

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 23/2020

BETWEEN

楊國榮

Appellant

and

THE PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr. Erik Ignatius Shum Sze-man (Deputy Chairman)
- Mr. Dick Kwok Ngok-chung (Member)
- Mr. Eugene Chan Yat-him (Member)

Date of Hearing: 4 February 2021

Date of Handing down Written Decision with Reasons: 16 March 2021

DECISION

Introduction

1. This is an appeal brought by the Appellant to the Administrative Appeals Board (the “**Board**”) against a Decision of the Respondent dated 16 June 2020 (the “**Decision**”) whereby the Respondent decided not to pursue further the complaint lodged by the Appellant against the Person Bound (“**the Complaint**”) pursuant to section 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486)

(“**the Ordinance**”) and paragraph 8(h) of the Respondent’s Complaint Handling Policy.

2. The Appellant acted in person throughout the proceeding of this appeal and at the appeal hearing. He presented his oral submissions and submitted supplemental written representations at the appeal hearing before this Board which were accepted by the Board despite the lateness of the submission of written documents. The Respondent was represented by Ms. Annabel Ng, Assistant Legal Counsel for the Respondent, who submitted written submissions dated 27 January 2021 and made oral submissions at the appeal hearing. The Person Bound was represented by Mr. Eddie Ng of Counsel, instructed by Messrs. Kennedys Lawyers (“**Messrs. Kennedys**”). Mr. Ng submitted written representations dated 14 December 2020 and made oral submissions at the appeal hearing.

3. At the conclusion of the appeal hearing the Board indicated that the formal written decision of the Board will be in English with Chinese translation, and would be distributed to the parties which the Board hereby do. In the event that there are any inconsistencies between the two versions, the English version shall prevail.

History of the Complaint

4. The Person Bound, A, is a medical practitioner and practised at a medical centre at the material time of the events described below. On 13 December 2017, the Appellant went to the medical centre for medical consultation but on that occasion, he did not meet the Person Bound.

5. On 19 March 2018, the Appellant consulted the Person Bound who provided medical treatment to him for a severe cold. The Appellant subsequently lodged a complaint to the Medical Council of Hong Kong (the “**Medical Council**”) against the Person Bound in relation to the medicine the Person Bound prescribed to him. That complaint was dismissed by the Medical Council in April 2019 on the ground that there was insufficient evidence of any misconduct. It was represented at the appeal hearing that the complaint to the Medical Council has been reopened and reconsidered by the Medical Council. By reason of the reasoning of the present Decision whether the Medical Council did reopen the complaint lodged to them is not relevant to this Appeal.

6. The subject matter of this Appeal arose from events starting on 29 January 2019, on which day the Appellant received an SMS notification (the “**SMS**”), which states that the Person Bound had accessed and reviewed the Appellant’s Electronic Health Record on the Electronic Health Record Sharing System (the “**eHRSS**”).

7. As a result, the Appellant lodged a second complaint to the Medical Council against the Person Bound for an alleged violation of privacy (the “**Privacy Complaint**”). With the consent of the Appellant, the Medical Council referred the Complaint to the Respondent on 20 April 2020.

8. The Respondent followed up on the Privacy Complaint by inviting representations from the Person Bound and the Appellant. The Person Bound through solicitors, Messrs. Kennedys made representations to the Respondent by a letter dated 28 May 2020 (“**the May Letter**”).

9. The Appellant contended that he did not give the requisite sharing consent to the Person Bound for accessing his Electronic Health Record on the eHRSS on any occasion of consultation.

10. Messrs. Kennedys, in their May Letter attached a copy of the Appellant's sharing consent to the medical centre dated 13 December 2017. The term of the sharing consent is "indefinite" (i.e. no expiry date) (the "**Indefinite Sharing Consent**").

11. It is common ground between the Appellant and the Person Bound that:

- (1) The Appellant was not receiving medical treatment from the Person Bound on 29 January 2019;
- (2) The Electronic Health Record contains personal data of the Appellant; and
- (3) Without the Appellant's consent, the Person Bound used the Appellant's personal data for a purpose other than the purpose for which the data was collected at the time of its collection.

