

# How to respond to a data access request

*20 October 2006*

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## General

A "data user" must comply with a valid data access request ("**DAR**") not later than 40 days after receiving the request.

Failure to comply with a valid data access request does not, in itself, constitute an offence. However, the Privacy Commissioner may investigate into such contravention and serve an **enforcement notice** to the data user prescribing, among other things, remedial action to be taken by the data user. If the data user fails to comply with the enforcement notice, it commits an offence punishable by fine and imprisonment.

## What types of documents will need to be provided?

A data user must provide the "Requested Data" identified in section 2 of the DAR Form. It should take note of:

- the description of the data sought, and
- the period within which the requested data was collected.

A data user is **not** required to provide documents:

- outside of the above types of documents and timeframe,
- documents which do not contain the data subject's "personal data" (see 3 below),
- legal privileged documents which contain legal advice (see 5 below),
- draft documents where the final document is not materially different, and
- documents which duplicate information already contained in a document to be provided to the data subject.

A data user is also not required to provide data which is excluded by virtue of section 3 of the DAR Form. This **may** include data:

- contained in documents previously provided to you by the data subject (eg letters to the data user from the data subject),
- contained in documents already provided to the data subject by the data user (eg letters to the data subject from the data user or documents provided pursuant to a previous request), or
- in the public domain (eg newspaper clippings or entries in public registers concerning the data subject).

## What is "personal data" of the data subject?

Personal data means any data:

- relating directly or indirectly to a living individual,
- from which it is practicable for the identity of the individual to be directly or indirectly ascertained, and
- in a form in which access to or processing of the personal data is practicable.

Therefore a data user will be required to provide all documents containing the data subject's name (eg. if the data subject is called "Maggie Cheung" - all documents with references to Maggie, Maggie Cheung, M Cheung), initials "MC", her photo, her passport or ID card number as these would be regarded as personal data.

Whether a reference to a data subject's title (ie "Executive Director", "ED", "Managing Director", "MD", "Manager", "CEO") will be personal data will depend on whether the identity of the data subject could be directly or indirectly ascertained from the data. For example an email from 1 person to another referring to something that "the ED" said on a certain date could arguably allow someone to identify the data subject by working out from other documents who was the Executive Director on that date.

## Blocking out/covering up personal data of another person not of the data subject

A data user must cover up (or block out) in documents personal data of someone other than the data subject and references to that person's personal data. Alternatively, if it is not possible for you to comply with the DAR without disclosing the personal data of any other individual (and that individual does not consent to the data user disclosing their personal data) the data user need not disclose the document at all.

## Legal professional privilege

Correspondence and other communications passing between solicitor and client are privileged from production provided that such communications are made confidentially to or by the solicitor in his professional capacity and for the purpose of obtaining legal advice or assistance to the client (this includes an in-house solicitor as well as external solicitor).

Correspondence and other communications made confidentially and which come into existence for the dominant purpose of obtaining legal advice in existing or anticipated proceedings are also privileged and do not need to be provided in response to a DAR.

## Fee for complying with a valid DAR

The PDPO provides that a data user may impose a fee for complying with a data access request provided that the fee is not excessive. Generally, a fee which covers the data user's costs of complying with the request will not be excessive. However, the data user should not make a gain from the fee imposed. To illustrate, a photocopying charge of HK\$1.5 is generally regarded as reasonable. The Privacy Commissioner's office charges HK\$2.5 per page.

Although not legally obliged, we suggest that a data user inform the data subject of the amount of fees before providing the personal data to the data subject.

A data user may refuse to comply with a data access request unless and until any fee imposed by it for complying with the request has been paid.

## Steps on reviewing a valid DAR

The next steps on reviewing a valid DAR should include:

- Identifying the documents that may need to be provided in response to the DAR keeping in mind the guidelines set out in 2 and 3 above.
- If the data user has in its possession or control documents that fall within the category of "Requested Data" in the DAR Form it should send a letter to the data subject (or his or her legal representative) advising that it holds documents pertaining to the data subject and requesting agreement as to the costs of providing those documents (see Letter A).
- The data user should then review the documents and exclude those documents as referred to in 2, 4 and 5 above.
- The data user will need to advise the data subject (or his or her legal representative) of the costs for obtaining copies of the documents to be released and filtering out those documents or parts of documents that are not to be provided.
- After the data subject (or his or her legal representative) pays the costs the data user should provide the documents (see Letter B).

## Letter "A"

[On letterhead]

[date]

[data subject]

[address of data subject or his or her legal representative]

Dear [data subject],

### Data Access Request for Personal Data

[I/We] refer to your (or lawyer's) letter dated [date] enclosing a Data Access Request in respect of certain personal data.

Pursuant to section 18(1)(a) of the Personal Data (Privacy) Ordinance ("PDPO"), [I/we] confirm that [I/our organisation] holds the Requested Data.

In accordance with section 28 of the PDPO, [I/we] will require payment of a fee in respect of our administrative costs for complying with the Data Access Request **before** we comply with the request. We advise that such fee will be charged in accordance with the following schedule:

	HKD
<p>Handling charge (based on the hourly rates of personnel involved in the processing of the request) [This charge will also apply to scanning of documents to save to disk.</p> <p><b>[Note: if you use an external service provider to do this, you may wish to include the quote from the service provider]</b></p>	[amount] per hour (based on time spent in processing the request)
Copying and printing charges	[amount, say HK\$2.50] per page

Please confirm that you are happy to pay the above fees. [I/We] will notify you of the total amount payable once [I/we] have collated the personal data requested by you.

Yours sincerely,

## Letter "B"

[On letterhead]

[date]

[data subject]

[address of data subject or his or her legal representative]

Dear [data subject],

### Data Access Request for Personal Data

[I/We] refer to our letter of [insert date of Letter A].

[I/We] advise that the cost of complying with your Data Access Request in accordance with the fees set out in [my/our] letter of [insert date of Letter A] is as follows:

	HKD
<p>Handling charge (based on the hourly rates of personnel involved in the processing of the request) [This charge will also apply to scanning of documents to save to disk.</p> <p><b>[Note: if you use an external service provider to do this, you may wish to include the quote from the service provider]</b></p>	[amount] (based [x] hours at the rate of HK\$[y] per hour)
Copying and printing charges	[amount] ([insert number of pages] pages, at the rate of [HK\$2.50] per page)

[I/we] will require payment of a fee in respect of our administrative costs for complying with the Data Access Request **before** we comply with the request.

Please forward payment of [insert total amount] after which [I/we] will provide you with the documents.

Yours sincerely,