

POSITION STATEMENT OF
THE INDEPENDENT POLICE COMPLAINTS COUNCIL [“THE COUNCIL”]
IN RELATION TO THE REPORT OF
THE PRIVACY COMMISSIONER FOR PERSONAL DATA [“THE COMMISSIONER”]

PRELIMINARY

1. This is the position statement of the Council consisting of its current members. As distinct from the “Report on Leakage of Personal Data” dated 8th April, 2006 [“the April Report”] when the term IPCC was used as a compendious reference to the Council and to the IPCC Secretariat [“the Secretariat”]¹, the Secretariat is not a party to this statement.

2. In § 3.1.1 of his Report published under section 48(2) of the Personal Data (Privacy) Ordinance [“the Commissioner’s Report”], the Commissioner described the Council as an independent body comprising of a Chairman, three Vice-chairman and fourteen other Members appointed by the Chief Executive. This is inaccurate in that he omitted the representative from the Ombudsman who is an ex-officio member of the Council. The current Chairman of the Council was first appointed on 25th May, 2004. Three of its current members were respectively appointed on 1st January, 2005 and 1st January, 2006.

3. The terms of reference of the Council are set out in § 9.1 of the April Report. They are
 - (a) to monitor and, where it considers appropriate, to review the handling by the Police of complaints by the public;

 - (b) to keep under review statistics of the types of conduct by police officers which

¹See footnote 1 of the April Report

lead to complaints by members of the public;

(c) to identify any faults in Police procedures which lead or might lead to complaints; and

(d) where and when it considers appropriate, to make recommendations to the Commissioner of Police or, if necessary, to the Chief Executive.

4. The Secretariat, on the other hand, is a Government body. As pointed out by § 3.2.1 of the Commissioner's Report, it is headed by an Administrative Officer Staff Grade C (as Secretary) with 21 general grade staff and a Senior Government Counsel. The current Secretary assumed office on 16th September, 2005.

OVERALL VIEW OF THE COUNCIL'S STANCE

5. The Commissioner first commenced his investigation on 15th March, 2006 under section 38(b) of the Personal Data (Privacy) Ordinance (Cap. 486) [“the Ordinance”]. The section provides that where the Commissioner has reasonable grounds to believe that an act has been done by a data user which relate to personal data may be a contravention of a requirement under the Ordinance then the Commissioner may carry out an investigation in relation to the relevant data user to ascertain whether the act is a contravention of a requirement under the Ordinance. This is to be distinguished from the Commissioner’s power under section 38(a) which relates to investigation in response to a complaint when his jurisdiction is to ascertain whether the act “specified in the complaint” is a contravention of a requirement under the Ordinance. As indicated by § 1.2.3 of the Commissioner’s Report, section 38(a) was also invoked after the Commissioner received complaints from individuals after the leakage.

6. After 7 months of investigation, the Commissioner has not made any criticism against the Council or the Secretariat that they had in any way suppressed or omitted any relevant material facts in the April Report. The April Report was completed less than a month after discovery of the leakage on 10th March, 2006. There is no significant difference between the April Report and the Commissioner’s Report in relation to the primary facts.

7. The Commissioner’s Report may be analysed under 3 sections : his findings in relation to the handling of the personal data; his findings against EDPS and Mr. Y and the steps that the Commissioner took on the basis of his findings.
 - (a) In relation to the Commissioner’s findings on the handling of the personal data, the Council does not dispute those findings in so far as they relate to the Secretariat;

 - (b) In relation to the Commissioner’s findings against EDPS and Mr. Y, the

Council supports those findings. They accord with the stance taken by the Council against EDPS and Mr. Y.

- (c) In relation to the steps which the Commissioner took, the Council takes the view that whilst the remedial steps proposed are eminently sensible, the Commissioner had erred in failing to appreciate and to exercise his duties under the Ordinance and that he imposed a burden on a totally inappropriate body (the Council) when he ought to have considered whether such burden should properly rest on the Government.

THE COMMISSIONER’S FINDINGS ON
THE TREATMENT OF PERSONAL DATA

8. The Commissioner made the following principal findings :
- (a) In relation to general IT culture within the Secretariat :
 - (i) “From the evidence before me, I do not find that IPCC had given any due consideration to ensuring security of the data”².
 - (ii) “... IPCC had not issued any practical guidelines to its staff in respect of the matters that needed to be considered if a request for personal data was made by its contractor”³.

