

LT. Long title

An Ordinance to protect the privacy of individuals in relation to personal data, and to provide for matters incidental thereto or connected therewith.

(Enacted 1995)

[Part 2, section 71 (as affects Schedule 2) and Schedule 2	} 1 August 1996 <i>L.N. 343 of 1996</i>
The other provisions, excluding sections 30 and 33	} 20 December 1996 <i>L.N. 514 of 1996</i>
Section 30	} 1 August 1997 <i>L.N. 409 of 1997</i>

(Enacting provision omitted—E.R. 1 of 2013)

(Originally 81 of 1995)

(*Format changes—E.R. 1 of 2013)

Note:

*The format of the Ordinance has been updated to the current legislative styles.

PART 1

PRELIMINARY

(Enacted 1995)

1 Short title and commencement**Remarks:**

For the saving and transitional provisions relating to the amendments made by the Resolution of the Legislative Council (L.N. 130 of 2007), see paragraph (12) of that Resolution.

- (1) This Ordinance may be cited as the Personal Data (Privacy) Ordinance.
 - (2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Constitutional and Mainland Affairs by notice in the Gazette. (Amended L.N. 130 of 2007)
- (Enacted 1995)

[1.01] Enactment history

Subsection (2) was amended by L.N. 130 of 2007, effective 1 July 2007.

[1.02] England

The current English legislation is the Data Protection Act 1998 c 29 [Eng], the main provisions of which commenced on 1 March 2000. That Act replaced the Data Protection Act 1984 c 35 [Eng] in order to implement the requirements of the European Data Protection Directive (Directive 95/46/EC of the European Parliament and Council on the protection of individuals with regard to processing of personal data and the free movement of such data).

[1.03] Commencement

'Commencement' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) that when used in relation to an Ordinance, or any part or provision thereof, to mean the date on which the present Ordinance, part or provision came or comes into operation.

With the exceptions of sections 30 and 33 below, the present Ordinance, as originally enacted, came into operation on 20 December 1996. Section 30 came into force on 1 August 1997. Section 33 has not yet been brought into force.

[1.04] Gazette

'Gazette' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean: (a) the Government of the Hong Kong Special Administrative Region Gazette and any supplement thereto; (b) the Gazette published by the Administration on or between 12 October 1945 and 1 May 1946; (c) the Government of the Hong Kong Special Administrative Region Gazette Extraordinary; (d) the Hong Kong Government Gazette and any supplement thereto published before 1 July 1997; and (e) any Special Gazette or Gazette Extraordinary published before 1 July 1997.

[1.05] Long title

Section 19 of the Interpretation and General Clauses Ordinance (Cap 1) provides that an Ordinance shall be deemed remedial and shall receive such 'fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit'. The long title's stated aim of protecting the 'privacy' of individuals facilitates a purposive interpretation of the provisions of the present Ordinance: see *Cinepoly Records Co Ltd & Ors v Hong Kong Broadband Network Ltd & Ors* [2006] 1 HKC 433 at 444, [2006] 1 HKLRD 255. This is not to claim that the concept of 'privacy' is precise: for instance it has been said that 'in spite of the huge literature on the subject, a satisfactory definition of 'privacy' remains as elusive as ever': see Wacks R, *Personal Information: Privacy and the Law* (Clarendon Press, 1989). The modern legal genesis of 'privacy' is generally attributed to the article by Warren and Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193. Following a comprehensive review of English decisions the learned authors concluded that cases in such areas as copyright, breach of confidence, and defamation were particular instances of a general right to privacy. According to this view the law's protection of property had gradually extended to the protection of the individual's 'thoughts, emotions and sensations'. This thesis first received judicial assent in *Pavesich v New England Life Insurance Co* 122 Ga 190, (1902) 50 SE 68 and the US has since developed a large body of case law which recognises not one tort but four. However, these developments have not been mirrored in England. In *Kaye v Robertson* [1991] FSR 62, the Court of Appeal concluded that the right to privacy had been so long disregarded in that country that it could now only be recognised by the legislature; and in *Wainwright v Home Office* [2004] 2 AC 406, [2003] 4 All ER 696, the House of Lords confirmed that there is no common law tort of invasion of privacy under English law. Yet while there is no such general tort of privacy in England or Hong Kong, an action for misuse of private information has been developed by the English courts as an offshoot from the action for breach of confidence: see *Campbell v MGN Ltd* [2004] 2 AC 457; *McKennitt v Ash* [2008] QB 73; *Murray v Express Newspapers Plc* [2009] Ch 481. The action protects against, for example, wrongful disclosures of private information.

The American case law distinguishes four discrete torts focusing on intrusion upon the plaintiff's seclusion, public disclosure of private facts, publicity placing the plaintiff in a false light, and the appropriation for advantage of the plaintiff's name or likeness. This approach whereby 'privacy' is viewed as a composite of related values has also been adopted by recent law reform enquiries. The English Younger

Committee on Privacy concluded in its 1972 report that 'privacy' could not be satisfactorily defined and instead sought to identify those values in which privacy was a major element and deserved protection. Similarly, in its 1983 report, the Australian Law Reform Commission identified various 'privacy interests'. These included territorial privacy, personal privacy, and communications and surveillance privacy. Like the Younger Committee, the Australian Commission identified as one of these interests that of the individual in controlling information held by others about him, or what in Europe is referred to as 'informational self determination'.

In *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 per Eichelbaum CJ, the New Zealand High Court considered the ambit of 'privacy' in the context of s 4(1) of the Broadcasting Act 1989. That provided in part that it was the responsibility of broadcasters to maintain standards which are consistent with 'the privacy of the individual'. The court held that the Broadcasting Standards Authority was entitled to adopt privacy principles which drew on United States case law. In so finding, the court rejected the submission that 'privacy' should be read as a reference to the principles of the New Zealand law of privacy. The Court held that the word did not have an established meaning at law in 1989 and accordingly the presumption that the legislation uses a technical legal term in its ordinary common law meaning did not apply.

The New Zealand Privacy Act 1993 provides a number of data protection principles which closely correspond to those in Schedule 1 of the present Ordinance. As suggested above, however, these only address one of the several privacy interests and the Act was not referred to in the judgment which was followed in *Television New Zealand Ltd v R* [1996] 3 NZLR 393 (CA, Wellington).

