保障資料主任聯會 DATA PROTECTION OFFICERS' CLUB

Learning from the Administrative Appeals Board's Decisions

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CASE 1

AAB 54/2014
(David M. Webb and Privacy Commissioner for Personal Data)
(Decision handed down on 27.10.2015)

- The Complainant was a female member of several statutory panels. There were three judgments concerning her divorce proceedings handed down in 2000, 2001 and 2002 in open court. These judgments were originally made available by the Judiciary in the Legal Reference System ("**LRS**") with the names of the Complainant, her ex-husband and her children. In 2010 and 2012, the Judiciary replaced the original judgments in the LRS with their names anonymised at the request of the Complainant.

- The Complainant found her name revealed on three hyperlinks on "Who's Who" of Webb-site (operated by the Appellant) connecting to the three anonymised judgements in the LRS. If a user entered the Complainant's name in the "search people" box, Webb-site would bring the user to the "Who's Who" page. The hyperlinks were embedded under the item "Articles" on the "Who's Who" page.

- By clicking on "Articles" and then on the hyperlinks, the user would be taken to the three anonymised judgments in the LRS.

- In March 2013, the Complainant wrote to the Appellant asking for deletion of the hyperlinks but her request was declined. She then lodged a complaint with the Commissioner.

- The Commissioner carried out an investigation and collected further information from the Appellant, the Person Bound and the Judiciary.

- According to the statements on the Judiciary's website, the purpose of making the court judgments publicly available was to enable them to be utilized as *"legal precedents on points of law, practice and procedure of the courts and of public interests"*.

- When ascertaining the permitted purposes of use of the three judgments, the Commissioner also took into account the following factors :-

(a) According to the new internal direction from the Chief Justice, with effect from April 2011, all judgments in family and matrimonial cases at every level of court, whether in open court or in chambers, should be anonymised before release. This policy is consistent with Article 10 of the Hong Kong Bill of Rights which excludes judgments of proceedings concerning matrimonial disputes from being made known.

(b) The disclosure on Webb-site ran contrary to the reasonable privacy expectation of the Complainant.

(c) The three judgments were matrimonial proceedings touching on the private life of the Complainant, and did not address any issue that impinged her integrity and honesty in discharging her public duties. Under such circumstances, in weighing the freedom of press and expression against the personal data privacy of the Complainant, the balance should be tipped in favour of protecting the personal data of the Complainant in the three edited judgments.

Findings of the Commissioner

- The Commissioner therefore concluded that the Appellant had contravened the requirement of DPP3 in Schedule 1 to Ordinance.

- On 26 August 2014, the Commissioner served the Appellant with the Result of Investigation and the Enforcement Notice directing him to remove the three hyperlinks from Webb-site and to confirm his compliance in writing together with supporting evidence.

At the hearing

- The Appellant repeated his arguments raised in his written submissions previously filed in this appeal. He further submitted that should the AAB find him to be acting in contravention of DPP3, the exemptions under sections 51A and 60B of the Ordinance would apply to his case.

- Section 51A(1) provides that personal data held by a court, a magistrate or a judicial officer in the course of performing judicial functions is exempt from the provisions of data protection principles. The Appellant argued that the court is performing its judicial functions when publishing the judgments, which means all personal data that appears in judgment is exempt from all data protection principles, including DPP3.

- Section 60B(a) provides that personal data is exempt from DPP3 if the use of the data is required or authorized by or under any enactment, by any rule of law or by an order of a court in Hong Kong. "***Rule of law***" is defined in section 2 of the Ordinance to include "***a rule of common law***".

- The Appellant argued that the disclosure of data in public registers and its onward disclosure by other publishers is exempt from DPP3 because its disclosure is authorized by the common law principle of open justice.

- The Appellant further submitted that the exemptions in sections 51A and 60B(a) attach to the personal data, and not the data user, and therefore the Complainant's personal data in question can be used without restrictions.

PCPD's submissions:-

- DPP 3 is applicable to personal data in the public domain

- It is clear from the Court of Appeal's decision in ***Re : Hui Kee Chun, CACV No.4 of 2012*** that "[DPP3] is directed against the misuse of personal data and it matters not that the personal data involved has been published elsewhere or is publicly available".

