



澳門特別行政區政府  
Governho da Região Administrativa Especial de Macau  
個人資料保護辦公室  
Gabinete para a Protecção de Dados Pessoais

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## **The right to information in indirect collection of personal data**

### **I. Introduction**

The protection of data subjects' rights under the Law no. 8/2005 (Personal Data Protection Act) encompasses mainly the right to information, the right of access and the right to rectify. The materialisation of the right to information, however, constitutes a prerequisite for the realisation of the other rights. To ensure the materialisation of this right where personal data are collected directly or indirectly, the law subjects controllers to a variety of obligations; the issues such entities encounter vary from case to case.

Addressing such issues, this Office would hereby offer its opinion for the reference of controllers on how to materialise data subjects' right to information when collecting personal data indirectly.

First of all, we need to bear in mind that the Personal Data Protection Act is about establishing a regime on processing and protection of personal data. Personal data protection as a practice has been around for more than thirty years in some countries, where laws for this purpose have had years of success. In establishing the regime for personal data processing, substantial contemplation has been given to striking a balance between the rights of data subjects and the legitimate interests of controllers. Controllers need to understand the legislation properly before they can cost-effectively fulfil their legal responsibilities of protecting data subjects' personal data.

As indicated above, personal data collection tends to be either direct or indirect. Article 10.1 of the Personal Data Protection Act provides that when controllers collect data from data subjects, the former should provide the latter some information about the data processing. This means that when collecting data directly, controllers must satisfy data subjects' right to information at the time of collection.

Article 10.3 is a provision for the materialisation of data subjects' right to information where their personal data are collected indirectly. It stipulates that "if the data are not collected from the data subject and except where he already has it, the controller or his representative must provide the data subject with the information set down in No. 1 at the time of undertaking the recording of data or, if a disclosure to third parties is envisaged, no later than the time the data are first disclosed." This is the requirement



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for controllers to satisfy their data subjects' right to information when collecting personal data indirectly.

Of course it is easier and more economical to provide data subjects the information at the time of collecting personal data directly than it is otherwise. It is generally advisable for controllers to prepare and make their Statement on Personal Data Collection available to data subjects vis-à-vis at the time of data collection or via correspondence or telecommunication.

On the other hand, it is necessary to point out that collecting personal data through the delegate or representative of a data subject should be viewed as collecting data directly from the data subject rather than indirectly through a third party. Under such a circumstance informing the delegate or representative is as good as informing the data subject, though the data controller may reject or accept the ways of delegation or representation as it chooses to where the law makes no specific provisions in this regard.

However, when collecting personal data indirectly, controllers usually have not contacted data subjects in advance (via correspondence or otherwise). Therefore, it would take proactive effort and certain operational cost for controllers to provide information to data subjects, and hence some legal provisions to heed. Even so, controllers remain legally bound to fulfil their obligations.

## **II. Key factors in satisfying data subjects' right to information**

### **(I). Roles of the institution**

It is of course for controllers to provide information to data subjects about the processing of the latter's personal data. Therefore, when processing personal data, institutions should establish whether they play the role of controllers or that of processor, as the case may be.

Controllers are known to have the decision making power over the purposes and means of personal data processing, whereas processors are parties that carry out personal data processing by others' commission and as such do not have the power to decide on purposes and means of personal data processing.



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**Example 1**

Company Group A has a subsidiary B, which, for managerial reasons, is in the practice of transferring its personnel data to A besides processing them on its own. Company A thus indirectly collects company B's staff data, which it processes in accordance with its own "staff personal data processing policy". Company A therefore plays the role of a controller.

Company B has quantities of customer purchase order files, which it decides, to take advantage of technical means of efficient storage, to turn into electric image files. This job is then contracted to an IT company C. In so far as company C undertakes to process the "customer purchase order files" as requested by and to the specifications of company B, it plays the role of a processor, since it does not have the decision making power on the data processing.

