



中文譯本

香港個人資料私隱專員公署
Office of the Privacy Commissioner
for Personal Data, Hong Kong

專員用箋 From the desk of the Commissioner

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政府帳目委員會秘書

韓律科女士

韓女士：

**審計署署長衡工量值式審計報告(第五十三號)
個人資料私隱專員公署(第 9 章)**

關於你 12 月 28 日的來信，現附上下述文件：

- (a) (i) 申訴專員公署於 2009 年 3 月發出的直查審研報告(**附錄 1**)。我們沒有獲發中文版本。
- (ii) 行政上訴委員會上訴案件 2003 年 35 號的裁決(**附錄 2**)。委員會有關 45 日規定的意見可參閱第 27 至 32 段。我們亦沒有獲發中文版本。
- (b) 圖表顯示公署因未填補空缺所剩的款項佔盈餘的百分比(**附錄 3**)。部分空缺屬高層職位，例如副私隱專員、政策顧問及首席私隱審查主任。
- (c) 圖表顯示公署執行部的人員由 2004 年至 2008 年的離職情況(**附錄 4**)，離職原因已盡量列出。

- (d) 13 份本地報章對 2006 年舉行的酒店業保障私隱活動的 18 個報道的剪報副本(附錄 5)。
- (e) 公署於 2005 年 9 月 23 日發出的總務通告第 03/05 號副本(附錄 6)。
- (f) 兩封致劉嘉敏先生，JP(分別為 2009 年 10 月 2 日及 12 日)及一封致鄧爾邦先生(2009 年 10 月 2 日)的信件副本(附錄 7)。
- (g) 公署的推廣活動手冊已夾附於專員在 2009 年 12 月 14 日提交委員會的陳詞的附件 1。有關送禮的指引|可參閱第 III(4) 部。

鑑於人手短缺，(c)及(f)項尚未譯成中文。如需要這兩項文件的中譯本，請致電 3423 6601 與李兆昇先生聯絡。

個人資料私隱專員
吳斌

連附件

二零一零年一月四日

副本送：財經事務及庫務局
財經事務及庫務局局長(經辦人：甯漢豪女士，JP)

政制及內地事務局
政制及內地事務局局長(經辦人：何建華先生，JP)

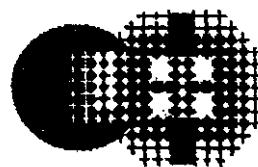
審計署
審計署署長(經辦人：林傑豪先生)

*委員會秘書附註：關於本函件的附錄 3，請參閱此報告書的附錄 28；至於本函件的附錄 4，請參閱此報告書的附錄 29。本函件的附錄 5、6 及 7 並無在此隨附。

**DIRECT INVESTIGATION
ASSESSMENT REPORT**

**PRIVACY COMMISSIONER
FOR PERSONAL DATA'S ARRANGEMENTS
FOR NOTIFYING COMPLAINANTS
OF REFUSAL TO INVESTIGATE**

March 2009



**Office of The Ombudsman
Hong Kong**

Privacy Commissioner for Personal Data's Arrangements for Notifying Complainants of Refusal to Investigate

INTRODUCTION

The Personal Data (Privacy) Ordinance, Cap. 486 ("PDPO") provides that where the Privacy Commissioner for Personal Data ("PCPD") refuses to carry out or continue the investigation of a complaint, he should notify the complainant in writing not later than 45 days after receipt of the complaint.

2. PDPO came into operation in 1996. By 1998, the PCPD Office found it difficult to follow this 45-day rule. Between 2001 and 2007, the compliance rate was 62.54%.

3. Concerned that PCPD's persistent non-compliance might mean unsatisfactory service to the public and lack of respect for statutory deadlines, The Ombudsman initiated a direct investigation assessment on the subject.

STATUTORY PROVISIONS

4. Section 37 of PDPO provides that a complaint to PCPD must satisfy the following conditions:

- the complaint is related to personal data of which the complainant is the data subject;
- the complaint is in respect of an act or practice of a data user specified in the complaint; and
- the act or practice may be a contravention of a requirement under PDPO.

5. Section 38 provides that where PCPD receives a complaint, he shall carry out an investigation to ascertain whether the act or practice under complaint is a contravention of a requirement under PDPO.

6. Sections 39(1) and (2) contain various grounds on which PCPD may exercise his discretion to refuse to carry out or continue an investigation, including:

- the complaint is made anonymously;
- the complainant cannot be identified or traced;
- the act or practice is considered to be trivial;
- the complaint is considered vexatious or not made in good faith; or

- any investigation or further investigation is for any other reason considered unnecessary.