- It is not the legislative intent of the Ordinance to exempt public domain data from the application of DPP3. The proposal to exempt public domain data was rejected when the Ordinance was first enacted and during subsequent public consultation in 2009-2010.

- In this particular case, the three judgments concerned the private life of the Complainant which the public needed not to know, especially they all took place in the distant past.

- Reasonable expectation of the data subject

- In ***Ng Shek Wai v The Medical Council of Hong Kong, HCAL No.167 of 2013***, the Judge endorsed PCPD's view that in ascertaining the original purpose or any directly related purpose under DPP3, it is legitimate to have regard to "***the reasonable expectations of the data subject***".

- Subject to restrictions on use imposed by the Judiciary

- It is the "***search people***" function of the Webb-site that links up the Complainant's name with the three anonymised judgments that PCPD objects. PCPD does not require the media to redact their archives, or private users and libraries to destroy any copies of the three judgments (in their original forms) with the names of the parties appeared thereon.

- Each access to the judgment (albeit redacted) held in the Judiciary's website amounts to a "***collection***" of personal data made by the operator of the webpage providing the search function (i.e. the Appellant).

- Each collection is subject to the terms of the provider (see DJ Ng in ***Dr. Yeung Sau Shing Albert v Google Inc. [2014] 4 HKLRD 493*** at Para. 122). The use of the three judgments in this case is subject to the implied term imposed by the Judiciary that all family and matrimonial judgments have to be anonymised before release with effect from April 2011 pursuant to the direction from the Chief Justice.

- Distinction between reporting of "proceedings" and "judgments"

- The Appellant quoted the example of ***TCWF v LKKs & Others, CACV 134 & 166 of 2012*** to show that the media could report the names of the parties to the matrimonial proceedings even the judgments used only their initials.

- PCPD submitted that report of proceedings (as allowed by s.3 of Judicial Proceedings (Regulation of Reports) Ordinance) is different from naming the parties or witnesses in a judgment. That explains why an anonymity order can still be granted as to reporting of names even where a hearing is held in public. This is the prevailing practice in matrimonial proceedings as set out in the Interim Report and Consultative Paper on "Review of Family Procedure Rules" issued by the Judiciary at P.198 to P.200.

- Right to privacy and freedom of expression

- The Appellant argued that PCPD's decision posed threat to the freedom of expression in Hong Kong. PCPD submitted that right to privacy and freedom of expression are both fundamental human rights so neither has any pre-eminence over the other. It is a balancing exercise of the two fundamental rights (see ***Eastweek Publisher Ltd v Privacy Commissioner for Personal Data [2000] 1 HKC 692***, Line I of P.709 to Line A of P.710).

- As for reporting of judgments in matrimonial proceedings, a balance has already been struck and stated in Article 10 of the Hong Kong Bill of Rights.

Ground 1 - AAB No.36/2007

- The Appellant submitted that ***AAB No.36/2007*** establishes the proposition that *"purpose"* in DPP3 refers to the purpose of the data collector and not the purpose of the data subject. The Appellant regarded himself as the *"data collector"*, and his purpose of collecting personal data from the three judgments included publication of the data on the Webb-site. This purpose did not change at any time.

- The AAB considered that in subsection (4) of DPP3, the phrase *"the purpose for which the data was to be used at the time of the collection of the data"* refers to the purpose for which the data was originally collected. In this case, such original purpose would be referable to the purpose of the Judiciary being the person who first collected the relevant data.

- The AAB did not agree that the Appellant's purpose of using the Complainant's personal data (i.e. reporting and publication for general use) can be said to be consistent with the Judiciary purposes of publishing the judgments (i.e. to enable their judgments to be utilized as *"legal precedents on points of laws, practice and procedure of the courts and of public interests"*). There was nothing to suggest that the Appellant's purpose was in any way related to law. As the Appellant used the relevant personal data for a "new purpose", PCPD was correct in concluding the Appellant had contravened DPP 3.

Ground 2 – TCWF v LKKS

- The Appellant sought to rely on paragraphs 30 and 32 of the Court of Appeal's Judgment in ***TCWF v LKKS (unreported, CACV 154 & 166/2012, 29 July 2013)*** to contend that unless the court grants a specific injunction, it is not against the law to publish the name of the parties in an action if their identities are known.

