ANALYSIS

Domestic Helpers' Privacy

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Video surveillance of domestic helpers by their employers in order to confirm parental fears of child abuse has recently become topical in Hong Kong, as a result of number of recent instances coming before the courts and reported in the press. The lawfulness of such surveillance is questioned by the author, who argues that the correct interpretation of the 'domestic purposes' exemption in section 52 of the Personal Data (Privacy) Ordinance does not apply to this kind of activity. However, given the very real interests of parents in protecting their children from violence at the hands of domestic helpers, the author argues for the adoption by the Commissioner of Privacy of a code of practice on the subject under section 12 of the Ordinance.

Inroduction

The increasing use of surveillance in the workplace is changing the character of that environment. The knowledge that our activities are, or even may be, subject to monitoring, unsettles workers' psychological and emotional autonomy. Indeed, the slide towards electronic panopticonism may fundamentally alter our relationships and our identity. In such a world, employees are, in certain circumstances, less likely to execute their duties effectively. If that should occur, the snooping employer may achieve the precise opposite of the purpose of his espionage.

But what of the domestic helper whose responsibilities often include attending to young children in her care? Is it lawful for her suspicious employer to engage in the clandestine recording of these activities? This is not merely of academic interest, for the practice of surreptitiously monitoring maids at work has recently grown — principally as a consequence of the alleged failure of helpers properly to attend to children in their care.

Parents have an understandable desire to prevent acts of violence against their children and to obtain evidence where such conduct is suspected. And a number of helpers have been convicted of offences captured on video. In September this year a Filipina maid admitted assaulting a toddler. She was sentenced to a fine of $3,000 and two months' imprisonment, suspended for two

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years.[1] In June a helper was arrested after she was allegedly videotaped squeezing a nine-month old child's neck and hitting his head with a plastic chair.[2] In May 1999 an Indonesian maid received a two-month custodial sentence after pleading guilty to a charge of cruelty to a child causing unnecessary suffering. The video showed her punching a two-year-old boy in the face and the thigh before swinging him on to a sofa. Another helper was dismissed after a hidden video camera allegedly caught her abusing a 15-month-old boy in August 1999.[3]

The monitoring of the activities of workers will inevitably result in their apprehension *in flagrante delicto*, but, in the absence of effective common law protection of privacy,[4] can a domestic helper seek the protection of the Personal Data (Privacy) Ordinance?

Section 52 of the Personal Data (Privacy) Ordinance

The question yields something of a conundrum. Section 52 provides, under the heading 'domestic purposes,' that personal data '*held*' by an individual and 'concerned only with the management of his personal, family or household affairs' or for 'recreational purposes' are exempt, inter alia, from all the data protection principles. But how can personal data that is already 'held' be exempted from the first data protection principle (DPP1) that declares that personal data shall be '*collected*' by means that are both lawful and fair? While it is axiomatic that data must be collected before they can be held, it is only once the data are held that the exemption applies — when it is too late! This would appear to be a legislative lapse.

Holding the data is a means by which to determine whether the party in question is, indeed, a data user, as defined. Most of the exemptions relate to data 'held' for various purposes (sections 52, 54, 56, 57, 58, 61). Where this term is not used (sections 53, 55, 59, 60, 62) it is implied that the exemption applies to the *holding* of the data rather than to the process of their collection. It would

1 The boy's father reviewed the tape that revealed the maid attacking his son. The toddler, sitting on a highchair, was assaulted after he wet the chair. The helper was seen pulling him out of the chair and slapping his back once. She grabbed him by the hair and took him out of the seat. The father went to police with the tape and the helper was arrested. She admitted using force against the child, but said she was merely trying to discipline him, South China Morning Post, 19 September 2000, and 20 November 2000.

2 South China Morning Post, 20 November 2000.

3 Ibid. On 22 September 1999 a helper was questioned by the police after the parents of a 23-month old boy claimed a surveillance camera in their flat caught her pinching and slapping him and stripping him naked, South China Morning Post, 20 November 2000.

4 The common law provides limited protection that is often adventitious and generally inadequate. See Raymond Wacks, *Personal Information: Privacy and the Law* (Oxford: Clarendon Press, 1989 and 1993), Raymond Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995). The recommendation in 1996 of the Law Reform Commission of Hong Kong that legislation be enacted to regulate surveillance and the interception of communications still awaits government action. See *Report on Privacy: Regulating Surveillance and the Interception of Communications* (The Law Reform Commission of Hong Kong, 1995).

be unwise to suppose that the relationship between the collection and the holding of data is a simple one. In most cases, it is true, the holder of data will have 'collected' the data — even if the physical act of collection has not been carried out personally by him. Thus an employer may not himself record the activities of his employee by means of a hidden video camera, but once the data stored on the video or disk are given to him, he has 'collected' the data. But the collector of data, on the other hand, may not necessarily 'hold' the data, for, as in the example just mentioned, the individual who records the data divests himself of them when he hands the video or disk to the employer (who now 'holds' the data). It has therefore been suggested that, since such data are *held* for these domestic purposes, the exemption is triggered, and surreptitious recording of these activities is permissible. But this cannot have been the intention of the legislature, as I shall suggest below.

