

**IT.law@hku.hk - class 5B**

- **The Personal Data (Privacy) Ordinance**

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- **Data Protection Issues:**
  - What is Privacy?
  - technological advances
  - international consensus on the need of data protection legislation

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- Personal Privacy vs  
Informational Privacy  
- Eastweek Publisher Ltd v  
Privacy Commissioner of  
Personal Data [2000] 1  
HKC 692

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- The scope of the Personal Data  
(Privacy) Ordinance  
- The Data Protection Principles  
Schedule One to Personal Data  
(Privacy) Ordinance

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- **Personal Data (Privacy) Ordinance**
- Establishment of the Law Reform Commission Privacy Sub-Committee in 1990 to consider data protection law
- Passing of the Personal Data (Privacy) Ordinance on 3 August 1995 (came into force on 20 December 1996)

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- **Basic Concepts**
- **“Data”**
  - s 2
  - it is a representation of information
  - includes an expression of opinion
  - data are regulated only if they are contained in a document

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- **“Document”**

- s 2
- wide, inclusive (rather than exhaustive) definition
- includes for example, a disk, a tape, a document in writing
- a document is essentially a recording medium

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- **“Personal Data”**

- s 2
- Three criteria:
  - Attribution
  - Identification
  - Retrievability

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- **Attribution**
- “(a) relating directly or indirectly to a living individual”
- “relating to” – a nexus between the data and the individual
- **Identification**
- “(b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained”
- **Retrievability**
- “(c) in a form in which access to or processing of the data is practicable”

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- **“Data Subject”**
- s 2 of the Ordinance
- “the individual who is the subject of the data”
  
- **“Data User”**
- s 2 of the Ordinance
- “a person who, either alone or jointly or in common with other persons, controls the collection, holding, or use of the data”

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- **The Scope of the Ordinance**

- applies to both the public and private sector
- applies to both computerized and manual data
- does not permit data users to contract out of the application of the Ordinance by obtaining the agreement of the individual

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- **Framework of the Ordinance**

- Regulation of personal data through the application of 6 “data protection principles” – principles of fair information practice – set out in Schedule 1 of the Ordinance

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- **The Data Protection Regime under the Ordinance**
- focus on fair information practice: Data Protection Principles in Schedule One of the Ordinance
  - objective: protection of the individual concerned (i.e. “the data subject”)
  - the regulatory regime is directed at the “data user” – these are the private and public bodies that controls the collection, holding or use of the personal data

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- Data Protection Principles
- Principle 1 –
  - Collection - Purpose and Manner of collection
- The collection must be:
  - necessary
  - lawful and fair

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- Personal data be collected by means that are “fair in the circumstances of the case”
- Eastweek Publisher Ltd v Privacy Commissioner for Personal Data, [2000] 1 HKC 692

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- To ensure that only relevant data are collected, the statutory test requires that a data user should identify:
  - its functions or activities
  - all those lawful purposes directly related to those functions or activities
  - the classes of data whose collection is necessary for or directly related to those purposes
- Example: Bank Privacy Statements

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- Principle 2 -- Accuracy and duration of retention
- This provides that personal data should be accurate, up-to-date and kept no longer than necessary.

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- Principle 3 -- Use of personal data
- This provides that unless the data subject gives consent otherwise personal data should be used for the purposes for which they were collected or a directly related purpose.

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- Principle 4 -- Security of personal data
- This requires appropriate security measures to be applied to personal data (including data in a form in which access to or processing of the data is not practicable).

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- Principle 5 -- Information to be generally available
- This provides for openness by data users about the kinds of personal data they hold and the main purposes for which personal data are used.
- Privacy Policy Statements

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- Principle 6 -- Access to personal data
- This provides for data subjects to have rights of access to and correction of their personal data.

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#### - Rights of Data Subjects

- Right to confirm your data is held
- Right of access
- Right of correction
- Right to be informed of use
- Right to fair collection
- Right to give only necessary data
- Right to consent to a change of use
- Right to openness
- Right to accuracy and security

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- **Codes of Practice**

- A breach of the Code by a data user will give rise to a presumption against the data user in any legal proceedings under the Ordinance.
- Section 13, Personal Data (Privacy) Ordinance

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- Exemptions:

- Competing public or social interests, such as: security, defence and international relations; prevention or detection of crime; assessment or collection of any tax or duty etc

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- Offences and Compensation
- E.g. non-compliance with an enforcement notice served by the Privacy Commissioner carries a penalty of a fine at Level 5 (at present \$25,001 to \$50,000) and imprisonment for 2 years.
- Compensation for damage - including injured feeling

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- Readings: - Personal Data (Privacy) Ordinance, Cap 486 (available on BLIS <http://www.justice.gov.hk/Home.htm>)
- Wacks, "Privacy and Anonymity" (2000) 30 Hong Kong Law Journal 178
- Eastweek Publisher Ltd v Privacy Commissioner of Personal Data [2000] 1 Hong Kong Cases 692
- Wacks, "Data Privacy: Reforming the Law" (1996) 26 Hong Kong Law Journal 149
- Law Reform Commission of Hong Kong Consultation Paper on Civil Liability for Invasion of Privacy (August 1999) (available on the website of the Law Reform Commission of Hong Kong: <http://www.info.gov.hk/hkreform/reports/index.htm>)
- Useful Website: <http://www.pco.org.hk/>
- Website of Office of the Privacy Commissioner for Personal Data, Hong Kong - the website contains a lot of useful information including the text of the Personal Data (Privacy) Ordinance and various Codes of Practice as well as links to the websites of Offices of Privacy Commissioners in other jurisdictions
- Recommended Book: Berthold & Wacks, *Data Privacy Law in Hong Kong* (Sweet & Maxwell, 2000)

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