In the context of Article 17 of the International Covenant on Civil and Political Rights (and Article 14 of the Hong Kong Bill of Rights (as contained in the Hong Kong Bill of Rights Ordinance (Cap 383)), Ma CJ stated in *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400 at 347:

"But what does the term 'privacy' mean and what does it encapsulate? The concept is a wide one, covering an extremely diverse range of situations. In the Shorter Oxford English Dictionary, the term 'privacy' is defined in the following way: 'The state or condition of being withdrawn from the society of others or from public attention; freedom from disturbance or intrusion; seclusion.' Thus, for example, a conversation with a friend on the street can be said to involve some element of privacy as will obviously activities within one's own home. A right to privacy will generally exist where the person in question has a reasonable expectation of privacy, this being a test that finds favour in both the United Kingdom (see *Campbell v MGN Ltd* [2004] 2 AC 457 at 466E (paragraph 21) per Lord Nicholls of Birkenhead) and in Canada (*R v Wong* (1990) 60 CCC (3d) 460 at 477c-d and 478a per La Forest J)."

It was held in the above case that the right to privacy extends to privacy in a person's office or workplace. In the more recent decision of *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2014] HKCU 2956 (unreported, HCAL 113/2012, 23 December 2014) McWalters J considered that the right to privacy includes a right to be free from unlawful search of both domestic and non-domestic premises. His Lordship cited both *HKSAR v Chan Kau Tai*, above, as well as the comments of a Canadian court in *R v Symalisty* (2004) 119 CRR (2d) 311 at 319:

“What does the term ‘privacy’ mean in modern society and law? It connotes liberty. It means the right to be left alone by the state; the right to be free from unjustified intrusion or interference; the right of the individual to determine for himself or herself when, how, and to what extent he or she will release personal information about himself or herself.”

The various decisions outlined above discussing the concept of privacy would suggest that ‘privacy’ in the Long Title encompasses the various privacy interests and also that the United States case law is relevant in interpreting their ambit. While the long title’s reference to the ‘privacy of individuals in relation to personal data’ identifies this last mentioned privacy value as being the specific focus of the present Ordinance, given their interrelated nature the other privacy values will also be relevant. For example, in determining whether the collection of personal data through surveillance has been ‘fair in the circumstances’ it would be relevant to take into account any infringement of the data subject’s seclusion.

2 Interpretation

- (1) In this Ordinance, unless the context otherwise requires-
- act** (作為), includes a deliberate omission;
- adverse action** (不利行動), in relation to an individual, means any action that may adversely affect the individual’s rights, benefits, privileges, obligations or interests (including legitimate expectations);
- appointed day** (指定日), means the day appointed under section 1(2);
- approved code of practice** (核准實務守則) means a code of practice approved under section 12;
- change notice** (變更通知) means a notice served on the Commissioner under section 14(8) and, if applicable, corrected under section 14A(5); (Added 18 of 2012 s 3)
- code of practice** (實務守則) includes-
- a standard;
 - a specification; and
 - any other documentary form of practical guidance;
- Commissioner** (專員) means the Privacy Commissioner for Personal Data established under section 5(1);
- Committee** (諮詢委員會) means the Personal Data (Privacy) Advisory Committee established under section 11(1);

complainant (投訴人) means the individual, or the relevant person on behalf of an individual, who has made a complaint;

complaint (投訴) means a complaint under section 37;

correction (改正), in relation to personal data, means rectification, erasure or completion;

daily penalty (每日罰款) means a penalty for each day on which the offence is continued after conviction therefor;

data (資料) means any representation of information (including an expression of opinion) in any document, and includes a personal identifier;

data access request (查閱資料要求) means a request under section 18;

data correction request (改正資料要求) means a request under section 22(1);

data protection principle (保障資料原則) means any of the data protection principles set out in Schedule 1;

data subject (資料當事人), in relation to personal data, means the individual who is the subject of the data;

data user (資料使用者), in relation to personal data, means a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data;

data user return (資料使用者申報表) means a return submitted to the Commissioner under section 14(4) and, if applicable, corrected under section 14A(5); (Replaced 18 of 2012 s 3)

disclosing (披露) in relation to personal data, includes disclosing information inferred from the data;

document (文件) includes, in addition to a document in writing-

- a disc, tape or other device in which data other than visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced from the disc, tape or other device; and
- a film, tape or other device in which visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced from the film, tape or other device;

employment (僱用) means employment under-

- (a) a contract of service or of apprenticeship; or
 - (b) a contract personally to execute any work or labour,
- and related expressions shall be construed accordingly;

enforcement notice (執行通知) means a notice under section 50(1);

financial regulator (財經規管者) means any of-

- (a) the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap 66);
- (b) the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap 571); (Replaced 5 of 2002 s 407)
- (c) a recognized clearing house, a recognized exchange company, a recognized exchange controller or a recognized investor compensation company within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap 571); (Replaced 5 of 2002 s 407)
- (d) a person authorized under Part III of the Securities and Futures Ordinance (Cap 571) to provide automated trading services as defined in Schedule 5 to that Ordinance; (Replaced 5 of 2002 s 407)
- (e) (Repealed 5 of 2002 s 407)
- (ea) (Repealed 5 of 2002 s 407)
- (f) the Insurance Authority appointed under section 4 of the Insurance Companies Ordinance (Cap 41);
- (g) the Registrar of Occupational Retirement Schemes appointed under section 5 of the Occupational Retirement Schemes Ordinance (Cap 426);
- (ga) the Mandatory Provident Fund Schemes Authority established by section 6 of the Mandatory Provident Fund Schemes Ordinance (Cap 485); (Added 4 of 1998 s 14)
- (gb) the Financial Reporting Council established by section 6(1) of the Financial Reporting Council Ordinance (Cap 588); (Added 18 of 2006 s 84)
- (h) a person specified in a notice under subsection (7) to be a regulator for the purposes of this definition;

inaccurate (不準確), in relation to personal data, means the data is incorrect, misleading, incomplete or obsolete;

inspection (視察) means an inspection under section 36;

investigation (調查) means an investigation under section 38;

log book (紀錄簿), in relation to a data user, means the log book kept and maintained by the data user under section 27(1);

matching procedure (核對程序) means any procedure whereby personal data collected for 1 or more purposes in respect of 10 or more data subjects is compared (except by manual means) with personal data collected for any other purpose in respect of those data subjects where the comparison- (Amended 18 of 2012 s 3)

- (a) is (whether in whole or in part) for the purpose of producing or verifying data that; or
- (b) produces or verifies data in respect of which it is reasonable to believe that it is practicable that the data, may be used (whether immediately or at any subsequent time) for the purpose of taking adverse action against any of those data subjects;

matching procedure request (核對程序要求) means a request under section 31(1);

personal data (個人資料) any data-

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- (c) in a form in which access to or processing of the data is practicable;

personal data system (個人資料系統) means any system, whether or not automated, which is used, whether in whole or in part, by a data user for the collection, holding, processing or use of personal data, and includes any document and equipment forming part of the system;

personal identifier (個人身分標識符) means an identifier-

- (a) that is assigned to an individual by a data user for the purpose of the operations of the user; and
 - (b) that uniquely identifies that individual in relation to the data user,
- but does not include an individual's name used to identify that individual;

practicable (切實可行) means reasonably practicable;

[11A.03] Definitions

For 'Commissioner' and 'prescribed officer', see s 2 above.

