

HONG KONG MAY ENACT A DATA PROTECTION LAW IN 1994

There is a good prospect that Hong Kong will enact data protection legislation in 1994. A law draughtsman has been assigned to begin his work in consultation with the Privacy Sub-committee of the Hong Kong Law Reform Commission, and a legislation slot has been reserved for June 1994. Even if this timetable slips, it is likely that a bill will be before the Legislative Council by September 1994, according to The Hon Mr Justice Mortimer, Chairman of the Privacy Sub-committee.

The 1988 guidelines created a framework for public and private sectors but they were voluntary in character (PL&B May 1988 pp.7,14). In March 1990, the Hong Kong Law Reform Commission was asked by the government to make recommendations on the law relating to privacy and data protection (PL&B July 1991 pp.14-17).

Three years later, on 17th March 1993, the Privacy Sub-committee published a substantial 200 page Consultative Document on the *Reform of the Law Relating to Information Privacy*. The Consultative Document opened a public debate and the Sub-committee received over 80 submissions from interested parties in Hong Kong and abroad.

The Consultative Document takes an up-to-date approach in regulating data protection

issues. It systematically draws on experience of national data protection legislation already functioning in many European countries. Also, it is based on recognised data protection principles contained in international instruments, such as the Council of Europe Convention 108 and the OECD Guidelines. Finally, the proposal was substantively influenced by the revised EC Draft Directive, which is quite understandable bearing in mind Hong Kong's current position in the global economic structure as an important financial and economic centre in the region. Thus, by drafting legislation with a high level of data protection, Hong Kong is not likely to have problems in meeting the EC Draft Directive's transborder data flows requirement for providing an adequate level of protection (see box on next page).

The main points of the proposed law

The following are the main characteristics of the Hong Kong proposal:

- It covers both automated and readily retrievable manual data.
- The proposal applies uniformly to the private and public sectors.
- It adopts a system of notification which is based on, but simpler than, registration requirements in the UK's Data Protection Act. Users of personal data will need to complete a form by ticking appropriate boxes specifying purposes. The form will be distributed with the annual business

Hong Kong Privacy Survey

Parallel with the Privacy Sub-committee's work, a recent University of Hong Kong study, *Privacy Attitudes in Hong Kong*, shows that privacy is seen by a representative sample of all Hong Kong households as:

1. very important by a quarter of survey respondents, while
2. two thirds of them considered privacy to be, at least, somewhat important
3. 7.3% of the sample had experienced an invasion of their privacy within the last 12 months
4. 62.9% would object if their identity card number were made publicly available.

The survey was conducted by Dr John Bacon-Shone and Harold Traver, the Social Science Research Centre, University of Hong Kong, Pokfulam Road, Hong Kong. A summary of the survey results is available from the PL&B office.

Hong Kong's Transborder Data Flows Proposals

The Consultative Document's proposed legal framework for transborder data flows is determined by the provisions on the territorial application of the Hong Kong law and by the proper provisions on transfers of data abroad. In this way, the whole legal framework is made more precise and clear for data users wishing to transfer their personal data from Hong Kong to other countries.

The territorial application of the Hong Kong law

The Privacy Sub-committee recommended that Hong Kong law should apply to all processing of personal data where the data controller is in the territory of Hong Kong. Thus, ~~transfers of personal data abroad will be subject to the provisions of Hong Kong legislation as long as the control of that data remains in Hong Kong.~~ Subsequently, when transfer of personal data abroad implies the loss of control over that data, the provisions of the Hong Kong law on the use of data would cease to apply and the question of legality of such transfer would be regulated by the provision on transborder data flows.

The criterion of control over data seems to be well chosen, especially bearing in mind a potential conflict of various national data protection laws and their jurisdictions over transborder data flows. However, there might be a need for further interpretation as to what are the elements and what is considered to be effective control over processing and use of data. For the sake of legal certainty, it would be important to define in these cases, either in the legislation itself, or in interpretative/guideline notes, at what stage pure processing ceases and becomes data control.

