

MISCONDUCT IN PUBLIC OFFICE

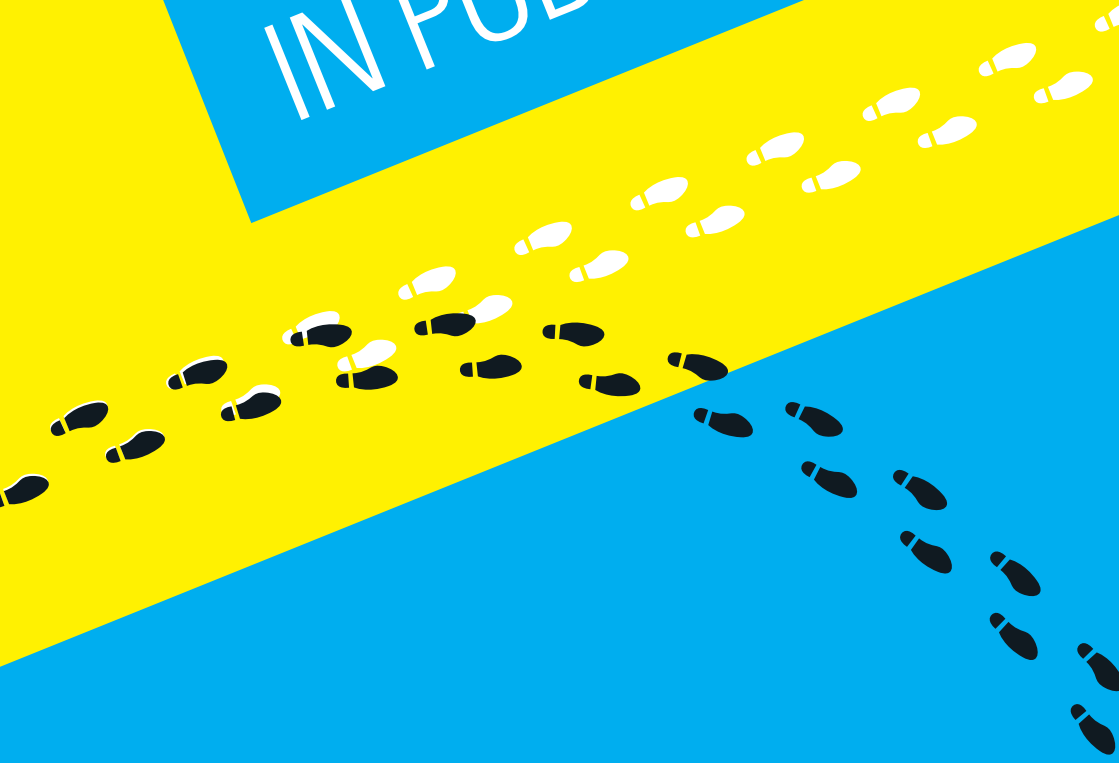


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Mr Kevin P. Zervos, SC, JP

*Director of Public Prosecutions of the Department of Justice,
for providing valuable comments on this booklet.*

Foreword

As public officers, we are entrusted with powers to serve the community. We are expected, and quite rightly so, to live up to a high ethical standard.

The Prevention of Bribery Ordinance (Chapter 201 of the Laws of Hong Kong) has been serving Hong Kong well in ensuring a corrupt-free environment in the private and public sectors. It seeks, amongst other things, to enforce against any abuse of entrusted power or official position by public officers through the solicitation or receipt of a bribe or an advantage.

The common law offence of misconduct in public office (“MIPO”) has a considerable historical foundation. However, it had not been widely used until the early 1990’s, when the Independent Commission Against Corruption (“ICAC”) in Hong Kong started to detect cases where civil servants whom it investigated abused their position and powers for their own benefit or that of others without their conduct involving the solicitation or acceptance of an advantage.

In fact, over the years, corrupt activities in the public sector have evolved from straightforward bribery to illegal acts involving varying nature and degree of abuse of authority or conflict of interest.

