

## COMMENT



### Media Intrusion: An Expanded Role for the Privacy Commissioner?

The Privacy Commissioner for Personal Data has survived the first judicial review of the exercise of his power.<sup>1</sup> The decision raises a number of fundamental questions about the character and scope of the Personal Data (Privacy) Ordinance.<sup>2</sup>

*Eastweek*, a popular Chinese magazine published a photograph of a young woman to illustrate an article on fashion. Her image, taken with a long-range lens as she stood at a busy intersection, was used as an example of poor dress sense. Needless to say, she consented neither to the photograph nor to its subsequent uncharitable publication. Her successful complaint to the Privacy Commissioner was based on a breach of the first data protection principle (DPP 1) in Schedule 1 of the ordinance requiring, inter alia, that personal data be collected by means that are 'fair in the circumstances of the case.'

Keith JA (sitting as an additional judge of the Court of First Instance) rejected the magazine's argument that, since it wanted to capture the complainant's picture in a 'natural pose', its non-consensual long-range shot was justified. And he gave short shrift to its claim that, since the Commissioner had accepted that it would have been impractical to obtain the complainant's prior consent to a candid photograph, such a picture could be taken without her *knowledge*.

This, the learned judge opined, was an erroneous construction of the Commissioner's decision, for he had not found the taking of the photograph to have been unfair solely on this ground: 'What rendered the taking of the photograph unfair was the fact that it was taken without the complainant's knowledge or consent *'at a time when (a) the photographer did not have reasonable grounds for thinking that he would be able to obtain her consent to its publication, and (b) the magazine did not have a policy of publishing someone's photograph (obtained without the person's knowledge or consent) in such a way that the person cannot be identified.'*<sup>3</sup>

Nor, the court held, was this a matter of the photographer's subjective judgment. The Commissioner had ruled that the photographer had no reasonable grounds to believe that the complainant's consent could be obtained to the *publication* of her photograph. Keith JA observed that the fairness of the means by which personal data are to be collected depends on the circumstances of the

<sup>1</sup> *Eastweek Publisher Ltd v the Privacy Commissioner for Personal Data* [1999] HCAL 98/98.

<sup>2</sup> See generally Mark Berthold and Raymond Wacks, *Data Privacy Law in Hong Kong* (Hong Kong: FT Law & Tax, 1997).

<sup>3</sup> At 10-11. Emphasis in original.

case: 'It would be absurd if a wholly unreasonable belief that such means are fair could render fair means which would otherwise be regarded as unfair.'<sup>4</sup>

In upholding the Commissioner's ruling, the court has, perhaps unwittingly, acknowledged that the reach of the ordinance extends well beyond the realm of 'data protection', and includes the press. This is a view that I have myself advanced.<sup>5</sup> But it is far from uncontroversial.<sup>6</sup>

In August 1999 the Law Reform Commission of Hong Kong published two consultation papers. One proposes, inter alia, the establishment of an independent Press Council for the Protection of Privacy.<sup>7</sup> It detonated an unprecedented explosion of public debate. This is not surprising since the press itself has a direct interest in the proposal. The other recommends more sweeping safeguards for privacy, notably, the creation of a statutory tort of invasion of privacy. It has passed almost unnoticed.<sup>8</sup>

A viable alternative to both, I have argued,<sup>9</sup> lie in an expanded Personal Data (Privacy) Ordinance. Though it was not forged for this purpose, its legislative regime could, with only modest amendment be extended to afford relief to victims of unwanted publicity.

Indeed, this is precisely what it achieved in *Eastweek*. The complainant, was vindicated. Small fry, perhaps, but there was no suggestion by the magazine that its 'journalistic activity' fell beyond the orbit of the law.

Three aspects of the judgment warrant comment. First, there is little doubt that the mischief addressed by three generations of data protection law<sup>10</sup> is the misuse of personal data rather than the activities of the press. Indeed the European Directive on Data Protection explicitly exempts the press from its

<sup>4</sup> At 12-13.

<sup>5</sup> See Raymond Wacks, 'Towards a New Legal and Conceptual Framework for the Protection of Internet Privacy' (1999) 3 *Irish Intellectual Property Review* 1-5; Raymond Wacks, 'Privacy Reconceived: Personal Information and Free Speech,' paper presented to the 21st International Conference on Privacy and Personal Data Protection, Hong Kong, 13-15 September 1999.

<sup>6</sup> The Law Reform Commission of Hong Kong concludes that, though the Privacy Commissioner ought to issue a code of practice on the collection and use of personal data for journalistic purposes, DPP 3 was 'not effective in protecting individuals from unwanted publicity,' The Law Reform Commission of Hong Kong, *Consultation Paper on the Regulation of Media Intrusion*, August 1999, para 5.24. I should declare that I am a member of both the Law Reform Commission's sub-committee on privacy (and since 1 September 1999 its chairman) and, from the same date, a member of the Law Reform Commission.

<sup>7</sup> See note 6 above.