PART 3**CODES OF PRACTICE**

(Enacted 1995)

12 Approval of codes of practice by Commissioner

- (1) Subject to subsections (8) and (9), for the purpose of providing practical guidance in respect of any requirements under this Ordinance imposed on data users, the Commissioner may-
- (a) approve and issue such codes of practice (whether prepared by him or not) as in his opinion are suitable for that purpose; and
 - (b) approve such codes of practice issued or proposed to be issued otherwise than by him as in his opinion are suitable for that purpose.
- (2) Where a code of practice is approved under subsection (1), the Commissioner shall, by notice in the Gazette-
- (a) identify the code concerned and specify the date on which its approval is to take effect; and
 - (b) specify for which of the requirements under this Ordinance the code is so approved.
- (3) The Commissioner may-
- (a) from time to time revise the whole or any part of any code of practice prepared by him under this section; and
 - (b) approve any revision or proposed revision of the whole or any part of any code of practice for the time being approved under this section,
- and the provisions of subsection (2) shall, with the necessary modifications, apply in relation to the approval of any revision under this subsection as they apply in relation to the approval of a code of practice under subsection (1).
- (4) The Commissioner may at any time withdraw his approval from any code of practice approved under this section.
- (5) Where under subsection (4) the Commissioner withdraws his approval from a code of practice approved under this section, he shall, by notice in the Gazette, identify the code concerned and specify the date on which his approval of it is to cease to have effect.

- (6) References in this Ordinance to an approved code of practice are references to that code as it has effect for the time being by virtue of any revision of the whole or any part of it approved under this section.
- (7) The power of the Commissioner under subsection (1)(b) to approve a code of practice issued or proposed to be issued otherwise than by him shall include power to approve a part of such a code and, accordingly, in this Ordinance *code of practice* (實務守則) may be read as including a part of such a code.
- (8) The Commissioner shall, not later than 6 months after the day on which this section comes into operation (or within such further period, not exceeding 6 months, as the Secretary for Home Affairs may allow), approve a code of practice under subsection (1) in respect of all or any requirements referred to in that subsection in so far as such requirements relate to personal data which is personal identifiers. (Amended 18 of 2012 s 2)
- (9) The Commissioner shall, before approving a code of practice under subsection (1) or any revision or proposed revision of the code under subsection (3), consult with-
- (a) such bodies representative of data users to which the code or the code as so revised, as the case may be, will apply (whether in whole or in part); and
 - (b) such other interested persons,
- as he thinks fit.
- (10) For the avoidance of doubt, it is hereby declared that different codes of practice may be approved under subsection (1) (including any code of practice referred to in subsection (8)) for different classes of data users, and may be so approved for the same or different requirements referred to in subsection (8).

(Enacted 1995)

[12.01] Enactment history

Subsection (8) was amended by the Personal Data (Privacy) (Amendment) Ordinance 2012 (18 of 2012), effective 1 October 2012.

[12.02] General Note

The role of codes approved under this section is to provide 'practical guidance' on its requirements (subsection (1)). In particular, the data protection principles are necessarily very general. Nonetheless, it is the provisions of the present Ordinance including the principles which provide the relevant legal parameters and while the provisions of a code may explain their application in specific contexts they may not materially amend them. Nor does failure to comply with a provision of a code render a data user liable to civil or criminal proceedings (s 13(1) below). Such failure shifts the onus onto the defendant: non-compliance with a relevant provision of an approved code will suffice to prove the statutory breach unless the data user can produce evidence of compliance with the statutory requirement 'otherwise than by way of observance of that provision'. This further emphasises the subordinate role of codes of practice.

As at the time of publication, the Commissioner has issued three codes of practice pursuant to s 12(1):

- (a) The Code of Practice on the Identity Card Number and other Personal Identifiers was gazetted on 19 December 1997. With the exception of the requirement restricting the issue of a card with an identity card number printed on it (which took effect on 19 December 1998), the requirements of the code took effect on 19 June 1998. The Code gives practical guidance to the requirements of the Personal Data (Privacy Ordinance) as applied to the collection, retention, accuracy, use and security of identity card (ID) numbers and copies of the ID card and other personal identifiers. A booklet on the issue is available from the office of the Privacy Commissioner.
- (b) The Code of Practice on Consumer Credit Data was first issued on 27 February 1998, taking effect on 27 November 1998. The Code has been revised on a number of occasions since it was first issued. The Code protects the privacy interest of individuals in relation to their personal data used in the provision of consumer credit. In particular, it regulates the exchange of such data between lending institutions and credit reference agencies. See also the Fact Sheet 'Understanding the Code of Practice on Consumer Credit Data – Frequently Asked Questions – On the Sharing of Mortgage Data for Credit Assessment Purposes', which is available from the office of the Privacy Commissioner.
- (c) The Code of Practice on Human Resource Management was notified in the gazette on 22 September 2000 and came into effect on 1 April 2000. The purpose of the Code is to provide practical guidance to employers and their staff on how to properly handle personal data relating to the employment process and in the performance of human resource management functions and activities.

[12.03] England

Under the present Ordinance codes of practice perform a similar role as they do under the Data Protection Act 1998 s 51(3).

[12.04] Consult

On what constitutes consultation, see, in particular, *Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496, (1947) 111 JP Jo 542; *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13, [1948] LJR 817 (CA); *Re Union of the Benefices of Whippingham and East Cowes, Derham v Church Comrs for England* [1954] AC 245, [1954] 2 All ER 22 (PC); *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280, [1972] 1 WLR 190; and *R v Secretary of State for Social Services ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1.

[12.05] Gazette

As to meaning, see [1.04] above.

[12.06] Power

As to meaning see [7.04] above.