How is such monitoring to be justified? The main purpose of overt collection of personal data of this kind is presumably to deter or prevent violence being inflicted on children. When practised covertly, its object is normally to obtain evidence of child abuse with a possible view to prosecuting the offender. If section 52 exempts such data from the provisions of *all* the data protection principles, the collection in question need be neither lawful nor fair. But this, too, must be mistaken, for data collected and/or held for the purpose of preventing and/or obtaining evidence of child abuse cannot be regarded as falling within this class of data. The prospect of a prosecution lifts this form of collection or holding of personal data beyond the realm of 'domestic purposes.'

The true ambit of section 52

Before returning to the questions in the preceding paragraph, it is necessary to grasp several significant features of the ordinance's complex scheme of exemptions in Part VIII and to set section 52 in this context. In particular, it must be recognized that, though the exemptions differ in their precise content, they are all premised on the existence of factors that render impractical or undesirable the strict enforcement of three rights to which a data subject would otherwise be entitled:

- The right that personal data be used only with his or her consent for any purpose other than one for which the data were to be used at the time of collection, as provided for by data protection principle 3 (DPP3);
- The right of access to his or her personal data under the provisions of DPP6 and section 18(1)(b); and
- The (restricted) right to be notified of matters such as the purpose for which personal data are being collected under DPP1 (3).

Section 52, however, is substantially wider than the other exemptions that are contained in Part VIII of the ordinance. It alone extends the exemption beyond the above three rights to include *all* six data protection principles, the need for data user returns (under Part V), and the Commissioner's powers of investigation and inspection (under sections 36 and 38).

Section 52, however, is also narrower than the other exemptions in that they are stated to apply to 'data users', while section 52 applies only to '*individuals*'. In other words, although the other exemptions apply to both natural and legal persons, the exemption contained in section 52 is expressly limited to the former. But this, I shall suggest below, may not necessarily be a significant factor in determining the intention of the legislature in respect of both the nature and scope of this section.

Four other points in respect of exemptions should be noted:

- Section 51 declares that where personal data fall within one of the sections of the ordinance establishing an exemption, that section confers no right nor does it impose any requirement on any person;
- The interests specified in the exemptions are not mutually exclusive; more than one exemption may apply to the same activities;
- The exemptions relate to *data* not to records as such;
- The exemptions are permissive: they permit the data user to change the use to which data are put or to deny access to the data subject; they do not *require* the data subject to do so.[5]

To return to the two arguments above, the first is based on the notion of 'domestic purposes.' The language of section 52 may appear to point towards an interpretation that *includes* the employment of domestic helpers within the ambit of the exemption. The terms 'domestic', 'personal', and 'household affairs' do seem to convey the impression that the legislature had in mind this activity, in contradistinction, perhaps, to those of the personnel departments of companies. But this cannot be a correct reading of the section.

Section 52 has a different purpose. Though this fact is of limited relevance (and admissibility!) in a strictly legal sense, the import of what is now section 52 was clear to members of the Law Reform Commission's sub-committee on privacy in our recommendations that led to the enactment of the ordinance. We took the view that personal data held by a private individual in respect of personal or family matters ought not to be subject to the regime of fair information practice established by the legislation. This was largely because, provided these data were used for domestic purposes, they carried little or no

5 See Mark Berthold and Raymond Wacks, *Data Privacy Law in Hong Kong* (Hong Kong: Sweet & Maxwell, reprinted 2000) pp 209-216.

risk of harm to the persons to whom such data related. To attempt to regulate this sphere of activity (by, for example, granting these data subjects a right of access to these items of personal data) would, moreover, constitute a cumbersome intrusion into the private domain — a paradoxical consequence for 'privacy' legislation to engender![6]

The principal instances of this form of domestic data to which the sub-committee referred were personal communications and lists of names and addresses that might be used by an individual for the purpose of sending New Year or Christmas cards. Section 52, if its intention was to achieve this objective, is therefore designed to exempt genuinely household-related information from the data protection principles. Further support for this position may be found in section 52's use of the term 'individual' (as opposed, in most of the other exemptions, to the express formulation either of 'data user' or its implied equivalent). This underlines the intention of the legislature to limit the range of the exemption to authentic household-related matters.

The employment of domestic helpers in Hong Kong is, moreover, a conspicuous feature of economic activity in Hong Kong, governed (unusually for the territory) by legislation. Such employment is not a matter of the casual engagement of workers for temporary or part-time assistance in the home (such as is the case in respect of so-called char-ladies in Britain), but assumes an important function in liberating thousands of Hong Kong people, mostly women, to join the workforce. This social and economic reality is not, of course, directly relevant to the construction of the ordinance, but it lends support to the view I have postulated of the limited reach of section 52. The second argument (that section 52 exempts DPP1 and hence even unlawful or unfair collection may be conducted with impunity) must, as submitted above, also be rejected.