The precise range of misconduct that might be caught by the offence of MIPO is getting clearer in the light of developments in case law both locally and overseas.

Public officers should steer themselves away from such behaviour which may give rise to any impression or suspicion of MIPO and call into question the conduct of an officer. This booklet aims to present MIPO in layman’s terms, and gives some general guidance on what we should and should not do as civil servants.

What is MIPO?

Object

MIPO is a common law offence which targets all forms of serious abuse of office by public officials.

Key elements

The Court of Final Appeal has in previous court cases spelt out the key elements of the offence of MIPO¹. It was held that the offence would be committed where –

- (1) a public official;
- (2) in the course of or in relation to his² public office;
- (3) wilfully misconducts himself; by act or omission (for example, by wilfully neglecting or failing to perform his duty);
- (4) without reasonable excuse or justification; and
- (5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the office-holder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.

¹ *Sin Kam-wah and another v HKSAR* (FACC 14/2004) as read with *Shum Kwok-sheer v HKSAR* (FACC 1/2002) and *Chan Tak-ming v HKSAR* (FACC 5/2010) and *HKSAR v Wong Lin-kay* (FACC 3/2011)

² A reference to the masculine gender in this booklet covers both the feminine and masculine gender.

What is MIPO?

The misconduct must be deliberate rather than accidental in the sense that the official either knows that his conduct is unlawful or wilfully disregards the risk that his conduct is unlawful. Wilful misconduct without reasonable excuse or justification is culpable.

A public officer may commit MIPO even if his misconduct does not involve any bribery or he does not have any pecuniary gains as a result.

The essential feature of the offence is an abuse by the public official of the powers, discretions or duties exercisable by virtue of his official position conferred on him for the public benefit.



What is MIPO?

What is not misconduct under MIPO?

Generally speaking, misconduct of the following nature does not fall under MIPO –

- misconduct which is insufficiently serious;
- misconduct which is the result of accident, inadvertence, error of judgment or mere negligence (but “wilfully disregarded the risk that his conduct was unlawful” would be sufficient);
- misconduct for which there is a reasonable excuse or justification;
- misconduct which does not involve an abuse of powers, discretions or duties entrusted to a public officer in his official position for the public benefit.



Punishment

A public officer convicted of MIPO is punishable under section 101I(1) of the Criminal Procedure Ordinance (Chapter 221 of the Laws of Hong Kong), and is liable to a maximum penalty of seven years' imprisonment and a fine.

Who is a Public Officer under MIPO?

For the purpose of MIPO, a public officer is a person who is vested with powers, duties, responsibilities or discretions which he is obliged to exercise or discharge for the benefit of the general public. Such a person may or may not be employed by the Government, and he may or may not be paid³.

Notwithstanding the above, the definition of public office is an area where the common law is still evolving and developing to meet the changing and different forms of public responsibility.



³ *HKSAR v Wong Lin-kay* (FACC 3/2011)

MIPO and Civil Servants

Civil servants, as public officers, are placed in a position of trust. We are entrusted with certain powers by the public. We may only use such powers to serve the public interest, and must not subordinate the public interest to private interests.

Civil servants are expected to uphold the following core values ⁴ when serving the public –

- commitment to the rule of law;
- honesty and integrity;
- objectivity and impartiality;
- political neutrality;
- accountability for decisions and actions; and
- dedication, professionalism and diligence.

The Government takes a serious stance towards the offence of MIPO. In addition to the punishment awarded by the court, civil servants who are convicted of the offence are liable to disciplinary actions and severe sanction, including removal from the service with or without forfeiture of the retirement benefits.

⁴ The Civil Service Code as attached to CSB Circular No. 9/2009

Who are more prone to committing the Offence?

Public officers at all levels should remain vigilant in the discharge of their duties.