 - (b) In relation to contractual arrangement with IT contractors :
 - (i) There is no provision in the relevant contract imposing on the contractor the obligation to keep the personal data secure and confidential nor is there any provision requiring EDPS “to take security measures to protect the sensitive personal data entrusted to it by IPCC”⁴.
 - (ii) “There is no evidence which shows that IPCC had taken any practical precautionary measures to prevent leakage of the data by EDPS or Mr. Y”⁵.

 - (c) In relation to the general dealings with EDPS and Mr. Y, the Commissioner found that :
 - (i) “With clear understanding of the nature and scope of the tasks

²Per § 7.1.3 of the Commissioner’s Report

³Per § 7.1.9 of the Commissioner’s Report

⁴Per § 7.1.11 of the Commissioner’s Report

⁵Per § 7.1.10 of the Commissioner’s Report

outsourced to EDPS, IPCC ought to have known that data were required for testing the system by the contractor”⁶

- (ii) “...If due consideration was given at the time on the use of “dummy” data, the Incident might conceivably have been avoided”⁷.
- (iii) There is no evidence that Ms. X “or indeed anyone in IPCC had, before releasing the data to Mr. Y, discussed with him or considered whether the process in which actual data were to be used could be carried out within IPCC’s premises”⁸.

- (d) In relation to the parting of data to Mr. Y, the Commissioner found that⁹ :
 - (i) no receipt was obtained from Mr. Y or EDPS for the discs and the data passed to them;
 - (ii) no log book kept recording every transfer of data to Mr. Y or EDPS;
 - (iii) no written instruction given to Mr. Y or EDPS to keep the data secure and confidential;
 - (iv) no discussions or consideration as to whether the discs or the data should be returned or destroyed after use by Mr. Y or EDPS;
 - (v) no requirement imposed on Mr. Y or EDPS to return or destroy the discs or data within a specified period of time;
 - (vi) no written confirmation or report was obtained from Mr. Y or EDPS on details of any destruction of the discs or data by Mr. Y or EDPS.

9. The Council does not dispute any of the findings summarised in § 8 above in so far as they are levied against the Secretariat. The Council made similar criticisms in § 6.3 of

⁶Per § 7.1.5 of the Commissioner’s Report

⁷Per § 7.1.6 of the Commissioner’s Report

⁸Per § 7.1.7 of the Commissioner’s Report

⁹Per § 7.6.2 of the Commissioner’s Report

their April Report.

10. What is pertinent to observe in this instance is that :
- (a) The Secretariat is a Government agency. The culture within the Secretariat has to be established by the Government. In § 8.6.1 of the Commissioner's Report, the Commissioner expressed concern "about the handling of personal data by government departments which hold a large number of personal data of the public". In § 8.6.2 of the Commissioner's Report, the Commissioner indicated that his Office, together with the Home Affairs Bureau, are planning to organize seminars on compliance of the Ordinance for government officers". The Council welcomes these belated initiatives.
 - (b) In relation to the making of the relevant contracts with EDPS, the Commissioner has wholly ignored 3 factors highlighted in the April Report. First, the contracts were negotiated and signed by staff of the Secretariat who were all civil servants. There is no evidence to suggest that the then Council was informed or consulted in any way on the making of these contracts. Secondly, those civil servants executed some of the contracts after consultation with other relevant Government department. § 2.2 of the April Report adverted specifically to the exchanges with the Information Technology Services Department and the recommendations received by the Secretariat. Thirdly, the Commissioner does not appear to have taken into account that the relevant contracts were executed pursuant to the applicable Stores and Procurement Regulations¹⁰. The inadequacies are therefore inadequacies within the then Government framework.
 - (c) The acts and defaults identified were all acts of civil servants. Section 65(1) of the Ordinance provides that "Any act done or practice engaged in by a person in the course of his employment shall be treated for the purposes of this Ordinance as done or engaged in by his employer as well as by him, whether

¹⁰See for instance § 2.2(b) of the April Report

or not it was done or engaged in with the employer's knowledge or approval". The Council was not and has never been the employer of these civil servants. The Commissioner had wholly failed to consider the liability of Government as the employer of these civil servants.