It is therefore the case, but not ineluctably so, that where the ordinance uses the term 'hold' or 'held', the 'collection' of the data is implicitly contemplated. In the case of section 52, however, it seems that the draftsman simply adopted the usage of the United Kingdom's Data Protection Act of 1984 which refers to data 'held', but exempted the data concerned only from the registration, access, compensation for loss or unauthorised disclosure and rectification and erasure requirements of the Act. The term 'processing' in the 1998 Data Protection Act includes, in its definition, 'obtaining' (which is broadly equivalent

6 *Report on Reform of the Law relating to the Protection of Personal Data* (1994), The Law Reform Commission of Hong Kong. I should declare that I was a member of the sub-committee that produced the report, and, since 1999, its chairman. I am also a member of the Personal Data (Privacy) Advisory Committee. The views expressed here are personal, and have benefited from real and virtual conversations with Robin McLeish, former Deputy Privacy Commissioner for Personal Data. In September 2000 the PCO published a Code of Practice on Human Resource Management that does not appear to exclude domestic helpers from its ambit. See Raymond Wacks, 'Is the Private Domain Doomed?' in Raymond Wacks, *Law, Morality, and the Private Domain* (Hong Kong: Hong Kong University Press, 2000).

to the ordinance's concept of 'collection'). It may be that an oversight occurred when the Hong Kong draftsman employed the word 'held' — somewhat incongruously in a section that explicitly provides an exemption from the requirements of 'collection.'[7]

If this view is correct, then it would seem that the effect of section 52 is not to exempt from the data protection principles the act of collection, and hence DPP1's requirement that such collection be lawful, fair, and not excessive would apply — *even in the case of data held for domestic purposes*. Indeed this appears to have been accepted to be the law in the case of a Peeping Tom who made secret video recordings of a student dressing and undressing in a university hall of residence. The data may well have been held for 'personal' or even 'recreational' purposes, as specified in section 52, but its collection was nevertheless found to have infringed DPP1[8] though the exemption was (understandably) not raised.

The consequence

The consequence of this interpretation of the exemption is that should a prying employer of a domestic helper choose to engage in the surreptitious recording of her baby-sitting activities, such recording could fall foul of DPP1 — regardless of whether section 52 is thought to exempt data *held* for domestic purposes from the operation of the data protection principles. Indeed, the artificiality of a converse interpretation may be demonstrated by the example of a married couple that employs a domestic helper. Suppose that the wife suspects that the helper is abusing their child and surreptitiously monitors her conduct. The husband, who is the contractual employer, though he does not actually engage in the physical collection of the data, is both the holder of the data and its collector once it becomes part of the record of his employee's activities. To treat one party as the collector and the other as the holder is to strain the natural meaning of these terms, even if their roles are different.

What if the employer has reasonable grounds upon which to suspect that the helper is abusing children in her charge? Surveillance to confirm (or refute?)

7 Section 36 of the 1998 statute provides: 'Personal data processed by an individual only for the purposes of that individual's personal, family or household affairs including recreational purposes) are exempt from the data protection principles and the provisions of Parts II and III.

Interestingly, the New Zealand Privacy Act of 1993, in its 'domestic affairs' exemption in section 56 draws a line between data being collected and those being held, as follows:

(a) The collection of personal information by an agency that is an individual; or
(b) Personal information that is held by an agency that is an individual, where that personal information is collected or held by that individual solely or principally for the purposes of, or in connection with, that individual's personal, family, or household affairs.

8 See *Report Published under Section 48(2) of the Personal Data (Privacy) Ordinance (Cap 486)*, Report No R97-1948, 13 October 1997. The plaintiff was awarded $50,000 damages for injury to feelings, $20,000 exemplary damages, and $10,000 aggravated damages in the first case involving the tort of sexual harassment under s 76 of the Sex Discrimination Ordinance of 1996: *Yuen Sha Sha v Tse Chi Pan* [1998] Equal Opportunities Action No 1, DCE01/98.

such reasonable suspicion could be regarded as fair collection of personal data where it does not extend to the helper's private quarters.[9] This is not an entirely happy conclusion, for one would prefer a climate in which employers, in principle, eschew snooping on their employees. Circumstances may, however, arise in which unexplained bruises impel secret monitoring as a last resort, though the injuries and the need to capture them on video suggest that the employment relationship has already broken down. What is plainly required is for the Commissioner to approve a code of practice on this subject under section 12 of the ordinance. This would at least facilitate consultation with both employers and domestic helpers to ensure that a fair balance is struck on the propriety or otherwise of these troubling home videos.

9 This is the view of the Privacy Commissioner for Personal Data; see South China Morning Post, 20 November 2000.