



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

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7 May 2015

By Post

Ms Maisie LAM

Clerk to Bills Committee on Electronic Health Record Sharing System Bill

Legislative Council Secretariat

Legislative Council Complex

1 Legislative Council Road

Central

Hong Kong

Dear Ms Lam,

Electronic Health Record Sharing System Bill (“the Bill”)

Thank you for your letter dated 29 April 2015 addressed to the Privacy Commissioner who has directed me to reply on his behalf.

We note that members of the Bills Committee are concerned about the implications of section 33 of the Personal Data (Privacy) Ordinance (“**the Ordinance**”) on the operation of the Bill. Particularly, we understand that the Electronic Health Record Sharing System (“**eHRSS**”) may be accessed in places outside Hong Kong by registered healthcare providers for improvement of healthcare of registered healthcare recipients (“**Scenario A**”). In addition, registered healthcare providers may also disclose the healthcare records of registered healthcare recipients to overseas healthcare providers (“**Scenario B**”).

Section 33 of the Ordinance which regulates the transfer of personal data outside Hong Kong is not yet in operation. Pursuant to this provision, a data user is prohibited from transferring any personal data outside Hong Kong except under

the specified circumstances mentioned in section 33(2) of the Ordinance (see the full version of the provision in the Schedule attached). It is clear that Scenario B will fall within the scope of section 33 when it becomes operative. As for Scenario A, we tend to regard it as a “*transfer*” of personal data to a place outside Hong Kong. This is analogous to the example provided by us in our *Guidance on Personal Data Protection in Cross-border Data Transfer* (“**Guidance**”) (LC Paper No. CB(2)1321/14-15(04)). At page 3 of the Guidance, we give the example of access of personal data stored in a multinational corporation’s internal server located in Hong Kong by an employee who works outside Hong Kong. We consider such arrangement falls under the scope of section 33. Likewise, there will be a “*transfer*” of a healthcare recipient’s personal data outside Hong Kong if a registered healthcare professional accesses the eHRSS by using a portable device outside Hong Kong.

While such transfer of eHRSS data falls within the scope of section 33 of the Ordinance, healthcare providers may, where appropriate, invoke the exceptions under section 33(2) of the Ordinance. For example, they may seek the data subjects’ written consent for the transfer of their personal data outside Hong Kong (re : section 33(2)(c)). In the event of an emergency situation that the written consent of the data subjects cannot be obtained, the healthcare providers may consider invoking the exemption under section 59 of the Ordinance where non-disclosure of personal data would be likely to cause serious harm to the data subjects’ physical or mental health (re : section 33(2)(e)). There are also other exceptions available, such as, all reasonable precautions and all due diligence have been taken to ensure that the personal data will be subject to equivalent protection as offered under the Ordinance (re : section 33(2)(f)); or the transfer is made to a destined jurisdiction that has in force a law that is substantially similar to or serves the same purposes as the Ordinance (re : section 33(2)(a) and (b)).

As seen from above, the current provision under section 33 of the Ordinance contains various exceptions that a data user may invoke. In this regard, we note

that the Administration has pledged during the meeting of the Bills Committee on 28 April 2015 that they shall observe the requirements under section 33 of the Ordinance when it becomes effective. In the meantime, our Office encourages data users (including healthcare providers) to embrace the practices recommended in the Guidance as part of their good corporate governance responsibility to protect personal data.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sandra LIU', written in a cursive style.

Sandra LIU
(Senior Legal Counsel)
For Privacy Commissioner for Personal Data

c.c. Secretary for Food and Health
(Attn: Mr Sidney CHAN Shuen-yiu, JP)

SCHEDULE

Section 33. Prohibition against transfer of personal data to place outside Hong Kong except in specified circumstances

- (1) This section shall not apply to personal data other than personal data the collection, holding, processing or use of which-
 - (a) takes place in Hong Kong; or
 - (b) is controlled by a data user whose principal place of business is in Hong Kong.

- (2) A data user shall not transfer personal data to a place outside Hong Kong unless-
 - (a) the place is specified for the purposes of this section in a notice under subsection (3);
 - (b) the user has reasonable grounds for believing that there is in force in that place any law which is substantially similar to, or serves the same purposes as, this Ordinance;
 - (c) the data subject has consented in writing to the transfer;
 - (d) the user has reasonable grounds for believing that, in all the circumstances of the case-
 - (i) the transfer is for the avoidance or mitigation of adverse action against the data subject;
 - (ii) it is not practicable to obtain the consent in writing of the data subject to that transfer; and
 - (iii) if it was practicable to obtain such consent, the data subject would give it;
 - (e) the data is exempt from data protection principle 3 by virtue of an exemption under Part 8; or (Amended 18 of 2012 s. 2)
 - (f) the user has taken all reasonable precautions and exercised all due diligence to ensure that the data will not, in that place, be collected,

held, processed or used in any manner which, if that place were Hong Kong, would be a contravention of a requirement under this Ordinance.

- (3) Where the Commissioner has reasonable grounds for believing that there is in force in a place outside Hong Kong any law which is substantially similar to, or serves the same purposes as, this Ordinance, he may, by notice in the Gazette, specify that place for the purposes of this section.
- (4) Where the Commissioner has reasonable grounds for believing that in a place specified in a notice under subsection (3) there is no longer in force any law which is substantially similar to, or serves the same purposes as, this Ordinance, he shall, either by repealing or amending that notice, cause that place to cease to be specified for the purposes of this section.
- (5) For the avoidance of doubt, it is hereby declared that-
 - (a) for the purposes of subsection (1)(b), a data user which is a company incorporated in Hong Kong is a data user whose principal place of business is in Hong Kong;
 - (b) a notice under subsection (3) is subsidiary legislation; and
 - (c) this section shall not operate to prejudice the generality of section 50.