- (d) The Commissioner had identified a series of staff meetings of the Secretariat when the dealings with EDPS were discussed. There is no evidence indicating that the then Council was appraised of any of these issues.

THE COMMISSIONER'S FINDINGS AGAINST EDPS AND MR. Y

11. The Commissioner identified 3 issues between Council/Secretariat on the one hand and EDPS/Mr. Y on the other¹¹. They are :
- (a) whether or not Ms. X had expressly informed Mr. Y that the data given to him on the computer discs were actual confidential data;
 - (b) whether or not Mr. Y was aware of the confidential nature of the data and
 - (c) whether Mr. Y or EDPS had made an explicit request for IPCC to provide “test data”.

We are of the view that, in the final analysis, the second of these issues is the most germane of the three.

12. On the issue whether or not Ms. X had expressly informed Mr. Y that the data given to him on the computer discs were actual confidential data, the Commissioner found as follows :
- (a) “...after listening to the testimony of Ms. X given on oath, I have no reason to doubt the truthfulness of her account of the events in respect of her encounter with Mr. Y”¹².
 - (b) “...I am not convinced that Mr. Y was not aware that the data given by IPCC were actual data of CAPO’s cases”¹³.

¹¹Per § 6.4.1 of the Commissioner’s Report

¹²Per § 7.6.1 of the Commissioner’s Report

¹³Per § 7.5.4 of the Commissioner’s Report

13. On the issue whether Mr. Y was aware of the confidential nature of the data :
- (a) In § 6.4.6 of the Commissioner’s Report, the Commissioner identified 6 factors in support of Ms. X’s case :
 - (i) In and around June, 2000, Mr. Y requested CAPO to provide another disc with denamenators added¹⁴.
 - (ii) In and around May, 2001, Mr. Y advised in relation to the Matching Programme that IPCC should ask CAPO for an up-to-date database so as to facilitate the data conversion process¹⁵.
 - (iii) In and around June, 2001, Ms. X gave a disc containing actual complaint data provided by CAPO to Mr. Y¹⁶ and on 19th June, 2001 Mr. Y successfully decoded the data so provided ¹⁷.
 - (iv) By 18th January, 2002, Mr. Y conducted a trial run using actual data¹⁸.
 - (v) In and around September, 2003, Mr. Y had direct contact with the statistician of CAPO and asked the Police Programmer to change the “variable length format” back to the original “fixed length format” to enable IPCC system to read the CAPO data¹⁹.

¹⁴Per § 6.2.1 of the Commissioner’s Report and § 6.4.6 of the Commissioner’s Report

¹⁵Per § 6.2.2 of the Commissioner’s Report at PC/89 and § 6.4.6.2 of the Commissioner’s Report

¹⁶Per § 6.2.2 of the Commissioner’s Report

¹⁷Per § 6.2.2 of the Commissioner’s Report

¹⁸Per § 6.2.3 of the Commissioner’s Report and § 6.4.6.4 of the Commissioner’s Report

¹⁹Per § 6.3.3 of the Commissioner’s Report

- (vi) In and around November, 2003 the latest actual CISS data were handed over to Mr. Y for analysis²⁰
- (b) Mr. Y has now expressly admitted before the Commissioner that “he first became aware that the information handled by IPCC concerned complaints against police officers during the Matching Programme in 2001. Although he had no idea what exactly the information was, he was aware that the data contained personal data, including names, dates, ages, addresses, etc”²¹. This is consistent with the admissions made by Mr. Y to the Task Force of Council on 11th March, 2006. EDPS and Mr. Y had previously sought to retract those admissions.
- (c) On the basis of such evidence, we are of the view that the Commissioner is being charitable to EDPS/Mr. Y when he concluded that “...I am not convinced that Mr. Y was not aware that the data given by IPCC were actual data of CAPO’s cases”²².
14. On the issue whether Mr. Y or EDPS had made an explicit request for IPCC to provide “test data”
- (a) The Commissioner found that :
- (i) EDPS Systems Ltd. did not explain to IPCC that “test data” meant “dummy” or sanitized data. They had not taken any steps to ensure that Ms. X, who was a non-IT professional, understood the term²³.