Past cases in Hong Kong and in other common law jurisdictions show that public officers whose work involve the following areas are more prone to committing the offence of MIPO –

- procurement of service/award of contracts (e.g. award of works contracts);
- law enforcement (e.g. licensing and registration);
- handling of claims and payments (e.g. contract administration);
- handling of classified information; and
- having access to resources/services provided by government contractors.

DOs



Be honest and impartial when discharging official duties.



Make reasonable and impartial decisions free from any improper influence or bias.



Avoid conflict of interest, and if unavoidable, declare any actual, potential or perceived conflict of interest.



Follow the guidelines stipulated in the Stores and Procurement Regulations and Civil Service Bureau circulars and regulations on conflict of interest and related matters, and comply with service-wide or departmental rules and guidelines when discharging official duties.



Decline requests for information or advice or assistance from your relatives or personal friends that may confer or be perceived to confer any unfair advantage on them over other persons.



Consult your supervisors whenever in doubt.

DON'Ts



Use your official position to further your private or personal interests, namely, to benefit yourself or your relatives, friends or associates.



Take part in decision-making that may be compromised or seen to be compromised by your private or personal interests.



Accord preferential treatment to organisations or persons with whom you have connection whether directly or indirectly.



Use or disclose classified official information for any private or personal interests.



Place yourself in a position of obligation or compromise to any person (including subordinates, companies/organisations, members of the public) with whom you have or are likely to have official dealings.



Accept advantages (including free service and favour) from persons you have or are likely to have official dealings.



Accept invitations to meals or entertainment that are inappropriate, undesirable or excessive.



Use government resources, including manpower for private or personal interests.

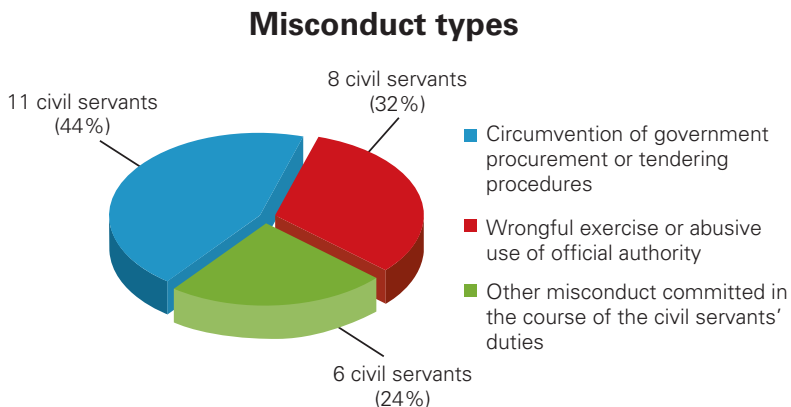
Statistics on Past Cases

Since 2000 ⁵, disciplinary and related actions were taken against 25 civil servants who were convicted of MIPO. An analysis of the relevant cases is set out below.

Types of misconduct

Among the 25 civil servants involved in the past cases –

- 11 (44%) were related to circumvention of government procurement or tendering procedures;
- 8 (32%) were related to wrongful exercise or abusive use of official authority; and
- the remaining 6 (24%) were related to other misconduct committed in the course of the civil servants' duties.



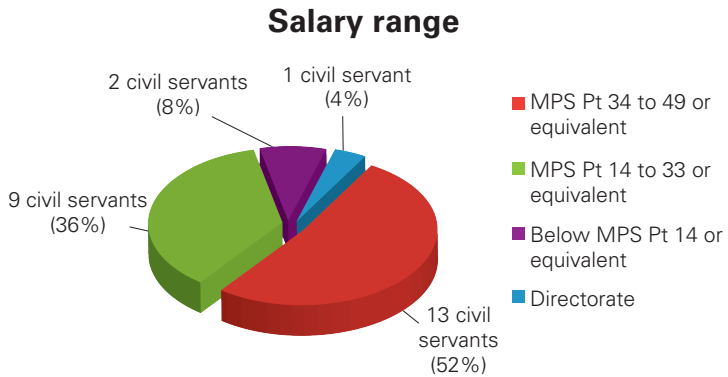
⁵ This part covers cases where disciplinary actions were completed between 1 January 2000 and 31 December 2011. It excludes cases where the civil servants were criminally convicted but disciplinary actions against them have not yet been completed.