As stated above, according to the law, the responsibility to satisfy the data subjects' right to information falls on controllers rather than processors. Therefore, institutions do not have to worry about informing data subjects about the data processing as long as they are in the role of processor, in which case they can refer anyone enquiring about the data processing to the controller. Of course we do not rule out the possibility of a controller outsourcing the informing to a processor, in which case the processor is bound to discharge its contractual obligations by informing the data subject on behalf of the controller.

**(II). Data subjects' knowledge**

According to the law, where data subjects already have the information about the personal data processing, controllers do not have to provide them again. This provision is important in that it saves controllers the operational cost in satisfying data subjects' rights, and as such it is practical and suitable to most institutions, especially business ones.

**Example 2**

Company E as an insurer sells a labour insurance policy to company F, for which F submits its employees' personal data to E. Thus E indirectly collects F's employee



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data, hence its responsibility to satisfy the data subjects' right to information.

According to the contract between them, F promises to duly inform its employees before conveying its employee data to E. So, assuming that data subjects (F's employees) are already informed accordingly, company E does not have to inform the data subjects again about the same data processing.

This scenario is rather common-place in practice nowadays, where a controller (company E) undertakes to collect personal data indirectly through a “data provider” (company F) since the latter has assured that it will properly inform the data subjects before collecting their personal data. Under such a circumstance, the controller (company E) does not have to bother providing information to the data subjects again because they “already have them” and their right to information is already sufficiently materialised.

However, one should be cautious about assuming “data subjects' awareness” as it incurs certain legal responsibilities given there is no contact between controller and data subjects beforehand. Where this is the case, the assumption is then rather dependent on what the “data provider” has done before. Therefore, to ensure proper discharge of their legal obligation of satisfying the data subjects' right, controllers tend to verify with the “data provider” that “data subjects are indeed informed” about the data processing. The parties involved also tend to make a contract to establish that the “data provider” assure or guarantee this commitment in a written statement.

Even with such an assurance, controllers still have the obligation to contemplate the nature of the personal data they are to process. For, suppose that the data processing is to pose a substantial risk to the interests of the data subjects, and that the controller views what “the data provider” has done as inadequate, then even if it can be assumed that the “data subjects already have them”, the controller may still do well to provide information to the data subjects of its own accord, just to reduce its own risk at law.

### **(III). Ways of provision**

#### **1. Indirect provision via “data providers”**

In practice, it is common-place and cost-effective to request or demand the “data provider” to inform data subjects when indirectly collecting the data from the provider. It should be noted that under such circumstances, while the “data provider” is the



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party who informs data subjects, the actual informing happens after the controller indirectly collects the personal data.

**Example 3-1**

Department G provides certain service for which application must be made by families. But it suffices for a family to have one of its members visit the department in person to make the application and sign the application form.

Citizen A visited Department G, filled in an application form and submitted some personal data, including those of his father and mother (B and C). As a rule, Department G would register the data of A, B and C in a family application file. In practice, however, it would be impractical to require A to assure that B and C were aware that A was going to provide their personal data to Department G before he actually did so. Therefore, there was no reason to assume that B and C “already had the information”, so Department G might want to inform them. Besides, the data processing to be carried out by Department G in this case happened to be more complicated than normal, which would require B and C to be informed. Therefore, the department decided to inform B and C as it should be.

Department G offers copies of its Statement on Personal Data Collection to all applicants for this service. In handling this case, the department chose to indirectly inform B and C with the help of A, to be cost-effective, as the risk at law involved in this instance of data processing would not be high, and the impact of the data processing on the data subjects would not be substantial. A was given a copy of the Statement on Personal Data Collection at the time of submitting his application form, and was asked to sign a statement promising that, for their information, A would pass the Statement to B and C as soon as possible.

This is an example of a controller (Department G) providing information to data subjects (B and C) through a “data provider” (A) after collecting the personal data of B and C, with the help of A’s direct contact with them.