²⁰Per § 6.3.5 of the Commissioner’s Report and § 6.4.6.6 of the Commissioner’s Report

²¹Per § 6.4.7 of the Commissioner’s Report

²²Per § 7.5.4 of the Commissioner’s Report

²³Per § 7.4.2 of the Commissioner’s Report

- (ii) “I am not convinced that EDPS Systems Ltd. did provide sufficient guidance to Mr. Y in relation to the handling of the data collected from IPCC, nor am I convinced that EDPS established any policy or procedure on the return or disposal of the data, “test data” or otherwise”²⁴.

- (iii) “I accept that, depending on the complexity of the job and other consideration (such as the level of accuracy required for a test), there could be situations where the use of actual data might be required by the outsourced contractor in the process of developing and maintaining a computer database system”²⁵.

Given the admission of Mr. Y referred to in § 13 above, this issue is an irrelevancy in the context of the dispute between Council/Secretariat and EDPS/Mr. Y.

15. The Commissioner also commented on the sub-contracting relationship between EDPS and Mr. Y :

- (a) The Commissioner found that “At all material times, EDPS intended to sub-contract to Mr. Y all the maintenance and enhancement work it contracted with IPCC”²⁶ and that IPCC was unaware of the sub-contractual relationship between EDPS and Mr. Y²⁷.

- (b) The Commissioner is of the opinion that “From the perspective of data security, if IPCC had been made aware that the projects were handled by a

²⁴Per § 7.4.3 of the Commissioner’s Report

²⁵Per § 7.1.10 of the Commissioner’s Report

²⁶Per § 4.6.3 of the Commissioner’s Report

²⁷Per § 4.6.3 of the Commissioner’s Report

sub-contractor, IPCC might have given due consideration to the issue of data security associated with the handling of sensitive personal data by a sub-contractor”²⁸.

EDPS had previously sought to downplay their secretive sub-contracting in favour of Mr. Y. The Commissioner has provided refutation of that stance.

16. The public had previously made strong comments on § 6.4(c) of the April Report which asserted that “EDPS/[Mr. Y] was the immediate and proximate cause of the data being rendered accessible to the public”. EDPS had also sought to avoid responsibility by downplaying the loading of the data onto the internet. By way of example, EDPS contended that “The way of the test data was stored ...has been compromised by a combination of numerous system tools, search engines, and the Internet, even though the test data was stored in a private server...”²⁹.
 - (a) The commissioner found as follows : “According to the Webmaster, the information leakage of IPCC data was caused by Mr. Y, who had uploaded the confidential information of IPCC to a location of the server, which was accessible by others. Mr. Y might not have realized that uploading information to different locations of the server would have different effects. Mr. Y had never asked the Webmaster the location or sub-directory in the server whereby access by others through the Internet might be possible, and the Webmaster had not advised Mr. Y of the same”³⁰.
 - (b) As indicated by § 6.2 of the April Report, the Council had identified “the initial parting of data and the ultimate rendering of access to users of the internet” as both relevant to the leakage.

²⁸Per § 7.4.1 of the Commissioner’s Report

²⁹Per § 6.5.6 of the Commissioner’s Report

³⁰Per § 6.5.4 of the Commissioner’s Report

- (c) In light of the findings of the Commissioner referred to above, the Council is of the view that its conclusions as outlined in § 6.4 (c) of the April Report are fully justified.

THE STEPS TAKEN BY THE COMMISSIONER

17. By letter dated 18th September, 2006, the Commissioner informed the Council that “you have contravened the requirements of Data Protection Principle 4...”. The Commissioner further informed Council that he is of the view that the circumstances of the contravention “make it likely that the contravention will continue or be repeated”. Accordingly, he served on Council an enforcement notice for compliance within 28 days from the date of such notice.
18. The Council is of the view that in arriving at such decision, the Commissioner
- (a) erred in law;
 - (b) failed to observe the basic principle of fairness and
 - (c) has demonstrated a total inability to appraise the role of and a reluctance to take on the Government on the issue of privacy.
19. We have in § 5 above indicated that the Commissioner conducted his investigation pursuant to both sections 38(a) and 38(b) of the Ordinance. In relation to both subsections, the Commissioner must determine :
- (a) who was “the relevant data user” ?
 - (b) what was the act or practice in question ?
20. In relation to these issues, the following provisions in the Ordinance are relevant :
- (a) “Data user” is defined by section 2(1) of the Ordinance to mean :
“a person who, either alone or jointly or in common with other

persons, controls the collection, holding, processing or use of that data”.

