

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 14 OF 2011

BETWEEN

CHAN SIU-LUN

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 14 December 2011

Date of handing down Written Decision with Reasons: 19 March 2012

DECISION

Medical History and the Complaint to the Commissioner

1. Mr Chan, the appellant, met with an accident and sustained head injury on 23 July 2007. He was treated on the same day in United Christian Hospital ("UCH"). Unfortunately he has failed to fully recover from the injury. Once he took out proceedings in the Small Claims Tribunal claiming compensation, in

particular, for his pain and suffering caused. His claim has been adjourned sine die for two reasons. Firstly, the amount he seeks to claim may exceed the jurisdiction of the Small Claims Tribunal. Secondly, he needs time to set his medical evidence and medical record correct. His effort to rectify the medical evidence and medical record eventually leads to the complaint to the Respondent (“the Commissioner”) and the present appeal.

2. On his request, UCH has supplied him with two medical reports, dated respectively 26 March 2008 and 20 May 2008. Both reports were provided by one Dr Chen. Mr Chan alleges that these medical reports contain misleading information about him. In the report of 26 March 2008 (“the First Report”), the misleading information about him is *“he has no vomiting and no loss of consciousness---and there was no focal neurological signs”*. In the report of 20 May 2008 (“the Second Report”) the misleading part about him is *“he has no vomiting and no definite loss of consciousness after the accident---and there was no focal neurological signs ”*.

3 On 23 July 2007, a nurse at the Accident and Emergency Department (“AED”) of the UCH examined him for triage assessment and wrote down her observations in the attendance record (“the Attendance Record”). In this record the nurse noted down *“no vomiting and no loss of consciousness”*. While Mr Chan accepts that the description is true and correct, he alleges it is incomplete.

4. Mr Chan then contacted UCH and sought to rectify his medical record but to no avail. He then made a complaint against the UCH for refusing to amend the record of his personal data. According to him the record should reflect the fact that immediately after the accident, he lost consciousness for a brief period and subsequently suffered headache and dizziness. The Attendance Record is true as far as his condition at the time of examination by the nurse is concerned. He maintains that his condition immediately after the accident should also be recorded. He blames the nurse for not directing his attention specifically to the time immediately

after the accident. The nurse omitted to ask about the time immediately after the accident and therefore he did not mention his earlier symptoms. As a result his brief period of loss of consciousness and dizziness was not recorded. Dr Chen had not asked him about vomiting and dizziness and therefore when he put down the references to these symptoms, he must be fabricating them. As his diagnosis and opinion in the report are based on these inaccurate or incomplete symptoms, the diagnosis and opinion cannot be right and accurate. In simple terms, he is seeking to have his medical records corrected so that the symptoms, diagnosis and medical opinion all are consistent with him suffering from post-concussional syndrome.

Follow Up Enquiry with Hospital Authority

5. The Commissioner approached the Hospital Authority and obtained the relevant information and documents about the medical treatment of Mr Chan. The Hospital Authority confirmed that the First Report and the Second Report were based on AED attendance record of 23 July 2007. The attendance record was a contemporaneous record made by the staff when medical service was rendered to the patient. According to the established guidelines, record of patients should be contemporaneous and strictly done upon the completion of medical/nursing observations and procedures. The position of the Hospital Authority is that their contemporaneous records which are based on the doctor's clinical observation and professional judgment should be a more accurate account than the patients' recollection and claims afterwards. It has been pointed out that Mr Chan did not attend AED of UCH after 23 July 2007 and it is impossible for the staff there to register the signs and symptoms developed afterwards. In short the Hospital Authority on behalf of UCH indicates there is no ground for changing their record of Mr Chan.

Decision of the Commissioner

6. Only one of the Data Protection Principles is relevant to the complaint. It is Data Protection Principle 2 (1) in Schedule 1 to the Personal Data (Privacy) Ordinance (“the Ordinance”). It requires a data user to take all practicable steps to ensure that 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.

7. The Commissioner is of the view that the alleged inaccurate information in the First Report and the Second Report is the medical opinion of Dr Chen and that the Commissioner or his office is in no position to determine its accuracy or otherwise citing in support a case of the Board in AAB NO. 42 of 2006. The Commissioner also does not consider it is his function or his role to deal with the kind of disputes or matters raised in the complaint. It is said that it is not the intent or purpose of the Ordinance which establishes the Office of Privacy Commissioner. This is one of the reasons for the Commissioner to refuse to initiate a formal investigation.