<sup>8</sup> The Law Reform Commission of Hong Kong, *Consultation Paper on Civil Liability for Invasion of Privacy*, August 1999.

<sup>9</sup> See note 5 above, and Raymond Wacks, 'Pursuing Paparazzi: Privacy and Intrusive Photography' 1998) 1 HKLJ 1.

<sup>10</sup> For an account of these developments, see Viktor Mayer-Schonberger, 'Generational Development of Data Protection in Europe' in Philip E. Agre and Marc Rotenberg (eds), *Technology and Privacy: The New Landscape* (1997). See too Robert Gellman, 'Conflict and Overlap in Privacy Regulation: National, International, and Private' in Brian Kahin and Charles Nesson (eds), *Borders in Cyberspace: Information Policy and the Global Information Infrastructure* (1997).

purview.<sup>11</sup> While the judgment of Keith JA acknowledges this fact,<sup>12</sup> the learned judge nevertheless appears untroubled by the application of the ordinance to the conduct of journalists.<sup>13</sup>

Secondly, it is doubtful whether press freedom is served by the unduly narrow conception of 'news gathering' adopted by the Commissioner and accepted by the judge. Those engaged in a 'news activity' are exempted by Section 61 from, inter alia, the requirement to provide access to data subjects of personal data held about them. The Commissioner was not persuaded that the snap of a woman in a 'lifestyle' article was 'news gathering' even if that phrase could be equated (as the publisher contended) with the definition in s 61(3) of 'news activity' to mean 'any journalistic activity' and includes 'observations on ... current affairs.' The court considered this a tenable view, holding that the Commissioner 'was entitled to conclude that it was no more than an article illustrating and commenting on the ability of various women who were photographed to choose clothes and accessories which co-ordinated with each other.' This is an unduly restrictive understanding of what journalists do.

Thirdly, Keith JA was reluctant to accept that a photograph fell within the ordinance's definition of 'data' as 'any representation of information ... in any

<sup>11</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal of the European Communities, 23 November 1995, No L 281, p 31. The Directive provides that in the case of 'the processing of sound and image data carried out for purposes of journalism or the purposes of literary or artistic expression ... the principles of the Directive are to apply in a restricted manner according to the provisions laid down in Article 9.' Article 9 requires member states to provide for exemptions or derogations for the processing of personal data 'carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.'

<sup>12</sup> Thus, for example, the learned judge (at 13) wonders why the Commissioner decided not to investigate a possible breach of DPP 1(3) which requires a data subject to be informed on or before the collection of the data whether he is obliged to provide it. 'It may be,' Keith JA speculates, 'that the Commissioner thought that the taking of someone's photograph without that person's knowledge could not amount to the "collection" of data "from" that person ... [and] ... that the taking of someone's photograph without that person's consent could not amount to the "supply" of data by that person.' The language of the ordinance plainly has other activities in mind. See Raymond Wacks, 'The New Privacy: Protecting Personal Information in A Digital Age' paper presented to the Buchmann International Conference on Law, Technology and Information, Faculty of Law, University of Tel Aviv, 13-18 May 1999. In addition, while expressing doubt as to whether a photograph was 'data' (see below) he thought that 'the complainant's real complaint ... related to the invasion of her privacy ... rather than the unfair collection of "data" about her.' (At 17). But surely it is not unreasonable to characterise it as both.

<sup>13</sup> Indeed, in considering the question of the use of the photograph, Keith JA agrees that the Commissioner was entitled to take into account whether the magazine had a policy in respect of the of non-consensual publication of photographs. 'This is especially so, he adds, 'when the DPP relating to the use of data (DPP3) focuses not on the fairness of the use but on its purpose. The absence of any express prohibition on the unfair use of data strongly suggests that an intention to use it in an unfair manner is a matter which can be taken into account in determining whether its original collection was by unfair means.' (At 14). Leaving aside the potential conflation between 'intrusion' and 'disclosure' about which there may be certain problems, this dictum assumes the applicability of DPP3 to the press.

*document ...*<sup>14</sup> His view was that 'data' related to information *about* someone such as a bank balance, and confessed that he was 'extremely sceptical'<sup>15</sup> about whether the photograph of the complainant constituted data about her. A closer reading of the ordinance, however, would have revealed that the term 'document' is defined in s2 to include 'a film, tape or other device in which visual images are embodied ...' A photograph is plainly included. In our digital world, it could not be otherwise.

In the current debate generated by the Law Reform Commission's two consultation papers, the notion that the Privacy Commissioner should be charged with striking the balance between privacy and press freedom has found little favour. But it is already happening. And it is no bad thing.

*Raymond Wacks\**

<sup>14</sup> S2. Emphasis added.

<sup>15</sup> At 17. Despite his 'real doubts,' since neither party had argued the point, he was willing to suppress them.

\* Professor of Law and Legal Theory, University of Hong Kong. An earlier version of this note appeared in Raymond Wacks, 'Privacy and Press Freedom: Oil on Troubled Waters?' (1999) 4 *Media and Arts Law Review* 259, 265-8. I am grateful for permission to use it here.