[12.07] Guidelines and codes otherwise than pursuant to s 12

Apart from approving codes under this section, the Commissioner may issue guidelines or other codes pursuant to its general powers under s 8: see [8.12] and see also, for example, the voluntary Code of Practice on Protection of Customer Information for Fixed and Mobile Service Operators (jointly issued by the Consumer Council, ICAC, PCO and OFTA on 17 June 2002). The provisions in s 13 shifting the onus of proof in relation to proceedings involving an alleged contravention of the present Ordinance where there has been non-compliance with a provision in a code of practice only apply to codes approved under s 12: see s 13(1).

[12.08] Definitions

For 'data users', 'Commissioner', 'code of practice', 'approved code of practice' and 'personal identifiers', see s 2 above.

13 Use of approved codes of practice in proceedings under this Ordinance

- (1) A failure on the part of any data user to observe any provision of an approved code of practice shall not of itself render the data user liable to any civil or criminal proceedings but where in any proceedings under this Ordinance a data user is alleged to have contravened a requirement under this Ordinance, being a requirement for which there was an approved code of practice at the time of the alleged contravention, subsection

(2) shall have effect with respect to such code in relation to those proceedings.

- (2) Any provision of a code of practice which appears to a specified body to be relevant to a requirement under this Ordinance alleged to have been contravened shall be admissible in evidence in the proceedings under this Ordinance concerned and if it is proved that there was at any material time a failure to observe any provision of the code which appears to that body to be relevant to any matter which it is necessary to prove in order to establish a contravention of such requirement, that matter shall be taken as proved in the absence of evidence that such requirement was in respect of that matter complied with otherwise than by way of observance of that provision.
- (3) In any proceedings under this Ordinance, a code of practice which appears to a specified body to be the subject of a notice under section 12 shall be taken to be the subject of such notice in the absence of evidence to the contrary.

(4) In this section-

proceedings under this Ordinance (根據本條例進行的法律程序) includes any criminal proceedings where a data user is alleged to have committed an offence by reason of a contravention of a requirement under this Ordinance;

specified body (指明當局) means-

- (a) a magistrate;
- (b) a court; (Amended 18 of 2012 s 6)
- (c) the Administrative Appeals Board; or (Amended 18 of 2012 s 6)
- (d) the chairman of the Administrative Appeals Board. (Added 18 of 2012 s 6)

(Enacted 1995)

[13.01] Enactment history

Subsection (4) was amended by the Personal Data (Privacy) (Amendment) Ordinance (18 of 2012), effective 1 October 2012.

[13.02] Approved code of practice

An approved code of practice is a code of practice approved by the Commissioner under s 12: see s 12(6).

[13.03] Contravene

As to meaning, see [2.13] above.

[13.04] Offence

'Offence' is defined by s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include any crime and any contravention or other breach of, or failure to comply with, any provision of any law, for which a penalty is provided. The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence; see *Harry Lee Wee v Law Society of Singapore* [1985] 1 MLJ 1 at 5, per Lord Bridge of Harwich.

[13.05] Magistrate

'Magistrate' is defined by s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean any person appointed to be a permanent or special magistrate under the Magistrates Ordinance (Cap 227).

[13.06] Court

As to meaning, see [2.12] above.

[13.07] Administrative Appeals Board

'Administrative Appeals Board' is defined by s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Administrative Appeals Board established under the Administrative Appeals Board Ordinance (Cap 442).

As to the chairman of the Board, see s 6 of the Administrative Appeals Board Ordinance (Cap 442).

[13.08] Definitions

For 'data user', 'approved code of practice' and 'code of practice', see s 2 above.

PART 4

DATA USER RETURNS AND REGISTER OF DATA USERS

(Enacted 1995)

14 Data user returns**Remarks:**

For the saving and transitional provisions relating to the amendments made by the Resolution of the Legislative Council (L.N. 130 of 2007), see paragraph (12) of that Resolution.

- (1) Subject to subsection (2), the Commissioner may, by notice in the Gazette, specify a class of data users to which this section shall apply.
- (2) The Commissioner shall, before specifying a class of data users in a notice under subsection (1), consult with-
 - (a) such bodies representative of data users belonging to that class; and
 - (b) such other interested persons, as he thinks fit.
- (3) This section shall not apply to a data user except a data user belonging to a class of data users specified in a notice under subsection (1) which is in force.
- (4) A data user shall submit to the Commissioner a return- (Amended 18 of 2012 s 7)
 - (a) in the specified form;
 - (b) containing the prescribed information required by the return in relation to the data user;
 - (c) in the case of-
 - (i) a data user which belongs to the class of data users concerned on the day on which the notice under subsection (1) specifying that class commences, not earlier than 3 months before, and not later than, each anniversary of that day;
 - (ii) a data user which first belongs to the class of data users concerned on a day after the day on which the notice under subsection (1) specifying that class commences

- than 3 months before, and not later than, each anniversary of that first-mentioned day; and
- (d) accompanied by the prescribed fee.
- (5) The Commissioner shall cause a notice to be published not less than once during every period of 6 months-
- (a) in-
- (i) the Gazette; and
- (ii) not less than 1 Chinese language newspaper (and in the Chinese language) and not less than 1 English language newspaper (and in the English language), each of which shall be a newspaper circulating generally in Hong Kong; and
- (b) subject to subsection (6), specifying the places at which and the hours during which data user returns are available to data users for the purposes of this section. (Amended 18 of 2012 s 7)
- (6) The Commissioner shall not exercise his power under subsection (5)(b) to specify places which are Government offices unless and until he has the approval in writing of the Secretary for Constitutional and Mainland Affairs to do so. (Amended L.N. 130 of 2007)
- (7) The Commissioner shall cause data user returns to be available to data users- (Amended 18 of 2012 s 7)
- (a) free of charge; and
- (b) at the places and during the hours specified in the last notice published under subsection (5).
- (8) Where any prescribed information contained in a data user return submitted under subsection (4) to the Commissioner by a data user changes subsequent to the submission, then the data user shall serve a notice in writing on the Commissioner specifying such change-
- (a) if, but only if-
- (i) such information is specified in the return as information to which this subsection applies; and
- (ii) the return contains, or has annexed to it-
- (A) a copy of this subsection; or
- (B) a statement summarizing the requirement imposed by this subsection on the data user; and
- (b) not later than 30 days after such change.