As mentioned above, the controller needs to be aware of its legal responsibilities. In addition to those common practices for the parties involved to enter a contract requiring the “data provider” to assure or guarantee in writing to this effect, a controller may also require data subjects to sign return slips to make sure that they are indeed informed by the “data provider”.



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## 2. Direct provision

As mentioned above, to assume that “data subjects already have the information” and to entrust the “data provider” to inform the data subjects are both convenient and economical; but these approaches do carry some risk at law, or are by nature not suitable for certain controllers or certain types of personal data processing. Therefore, there are times when it is necessary for controllers to provide information to data subjects directly.

The way in which to inform data subjects depends on circumstances. It tends to be similar to that in situations where “personal data are collected directly”. The major distinction is that, where data are collected indirectly, the controller tends to have collected personal data before coming into contact with the data subjects. Therefore, data subjects may have questions about how the data controller already collected and processed their personal data. They may, by virtue of the provisions for the right of access, enquire about the source of personal data. Therefore, this Office deems it necessary for controllers to be prepared for such enquires before contacting the data subjects, by, for example, having their Statement on Personal Data Collection prepared.

## 3. Timing of provision

Timing of informing data subjects is of vital importance to the materialisation of their rights. According to Article 10.3 of the Personal Data Protection Act, there are two timing options available for controllers:

- i. At the time of undertaking the recording of data; or
- ii. If a disclosure to third party is envisaged, no later than the time the data are first disclosed.

This provision allows some flexibility in timing to “data controllers”. It is generally viewed as an effective way of securing data subjects’ rights as well as the interests of an institution to allow data subjects to be informed at the time of data recording. It is believed that most controllers would prefer this approach, as such timing tends to lend itself to easy management and cost-effectiveness from an institutional perspective.

However, it is hard to refute that some controllers, including some businesses, tend not to be able to inform data subjects as required at the “time of data recording”. This



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is particularly so where it involves large quantities of personal data. The law therefore incorporates a flexible provision, i.e. if a disclosure to third party is envisaged, the time for informing the data subjects must be before the “the time the data are first disclosed”. In other words, a controller may, after collecting personal data indirectly and before its “disclosure to a third party”, process the personal data in its possession without being considered in violation of the data subjects’ right to information, even if it has not yet provide them information about the processing.

While such flexible provisions are designed with a view to striking a balance between securing the rights of data subjects and protecting the legitimate interests of controllers, it does not mean that it may be tolerated to take advantage of such flexible provisions to infringe on data subjects’ right. Should any controller deliberately dodge the law and skip informing the data subjects properly with the result that their rights are compromised, it will still be held responsible for violation of the principles of personal data processing such as that of “good faith” (see Article 5 of the Personal Data Protection Act). According to Article 33 of the Act, conducts against the principles of personal data processing, as well as those violating the data subjects’ right to information, will nonetheless constitute illegality, and are punishable by a fine up to MOP40,000.00.

#### 4. Distinction between recording and collection

From the analysis of timing, we see that the legally designated times are that of “recording personal data” rather than “collecting personal data”. While in most cases the two actions happen at the same time, there are times when they do not. The law harbours flexibility in timing so that a balance between satisfying the data subjects’ right and ensuring controllers’ legitimate interests may be achieved.

##### Example 3-2

Let’s carry on from where we left off with example 3-1.

In applying for a certain service and in order to be more likely to be successful, citizen A delivered an application letter to Department G in addition to the personal data of himself, his father and mother (B and C) which were supplied as required. The letter describes his status of life and his relationship with his long-divorced ex-wife D and his adult son E, mentioning their names, addresses and contact



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numbers, etc.

Here we will not dwell on whether the data supplied by A constitute the personal data of D and E, as it takes other steps of legal analysis. Suppose the data were the personal data of D and E, Department G then would have indirectly collected the personal data of D and E, even if the department had never wanted the data, nor has it used them in any way.

