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International Information for International Business

VOLUME 15, NUMBER 1 >>> JANUARY 2015

HONG KONG

First Prison Sentence Imposed Under Personal Data (Privacy) Ordinance

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For the first time since the Personal Data (Privacy) Ordinance (“PDPO”) came into force in 1996, an individual has received a jail sentence for breach of the PDPO.

The PDPO

The PDPO protects the personal data of living individuals. Any person who controls the collection, processing, storage or use of personal data in Hong Kong is subject to the requirements of the PDPO.

Breach of the PDPO or non-compliance with enforcement notices issued by the Privacy Commissioner may amount to a criminal offence and result in a fine and/or imprisonment. For example, a person who uses personal data for direct marketing purposes without the relevant data subject’s consent will commit an offence and be subject to a maximum fine of HK\$500,000 (U.S.\$64,496) and up to three years’ imprisonment. Failure to comply with an enforcement notice issued by the Privacy Commissioner, which requires certain remedial or preventative steps to be taken, will also constitute an offence, and attracts a maximum fine of HK\$50,000 (U.S.\$6,450) and two years’ imprisonment on first conviction (with a daily penalty of HK\$1,000 (U.S.\$129) if the offence continues).

The Case

In October 2012, an individual lodged a complaint with the Office of the Privacy Commissioner, claiming that an insurance agent had obtained her personal data through unfair means.

The insurance agent had originally contacted the complainant whilst he was employed at insurance company A. The insurance agent subsequently moved to insurance company B. He then contacted the complainant and persuaded her to sign up for a new insurance policy, without disclosing the fact that he had resigned from insurance company A and the policy would be issued by insurance company B. The complainant claimed that the insurance agent had misled her, and in so doing had obtained her personal data by unfair means.

The Office of the Privacy Commissioner made enquiries with the insurance agent. In response to those enquiries, the insurance agent falsely told the Office of the Privacy Commissioner that he had been assigned to work with the complainant whilst he was employed by insurance company A. However, this was denied by insurance company A. The insurance agent had therefore committed an offence under Section 50B(1)(b)(i) of the PDPO.

Under Section 50B(1)(b)(i) of the PDPO, it is a criminal offence for a person to make a statement to the Office of the Privacy Commissioner which he knows is false, or to knowingly mislead the Office of the Privacy Commissioner. Such an offence incurs a maximum fine of HK\$10,000 (U.S.\$1,290) and six months’ imprisonment.

On December 4, 2014, the insurance agent was sentenced to four weeks' imprisonment.

Section 64 of the PDPO

It is worth noting that the insurance agent's actions could have potentially fallen foul of Section 64 of the PDPO. The new Section 64 was introduced by the 2012 amendments to the PDPO (*see analysis at WDPR, July 2012, page 4*), and makes it an offence for a person to disclose any personal data obtained from a data user without that data user's consent, if:

- that person intended to make a gain (either monetary or otherwise), for his/her own benefit or the benefit of another;
- that person intended to cause loss to the data subject; or
- the disclosure caused psychological harm to the data subject.

An example given in the "Information Leaflet: Offence for disclosing personal data obtained without consent from the data user", issued by the Office of the Privacy Commissioner in September 2012, of when a person may be in breach of Section 64 is the sale by an employee of customers' personal data in return for money, without the consent of his or her employer. In such circumstances, it would be the employee, rather than the employer, who would be guilty of an offence under Section 64, and liable to a maximum fine of HK\$1 million (U.S.\$128,992) and five years' imprisonment.

As no written judgment is available in respect of the insurance agent's conviction, it is not clear whether or not his actions could have amounted to an offence under Section 64 of the PDPO. So far, no person has been charged under Section 64 of the PDPO.

Conclusion

This is the first time a prison sentence has been issued for a breach of the PDPO, and is likely to be only the start of such actions and convictions.

We anticipate that the Hong Kong courts will start to take a more hard-line approach to offenders under the PDPO, not only in respect of Section 50B(1)(b)(i), but also other provisions, *e.g.*, Section 35E (which makes it

an offence to use an individual's personal data for direct marketing without his or her consent), Section 50A (which makes it an offence to breach an enforcement notice issued by the Privacy Commissioner) and possibly Section 64 discussed above.

The amendments made to the PDPO in 2012, the latest suite of guidance notes issued by the Office of the Privacy Commissioner, the fact that the Office of the Privacy Commissioner is recommending an increasing number of cases for prosecution and that the courts are willing to impose custodial sentences serve to emphasize the increased attention that the protection of personal data is receiving in Hong Kong.

In this case, criminal proceedings were brought against the insurance agent, an individual, and not against either insurance company A or insurance company B, which were not at fault.

Section 64 of the PDPO creates a criminal offence against rogue employees who misappropriate personal data from their employers for their own gain or for the benefit of another (*e.g.*, a new employer). Whilst Section 64 was not utilised in this case, it seems apparent that the Office of the Privacy Commissioner would be willing to bring proceedings against serious cases of personal data theft by employees in the future.

Actions by employees could also potentially open up the risk of liability for employers.

In addition to providing full cooperation and responding honestly to any enquiries made by the Office of the Privacy Commissioner, it is vital that all data users carry out periodic audits and put in place mechanisms and procedures that ensure that their policies and practices are in full compliance with the provisions of the PDPO at all times.

The text of the Office of the Privacy Commissioner's December 4, 2014, statement on the imposition of the prison sentence is available at http://www.pcpd.org.hk/english/news_events/media_statements/press_20141204.html.

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