12. In the May Letter, the Person Bound represented:

- (1) The information the Person Bound reviewed on 29 January 2019 mainly relates to the Appellant's medical background;
- (2) It was in the Person Bound's genuine belief that he had the Indefinite Sharing Consent given by the Appellant. Therefore, the Person Bound accessed the Appellant's shared electronic health records to refresh his memory of the Appellant's medical background.
- (3) The Person Bound confirmed that he would abide by the principle of "need-to-know" when he accesses any patient's Electronic Health Record on the eHRSS in future.

- (4) The Person Bound confirmed that prior to 29 January 2019, he had never accessed any patients' eHRSS other than for provision of medical management and had always complied with the "need-to-know" principle.
- (5) The Person Bound confirmed that he had not, since 29 January 2019, accessed the Appellant's eHRSS at all and had not accessed any patients' eHRSS outside the scope permitted.

13. After conducting preliminary enquiries and considering the Appellant's and the Person Bound's respective representations, the Respondent concluded that there was a breach of Data Protection Principle 3 of Schedule 1 of the Ordinance ("**Principle 3**") by the Person Bound. However, the Respondent considered that further investigation on the Compliant would be unnecessary in light of the remedial steps undertaken by the Person Bound. Accordingly, apart from issuing a written warning to the Person Bound and referring the case to the Electronic Health Record Office (the "**eHR Office**"), the Respondent made the decision not to continue further investigation into the Appellant's Complaint.

14. On 5 July 2020, the Appellant appealed to this Board against the Decision.

Ground of Appeal

15. The Appellant lodged the present appeal on one single primary ground, that is, despite making a finding that the Person Bound violated Principle 3, the Respondent did not impose any penalty on the Person Bound so as to act as deterrence. Hence, the Decision of the Respondent was wrong.

Issues for the Appeal Board

16. The powers of the Board are derived from the Administrative Appeal Board Ordinance (Cap. 442) (the “AABO”). Under section 3 and the Schedule of the AABO, the AABO applies to a decision of the Privacy Commissioner for Personal Data to terminate under section 39(3A) an investigation initiated by a complaint (item 29(ca) in the Schedule). The Board thus has jurisdiction over the present Decision and decide on the appeal.

17. As the Court of Appeal affirmed in *Li Wai Hung Cesario v Administrative Appeals Board & Anor* (unrep., CACV 250/2015, 15 June 2016), in an appeal on merits to this Board, the appellant has to say why the decision below is wrong. The tribunal will address the appellant’s grounds of appeal, but it does not follow that the tribunal is required to perform the task of a first instance decision maker afresh and set out its own findings and reasons for the decision.

18. In the premises, the issue for this Board to decide is whether the Respondent’s exercise of its discretion in the Decision was lawful and reasonable in the circumstances.

Order of the Board refusing conducting the hearing in camera and ordering limited anonymity

19. On 14 December 2020, Messrs. Kennedys wrote on behalf of the Person Bound to this Board to apply for two orders, namely, an order for the hearing to be conducted in camera (the “**In Camera Order**”) and an anonymity order (the “**Anonymity Order**”). This Board invited the written submissions in respect of the applications of the Person Bound.

20. On 19 January 2021, after considering all written submissions from the parties, this Board decided and directed that the In Camera Order was refused, whereas the Anonymity Order was granted but limited to the decision(s) issued by this Board and documents submitted by all parties since the date of the directions. This Board also indicated that we will give reasons for such directions in our decision, which we now do.

In Camera Order

21. The Person Bound contended that the In Camera Order would not lead to any injustice or affect the quality of the hearing, based on the following grounds:

- (1) the Person Bound did not disclose the Appellant's personal data to any third party;
- (2) the Person Bound has already adopted remedial measures after the violation was committed; and
- (3) this Board has already received all evidence from the parties.

22. The Appellant and the Respondent both objected to the application of the In Camera Order. The Respondent referred this Board to a number of authorities and submitted that (1) the general principle is that proceedings in court, particularly those relating to decisions made in the public field, should be held in public unless in doing so justice would be denied; and (2) it is the party that applies for the In Camera Order, i.e. the Person Bound's responsibility to prove why a departure from the general rule is warranted. The Respondent held the view that the Person Bound had not discharged its burden in raising enough reasons/evidence to support such a departure.