8. The Commissioner has another reason for his refusal. The complaint is time-barred.

Grounds of Appeal

9. In support of his appeal, Mr Chan has filed pages of materials, including previous submissions to various bodies to which he has made his complaint concerning his medical reports. Without disrespect, there is only one general ground of appeal, namely the Commissioner wrongly exercised his discretion in refusing to initiate an investigation.

Decision

10. This Board is as much impressed with the effort of Mr Chan in seeking to rectify his medical record with the Hospital Authority or UCH as is amazed, without disrespect and with utmost sympathy, at the irrelevancy of the voluminous materials

he has amassed for this appeal. We can only hope that these materials can be wisely and usefully recycled for use in his pending civil action for personal injury.

11. Mr Chan painstakingly attempts to show that the Commissioner has made some mistakes of facts and as a result misleading himself to rely on the time-bar issue as a reason for refusal to investigate. It is unnecessary to go into details and validity of his complaint in this respect. To take the global view of the matter, this Board is of the view that the time-bar is not a good reason for refusal to investigate. Mr Chan should be excused for the delay in making the complaint. Before making the complaint he never gave up his effort to have his medical record amended. He should not be blamed in not coming to the Commissioner for assistance earlier. It is not unreasonable for him not to come earlier, if he should come at all. The delay in coming to the Commissioner for help does not prejudice the Commissioner's investigation nor the party complained against in the defence of his allegations. This Board is of the view that the Commissioner should exercise his discretion in favour of Mr Chan in respect of the time-bar issue.

12. It is convenient to understand the meaning of the term 'investigation' before the decision of the Commissioner can be properly analysed and his reasons fully understood. The term 'investigation' must not be interpreted literally. Its scope covers more than its literal meaning. Literally it means the process of ascertaining and gathering facts or evidence of certain matter. The definition of the term covers more than that. 'Investigation' is defined by section 2 of the Ordinance as 'investigation means an investigation under section 38'. Provisions in sections relating to investigation under section 38 should be looked at to see what this formal 'investigation' includes.

13. Once an investigation is carried out, the provisions in other sections require the Commissioner to perform various functions apart from investigation in the usual sense. He has to pass judgment on the data user investigated, judging or assessing the likelihood of the data user repeating the contraventions found proved,

determining the content of Enforcement Notice if he sees fit to issue one, making a report on the investigation etc.

14. When the Commissioner receives a complaint, he shall carry out an investigation unless he decides otherwise under section 39. The investigation work in the ordinary sense that he is required to do is given under section 38 as follows:-

- (i) where paragraph (a) is applicable, the Commissioner shall, subject to section 39, carry out an investigation in relation to the relevant data user to **ascertain whether the act or practice specified in the complaint is a contravention** of a requirement under this Ordinance;

15. Applying the above provisions to the present case, the Commissioner with the cooperation of the Hospital Authority has already ascertained the act and practice complained of. How the Attendance Record, First Report and the Second Report came into being has been ascertained and the practice of the Hospital Authority and UCH in preparing these documents has also been ascertained. It should be noted that these facts and practices are not in dispute. What Mr Chan wants is to add something in the Attendance Record to show that immediately after the accident he had a transient loss of consciousness and dizziness. He also requires Dr Chen to change his medical opinion in the light of the fact that he had suffered a transient loss of consciousness and dizziness.

16. The Commissioner has no power to compel Dr Chen to amend his medical opinion. Sarcastically, Mr Chan may be able to do so if he allowed himself to be examined by Dr Chen. Even if Dr Chen is to change his opinion, he cannot or should not obliterate the two medical reports. What he can do and should do is to make a supplementary report correcting the previous errors. Theoretically, the only way the Commissioner can help Mr Chan to achieve his purpose is to determine for himself that the opinion of Dr Chen is wrong and to compel the UCH or the Hospital

Authority to amend their personal data of Mr Chan. It should be noted that in the event that amendment is necessary it will be by way of registering the findings of the Commissioner.

17. The materials supplied by Mr Chan are of no help to the Commissioner. The guidelines, ethics etc of various governing bodies of health workers and professionals and other literature cannot possibly show Dr Chen's opinion is wrong. The personal injury court cases about post-concussional syndrome equally offer no help.

18. In the present case, the Commissioner has done the investigation work; it is the other parts of the section 38 investigation which he refuses to perform. It is because he cannot determine if the medical reports contain wrong or misleading data even if he carries out a formal investigation evoking special powers of investigation. The Board must point out that amending the medical record through the proceedings of the Commissioner in carrying out formal investigation procedure will not serve any useful purpose for the civil claim anticipated by Mr Chan.

19. For all these reasons, the decision of the Commissioner cannot be faulted and the appeal is dismissed.

(signed)

(Mr Yung Yiu-wing)

Deputy Chairman

Administrative Appeals Board