7. Section 39(3) provides that where PCPD refuses to carry out or continue an investigation, he shall, as soon as practicable but, in any case, not later than 45 days after receiving the complaint, inform the complainant in writing of the refusal and the reasons.

8. Under section 39(4), the complainant may appeal to the Administrative Appeals Board against PCPD's decision not to carry out or continue an investigation of his complaint. Under section 9 of the Administrative Appeals Board Ordinance, the appeal has to be made within 28 days after the complainant has received notice of PCPD's decision.

45-DAY RULE: LEGISLATIVE INTENT

9. While it is evident that the general intent is to impose a timeline on PCPD, it has not been possible to trace the specific rationale for setting the timeline at 45 days. PCPD has searched records and sought assistance from the Department of Justice and the Home Affairs Bureau, the then policy bureau, to ascertain the rationale; we have also trawled the history of the passage of the Bill through the Legislative Council, but all to no avail. In this connection, it has been brought to our attention by PCPD that other local regulatory bodies such as The Ombudsman and the Equal Opportunities Commission as well as overseas privacy regulators are not subject to a statutory time limit for notifying the complainant of refusal to carry out or continue an investigation.

10. It is open to interpretation at what point the 45-day timeframe should start to run. From the outset, PCPD has construed the 45-day timeframe as starting to run from the date of first receipt of a complaint. However, he now takes the view that the 45-day timeframe should not start to run until all necessary information from the complainant is to hand. He estimates that the average time taken to acquire all necessary information is 30 days. Based on a 75-day timeframe, the compliance rate would be about 80% (see **Table 2** below) instead of 62.54%.

COMPLAINT HANDLING PROCEDURES

11. On receipt of an intended complaint, PCPD will first consider whether it satisfies the conditions of a complaint under section 37 of PDPO.

12. If any of the conditions is not satisfied, the case will not be treated as a complaint. No investigation will be carried out and the complainant will be notified in writing. Otherwise, PCPD will notify the complainant in writing and initiate inquiries to determine whether there exists a *prima facie* case of a contravention of PDPO.

13. If there is no *prima facie* case, PCPD may refuse to carry out or continue an investigation. In that case, he shall notify the complainant in writing under section 39(3). In so doing, it is PCPD practice also to notify the complainant of his right to appeal within 28 days and to attach for his information a copy of the entire section 39 and a fact sheet on PCPD's complaint handling policy.

14. If there is a *prima facie* case, PCPD will try to resolve the dispute through mediation where appropriate. If mediation fails, PCPD may decide to refuse to carry out an investigation after considering the circumstances of the case, or he may decide to carry out an investigation. Where PCPD carries out an investigation and concludes that the data user has contravened a requirement under the Ordinance, he may decide to serve an enforcement notice directing the latter to take steps to remedy the contravention.

PROGRESS MONITORING PROCEDURES

15. PCPD has in place the following arrangements for monitoring progress:

- Case Review Meetings chaired by the Deputy Commissioner are held weekly;
- All cases other than those under investigation under section 38 are raised for discussion at the Case Review Meeting before the expiry of 40 days from the date of receipt of complaint, and every two weeks thereafter;
- Where a case cannot be concluded within 45 days, the case officer shall make recommendation to the Deputy Commissioner for a decision on whether to commence investigation under section 38;
- Once a decision to commence an investigation under section 38 is made, the case shall be brought up once every month for review of progress; and
- A monthly report on all outstanding cases is tabled at PCPD's Monthly Meeting.

PCPD'S PERFORMANCE AGAINST THE 45-DAY RULE

16. On the basis that the 45-day timeframe starts to run from the date of first receipt of a complaint, PCPD's performance was as follows:

- the average annual compliance rate between 2001 and 2007 was 62.54%; and

PCPD's performance had improved from 52.07% in 2003 to 69.72% in 2007.

Table 1

PCPD's Compliance with 45-day Rule (2001 - 2007)

Year	Complaints received	Cases not fully investigated (i.e. refused or discontinued) (a)	Cases where complainants were notified within 45 days (b)	Rate of compliance (b)/(a)%
2001	921	851	591	69.45%
2002	843	743	454	61.10%
2003	984	964	502	52.07%
2004	900	894	540	60.40%
2005	989	933	544	58.31%
2006	1,025	991	661	66.70%
2007	937	895	624	69.72%
Average for period	N.A.	N.A.	N.A.	62.54%

17. To examine further the extent of delay, we have obtained from PCPD a breakdown of the cases refused and discontinued in 2007 by the time taken for notification. This is at Table 2, indicating that despite the 45-day rule, PCPD took 46 to 415 days¹ to notify complainants in 271 cases or 30.28% of the cases.