Statistics on Past Cases

Salary range

Different ranks of civil servants were involved in past MIPO cases. Among the 25 civil servants involved –

- 13 (52%) were paid between Master Pay Scale (“MPS”) Points 34 to 49 or equivalent;
- 9 (36%) between MPS Points 14 to 33 or equivalent;
- 2 (8%) below MPS Point 14 or equivalent; and
- 1 (4%) at the directorate rank.

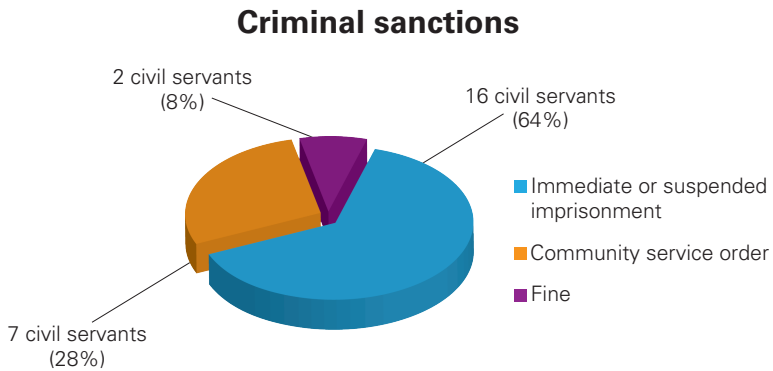


Statistics on Past Cases

Criminal sanctions

The court often imposes a heavy sentence on public officers convicted of the offence of MIPO. Of the 25 civil servants involved in the past cases –

- 16 (64%) were sentenced to immediate or suspended imprisonment;
- 7 (28%) were ordered to perform community service; and
- 2 (8%) were fined by the court.



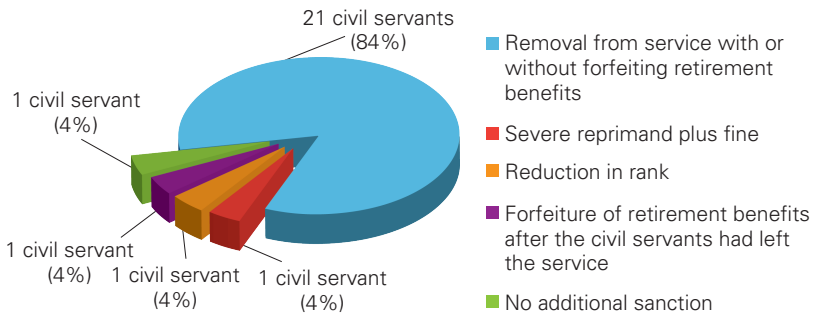
Statistics on Past Cases

Disciplinary and related sanctions

The Government takes a serious view of all convictions of MIPO. Out of the 25 civil servants involved in past cases –

- 21 (84%) were removed from the service with or without forfeiting their retirement benefits;
- 1 (4%) was punished with a severe reprimand plus a fine;
- 1 (4%) was punished with reduction in rank;
- 1 (4%) who had left the service during appeal against his conviction was punished with forfeiture of retirement benefits; and
- 1 (4%) who had already left the service at the time of conviction was not given any additional sanction.

Disciplinary and related sanctions



Case Highlights

MIPO may be committed without involving bribery or any pecuniary gains. A public officer may commit MIPO if he abuses discretionary powers, misuses official position, shows partiality towards a person/organisation whom he knows, or with whom he has dealings or fails to declare a conflict of interest, etc.

Highlights of some past conviction cases are given below.

