



InterPARES 2 Project

International Research on Permanent Authentic Records in Electronic Systems

Policy Cross-domain

Archival Legislation in Hong Kong Evidence Ordinance (Cap 8) and the Personal Data (Privacy) Ordinance (Cap 486)

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Hong Kong Evidence Ordinance (Cap 8) and the Personal Data (Privacy) Ordinance (Cap 486)

<http://www.legislation.gov.hk/eng/home.htm>

Parts of each ordinance germane to archives and records have been copied and pasted directly from the Hong Kong Law Database. Any comments I have made or modifications to a section (i.e., omitting portions of a section) are *italicised* and included in [*square brackets*]. These comments are placed directly under the section they are commenting on. **Bolded** sections are what I think are the most important parts/sections of the legislation.

Evidence Ordinance (Cap 8)

[The Evidence Ordinance is very similar to Canada's laws regarding evidence. In some areas, specifically sections 20-22, have a few slight differences. The Ordinance is also fascinating from a historical perspective because it has some interesting anachronisms. One example is treating a document with the seal or signature of the British ambassador as authentic.]

Section 17 – Comparison of disputed with genuine writing: Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses in any proceedings, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and to the jury, if any, as evidence of the genuineness or otherwise of the writing in dispute.

[This is the archival notion of authenticity. How 'genuineness' is measured is another matter]

Section 18 – Copy of document of public nature: Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper

custody, and no enactment exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in the court, provided it is proved to be an examined copy or extract or provided it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, on payment of a reasonable sum for the same, not exceeding 50 cents for every folio of 72 words.

[This section deals with the notions of custody and certified copies. Traditionally these are both functions of an archives.]

Section 19 – Official documents: Whenever, by any enactment, any certificate, official or public document, or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding is receivable in evidence of any particular in the court or before the Legislative Council or any committee thereof, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the enactment, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence.

[This section deals with the authentication function of an official seal or officially signed. The same idea is repeated in section 19A: Certificate in criminal proceedings in respect of foreign documents. Namely, that if an official certifies that a foreign record is genuine, then the record can be admitted as evidence. I wonder how this would play out for official electronic records? See Section 22A below.]

Section 19AA – Evidence of signature or fiat, etc.: Where the fiat, authorization, sanction, consent or authority of the Governor or any other public officer is necessary before any prosecution or action is commenced, or for any purpose whatsoever in connection with any proceeding, any document purporting to bear the fiat, authorization, sanction, consent or authority of the Governor, or such public officer, as the case may be, shall, until the contrary is proved, be received as evidence in any proceeding without proof being given that the signature to such fiat, authorization, sanction, consent or authority is that of the Governor or such public officer.

[The signature of the Governor or any other public official authenticates a document]

Section 20 – Copy of entry in banker's record: (3) In the case of a banker's record kept by means of a computer, it shall not be necessary to prove the matters referred to in subsection (1)(b) in relation to a document produced by the computer which is tendered in evidence under this section as a copy of a matter recorded therein if (subject, in the case of civil proceedings, to any rules of court made under section 54 of the High Court Ordinance (Cap 4) with respect to this subsection) it is proved-

- (a) that the document was so produced under the direction of a person having practical knowledge of and experience in the use of computers as a means of storing, processing or retrieving information;
- (b) that during the period when the computer was used for the purpose of keeping such

record, appropriate measures were in force for preventing unauthorized interference with the computer; and

(c) that during that period, and at the time that the document was produced by the computer, the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents, and for the purposes of this subsection

“computer” (電腦) has the same meaning as in section 22A.

[This is the best evidence law, but only for banker. Namely, originals are not necessary, but testimony to the trustworthiness of the record-keeping system is required. This is analogous to section 31.5 of Canada’s Evidence Law.]

Section 22 – Evidence in criminal proceedings from documentary records: *[A recorded statement can be admitted as evidence if it was created by a person acting under duty to create the records and had personal knowledge of the matters dealt with in the record. This is done when the person who supplied the information in the record is dead, is no longer fit to provide the information, or cannot be found.]*

[Naturally this type of evidence has low weight.]

Section 22A – **Documentary evidence in criminal proceedings from computer records:**

(1) Subject to this section and section 22B, a statement contained in a document produced by a computer shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if-

- (a) direct oral evidence of that fact would be admissible in those proceedings; and
- (b) it is shown that the conditions in subsection (2) are satisfied in relation to the statement and computer in question.

(2) The conditions referred to in subsection (1)(b) are-

- (a) that the computer was used to store, process or retrieve information for the purposes of any activities carried on by any body or individual;
- (b) that the information contained in the statement reproduces or is derived from information supplied to the computer in the course of those activities; and
- (c) that while the computer was so used in the course of those activities-
 - (i) appropriate measures were in force for preventing unauthorized interference with the computer; and
 - (ii) the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents.

[This is a combination of the Business Exception to the Hearsay Law and the Best Evidence Law.]