Table 2

Breakdown of Complaints by Time Taken to Notify Complainants of Refusal or Discontinuation (2007)

Time taken to notify complainants	No. of cases refused or discontinued (a)	% of (a) over total no. of cases refused or discontinued	Cumulative %
Within 45 days	624	69.72%	69.72%
Within 46 to 75 days (i.e. 30 days more)	96	10.73%	80.45%
Within 76 to 105 days (i.e. 60 days more)	71	7.93%	88.38%

¹ PCPD has explained that the longest case of 415 days was a special case, where the Office had reasonable grounds to believe that the complainant had supplied false statements, which was an offence under section 64(9), and had, therefore, referred the case to the Police for investigation. The Police took eight months to complete its investigation and another two months to provide PCPD with further information and documents – hence the exceptionally long time taken.

Within 106 to 135 days (i.e. 90 days more)	45	5.03%	93.41%
Within 136 to 225 days (i.e. 180 days more)	47	5.25%	98.66%
Over 225 days (longest case took 415 days)	12	1.34%	100%
Total no. of cases refused or discontinued	895	100%	N.A.

REASONS FOR NON-COMPLIANCE

18. PCPD attributes non-compliance to the following factors:

- complainants failing to present a complete picture when filing complaints;
- complainants failing to clarify anomalies;
- the parties complained against asking for extension of time, particularly for seeking legal advice;
- the need for further inquiries with the complainant or the parties complained against in complicated cases; and
- shortage of manpower within PCPD Office. During 2003 to 2007, PCPD had eight officers handling an average of 967 complaints per year.

CONSEQUENCES OF NON-COMPLIANCE

19. The direct consequence of PCPD's non-compliance is delay in service delivery to the public. Where legal consequences are concerned, in an appeal case heard in 2003, the Administrative Appeals Board gave the opinion that PCPD's non-compliance with the 45-day rule would not render his decision void or deprive the right of the relevant parties to apply for judicial review or to appeal to the Administrative Appeals Board.

REMEDIAL MEASURES

20. In July 1998, PCPD forwarded a proposal to the then Home Affairs Bureau to extend the 45-day notification rule to 75 days provided certain criteria are met. A draft Bill was prepared in 2002, but no time slot could be found for tabling it before the Legislative Council.

21. In 2006, PCPD undertook a comprehensive review of the entire PDPO and put to the Constitutional and Mainland Affairs Bureau ("CMAB"), the current

policy bureau, some 50 proposed amendments, including one to revise the 45-day rule. In this context, PCPD has adopted a different approach:

- he did not seek to relax the 45-day limit in the event of a decision not to commence an investigation; but
- he proposed that he be given power to discontinue an ongoing investigation at any time if he had reasonable cause for so doing.

22. PCPD adopted this approach because he considered there to be an anomaly under the existing Section 39(3): once an investigation had started and the 45-day period had expired, he had to go on regardless of any change of circumstances which might render the investigation unnecessary. This would be a waste of public resources.

23. CMAB is considering PCPD's 2006 proposals. In this connection, we would urge CMAB to expedite the proposed legal amendment.

OBSERVATIONS AND CONCLUSION

24. Although the specific legislative intent for setting the timeline for notification at 45 days is not traceable, it must be assumed that the statute is there for a reason, presumably to ensure that complainants should not be kept waiting indefinitely. The fact that in 2007, 104 cases (or 11.62% of cases) dragged on for more than 105 days (see Table 2) speaks for the need for a timeframe.

25. While the legal consequences may be limited (see para. 19), the delay in notifying complainants beyond a specified statutory timeline is unsatisfactory. It gives the impression of PCPD disregarding legal requirements and being inefficient in administration as well as inconsiderate in service.

26. The situation should be redressed. PCPD is taking steps in the right direction by putting a proposal to CMAB to revise the 45-day rule for a more realistic timeframe for his decision not to carry out or continue an investigation (see paras. 20 to 23).