- (9) It is hereby declared that-
- (a) a notice under subsection (1) is subsidiary legislation; and (Amended 18 of 2012 s 7)
- (b) where a data user belongs to 2 or more classes of data users specified in 2 or more notices under subsection (1) which are in force, then, for the purposes of this section, that data user shall be deemed to belong only to that class of data users specified in the first of those notices to be published in the Gazette. (Amended 18 of 2012 s 7)
- (c) (Repealed 18 of 2012 s 7)
- (10) (Repealed 18 of 2012 s 7)
- (11) A data user who, in purported compliance with subsection (4) or (8), knowingly or recklessly in a data user return or change notice supplies any information which is false or misleading in a material particular, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months. (Added 18 of 2012 s 7)

(Enacted 1995)

[14.01] Enactment History

Subsection (6) was amended by L.N. 130 of 2007, effective 1 July 2007. Subsections (4), (5), (7) and (9) were amended, and subs (11) added, by the Personal Data (Privacy) (Amendment) Ordinance (18 of 2012), effective 1 October 2012.

[14.02] General Note

The provisions of Part IV provide for notification rather than 'registration' as such as the Commissioner's approval is not required for processing personal data. Contrary to a recommendation of the Hong Kong Law Reform Commission, the present Ordinance does not impose a blanket notification requirement. It is for the Commissioner to identify classes of data users meriting the requirement and the implication is that he will proceed selectively. There is also provision for a register assisting individuals to identify those data users that are likely to hold personal data relating to them. Requiring data users to notify the Commissioner facilitates his office in more closely monitoring their activities. The present Ordinance does not identify any criteria in determining which classes of data users warranting the requirement. Nor to date have any classes been designated. However, the effective enforcement of the statutory scheme and in particular the data protection principles may be enhanced by the application of the notification requirement depending on the nature of the data involved and the role of the class of data users concerned. Data users processing highly sensitive data, such as medical data may be thought to warrant the imposition of the requirement, as too

those generating a high level of complaints to the Commissioner. There are also data users who operate in effect behind a screen because they collect data from other data users rather than directly from data subjects. Reference agencies servicing entire industries may cull data from a variety of sources for processing. The imposition of the notification requirement on such data users may help redress this lack of transparency.

[14.03] England

The Data Protection Act 1984 formerly imposed a general registration requirement on all data users, but this was replaced with a notification system under the 1998 Act: see Data Protection Act 1998 Pt III, the Data Protection (Notification and Notification Fees) Regulations 2000 (SI 2000/188), and the UK Information Commissioner's Notification Handbook - A Complete Guide to Notification. The Information Commissioner (previously the Data Protection Registrar and then the Data Protection Commissioner) maintains a public register of data controllers, and in contrast with the Hong Kong Ordinance, the UK legislation requires every data controller who is processing personal data to notify unless they are exempt.

[14.04] Gazette

As to meaning, see [1.04] above.

[14.05] Hong Kong

As to meaning, see [7.02] above.

[14.06] Power

As to meaning, see [7.04] above.

[14.07] Government

As to meaning, see [3.02] above.

[14.08] Subsidiary legislation

As to meaning, see [2.15] above.

[14.09] Consult

As to meaning, see [12.04] above.

[14.10] Subsection (11): offence

Subsection (11) was added in 2012: see [14.01] above. Prior to the 2012 amendments, the offence in this subsection was contained in the former s 64(1).

[14.11] Knowingly

Knowledge is an essential ingredient of the offence and must be proved by the prosecution; see: in particular *Gaumont British Distributors Ltd v Henry* [1939] 2 KB 711, [1939] 2 All ER 808; and *Sulthon Kavsonthi v PP* [1975] 1 MLJ 154.

Knowledge includes the state of mind of a person who shuts his eyes to the obvious: see *James & Son Ltd v Smee* [1955] 1 QB 78 at 91, [1954] 3 All ER 273 at 278, per Parker J; and *Westminster City Council v Croyalgrange Ltd* [1986] 2 All ER 353, [1986] 1 WLR 674 (HL). Moreover, there is authority for saying that where a person deliberately refrains from making inquiries the results of which he might not care to have, this constitutes in law actual knowledge of the facts in question: see *Knox v Boyd* [1941] JC 82 at 86; *Taylor's Central Garages (Exeter) Ltd v Roper* (1951) 115 JP 445 at 449, 450, [1951] WN 383, per Devlin J; and *Westminster City Council v Croyalgrange Ltd* (supra); and see also *Mallon v Allon* [1964] 1 QB 385 at 394, [1963] 3 All ER 843 at 847. Yet mere neglect to ascertain what could have been found out by making reasonable inquiries is not tantamount to knowledge: see *Taylor's Central Garages (Exeter) Ltd v Roper* (supra), per Devlin J; and cf *London Computator Ltd v Seymour* [1944] 2 All ER 11; but see also *Mallon v Allon* (supra).

As to when the knowledge of an employee or agent may be imputed to his employer or principal, see *Halsbury's Laws of England* (4th Ed Reissue) Vol 11(1) para 55.

[14.12] Recklessly

A person is reckless if he does an act which in fact involves an obvious and serious risk of harmful consequences where he was aware of the risk and where it was, in the circumstances known to him, unreasonable to take the risk: *Sin Kam Wah v HKSAR* [2005] 2 HKLRD 375 (CFA), *R v G* [2004] 1 AC 1034 (HL). Conversely, a defendant could not be regarded as culpable so as to be convicted of the offence if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions. As to what would constitute 'harmful' consequences for the purposes of the above test, see *Data Protection Registrar v Amnesty International* [1995] Crim LR 633. See further *Halsbury's Laws of England* (4th Ed Reissue) Vol 11(1) paras 14, 15.

[14.13] False or misleading

It may be doubted whether the addition of the words 'or misleading' is in itself of great practical importance, for there is authority for saying that information may be false because it conveys a false impression although it is literally true: see *R v Lord Kylsant* [1932] 1 KB 442, [1931] All ER Rep 179; and *R v Bishirgian* [1936] 1 All ER 586. Yet there may be statements which cannot create a wrong impression in the mind of a person of intelligence and education, but are apt to mislead lesser or less tutored minds and which, therefore, are misleading though not false: cf *Eno v Dunn* (1890) 15 App Cas 252 at 258, per Lord Watson. Nevertheless it is obvious that the abstract possibility that confusion may be created is not sufficient and that no information can be regarded as misleading unless there is 'a reasonable probability of confusion': cf *Re Bayer Products Ltd's*

Application [1947] 2 All ER 188 (CA) at 190, per Lord Greene MR. On the other hand, the fact that information is designed to mislead seems to give rise to a strong inference that it is likely to achieve its aim: cf *Johnston v Orr Ewing* (1882) 7 App Cas 219 at 230, 231, per Lord Blackburn. Whether or not gain or advantage accrues from the false or misleading information is irrelevant: see *Jones v Meatyard* [1939] 1 All ER 140; *Stevens & Steeds Ltd and Evans v King* [1943] 1 All ER 314; *Clear v Smith* [1981] 1 WLR 399, [1980] Crim LR 246; and *Barrass v Reeve* [1980] 3 All ER 705, [1981] 1 WLR 408.