Since D and E were not A's family members, so by the rules A's presentation would in fact have no effect on his application. Department G would not take D and E as A's family members, nor would it take special note of the statuses of D and E, besides having A's application letter archived.

Since Department G did not record/register the personal data of D and E, it did not have the obligation to inform D and E to materialise their right to information.

Two years later, A died of a disease, and left behind some legacy to be managed. In helping handle the legacy and other affairs of A's family, Department G contacted E using the contact information in A's application letter. By that time, Department G had registered E's data in A's archive as A's contact person, and informed E of related things to satisfy his right to information.

In this example, suppose it did not involve the personal data of D and E, Department G of course would have no obligation to inform D and E. And the same would hold even if it did involve their personal data, so long as Department G did not record/register and use the data after collection. So by this understanding of Article 10.3, it is obvious that the flexibility in the provisions is in the legitimate interests of controllers, as it is operation-friendly. Of course as mentioned before, the Personal Data Protection Act also have provisions for securing the rights of data subjects.

#### **(IV). Exemption on obligations to provide information**

According to Articles 10.5 and 10.6 of the Personal Data Protection Act, under the following exceptional circumstances, "data controllers" may be relieved of their obligations to inform the data subjects, whether personal data are collected directly or indirectly:

- (i). Where data processing is carried solely for journalistic purposes or the



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- purposes of artistic or literary expression;
- (ii). Where a legal provision waives the obligation to provide information;
  - (iii). Where it is on the grounds of security and criminal prevention or investigation;
  - (iv). Where it proves impossible or would involve a disproportionate effort (in particular for processing for statistical purpose or for the purposes of historical or scientific research);
  - (v). Where recording or disclosure is expressly laid down by law or administrative regulation.

According to Article 23 of the Personal Data Protection Act, under circumstances (iv) and (v) indicated above, controllers have no obligations to provide information to data subjects, but they must nonetheless notify this Office of their data processing, be it automatic or otherwise.

**Example 4**

Centre H is a research institution currently conducting a study of the development of one of Macao's charity stroll activities. For this purpose the Centre has collected data of participants in the activity in the past few years, which include, apart from statistical data, some documentary materials of citizens taking part in the activity, such as photos and video clips, etc. As the materials contain clear images of identifiable citizens, their processing constitutes personal data processing.

However, while Centre H has in its possession personal data of many participants, it has no means to get the identify information of most of the individuals in the photos or video clips, nor does it have their contact information. Therefore, it is in a situation where "it is impossible to inform the data subjects", and hence it qualifies for the exemption of obligations to inform the data subjects. However, it must notify this Office in compliance with the Personal Data Protection Act.

It is necessary to emphasise that, by (iv) above it is clear that where personal data processing is conducted for "statistical, historical or scientific research" purposes, data controllers may be relieved of their obligations to inform data subjects because "it proves impossible or would involve a disproportionate effort" to do so. Under other circumstances, they must have adequate reasons to invoke this exemption. This shows that while law makers wish to allow flexibility in the legitimate interests of controllers, they do not want it to be abused at the expense of data subjects. In



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addition, the law also makes it compulsory for controllers that qualify for the exemption to notify this Office, so that, with a transparent mechanism, data subjects may know how their data are processed. Plus, where necessary, this Office may also interfere to ensure the protection of data subjects' rights.

In (v) above, the personal data whose “recording or disclosure is expressly laid down by law or administrative regulation” mean such data that come from open sources, such as data published in government bulletin, data in the property registration database, etc. If a controller intends to use such data for purposes other than that for which they are made available, it would involve itself in indirect personal data collection, to which exemption may be applicable and it may not have to inform data subjects. But it must notify this Office in compliance with the Personal Data Protection Act.

### III. Conclusion

Controllers must, whether they collect personal data directly or indirectly, take legally admissible cost-effective measures to fulfil their obligations to satisfy data subjects' right to information, so that their personal data processing may be carried out smoothly with the protection of the law.

**The Office for Personal Data Protection**

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