

Paper for Legislative Council
Panel on Information Technology and Broadcasting
Special meeting to be held on 1 November 2005

Agenda Item I – Issues related to the protection of personal information of e-mail account subscribers

Introduction

The Privacy Commissioner for Personal Data (“the Privacy Commissioner”) is charged with the statutory obligation to monitor and supervise compliance with the provisions of the Personal Data (Privacy) Ordinance (“the Ordinance”). The recently reported incident on alleged disclosure by an e-mail service provider of its account subscriber’s personal information caused public concerns over the lawfulness of disclosure of such data.

Action taken by the Privacy Commissioner

2. Immediate action has been taken by the Privacy Commissioner to collect information from the relevant e-mail service provider namely Yahoo! Holdings (Hong Kong) Limited regarding the incident and in particular whether there was indeed any disclosure by it as alleged and if so, any justification for such disclosure.

The statutory obligations on website operators / e-mail service providers as data users as defined under the Ordinance

3. E-mail account subscribers’ personal information such as an individual’s name, address and date of birth are “personal data” as defined under the Ordinance. Where a website operator / e-mail service provider controls the collection, holding, processing or use of personal data in Hong Kong, it is a data user as defined under the Ordinance.

4. Section 4 of the Ordinance imposes an obligation on the part of a data user to comply with the Data Protection Principles stipulated in Schedule 1 to the Ordinance. The Data Protection Principles are fair information practices covering collection, accuracy, retention, use, security, access and correction of personal data.

Whether provisions in the Ordinance can adequately protect the privacy of e-mail subscribers in relation to their personal data

5. Data Protection Principle (“DPP”) 3 of the Ordinance aims at protecting the privacy of individuals in relation to the use of personal data. It applies to the use of e-mail account subscribers’ personal data by website operators / e-mail service providers. Pursuant to this principle, a data user shall not, without the prescribed consent of the data subject, use the subject’s personal data for any purposes other than the original collection purposes or a directly related purpose. The word “use” in relation to personal data, is defined under the Ordinance as including disclosure or transfer of the data.

6. When an individual subscribes for an e-mail account by providing his/her personal data, a website operator / e-mail service provider is required under DPP 1(3) to notify him/her of the purposes for which the data were to be used and the classes of persons to whom the data may be transferred.

7. Where the subsequent use or disclosure of the subscriber’s information is for the same or a directly related purpose to the original collection purposes, no consent from the subscriber concerned is required.

8. On the other hand, where the subsequent use or disclosure of the subscriber’s information is not for the same or a directly related purpose to the original collection purposes, the website operator / e-mail service provider should first obtain the subscriber’s consent before using or disclosing the data. Otherwise, it will constitute a breach of DPP 3.

Exemptions under sections 57 and 58 of the Ordinance

9. However, personal data privacy is not an absolute right. The current provisions of the Ordinance have struck a fine balance between the protection of privacy interest and that of public interest by providing certain circumstances under Part VIII justifying exemptions from the provisions of DPP 3.

10. Exemptions which are of relevance to law enforcement agencies are provided for under sections 57 and 58 of the Ordinance. Pursuant to these provisions, personal data are exempt from DPP 3 where the data is disclosed for any

of the following purposes:-

- (a) safeguarding security, defence or international relations in respect of Hong Kong (section 57 refers);
- (b) prevention or detection of crime, or the apprehension, prosecution or detention of offenders (section 58 refers)

and non-disclosure of such data would be likely to prejudice any of the above purposes. In any proceedings against any person for a contravention of DPP 3, it shall be a defence to show that he had reasonable grounds for believing that failure to so disclose the data would have been likely to prejudice any of the above purposes.

11. By virtue of these exemptions, disclosure of personal data by a data user to a law enforcement agency for the purpose of prevention or detection of crime will not infringe the Ordinance so long as there are reasonable grounds for the data user to believe that failure to so disclose the data would be likely to prejudice the purpose of prevention or detection of crime.

12. It should however be noted that the exemptions are permissive in nature. There is nothing under the Ordinance to compel disclosure of personal data by a data user to a third party. Hence, the invocation of an exemption remains a matter of defence or justification for action taken by the data user.

Remedies for infringement of DPP 3

13. Following completion of an investigation, where the Privacy Commissioner finds that a data user has contravened DPP 3, he may issue an enforcement notice on the relevant data user directing it to take steps to remedy the contravention. Contravention of the terms of an enforcement notice is a criminal offence.

14. In addition, if the data subject suffers any damages, including injury to feelings, as a result of any breach of the requirements of the Ordinance, he may institute civil proceedings against the relevant data user to seek compensation.

Office of the Privacy Commissioner for Personal Data
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