27. While details of the legislative amendments should be left to PCPD and CMAB, we remind PCPD to take into account its own ability to speed up complaint processing in setting any new rule. The statistics on past performance in Tables 1 and 2 suggest that:

- there would still be a rather high non-compliance rate of about 20% if PCPD's 1998 proposal to revise the rule to 75 days were adopted (see para. 20); and
- similarly, there could be considerable non-compliance under PCPD's 2006 proposal (see para. 21), depending on the number of *prima facie* cases to hand.

28. Unless and until section 39(3) is amended, PCPD should endeavour to comply with the 45-day rule and where necessary, alert complainants to a longer processing or waiting time. PCPD's efforts at monitoring progress (see para. 15) and the improvement made in the past years (see Table 1) are reasonable and realistic. However, the procedures for progress monitoring should be tightened. Pending revision of the 45-day rule, PCPD should establish interim targets to enhance internal monitoring.

29. In the light of the foregoing, The Ombudsman has decided that there is no need for a full-fledged direct investigation into this subject.

Office of The Ombudsman
Ref. OMB/DI/179
March 2009

*委員會秘書附註：本文件只備英文本。

附錄2

(譯本)

行政上訴委員會

行政上訴案件 2003 年第 35 號

判決書的第 27 至 32 段的節錄

27. 理由(7)要考慮的問題是，第 39(3)條是否有這樣的意圖：如專員不是在收到投訴後的 45 日內發出通知，不進行調查的決定便會無效。
28. 第 39(3)條的規定如下：
 - (3) 凡專員根據本條拒絕進行或拒絕繼續進行一項由投訴引發的調查，他須於收到該項投訴後的 45 日內，在切實可行範圍內，盡快藉向投訴人送達一份附同第(4)款的文本的書面通知，告知該投訴人—
 - (a) 該項拒絕一事；及
 - (b) 拒絕的理由。
29. 請注意，該條並沒有規定專員要在 45 日內作出決定。不過，由於未作出決定就不能發出通知，從表面看，該條的意思是必須於該段期間內作出決定。上訴人認為，由於該條規定專員「須於...45 日內...」發出通知，因此該項規定是強制性的，沒有依從該項規定會導致專員的決定無效。
30. Mr. Ross 認為這項規定僅屬指導性，專員的決定在所有情況下都是有效的。他請我們按 Au Kwok Hung and The Appeal Panel appointed under section 7A(1) of the Housing Ordinance CACV 426/2000 一案的方法考慮有關問題，而我們應該確定立法機構認為不依從 45 日期限的後果是甚麼。

31. 他認為專員可能會受到妨礙，不能在 45 日期限內作出不進行調查的決定，因為證明該投訴不是以真誠作出的證據在期限過後才出現，或投訴人及資料使用者之間的調解過程超過 45 日，或投訴人失去聯絡超過 45 日。以該條的詮釋阻止專員在該等情況下拒絕在 45 日期限之後繼續進行調查是不合邏輯的，並對被投訴者不公平。在任何情況下，專員不依從有關規定並不會損害上訴人向本委員會提出上訴的權利，因為上訴人在收到拒絕通知後 28 日內即可提出上訴。
32. 我們留意到該條規定，通知「必須」於專員收到投訴後的 45 日內發出。表面上，這是一項強制性的規定。但我們看不到在該條文中有任何指明不依從時限規定會妨礙投訴人行使其法律權利，以致為了公眾利益而令專員的決定無效。第 39(4)條規定，上訴人可以向本委員會提出上訴，反對專員的決定。根據《行政上訴委員會條例》，提出上訴的時間是上訴人收到專員的決定之後 28 日內，而不是專員收到投訴之後 28 日內。在 45 日期限之後作出的決定並不會影響上訴人就專員的決定向本委員會提出上訴的權利。此外，沒有依從時限規定並不會限制上訴人對決定申請司法覆核的權利。在本個案，上訴人直至 2002 年 11 月 25 日(即 45 日期限已過)才向專員提供其身份證明，令專員無法在訂明時間內考慮他的投訴。在此等情況下，如第 39(3)條的規定是強制性的，儘管專員可以因上訴人沒有在 45 日期限內提供身份證明而根據第 39(2)條拒絕進行調查，專員仍須進行調查。這種異常情況是立法的意圖嗎？我們認為不是。我們認為「不依從時限規定會令專員的決定無效」不會是立法的意圖。我們駁回理由(7)。

*委員會秘書附註：上述判決書的原文為英文本，中文本為個人資料私隱專員公署提供的譯本。