Circumvention of procurement or tendering procedures

With personal relationship with the bidders

Case 1

A professional grade civil servant was responsible for the award of property management contracts. He had misused his office by exerting improper influence over the award of contracts with an aggregate value over \$150 million to a company which was not qualified for tendering for the contracts and in which his relatives had a financial interest. The civil servant argued on appeal that there was no question of corruption as he had received no financial gains and the Government had suffered no loss. The civil servant was sentenced to 30 months' imprisonment.

Case Highlights

The Court said

“The receipt of a bribe or an advantage is not an essential ingredient of corruption in its broad and general sense. A deviation from fidelity in the discharge of a person’s duty can amount to corruption..... The gravamen of the offence was that the defendant had been instrumental in bringing about a situation whereby there was not a level playing field for all the parties who wished to tender for these contracts.”

Case 2

A general grade civil servant responsible for procurement matters channelled, over a period of four years, nearly 400 purchase orders with an aggregate value of about \$3.5 million to companies owned by his wife and friends. He failed to declare a conflict of interest and showed improper partiality towards these companies by falsely representing that competing quotations higher in price had been received. The civil servant was sentenced to two years’ imprisonment.

Case Highlights

Case 3

A technical grade civil servant showed improper partiality by exerting pressure on a contractor to subcontract maintenance works to a subcontractor, and making arrangements for the latter to further subcontract the works to an engineering company in which he had an interest. The civil servant was convicted of several offences and sentenced to 36 months' imprisonment, of which 30 months were due to the MIPO conviction.

Without personal relationship with the bidders

Case 4

Without inviting competing contractors to submit quotations, two departmental grade civil servants awarded contracts for production of learning packages and pamphlets to the same design company. They asked the design company to provide fictitious quotations with higher prices in the names of other companies. The civil servants contended that they were under great pressure to meet the project deadline. There was no evidence of corruption and the court accepted that both civil servants had not obtained any financial gains. The two civil servants were convicted of MIPO and each was sentenced to several months' imprisonment suspended for two years plus a fine.

Case Highlights

Wrongful exercise or abuse of authority

Abuse of official position

Case 5

A law enforcement civil servant was convicted of MIPO for accepting free sexual services on three occasions while off duty from his co-accused, the wife of another law enforcement civil servant with a beneficial interest in four hostess clubs. On appeal, the civil servant argued that the conduct complained of was not in the course of or in relation to his public office. The court ultimately held that the favours were accepted by him in relation to his office. The civil servant was sentenced to two years' imprisonment.

The Court said

“To constitute the offence of misconduct in public office, wilful misconduct which has a relevant relationship with the defendant’s public office is enough. Thus, misconduct otherwise than in the performance of the defendant’s public duties may nevertheless have such a relationship with his public office as to bring that office into disrepute, in circumstances where the misconduct is both culpable and serious and not trivial.”

Case Highlights

Case 6

A technical grade civil servant used, for private purpose, a vehicle supplied to his department by a contractor for official use on more than a hundred occasions over a prolonged period. He also allowed the driver to make false entries in the overtime record and approved claim forms submitted to the contractor. The civil servant was sentenced to eight months' imprisonment.

Case 7

A departmental grade civil servant, who was in charge of an office and responsible for managing the stock of postal stationery items, had stocked up on items which would be subject to a price increase. He then resold them for a personal gain of about \$400. Despite the relatively small gain, his acts were deliberate and premeditated and he had abused his official position. The civil servant was convicted of MIPO and sentenced to perform 100 hours of community service.



Case Highlights

Unauthorised disclosure of classified information

Case 8

A law enforcement civil servant responsible for conducting a registration examination assisted a friend in obtaining the registration dishonestly, and provided the latter with classified information relating to the examination. The civil servant was convicted and, upon his appeal, sentenced to about seven months' imprisonment.

Case 9

A law enforcement civil servant had abused his official capacity to obtain and divulge privileged information relating to two suspected fraud cases to a citizen. The civil servant was convicted of MIPO and sentenced to 11 months' imprisonment.