(3) Notwithstanding subsection (1), a statement contained in a document produced by a computer used over any period to store, process or retrieve information for the purposes of any activities (“the relevant activities”) carried on over that period shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if-

- (a) direct oral evidence of that fact would be admissible in those proceedings;
- (b) it is shown that no person (other than a person charged with an offence to which such

statement relates) who occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities-

- (i) can be found; or
- (ii) if such a person is found, is willing and able to give evidence relating to the operation of the computer during that period;
- (c) the document was so produced under the direction of a person having practical knowledge of and experience in the use of computers as a means of storing, processing or retrieving information; and
- (d) at the time that the document was so produced the computer was operating properly or, if not, any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents, but a statement contained in any such document which is tendered in evidence in criminal proceedings by or on behalf of any person charged with an offence to which such statement relates shall not be admissible under this subsection if that person occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities.

[This is the Best Evidence Law, but is more specific than that in Canada. It specifically considers authenticity when it states that if the person under investigation was the 'responsible person,' then the records cannot be considered authentic. I find this interesting.]

(4) Where over a period the function of storing, processing or retrieving information for the purposes of any activities carried on over that period was performed by computer, whether-

- (a) by a combination of computers operating over that period; or
- (b) by different computers operating in succession over that period; or
- (c) by different combinations of computers operating in succession over that period; or
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose whether by one or more persons or bodies during that period shall be treated for the purposes of this section as constituting a single computer.

[This is interesting, because it looks at an entire computer network, which is very reflective of many contemporary workplaces. It makes the realisation that electronic records are more diffuse and susceptible to corruption. Last, this would make proving the reliability of a system more difficult, since the 'responsible person' is required to look after a potentially large system. I wonder what happens if information is kept on an off-site server as many companies today do? This is definitely an enable to the keeping authentic records.]

(5) Subject to subsection (6), in any criminal proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate-

- (a) identifying the document containing the statement and describing the manner in which it was produced, and explaining, so far as may be relevant in the proceedings, the nature and contents of the document;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- (c) dealing with any of the matters to which the conditions mentioned in subsection (2) relate, and purporting to be signed by a person occupying a responsible position in

relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall, on its production without further proof, be admitted in those proceedings as prima facie evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

[Best Evidence Rule]

(6) Unless the court otherwise orders, a certificate shall not be admitted in evidence under subsection (5) unless 14 days' notice in writing of the intention to tender such certificate in evidence, together with a copy thereof and of the statement to which it relates, has been served-

(a) where the certificate is tendered by the prosecution, on the defendant (or, if more than one, on each defendant) or his solicitor;

(b) where the certificate is tendered by a defendant, on the Secretary for Justice, (Amended L.N. 362 of 1997) but nothing in this subsection shall affect the admissibility of a certificate in respect of which notice has not been served in accordance with the requirements of this subsection if no person entitled to be so served objects to its being so admitted.

(7) Notwithstanding subsection (5), a court may (except where subsection (3) applies) require oral evidence to be given of any of the matters mentioned in subsection (5).

(8) Any person who in a certificate tendered in evidence under subsection (5) makes a statement which he knows to be false or does not believe to be true shall be guilty of an offence and shall be liable on conviction to a fine of \$50000 and to imprisonment for 2 years.

[Do large fines constitute an enabler?]

(9) For the purposes of this section-

(a) information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored, processed or retrieved for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

[This is the business exception to the hearsay rule and authentication rule. In other words, if the creator uses the information stored in a computer as part of their daily business, it is considered authentic because the creator relies on it to do their business.]

(10) The Criminal Procedure Rules Committee constituted under section 9 of the Criminal Procedure Ordinance (Cap 221) may make rules with respect to the procedure to be followed under this section. (Amended 13 of 1995 s. 27)

(11) Nothing in this section affects the admissibility of a document produced by a computer where the document is tendered otherwise than for the purpose of proving a fact stated in it.

(12) Subject to subsection (4), In this section “computer” (電腦) means any device for storing, processing or retrieving information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

[Good to have a definition of computer.]

(13) The Legislative Council may by resolution amend subsection (12) so as to make it cover devices performing functions of a similar character to the functions performed by the devices mentioned in that subsection.

Section 22B – Provisions supplementary to sections 22 and 22A: [Copies may be presented as evidence if the original record is no longer in existence. The weight of recorded evidence is affected by how quickly after the event it records was created (i.e., how contemporary the record is to the event it documents.)]

Section 23 – Copy of records of Hong Kong Observatory: A document purporting to be a copy of the records or part of the records kept by the Director of the Hong Kong Observatory and purporting to be certified by the officer having the custody of the records shall be admitted in evidence in criminal or civil proceedings before any court on its production without further proof, and- (Amended L.N. 362 of 1997)

(a) until the contrary is proved, the court before which such document is produced shall presume-

- (i) that the document is certified by such officer;
- (ii) that the document is a true copy of the records or part of the records to which it refers; and
- (iii) that the records were duly made and compiled at the time referred to in the document; and

(b) such document shall be prima facie evidence of all matters contained therein.