[14.14] Level 3

Section 113B of the Criminal Procedure Ordinance (Cap 221) provides that where an Ordinance provides for a fine for an offence by reference to a level, the fine applicable for the offence is the amount shown for that level in Sch 8. Schedule 8 provides that a level 3 fine is \$10,000.

[14.15] Definitions

For 'Commissioner' and 'data user', see s 2 above.

14A Verification of data user returns

- (1) For the purpose of verifying the accuracy of information in a data user return or change notice, the Commissioner may, by written notice served on any of the persons specified in subsection (2), reasonably require the person—
 - (a) to provide any document, record, information or thing specified in the written notice; and
 - (b) to respond in writing to any question specified in the written notice.
- (2) The persons are—
 - (a) the data user; and
 - (b) any other person whom the Commissioner has reasonable grounds to believe may be able to assist in verifying any information in the data user return or change notice.
- (3) A person on whom a notice is served under subsection (1) may refuse to provide any document, record, information or thing, or any response to any question, specified in the notice, if the person is entitled or obliged under any other Ordinance to do so.
- (4) If, having regard to any document, record, information or thing, or any response to any question, provided under subsection (1), the Commissioner has reasonable grounds to

believe that any information in a data user return or change notice is inaccurate, the Commissioner may, by written notice, require the data user to correct the information in the data user return or change notice.

- (5) Subject to subsection (3), a person on whom a notice is served under subsection (1) or (4) must comply with the requirement within such reasonable period as is specified in the notice.
- (6) A person who contravenes subsection (5) commits an offence and is liable on conviction to a fine at level 3.
- (7) A person who, in purported compliance with a notice under subsection (1), knowingly or recklessly provides any document, record, information or thing, or any response to any question, which is false or misleading in a material particular, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.
- (8) A data user who, in purported compliance with a notice under subsection (4), knowingly or recklessly in a data user return or change notice supplies any information which is false or misleading in a material particular, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months.

(Added 18 of 2012 s 8)

[14A.01] Enactment history

This section was added by the Personal Data (Privacy) (Amendment) Ordinance (18 of 2012), effective 1 October 2012.

[14A.02] General note

This section was introduced to empower the Commissioner to obtain information from data users to verify information stated in a data user return. For the background to the introduction of this provision, see Constitutional and Mainland Affairs Bureau, *Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance* (Oct 2010) at 68–69.

[14A.03] Document

As to meaning, see [2.08] above.

[14A.04] Contravene

As to meaning, see [2.13] above.

[14A.05] Knowingly

As to meaning, see [14.11] above.

[14A.06] Recklessly

As to meaning, see [14.12] above.

[14A.07] False or misleading

As to meaning, see [14.13] above.

[14A.08] Level 3

As to meaning, see [14.14] above.

[14A.09] Definitions

For 'Commissioner', 'data user', 'data user return' and 'change notice', see s 2 above.

15 Register of data users

- (1) The Commissioner must keep and maintain a register of data users who have submitted data user returns, using information in those returns and in any change notices. (Replaced 18 of 2012 s 9)
- (2) The register shall-
 - (a) be in the form of a database; and
 - (b) contain, in respect of each data user who has submitted a data user return, such particulars of the information supplied in that return and any change notice as the Commissioner thinks fit. (Amended 18 of 2012 s 9)
- (3) The Commissioner may, by notice in writing served on a data user, require the data user to submit a notice in the specified form containing such prescribed information in relation to the data user as the Commissioner may reasonably require in order to keep and maintain the register in so far as it relates to that data user, and the data user shall so submit the second-mentioned notice within such period (being a period of not less than 30 days after service of the first-mentioned notice) and in such manner as the Commissioner requires in the first-mentioned notice. (Amended 18 of 2012 s 9)

- (4) Where any prescribed information submitted to the Commissioner under subsection (3) by a data user changes subsequent to the submission, then the data user shall serve a notice in writing on the Commissioner specifying such change-
 - (a) if, but only if-
 - (i) such information is specified in the notice concerned under that subsection as information to which this subsection applies; and
 - (ii) the notice referred to in subparagraph (i) contains, or has annexed to it-
 - (A) a copy of this subsection; or
 - (B) a statement summarizing the requirement imposed by this subsection on the data user; and
 - (b) not later than 30 days after such change.
- (4A) A data user who, in purported compliance with subsection (3) or (4), knowingly or recklessly in a notice submitted to or served on the Commissioner supplies any information which is false or misleading in a material particular, commits an offence and is liable on conviction to a fine at level 3 and to imprisonment for 6 months. (Added 18 of 2012 s 9)
- (5) If the Commissioner is satisfied that a person has ceased to be a data user, he may delete from the register any particulars contained therein relating to that person in that person's capacity as a data user.
- (6) A person who has ceased to be a data user may, by notice in the specified form served on the Commissioner, request the Commissioner to delete from the register the particulars contained therein relating to that person in that person's capacity as a data user, and the Commissioner shall, not later than 3 months after the date on which he receives that notice, comply with that request unless it has been withdrawn by that person.
- (7) A person who, in a notice served on the Commissioner under subsection (6), supplies any information which is false or misleading in a material particular for the purpose of having the particulars contained in the register relating to that person in that person's capacity as a data user deleted from the register, commits an offence and is liable on conviction to a

[38.04] Contravention

As to meaning, see [2.13] above.

[38.05] Definitions

For 'Commissioner', 'complaint', 'data user', 'personal data' and 'relevant data user', see s 2 above.