Case Highlights

Dishonest claims

Case 10

A departmental grade civil servant had acceded to the request for salary increase by two contract staff. Instead of following the proper procedure to seek approval for salary increase, he instructed the two contract staff to arrange for this to be falsely processed as payments to part-time workers made in the names of the relatives of the contract staff. On appeal, the civil servant contended that since the payment method had been known by others in the department, his intent was not dishonest. The civil servant was sentenced to four months' imprisonment suspended for two years.

The Court said

"..... the fact that many people know of an action does not make it honest."

Case Highlights

Other misconduct

Case 11

A departmental grade civil servant had mistakenly released the body of the late Mr A to the family of the late Mr B. He subsequently discovered the mistake but, instead of reporting this to his senior, he tried to cover it up by moving around the body of Mr B and removing the identification records. The mistake was revealed when the family members of Mr A were presented with the body of Mr B. Upon conviction, the civil servant was sentenced to perform 120 hours of community service.

The Court said

“The misconduct of the defendant in this case was very serious. The defendant may well have panicked in an attempt to save his job. However, the way he set about covering up the mistake in the release of the wrong body seriously undermined public confidence.....”

Case Highlights

Case 12

A law enforcement civil servant who was on duty in the court told a woman seeking to reclaim bail money on behalf of her sister that she needed an authorisation. While escorting the woman to the cell area, he used his mobile phone to take a photograph underneath her skirt. The civil servant was sentenced to six months' imprisonment. On appeal, the civil servant argued that the sentence was excessive when compared with other cases involving indecent assault or the taking of up-skirt photographs. The appeal was dismissed by the court.

The Court said

“An offence of Misconduct in Public Office demands a different perspective and a sentencing range which ensures that perpetrators of such offences are punished in a manner that the public understands and expects. Such sentences should also serve as a warning to others who are tempted to misconduct themselves in a similar fashion.”



Case Highlights

Case 13

A departmental grade civil servant was found to have stayed at a mahjong school on separate occasions while on duty. To cover up his non-performance of duties on such occasions, he made false records in official documents and files purported to show that he had visited various workplaces to carry out safety surveys when in fact he did not. While the civil servant did not commit the offence for financial gain, nor was there an element of corruption, his offence had breached the trust placed upon him. The civil servant was convicted of MIPO and sentenced to perform 240 hours of community service.

Case 14

A law enforcement civil servant was responsible for the investigation of a theft case. He paid a private visit to the case suspect without authorisation and persuaded the case suspect to plead guilty to a theft charge in order to reduce his workload. He also amended the date of the statement he took from a witness of the theft case and falsified records in his notebook and investigation report. The civil servant was convicted of MIPO and sentenced to 9 months' imprisonment.

Common Questions

Q.1 MIP0 applies only to those holding a public office. Why should public officers be subject to this common law offence?



A.1 Public officers are entrusted with powers to serve the public interest. Along with the power comes the responsibility to exercise it for the public good. The community is entitled to expect that all public officers must adhere to a high standard of integrity and probity when exercising the powers and discretions conferred on them by virtue of their public offices.

The offence is also a holistic approach to ethics capacity building as both the public officers and the community are made aware of the required ethical standard through deliberations in public court.

Common Questions

Q.2 Unlike bribery which involves the solicitation or acceptance of bribes, MIPO is defined so widely that it does not target at any specific acts. Does it mean that public officers may be sanctioned criminally for a single lapse of judgment or an inadvertent mistake?

A.2 The common law offence of MIPO is necessarily cast in general terms because it is designed to cover many forms of misconduct involving abuse of office on the part of public officers.

The misconduct must be deliberate rather than accidental in the sense that the public officer either knew that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful. Wilful misconduct which is without reasonable excuse or justification is culpable.

A civil servant who committed an error which was the result of inadvertence or misjudgment without any intention to breach the trust reposed in him would not normally be culpable under MIPO.



Common Questions

Q.3 I am only a junior staff with little discretionary power, will I be regulated by MIPO?