[This, again, shows the power of proper custody for guaranteeing the authenticity of a record]

Section 43 – Presumptions as to documents 20 years old: In any proceedings, whether civil or criminal, there shall, in the case of a document proved, or purporting, to be not less than 20 years old, be made any presumption which immediately before 24 March 1939, would have been made in the case of a document of like character proved, or purporting, to be not less than 30 years old. *[I believe this is the Ancient Documents rule, but I am not sure. The wording of this section is a bit strange. I wonder if the Ancient Document rule works for electronic records that need to be constantly migrated and updated? I should ask someone what the intention of this rule is.]*

Section 53 – **Proof of statements contained in documents:**

(1) Where a statement contained in a document is admissible as evidence in civil proceedings, it may be proved-

- (a) by the production of that document; or
- (b) whether or not that document is still in existence, by the production of a copy of that document or of the material part of it, authenticated in such manner as the court may approve.

(2) It is immaterial for the purpose of subsection (1) how many removes there are between a copy and the original.

[This is important for electronic records, since it specifically states that it does not matter how many removes from the original the record is. Authenticity of the record would probably be proved through what is described in Section 22A.]

Definition of Record

Records” (紀錄) means records in whatever form, and includes computer-generated records.

[Section 54 – Proof of records of business or public body]

Personal Data (Privacy) Ordinance (Cap 486)

[Generally this ordinance controls access and how information can be collected, etc.]

Section 26 – Erasure of personal data no longer required:

(1) A data user shall erase personal data held by the data user where the data are no longer required for the purpose (including any directly related purpose) for which the data were used unless-

- (a) any such erasure is prohibited under any law; or
- (b) it is in the public interest (including historical interest) for the data not to be erased.

(2) For the avoidance of doubt, it is hereby declared that-

- (a) a data user shall erase personal data in accordance with subsection (1) notwithstanding that any other data user controls (whether in whole or in part) the processing of the data;
- (b) the first-mentioned data user shall not be liable in an action for damages at the suit of the second-mentioned data user in respect of any such erasure.

[This is an enabler, since it prohibits information (i.e., electronic records) from being erased if it is against the law or deemed to be of historical significance.]

Schedule 1 – Data Protection Principles:

2. Principle 2-accuracy and duration of retention of personal data

(1) All practicable steps shall be taken to ensure that-

- (a) personal data are accurate having regard to the purpose (including any directly related purpose) for which the personal data are or are to be used;
- (b) where there are reasonable grounds for believing that personal data are inaccurate having regard to the purpose (including any directly related purpose) for which the data are or are to be used-
 - (i) the data are not used for that purpose unless and until those grounds cease to be applicable to the data, whether by the rectification of the data or otherwise; or
 - (ii) the data are erased;
- (c) where it is practicable in all the circumstances of the case to know that-
 - (i) personal data disclosed on or after the appointed day to a third party are materially inaccurate having regard to the purpose (including any directly related purpose) for which the data are or are to be used by the third party; and
 - (ii) that data were inaccurate at the time of such disclosure, that the third party-

- (A) is informed that the data are inaccurate; and
- (B) is provided with such particulars as will enable the third party to rectify the data having regard to that purpose.

[This is an enabler, since by law, information must be kept accurate.]

4. Principle 4-security of personal data

All practicable steps shall be taken to ensure that personal data (including data in a form in which access to or processing of the data is not practicable) held by a data user are protected against unauthorized or accidental access, processing, erasure or other use having particular regard to-

- (a) the kind of data and the harm that could result if any of those things should occur;
- (b) the physical location where the data are stored;
- (c) any security measures incorporated (whether by automated means or otherwise) into any equipment in which the data are stored;
- (d) any measures taken for ensuring the integrity, prudence and competence of persons having access to the data; and
- (e) any measures taken for ensuring the secure transmission of the data.

[This is an enabler, since it deals with access to the information. Too bad integrity here refers only to people!]

6. Principle 6-access to personal data

A data subject shall be entitled to-

- (a) ascertain whether a data user holds personal data of which he is the data subject;
- (b) request access to personal data-
 - (i) within a reasonable time;
 - (ii) at a fee, if any, that is not excessive;
 - (iii) in a reasonable manner; and
 - (iv) in a form that is intelligible;
- (c) be given reasons if a request referred to in paragraph (b) is refused;
- (d) object to a refusal referred to in paragraph (c);
- (e) request the correction of personal data;
- (f) be given reasons if a request referred to in paragraph (e) is refused; and
- (g) object to a refusal referred to in paragraph (f).

[I always view timely access as an enabler, since it implies that the records are kept in a ways that makes them easy to retrieve and identify. An outdated system or obsolescence impacts accessibility.]

Definition of Record

Document (文件) includes, in addition to a document in writing-

- (a) a disc, tape or other device in which data other than visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced from the disc, tape or other device; and
- (b) a film, tape or other device in which visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced from the film, tape or other device. [Section 2]