39 Restrictions on investigations initiated by complaint

(1) Notwithstanding the generality of the powers conferred on the Commissioner by this Ordinance, the Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if- (Amended 18 of 2012 s 22)

(a) the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) has had actual knowledge of the act or practice specified in the complaint for more than 2 years immediately preceding the date on which the Commissioner received the complaint, unless the Commissioner is satisfied that in all the circumstances of the case it is proper to carry out or not to terminate, as the case may be, the investigation;

(b) the complaint is made anonymously;

(c) the complainant cannot be identified or traced;

(d) none of the following conditions is fulfilled in respect of the act or practice specified in the complaint-

(i) either-

(A) the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) was resident in Hong Kong; or

(B) the relevant data user was able to control, in or from Hong Kong, the collection, holding, processing or use of the personal data concerned,

at any time the act or practice was done or engaged in, as the case may be;

(ii) the complainant (or, if the complainant is a relevant person, the individual in respect of

whom the complainant is such a person) was in Hong Kong at any time the act or practice was done or engaged in, as the case may be;

(iii) in the opinion of the Commissioner, the act or practice done or engaged in, as the case may be, may prejudice the enforcement of any right, or the exercise of any privilege, acquired or accrued in Hong Kong by the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person); or

(e) the Commissioner is satisfied that the relevant data user has not been a data user for a period of not less than 2 years immediately preceding the date on which the Commissioner received the complaint.

(2) The Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case- (Amended 18 of 2012 s 22)

(a) the complaint, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Commissioner was of the opinion that there had been no contravention of a requirement under this Ordinance;

(b) the act or practice specified in the complaint is trivial;

(c) the complaint is frivolous or vexatious or is not made in good faith;

(ca) the primary subject matter of the complaint, as shown by the act or practice specified in it, is not related to privacy of individuals in relation to personal data; or (Added 18 of 2012 s 22)

(d) any investigation or further investigation is for any other reason unnecessary.

(3) Where the Commissioner refuses under this section to carry out an investigation initiated by a complaint, he shall, as soon as practicable but, in any case, not later than 45 days after receiving the complaint, by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant- (Amended 18 of 2012 s 22)

(a) of the refusal; and

(b) of the reasons for the refusal.

- (3A) If the Commissioner decides to terminate an investigation initiated by a complaint before its completion, the Commissioner must, as soon as practicable by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant—
- (a) of the decision; and
 - (b) of the reasons for the decision. (Added 18 of 2012 s 22)
- (4) An appeal may be made to the Administrative Appeals Board—
- (a) against any refusal or termination specified in a notice under subsection (3) or (3A); and
 - (b) by the complainant on whom the notice was served (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person, or either).
- (Amended 18 of 2012 s 22)
(Enacted 1995)

[39.01] Enactment history

This section was amended by the Personal Data (Privacy) (Amendment) Ordinance (18 of 2012), effective 1 October 2012.

[39.02] General Note

The Office of the Commissioner attempts to mediate wherever possible. Accordingly, the most frequent reason for the Commissioner's refusal to investigate will be that to commence or continue an investigation would be 'unnecessary' (subsection (2)). The Commissioner's first *Annual Report* asserted that:

'If the complainant has [made] the complaint in the belief that it should result in some form of punishment for the party complained against, he or she may not be satisfied by the mediation process. However, it would not be appropriate for the PCO to engage in an elaborate formal investigation when a prima facie case is lacking, or such an approach could not yield a better outcome than is achieved through mediation' (at p 23).

[39.03] Subsection (2): grounds for not carrying out an investigation

In the regulatory experience of the Office of the Commissioner, the discretion has often been exercised under the catch-all provision in subs (2)(d) to refuse to carry out an investigation where the primary cause of the complaint is not related to personal data privacy. Subsection (2)(ca) was added in 2012 (see [39.01] above) to enable potential claimants to know that in such situations the Commissioner would usually decide not to investigate the matter: see Constitutional and Mainland

Affairs Bureau, *Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance* (Oct 2010) at 57–61.

[39.04] Power

As to meaning, see [7.04] above.

[39.05] Hong Kong

As to meaning, see [7.02] above.

[39.06] Control

As to meaning, see [2.06] above.

[39.07] Use

As to meaning, see [2.07] above.

[39.08] Contravention

As to meaning, see [2.13] above.

[39.09] Administrative Appeals Board

As to meaning, see [13.07] above.

[39.10] Definitions

For 'Commissioner', 'investigation', 'complaint', 'complainant', 'relevant person', 'data user', 'processing', 'use', 'personal data', 'relevant data user' and 'practicable', see s 2 above.

40 Commissioner may carry out or continue investigation initiated by complaint notwithstanding withdrawal of complaint

Where the Commissioner is of the opinion that it is in the public interest so to do, he may carry out or continue an investigation initiated by a complaint notwithstanding that the complainant has withdrawn the complaint and, in any such case, the provisions of this Ordinance shall apply to the complaint and the complainant as if the complaint had not been withdrawn.

(Enacted 1995)

[40.01] Definitions

For 'Commissioner', 'investigation', 'complaint' and 'complainant', see s 2 above.

41 Commissioner to inform relevant data user of inspection or investigation

- (1) The Commissioner shall, before carrying out an inspection or, subject to subsection (2), an investigation, by notice in writing served on the relevant data user, inform the data user of his intention to carry out the inspection or investigation, as the case may be.
- (2) The Commissioner is not required to comply with subsection (1) in the case of any investigation in respect of which he has reasonable grounds to believe that to so comply may prejudice the purposes of the investigation.

(Enacted 1995)

[41.01] Definitions

For 'Commissioner', 'inspection', 'investigation', 'data user' and 'relevant data user', see s 2 above.

42 Power of entry on premises for the purposes of an inspection or investigation

- (1) Subject to subsections (3) and (8), the Commissioner may, for the purposes of an inspection-
 - (a) where the personal data system, or any part thereof, the subject of the inspection is situated in-
 - (i) non-domestic premises, enter the premises at any reasonable time;
 - (ii) domestic premises, enter the premises with the consent of any person (other than a minor) resident therein;
 - (b) carry out in the premises the inspection.
- (2) Subject to subsections (3) and (8), the Commissioner may, for the purposes of an investigation-
 - (a) enter any premises-
 - (i) occupied by the relevant data user; or