A.3 The essential feature of the MIPO offence is an abuse by a public officer of the powers, discretions or duties exercisable by virtue of the official position conferred on him for the public benefit. He can be an officer of high or low rank. Therefore, it will be dangerous merely to look at the rank or post that a particular officer holds to determine whether he is regulated by MIPO.

Q.4 MIPO is a serious criminal offence. Does it mean that MIPO is not applicable to cases of minor misconduct?

A.4 MIPO is a common law offence which is evolving to meet the changing responsibility of a public officer and the public expectation. Whether a misconduct is considered serious and culpable for the purpose of MIPO has to be determined having regard to the responsibilities of the office and the office-holder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities. Some cases in the earlier part of this booklet may be seen as minor misconduct in terms of financial gain or other benefits but they were all misconduct involving abuse of official position or a breach of trust and therefore are culpable under MIPO.

Common Questions

Q.5 I am a law enforcement officer entrusted with power, duties and responsibilities by virtue of my official position to maintain law and order. Does it mean that any misconduct committed by me during my employment in the Government will be caught by MIPO?

A.5 To decide whether a misconduct is caught under MIPO, we need to identify whether the power being abused in the misconduct is the one entrusted to the public officer by virtue of his official position for the public benefit. A misconduct unrelated to such power or duties exercisable in the public interest, for example, having a fight with another law enforcement colleague in office due to personal clash is not an MIPO offence, though the misconduct may be subject to other criminal and/or disciplinary sanction.

Q.6 Will I commit an MIPO offence if I invite a friend or relative to bid for a government contract knowing that he is qualified to do the work?

A.6 The Government attaches great importance to awarding government contracts in an open, transparent and fair manner. Bureaux/departments should have a set of procedures (including rules for dealing with conflict of interest) in place to vet the qualifications of tenderers.

What matters is not whether your friend or relative is qualified for the work, but whether you have made use

Common Questions

of your official position to tilt the level playing field in his favour. This may harm the honest competitors who are equally qualified for the work but do not have personal relations with you.

The principle remains that you must be alert to and avoid situations which might compromise or be seen to compromise your personal judgment or integrity at work.

Q.7 Without my knowledge, my friend's company has submitted a bid for a government project under my purview, should I refrain from recommending this company for the sake of avoiding giving an impression of favouritism even if this company is fully qualified?



A.7 A civil servant should declare any conflict of interest as soon as he is aware of it. You should therefore declare your interest according to established rules and, with the advice of your supervisor, withdraw from the deliberations and decision-making process. Your supervisor will consider asking other colleagues to handle the bidding of the government contract.

Common Questions

Q.8 Is it true that improper use of personal data may not only constitute a breach of the Personal Data (Privacy) Ordinance, but may also attract the criminal sanction of MIPO?

A.8 Yes, there are MIPO conviction cases involving improper use or handling of personal data (e.g. taxpayers' information, patients' records, etc). Once the court is satisfied that the civil servant concerned has breached the trust reposed in him by virtue of his public office, and the misconduct is wilful, serious and without reasonable excuse or justification, the civil servant may be liable to the criminal sanction of MIPO.

Q.9 The best way to avoid committing an MIPO offence is to do what most colleagues do. It would be safest to follow the crowd. Am I right?

A.9 No. Whether a practice is acceptable should be seen through the lens of the high standard of probity and integrity expected of public officials, but not how long and how far it has been in use at your workplace.

Further Information

Should you wish to read up reference materials on the subject of MIPO, please visit the Resource Centre on Civil Service Integrity Management (<http://rcim.host.ccg.hksarg/eindex.html>) on the Central Cyber Government Office intranet.



Disclaimer

This booklet provides general guidance for civil servants only and does not purport to deal with all issues that may arise. Descriptions and explanations of the relevant legal provisions and the recommended work procedures and practices are necessarily general and abbreviated to make this booklet easy to understand from the layman's angle. Readers should seek legal or professional advice as and when necessary. The Government will not accept any liability, legal or otherwise, for loss occasioned to any person acting or refraining from action as a result of any material in this booklet.