- The AAB noted that there was no reference to the Ordinance or DPP3 in the Judgment. This suggests that there was no issue of personal data protection and the Court of Appeal was not concerned with the application of any provisions of the Ordinance. The AAB did not consider the relevant paragraphs as providing any defence or exemption to a contravention of DPP3.

Ground 3 – Article 27 of Basic Law and Article 16(2) of the Hong Kong Bill of Rights

- Article 27 of Basic Law states that Hong Kong residents shall have freedom of speech, of the press and of publication. Article 16(2) of the Hong Kong Bill of Rights provides that everyone shall have the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds. The Appellant argued that the application of DPP3 to restrict the repetition of public domain personal data is unconstitutional because it violates the above provisions of the Basic Law and the Hong Kong Bill of Rights.

- The AAB believed that PCPD has carried out the exercise of balancing the freedom of press and expression against the personal data privacy of the Complainant. The AAB was of the view that PCPD after performing the relevant balancing exercise, arrived at the conclusion of tipping in favour of protecting the personal data of the Complainant in the three edited judgments was not unreasonable.

Ground 4 – meaning of "data user"

- The Appellant submitted that PCPD erroneously interpreted the term "data user" to embrace persons who merely read or collect and aggregate personal information in and from the public domain.

- The AAB considered that this ground is effectively the same as the argument advanced by the Appellant that DPP3 should not be applicable to public domain personal data. In relying on the majority of the Court of Appeal's decision in ***Eastweek Publisher Ltd v Privacy Commissioner for Personal Data [2000] 2 HKLRD 83***, the AAB endorsed PCPD's view that a person who carries out the activities described by the Appellant is prima facie not considered as compiling information about another individual, and the provisions of the Ordinance do not come into play.

- Further, the AAB rejected the Appellant's argument by quoting the Court of Appeal decision in ***Re Hui Kee Chun (unreported, CACV 4/2012, 1 February 2013)*** which held that DPP3 is directed against misuse of personal data regardless of whether the relevant personal data has been published elsewhere or is in the public domain.

Other Grounds – sections 51A and 60B(a)

- The AAB considered that section 51A provides an exemption to the court, the magistrates and judicial officers in the course of performing judicial functions in relation to personal data from certain provisions of the Ordinance. This reading is reinforced by the consultation document which sets out the background in relation to this provision. As the Appellant has never been a judicial officer and the relevant personal data was never held by him in such a capacity, the AAB was unable to see how section 51A of the Ordinance can exempt him from the application of DPP3.

- The AAB considered that section 60B exempts the application of DPP3 if the use of the data is required or authorized by any statutory provisions (i.e. *"any enactment"*), any principles of law (i.e. *"any rule of law"*), or any orders made by a court (i.e. "*an order of a court in Hong Kong*"). The AAB found this construction supported by what was said in the consultation document. The AAB was of the view that the Appellant did not use the personal data of the Complainant to publish the hyperlinks on Webb-site as required or authorized by the principle of open justice. There is no principle of law that requires the Appellant to publish the personal data of the Complainant on Webb-site.

- The AAB rejected the Appellant's argument of attributing the exemptions under sections 51A or 60B(a) solely to the personal data such that the same data can be repeatedly used on different occasion in the future without any control under DPP3. The AAB considered that insofar any exemption is applicable to DPP3, such exemption has to be considered in the context of personal data being used by a data user.

- The AAB therefore dismissed the appeal with no order as to costs.

CASE 2

AAB 58/2014 (劉雪雲與個人資料私隱專員)

(Decision handed down on 22.3.2016)

***Salient points* :**

(1) The Board endorsed TransUnion's justification for retaining an individual's default in repaying her credit card debts (which was written off 10 years ago) in its database for an indefinite period of time. This is in contrast to the case of bankruptcy or settlement by way of IVA, where such negative credit data is allowed to be retained for 5 years only.

(2) The concept of "settlement" is very different from that of "write-off". "Write-off" of a bad debt is simply a prudent accounting measure, and in fact the individual has never repaid his debt.