(b) Section 65(1) of the Ordinance which provides that :
“Any act done or practice engaged in by a person in the course of his employment shall be treated for the purposes of this Ordinance as done or engaged in by his employer as well as by him, whether or not it was done or engaged in with the employer’s knowledge or approval”.

(c) Section 65(2) of the Ordinance which provides that :
“Any act done or practice engaged in by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Ordinance as done or engaged in by that other person as well as by him”.

21. In § 7.6.3 of the Commissioner’s Report, the Commissioner stated as follows :

“I consider that the problem was partly attributable to the inadequate supervision given to Ms. X from her then supervisor and the IPCC management during the process and the lack of proper training and support to Ms. X, both in terms of handling sensitive personal data and IT knowledge”

22. The parties to the immediate “act” can therefore be readily identified. They are Ms. X and her then supervisor who are both civil servants in the Secretariat employed by the Government. The issue then is who constitutes the IPCC management responsible for proper training and supervision of Ms. X and her then supervisor. There are at least 2 possible candidates :

- (a) the Government;
- (b) the Council consisting of its members.

23. In relation to the question whether the Government is liable :

- (a) In § 1.3.2 of the Commissioner's Report the Commissioner purported to identify "other relevant parties involved". No attempt was made to identify the Government as a relevant party given that the acts in question were acts performed by civil servants and the Government as employer is prima facie liable under section 65(1) of the Ordinance.
- (b) § 2.3 of the Commissioner's Report identified the persons "seen, interviewed or examined" by the Commissioner and/or his officers. Apart from staff members of the Secretariat and CAPO, the Commissioner and/or his officers did not interview any other member from the Government.
- (c) § 5.1.1 of the Commissioner's Report asserted that IPCC "operate in accordance with the Regulations of the Hong Kong Special Administrative Region, volume 5, Security Regulations" and "The principle shall be applied both within the Government and in dealing with persons outside it". Had the Commissioner been accurate, he would have appreciated that it can only be the Secretariat that operates in accordance with these Governmental regulations.
- (d) The April Report³¹ pointed out that members of the Secretariat executed the relevant IT contracts in accordance with the Stores and Procurement Regulations of the Government. The Commissioner made no reference at all to these Government regulations in his report. He did not interview any person in Government responsible for promulgation of those regulations.
- (e) The April Report indicated that the Secretariat consulted the Information

³¹See for instance § 2.2(b)

Technology Services Department on the terms of the IT contract. The Commissioner made no reference to this fact in his report. He did not interview any person in that Department as to why it was not Government's practice to insert provisions in IT contracts imposing obligations of confidence and prohibiting sub-contracting.

- (f) There are two possibilities leading to the current stance adopted by the Commissioner vis-a-vis the Government. The first possibility is that the Commissioner did consider liability of the Government but, for some reason(s), rejected such liability. If so, one would expect the Commissioner to outline in the Commissioner's Report his reasons in full for public scrutiny. The second possibility is that the Commissioner missed the point completely. We are of the view that this is unlikely, bearing in mind his exhortations that :
- (i) "...more effort is required to raise the sensitivity of ...government officers on the protection of personal data"³².
 - (ii) "I am particularly concerned about the handling of personal data by government departments which hold a large amount of personal data of the public"³³.
 - (iii) "I recommend all government departments to ...provide practical guidance on compliance with the Ordinance"³⁴.

We are therefore driven to the conclusion that the Commissioner's failure to address in his report the Government's responsibility for acts of the relevant civil servants is based on reasons that do not stand up to public scrutiny.