The provisions on transborder data flows

The provisions on transborder data flows are based on the revised text of the EC Directive and represent an example of a well-balanced way in which this important issue can be regulated. Clearly, when drafting its recommendations, the Sub-committee must have had constantly in mind the current position of Hong Kong in the global economic structure, as an important financial and economic centre in the region attracting a great number of foreign corporations and multinational companies. With such a background, regulating transfers of data to other countries in a balanced and practical manner becomes a condition *sine qua non* for future economic prosperity and development of the country.

As the criteria for transborder data flows, the Privacy Sub-committee recommends *an adequate level of data protection in the receiving country*. Thus, as a general rule, personal data may be transferred to a country with an adequate level of data protection. However, a number of exceptions are envisaged:

1. The consent of data subject preliminary to entering into a contract.
2. Transfer is necessary for the performance of a contract with a data subject and he has been informed of the transfer.
3. Transfer is necessary on important public interest grounds.
4. Transfer is necessary to protect the vital interests of the data subject.

Finally, if a particular transfer to a country without an adequate level of protection does not fall within one of the above exemptions, there is a duty for the data exporter to ensure that the receiving party in the other country complies with the data protection principles.

registration form and be financed by a small additional fee.

- The regulatory system will be overseen by a ~~Data Protection Commissioner who will report to an independent Privacy Commission~~ consisting of five people appointed by the Governor on the Legislative Council's advice. The Commissioner's powers will include investigation and a right of search and seizure, after obtaining a court order.
- Provisions on transborder data flows follow the pattern envisaged by the EC Draft Directive (see box).
- ~~Data matching activities are regulated in so far as they are subject to the approval of a Privacy Commissioner.~~ This provision is particularly important, as Hong Kong has a universal Personal Identification Number System used with national identity cards which are required for a wide range of purposes.
- ~~Several codes of conduct, approved by a Privacy Commissioner, are recognised as an additional regulatory instrument.~~

Response to the Proposals

There has been widespread support for the proposals, including broad support from Citicorp and American Express. Several issues have been raised in response to the proposals, such as:

1. Is it practical to give a right of access and correction in respect of evaluative data?
2. What transitional provisions should be made for readily retrievable manual records or those which become readily retrievable?
3. The notification system is too bureaucratic.
4. The Privacy Commissioner's powers are too great.
5. There is no definition of "data holder" or "data user."

This report has been written by Bojana Bellamy, a Privacy Laws & Business researcher and is based on a paper delivered by ~~The Hon Mr. Justice Mo~~ (Hong Kong), Chairman of the Privacy Sub-committee at the 15th International Conference of Data Protection and Privacy Commissioners, held in Manchester in September, 1993.

The Consultative Document is available from: The Secretary, The Privacy Sub-committee, The Law Reform Commission of Hong Kong, 1/F High Block, Queensway Government Offices, 66, Queensway, Hong Kong.

Privacy Laws & Business Newsletter Subscription Form

The *Privacy Laws & Business Newsletter* subscription: four issues, legislation and information service. Subscription £250 (UK), £265 (elsewhere). Sample copy £25 (UK), £40 (elsewhere).

Your name and address.....

Telephone.....Fax.....

You may pay by:

1. Cheque enclosed made payable to: Privacy Laws & Business

2. Credit card: American Express, Visa, Mastercard or Access. (Please indicate your card).

Credit card number.....Expiry Date.....

Card billing name and address if different from above:.....

3. Please invoice me.....

Signature..... Date.....

GUARANTEE

If you are dissatisfied with the newsletter, the unexpired portion of your subscription will be repaid.

Privacy Laws & Business, Roxeth House, Shaftesbury Avenue, Harrow, Middlesex, HA5 5BT, UK
Telephone: + (44) 81 423 1300 Fax: + (44) 81 423 4536