(3) The Board has power to determine whether Clause 3.3 of the "Code of Practice on Consumer Credit Data" ("CCD Code") contravenes DPP2(2). The Board after examining the original purpose of setting up the credit reference database, finally ruled that TransUnion had taken all reasonably practicable steps to ensure the Appellant's default in repaying her credit card debts was not kept longer than was necessary for the fulfillment of such purpose.

Facts of the case

- The Appellant was informed of her default record when a bank was promoting its services to her. She requested for a credit report from TransUnion which revealed her two past due credit accounts :

  (i) Visa card account with Hang Seng Bank with an outstanding balance of HK$532, and the account status was classified as 'Write-off' on 30.9.2003; and

  (ii) Visa card account with Standard Chartered Bank with an outstanding balance of HK$8,589, and the account status was classified as 'Write-off' on 31.12.2002.

- The Appellant submitted the prescribed "Personal Data Correction Form" to TransUnion requesting to delete the above two entries, but was refused by TransUnion.

The Commissioner's Findings

- TransUnion was entitled to retain the above two entries in its database. Pursuant to Clause 3.3 of the CCD Code, the credit reference agency (i.e. TransUnion) may retain account repayment data revealing material default until the earlier of :-

  (1) The expiry of 5 years from the date of final settlement (whether pursuant to a scheme of settlement); or

  (2) The expiry of 5 years from the date of discharge of bankruptcy,

  irrespective of any write-off by the credit provider of the amount in default.

- There was no evidence suggesting TransUnion had retained those entries longer than was necessary in contravention of DPP2(2).

  [Note : At the hearing, the Commissioner was asked to justify the retention of the above entries for an indefinitely period of time notwithstanding the limitation period for enforcing a debt is 6 years only. The Commissioner clarified that the primary purpose of a credit report is for assessing a person's credit worthiness in repayment of his debt, but not on his legal liability to repay.]

The Board's decision

- According to s.13(2) of the PD(P)O, the CCD Code only provides evidential guidelines for proving contravention of a requirement under the Ordinance. The CCD Code is not subsidiary legislation, and its legal status is incomparable to that of DPP2(2).

- The key issue to be determined by the Board is whether Clause 3.3 of the CCD Code contravenes DPP2(2). The Board adopted by and large the Commissioner's Written Submission filed on 26.5.2015, in particular the following :-

(a) The Board acknowledged that the original purpose of setting up the credit reference database is to provide credit data to banks and financial institutions for proper assessment of credit risk involved when dealing with loan applications. This is pivotal to the stability of the financial system in Hong Kong.

(b) The concept of "settlement" is very different from that of "write-off". "Write-off" of a bad debt is simply a prudent accounting measure, and in fact the individual has never repaid his debt. His credit worthiness is even worse than an individual who finally settles the amount in default. It is necessary for the "write-off" data be retained in TransUnion's database such that a credit provider can properly assess the credit risk involved in making a loan to the individual involved.

(c) In contrast to "write-off", the Board explained why a retention period of 5 years is also justified in the case a debtor is adjudged "bankrupt". During the bankruptcy process, the trustee in bankruptcy would administer the estate of the debtor and impose a number of restrictions upon him for the orderly repayment of his debts. This is incomparable to the case of "write-off".

- The Board considered that under such circumstances, TransUnion, in retaining the account repayment data relating to an individual that reveal a material default (as in the case of the Appellant), had taken all reasonably practicable steps to ensure personal data was not kept longer than was necessary for the fulfillment of the purpose for which the data was to be used.

CASE 3

AAB 8/2015 (A v. Privacy Commissioner for Personal Data)

(Decision handed down on 7.10.2015)

Salient points :

(1) The legislative intent of s.22 to s.24 would not cover the circumstances where the data user and the data subject have different views on certain matters. It would not be right for the data subject to compel the data user to change his view by a data correction request.

(2) The test under s.24(3) is whether there are reasonable grounds for a data user to be not satisfied that the personal data to which the request related is inaccurate. Where a meeting was attended by the interviewer and the interviewee alone, what actually took place in the meeting and the words exchanged by each side were matters of facts which only these two persons will know where the truth lies. If the interviewer is satisfied that his report of the meeting is accurate, the Board cannot direct otherwise under such circumstances.