24. In relation to the question whether the Council, consisting of its members, is liable :
- (a) The Commissioner should have addressed the following questions :

³²Per § 8.3.2 of the Commissioner's Report

³³Per § 8.6.1 of the Commissioner's Report

³⁴Per § 8.6.1 of the Commissioner's Report

- (i) Is the Council consisting of its members the relevant data user ?
 - (ii) Did any Council member authorise the acts of Ms. X or her then supervisor and, if so, who gave such authorisation ?
 - (iii) If the acts of Ms. X or her then supervisor were not authorised by the current Council members, has the Commissioner any jurisdiction to investigate the complaints vis-a-vis those Council members who held office at the date of the acts but who had since vacated office³⁵ ?
- (b) In § 3.2.1 of the Commissioner’s Report, the Commissioner expressly recognised that the “IPCC is supported by a full-time Secretariat (the “IPCC Secretariat”) which is formed by civil servants”. If and in so far as the Commissioner suggests in his report that those staff members were employed by that Council, that is incorrect.
- (c) In § 3.2.3 of the Commissioner’s Report, the Commissioner accepted that Council may give directives or orders that relate to the carrying out of the Council’s functions and duties; the Council has “no authority in deciding the staffing matters of the IPCC Secretariat, including termination of employment” and in general the “IPCC Secretariat does not report its operational matters” to the Council.
- (d) The Commissioner asserted in his report that he interviewed the Chairman and a Vice-Chairman of the Council³⁶. The Commissioner’s Report’s referred to the interview being held on 13th March, 2006³⁷. That interview was before commencement of investigation on 15th March, 2006³⁸. Apart from the current

³⁵See sections 2(5) and 39(1)(e) of the Ordinance

³⁶See § 2.3 of the Commissioner’s Report

³⁷See § 1.2.2 of the Commissioner’s Report

³⁸See § 1.2.2 of the Commissioner’s Report

Chairman and one of the current Vice-Chairmen, the Commissioner did not interview any other past Chairman or past and current members of the Council. The written submissions referred to in § 2.2 of the Commissioner's Report were submissions from the Secretariat.

- (e) Had any of the current Council members been interviewed by the Commissioner in accordance with section 43(5) of the Ordinance referred to hereunder, he would have been told that :
 - (i) None of them had been appointed member of the Council with the mandate to supervise the administration of the Secretariat;
 - (ii) None of them had authorised the act of Ms. X;
 - (iii) They are not data user(s) within the meaning of the Ordinance.

- (f) Had they been interviewed by the Commissioner, some of the current Council members would have further told the Commissioner that they had been appointed well after the last of the relevant acts which occurred before 9th January, 2004³⁹. Therefore they could not have been the relevant data user in the context of his investigation.

- (g) Section 43(5) of the Ordinance provides as follows :

“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 the person an opportunity to be heard”.

- (h) When compiling the April Report, the Council scrupulously observed the cardinal principle of natural justice in affording a party an opportunity to comment on any criticism proposed to be levied against that party⁴⁰. The

³⁹See § 4.5 of the Commissioner's Report

⁴⁰See for instance § 4.7 of the April Report

Commissioner is under an express statutory duty to act fairly. He failed to give each Council member an opportunity to be heard in accordance with section 43(5) of the Ordinance and in the process condemned persons who were not even Council members when the act(s) in issue were committed.

25. On 18th September, 2006, the Commissioner served his Enforcement Notice on the Council on the basis that “the contravention will continue or be repeated”. In § 8.8 of our April Report, we indicated that the Office of the Commissioner should be consulted “with the view of establishing clearly a baseline IT security policy consistent with the provisions in the Personal Data (Privacy) Ordinance”. Since the April Report, the Secretariat had been in contact with the Commissioner’s Office for such formulation. Prior to 18th September, 2006, the Commissioner had not given any warning to Council of his concern that “the contravention will continue or be repeated”.

26. The Enforcement Notice directed the Council to devise various “policy and practical guidelines for the Council’s staff to follow”. The Council is further asked to “review the existing outsourcing contracts”. Officers of the Secretariat are civil servants. Outsourcing contracts are Government contracts made in accordance with Governmental regulations. None of these had ever been within the purview of the Council. None of the present Council members had ever been mandated to carry out any of these functions. We have been asked to assume the role and liability of the Government in the absence of any opportunity of being properly heard and have been threatened with fine and imprisonment for non-compliance with the Enforcement Notice. We find this wholly unfair as we are no more than ordinary citizens devoting our time and energy to serve the community.