

Beauty and the Beast: New Guidance Note on the Handling of Customers' Personal Data for the Beauty Industry Issued in Hong Kong

The beauty business in Hong Kong is booming. Treatments can range from traditional facials to more invasive procedures utilising medical devices, such as laser hair removal and intradermal microinjection procedures. On 15 June 2015 and 2 February 2016, the Consumer Council in Hong Kong reported that consumer complaints made against beauty industry businesses rose 5.4% and 21% in 2014¹ and 2015², respectively. Some of the major incidents of beauty treatments gone wrong have made headlines (such as cases where customers died as a result of liposuction treatments at beauty clinics).

Despite the health and safety risks presented by some of these “beauty” treatments, there is no single over-arching law in Hong Kong that regulates the beauty industry or the medical devices used by them. Instead, a piecemeal approach has been adopted. The Trade Descriptions Ordinance (Cap. 362) (TDO), which generally regulates unfair business practices, and the Personal Data (Privacy) Ordinance (Cap. 483) (PDPO), which regulates the use, collection and handling of personal data, are the main pieces of legislation invoked when disenchanted customers want to lodge a complaint. Depending on the nature of the medical devices used, the Pharmacy and Poisons Ordinance (Cap. 138) or the Radiation Ordinance (Cap. 303) could also be relevant.

As a result of the increased scrutiny under which the beauty industry has been placed over the last few years, in June 2016, the Hong Kong Office of the Privacy Commissioner for Personal Data issued a new Guidance Note on the Proper Handling of Customers' Personal Data for the Beauty Industry (**Beauty Industry Guidelines**). The Beauty Industry Guidelines set out practical guidelines to address business practices employed by beauty centres, which continue to be an ongoing concern for consumers.

Beauty Industry Guidelines

COLLECTION OF HKIDS

A common complaint by consumers is the collection of their Hong Kong identity card (HKID) numbers by beauty centres. HKID numbers are collected routinely by beauty centres as part of the membership application process, or when enrolling customers for a free trial, or when signing up customers for beauty treatments involving medical devices in which case they have to sign a consent form.

The Beauty Industry Guidelines make it clear that beauty centres cannot compel an individual to provide their HKID number or a copy of their HKID card. A request for such information and documentation would amount to an excessive collection of personal data and breach data protection principle (DPP) 1(1)(c). Collecting the HKID number or a copy of an HKID card for the purposes of, say, avoiding clerical errors or verifying an individual's identity, is disproportionate to the purpose of use and collection of personal data. Such purposes can easily be achieved by other less privacy intrusive means, e.g., by collecting a customer's name and telephone number.

A beauty centre may be permitted to collect the HKID number of a customer in order to insert it into a contract with that customer, to help establish the legal rights of the beauty centre and the customer, so long as such legal interests are not trivial or of a short-term nature. For example, requiring a customer to provide their HKID number on a consent form prior to a one-off treatment, or asking them to provide their HKID number in order to sign up for a 7-day free trial, would not be justified or permitted.

¹ Consumers Alerted for Increased Complaints against Sales Practices of Beauty and Fitness Centers (https://www.consumer.org.hk/ws_en/news/press/p46405.html)

² Overall Consumer Complaints Down 12% amidst Travel Complaints Rising 41% (https://www.consumer.org.hk/ws_en/news/press/2015/yearender.html)

The Beauty Industry Guidelines also clarify that the operation of a medical device by a beauty practitioner who is not a registered doctor, does not establish a doctor-patient relationship and that the collection of the customers' HKID number on that basis is not permitted.

FAIR AND LAWFUL COLLECTION

Under the PDPO, the collection of personal data must be fair and lawful under the circumstances (DPP 1(2)). Inducing consumers to provide their personal data in return for a benefit (e.g., coupons, discounts, etc), may amount to an unfair collection of their data depending on the circumstances. One such example is where the consumer actually has a small chance of being able to take advantage of the benefits (e.g., the benefit is subject to numerous impracticable conditions) or the collection of the personal data is completely unrelated to the purported purpose of collection, such as the administration of the benefits (e.g., the data will be used for direct marketing, profiling, etc).