Facts of the case

- The Appellant was a patient of a medical doctor D. D sent a letter to the Appellant informing her termination of the doctor-patient relationship between them and the reasons for the termination ("Letter"). The Appellant obtained a copy of the Letter from D pursuant to a data access request.

- The Appellant later submitted a data correction request ("DCR") requiring D to make 23 "correction requests" from Corrections A to W. D refused to comply with the DCR.

The Commissioner's Findings

The Commissioner considered that D was entitled to refuse to accede to the DCR due to the following reasons :-

(a) Corrections A, C, E, K, M and V : concerned choice of words and interpretations of words and phrases, not related to accuracy of personal data;

e.g. Correction A

"There were more than 65 consultations in these 3 years."

Change "*more than 65*" to "*61*".

Correction K

Strike off "*I have been told by our clinic staff that on a number of occasions, you cancelled bookings because of your busy schedule.*"

(b) Corrections B and F : concerned medical opinions which were clearly beyond the scope of the Commissioner's authority;

e.g. Correction B

Add "*foot*" to the sentence "*You suffered from multiple orthopaedic problems involving your knees, neck, back and shoulders.*"

(c) Corrections D, J and L : concerned information which was not the Appellant's personal data and hence not subject to correction under PD(P)O;

e.g. Correction L

Strike off "*Our clinic nurses sometimes had to remind me that other patients were waiting. I would not regard this as improper because other patients might need urgent attention.*"

(d) Corrections N and R : concerned D's personal view or understanding, and hence not subject to correction under PD(P)O;

e.g. Correction N

'I cannot agree with you that "many of my (your) problems were not taken care of and deteriorated" due to the "limitation" on time.'

Change *"limitation on time"* to *"one condition only per consultation."*

(e) Corrections G, H and U : concerned records which were factually accurate and hence not subject to correction under PD(P)O;

e.g. Correction U

Strike off *"This is untrue. You are now receiving treatment from [Dr. X]. [Dr. X] was referred by me."*

(f) Correction I : was a matter of interpretation of the meaning of the Appellant's email by D, not related to accuracy of personal data; and

e.g. Correction I

"You have recently threatened to lodge a complaint with the Medical Council."

Change to *"You have recently informed me that you do not want to lodge a complaint with the Medical Council but would if I do not want to communicate with you."*

(g) Corrections O, P, Q, S, T and W : concerned D's thoughts and preferences and hence not subject to correction under PD(P)O.

e.g. Correction O

Strike off *"This is not true. I did my best to communicate with you on each and every medical consultation."*

Correction T

Strike off *"As having explained above, I would in appropriate cases, see it as my duty to give an honest opinion to my patient that he or she should consider seeking medical opinions from other doctors."*

The Board's decision

- The Board applied the principles established in two previous AAB decisions :-

(a) AAB No.22/2000 :

The legislative intent of s.22 to s.24 of the Ordinance would not cover circumstances such as an employee's request to change the reasons for termination of employment stated by the former employer in its letter of termination. Whether a data user might refuse to comply with a data correction request by relying on S.24(3) would depend upon whether there were reasonable ground for the data user to be not satisfied that the personal data to which the request related was inaccurate.

(b) AAB No.74/2011 :

It concerned two meeting reports containing words exchanged by each side to which correction request was made. The Board considered that these were matter of facts which only the interviewer and interviewee knew where the truth lies. If the interviewer was satisfied that these reports were accurate, it was not for the Commissioner or the Board to make him say otherwise.

- The Board considered each correction (A to W) in the present appeal and agreed with the Commissioner's analysis.

- The Appellant argued that the Letter as a whole would give the readers an impression that she was a "bad patient". As a result, no doctor was willing to take up her case. The Board considered that this was not a ground for compelling the Person Bound to change his comments and opinion as stated in the Letter.

The Board further observed that there was no evidence showing :-

(a) As a result of the Letter, the Appellant had difficulties in finding a doctor to look after her;

(b) D had passed the Letter to any person other than the Appellant; and

(c) Any doctor had refused to accept the Appellant as his or her patient after reading the Letter.

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