- (ii) in which is situated the personal data system, or any part thereof, used by the relevant data user;
- (b) carry out in the premises the investigation.
- (3) Subject to subsections (4) and (5), the Commissioner shall, not less than 14 days before exercising his power under subsection (1) or (2) in respect of any premises, by notice in writing served on the relevant data user, inform the data user-
 - (a) of the premises in respect of which he proposes to exercise that power; and
 - (b) that the power will not be so exercised before the expiration of 14 days after service of the notice.
- (4) Without prejudice to the generality of subsection (5), where any domestic premises are specified in a notice under subsection (3) in respect of which the Commissioner proposes to exercise his power under subsection (2), then the Commissioner shall not exercise that power in respect of those premises unless and until a person (other than a minor) resident therein consents thereto before the expiration of 14 days after service of the notice.
- (5) The Commissioner may, pursuant to a warrant issued under subsection (6), exercise his power under subsection (2) in respect of the premises specified in the warrant without complying with subsection (3).
- (6) A magistrate may, if satisfied by information upon oath by the Commissioner or any prescribed officer that there are reasonable grounds for believing that the purposes of any investigation may be substantially prejudiced if the Commissioner were required to comply with subsection (3) before exercising his power under subsection (2) in respect of any premises, issue a warrant-
 - (a) in the form specified in Part 1 of Schedule 6; and
 - (b) in respect of those premises.
- (7) A magistrate may, if satisfied by information upon oath by the Commissioner or any prescribed officer that there are reasonable grounds for believing that the purposes of an investigation may be substantially prejudiced if the Commissioner is prevented by the operation of subsections (4) from exercising his power under subsection (2) in respect of any domestic premises, issue a warrant-
 - (a) in the form specified in Part 2 of Schedule 6; and
 - (b) authorizing the Commissioner to exercise that power

in respect of those premises.

- (8) The Commissioner shall not exercise his power under subsection (1) or (2) in respect of any premises in such a way as to unduly disrupt any operations being carried out in the premises, whether by the relevant data user or any other person.
- (9) Where the Commissioner exercises his power under subsection (1) or (2), the relevant data user shall, without charge, afford the Commissioner such facilities and assistance as the Commissioner may reasonably require for the purposes of the inspection or investigation concerned.
- (10) Where the Commissioner, pursuant to a warrant issued under subsection (6), exercises his power under subsection (2) in respect of the premises specified in the warrant, he shall produce the warrant for inspection by any person found in those premises who questions his authority to exercise that power in respect of those premises.
- (11) In this section and Schedule 6-

domestic premises (住宅處所) means any premises which are constructed or intended to be used for habitation;

non-domestic premises (非住宅處所) means any premises other than domestic premises;

premises (處所) means-

- (a) any building where no part of the building is separately occupied, and includes any land appertaining to the building;
- (b) in any other case, any part of a building which is separately occupied, and includes any land appertaining to such part.

(Enacted 1995)

[42.01] Minor

As to meaning, see [2.11] above.

[42.02] Power

As to meaning, see [7.04] above.

[42.03] Magistrate

As to meaning, see [13.05] above.

[42.04] Oath

'Oath' is defined by s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include, in the case of persons allowed or required by law to affirm instead of swearing, affirmation; and 'swear' in the like case includes affirm.

[42.05] Reasonable grounds for believing

As to meaning, see [33.04] above.

[42.06] Definitions

For 'Commissioner', 'inspection', 'personal data system', 'relevant data user', 'prescribed officer' and 'investigation', see s 2 above.

43 Proceedings of Commissioner

- (1) Subject to the provisions of this Ordinance, the Commissioner may, for the purposes of any investigation-
- (a) be furnished with any information, document or thing, from such persons, and make such inquiries, as he thinks fit; and
- (b) regulate his procedure in such manner as he thinks fit.
- (2) Any hearing for the purposes of an investigation shall be carried out in public unless-
- (a) the Commissioner is of the opinion that, in all the circumstances of the case, the investigation should be carried out in private; or
- (b) if the investigation was initiated by a complaint, the complainant requests in writing that the investigation be carried out in private.
- (3) Counsel and solicitors shall not have any right of audience before the Commissioner at any hearing for the purposes of an investigation, but may appear before him if he thinks fit.
- (4) It shall not be necessary for the Commissioner to hold any hearing for the purposes of an investigation and no person shall be entitled to be heard by the Commissioner.
- (5) If at any time during the course of an investigation it appears

to the Commissioner that there may be sufficient grounds for him to make any report or recommendation that may criticize or adversely affect any person he shall give to the person an opportunity to be heard.

(Enacted 1995)

[43.01] Document

As to meaning, see [2.08] above.

[43.02] Hearing

A hearing is a proceeding of relative formality with definite issues of fact or law to be tried: see Black's Law Dictionary (5th Ed West Publishing Co, St Paul's Minn).

[43.03] Counsel

'Counsel' is defined by s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean a person admitted before the Court of First Instance to practise as counsel.

[43.04] Solicitor

'Solicitor' is defined by s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean a person admitted before the Court of First Instance to practise as a solicitor. The term is further defined by s 2(1) of the Legal Practitioners Ordinance (Cap 159) to mean a person who is enrolled on the roll of solicitors and who, at the material time, is not suspended from practice. For provisions governing solicitors generally, see the Legal Practitioners Ordinance (Cap 159) Pt II.

[43.05] Definitions

For 'Commissioner' and 'investigation', see s 2 above.

44 Evidence

- (1) Subject to subsection (2) and section 45, the Commissioner may, for the purposes of any investigation, summon before him any person who-
- (a) in the opinion of the Commissioner, is able to give any information relevant to those purposes;
 - (b) where the investigation was initiated by a complaint,

is the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person, or both),

and may examine any such person and require him to furnish to the Commissioner any information and to produce any document or thing which, in the opinion of the Commissioner, is relevant to those purposes and which may be in the possession or under the control of any such person.

(2) Where-

- (a) an investigation has been initiated by a complaint;
- (b) the complaint relates, whether in whole or in part, to personal data referred to in section 61(1);
- (c) the Commissioner has, for the purposes of that investigation, under subsection (1)(a) summoned before him a person; and
 - (i) that person asserts, in response to any requirement under subsection (1) by the Commissioner to furnish him with information or to produce a document or thing, that-
 - (i) to comply with that requirement would directly or indirectly disclose the identity of the individual from whom that data was collected (whether in whole or in part); or (Amended 18 of 2012 s 23)
 - (ii) he is not required to comply with that requirement by virtue of any common law privilege,

then-

- (i) notwithstanding any other provision of this Ordinance, the Commissioner shall not serve an enforcement notice on that person in relation to that requirement;
- (ii) the Commissioner may, not later than 28 days after that assertion is made known to him, make an application to the Court of First Instance for an order directing that person to comply with that requirement; (Amended 25 of 1998 s 2)
- (iii) the Court of First Instance may make the order if, but only if, it is satisfied, having regard to all the circumstances (including the circumstances of the complainant), that- (Amended 25 of 1998 s 2)
 - (A) if the act or practice specified in the