Acts that amount to unfair collection under the PDPO may also fall foul of the TDO. Bait advertising, bait and switch practices and aggressive commercial tactics (e.g., putting undue pressure on a consumer to provide their personal data and to sign up for a membership) can amount to a breach of the TDO. A breach of the TDO may incur a maximum fine of HK\$500,000 and imprisonment of 5 years upon conviction on indictment.

COLLECTION OF DATE OF BIRTH

The Beauty Industry Guidelines state that beauty centres should not make it mandatory for a customer to provide their date of birth. If a beauty centre wants to offer products or services tailored towards the customers' age, it can simply ask customers to tick a box indicating their age range (e.g., 40 to 45, 46 to 51, etc). For any special birthday promotions, it would be sufficient for the beauty centre to merely collect the customer's month of birth – there is no need to collect the exact date and year of birth.

PURPOSE OF USE AND TRANSFER

On or before the time that a customer's personal data is collected, the beauty centre must clearly inform them of the purposes for which their personal data will be used and to whom it may be transferred (DPP 1(3)).

A customer's name, contact telephone number and address should be sufficient data to enable a beauty centre to provide services to them. Any other personal data that is requested, e.g., marital status, occupation, age, education, etc, should clearly be marked as optional, and customers must be informed of the purpose of such collection.

If personal data will be transferred or used for a new purpose (outside of the original scope of collection, or a directly related purpose, as had been notified to the customer at the time of collection), then the customers' prior express consent is required. This includes the transfer of any personal data as part of a sale of business. If a beauty centre shuts down and sells its assets which include, the personal data of its customers to a third party purchaser, it must obtain the customers' prior consent (unless such transfer was already covered under the original notice provided to the customer at the time of collection of their personal data).

DIRECT MARKETING

More stringent requirements are imposed by the PDPO in respect of the use and transfer of personal data for direct marketing. Personal data cannot be used or transferred for direct marketing purposes unless the data subject has provided their express consent.

A beauty centre must notify a customer if it intends to use their personal data for direct marketing purposes, and must inform them of the kinds of personal data to be used, the types of products or services that will be marketed, and provide a means by which the customer can indicate whether or not they consent. Whilst customers can be asked to "opt-out" of obtaining direct marketing materials, silence does not amount to consent.

If a beauty centre intends to transfer the personal data of its customers to any third party for their use in direct marketing, the beauty centre must inform the customer beforehand in writing of such intention, as well as whether or not the personal data will be transferred in return for gain, the type of personal data to be transferred, the classes of recipients, and the types of goods or services which will be marketed. Such a transfer cannot be made unless the customer has provided their express written consent.

Customers have a right to withdraw their consent regarding the use or transfer of their personal data at

any time, despite having previously provided their consent.

Beauty centres must maintain an opt-out list of customers who have indicated that they do not want to receive marketing materials or to have their personal data transferred for marketing purposes. The opt-out list must be kept regularly up-to-date, and staff should be trained on how to maintain it.

SECURITY

Under DPP 4, beauty centres are obligated to take all practicable steps to protect the personal data held by them from any unauthorised or accidental access, processing, erasure, loss or use. Regular training should be provided to staff on the proper handling and safe-keeping of customers' personal data, and access to personal data should be limited on a need-to-know basis. Accurate audit trails and other methods (e.g., preventing documents from being saved onto portable drives) should be implemented to monitor and prevent any unauthorised access or use. Policies should also be put into place on how to handle a data breach. Staff should be bound by confidentiality obligations, which clearly sets out their obligations and the consequences for breaching them (e.g., termination of employment).

Conclusion

The Hong Kong market is saturated with beauty centres offering state of the art beauty treatments. In order to stay ahead of the game, beauty centres must ensure that their services receive positive reviews (particularly via social media) in order to build up

their goodwill and generate business. Any negative publicity regarding a breach of the PDPO could have a significant impact on a beauty centre's reputation, and result in loss of business. With the spotlight now shining on them, beauty centres must take steps to update their business practices to ensure that they are compliant with the PDPO and that they heed the Beauty Industry Guidelines. A top down approach should be adopted, with management taking proactive and preventive steps to minimise the risk of any breach of the PDPO.

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