23. Furthermore, the Respondent submitted that it is in the public interests that the hearing be conducted open to public. The Respondent is a statutory body established to implement the Ordinance. The public has the right to know whether the Respondent lawfully and reasonably exercised its powers.

24. The Person Bound agreed with the legal principles set out in the Respondent's written submissions and made no further submissions in reply in relation to the application for the In Camera Order.

25. This Board agrees with the Respondent both in terms of legal principles and their application to the present appeal. The Person Bound had not provided cogent reasons/evidence to demonstrate why a complete denial of public access to the hearing, instead of a mere restriction on publicising certain personal data of the individual(s), is justified and required so that the normal rule of open hearing in the public interest of openness and transparent justice is displaced.

26. In light of the public nature of the Decision being appealed against, this Board is of the view that an In Camera Order would be disproportionately restrictive to the public's right to know. Accordingly, the Board refused to grant the In Camera Order.

Anonymity Order

27. In support of the application for the Anonymity Order, the Person Bound contended that if his identity were to be publicised, he would unnecessarily suffer from damage to his reputation unnecessarily.

28. The Appellant objected to this application, whereas the Respondent adopted a neutral stance while referring this Board to the general principles concerning anonymity orders laid down in *In the Matter of BU* [2012] 4 HKLRD 417: it is a general rule that parties of a proceeding are to be named in judgments and the applicant for the Anonymity Order, i.e. the Person Bound, bears the burden to justify the making of such orders.

29. The Respondent also supplemented by making a submission that it does not consider the Anonymity Order will undermine the public's right to know in any way, nor does it affect the public being educated by this Board's decision.

30. In his written submissions in reply, the Person Bound submitted that the Anonymity Order is a far less intrusion to the principle of open justice than the In Camera Order. On balance, the Person Bound remains to be a medical practitioner as of the date of the hearing, should his identity be publicised, his reputation will suffer unnecessary and irretrievable damage. The Person Bound also agreed with the Respondent that the Anonymity Order will not undermine the public's right to know regarding the Respondent's work.

31. This Board considers all the submissions of the parties and come to a decision that since the Anonymity Order does not by itself exclude members of the public or the press from attending a hearing, it does not bring any material difference to open justice and public's right to know the principles and reasoning involved in the present Decision. The public will still have full access to the key facts and principles and reasoning in support of this Board's decision, even if they do not know identity of the Person Bound.

32. In other words, the basic requirement of open justice is not disproportionately compromised by an Anonymity Order. This Board therefore granted the Anonymity Order, limited to the scope as mentioned hereinabove.

Reasons for this Board's decision

33. In summary, the Respondent made the Decision on the following grounds:

- (1) Further investigation on the Complaint is unnecessary considering the remedial actions taken by the Person Bound (paragraph 17 of the Decision; paragraphs 15 and 16 of the Respondent's written submissions) (the "**First Ground**"); and
- (2) Under the Ordinance, the Respondent does not have the power to order the Person Bound to provide any pecuniary compensation or publish any open apology to the Appellant (paragraph 19 of the Decision; paragraph 13 of the Respondent's written submissions) (the "**Second Ground**").

34. In arriving at the Decision, the Respondent relied on section 39(2)(d) of the Ordinance and policy 8(h) of the Respondent's Complaint Handling Policy (Paragraph 17 of the Decision).

35. Section 39(2)(d) of the Ordinance provides:

"39(2) The Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case-

...

(d) any investigation or further investigation is for any other reason unnecessary.”

36. Policy 8(h) of the Complaint Handling Policy of the Respondent provides:

“ ...

In addition, an investigation or further investigation may be considered unnecessary if:

...

h. given the conciliation by the PCPD, remedial action taken by the party complained against or other practical circumstances, the investigation or further investigation of the case cannot reasonably be expected to bring about a more satisfactory result;

... ”

37. With respect to the exercise of the Respondent’s discretion under section 39(2)(d) of the Ordinance, the Respondent may decide not to investigate a complaint “for any reason”; of course, the reason(s) have to be relevant and reasonable. The Board would not interfere with the Respondent’s decision so long as it is reasonable, legal and made in accordance with the relevant procedures (梁惠貞女士 與 個人資料私隱專員, Administrative Appeal No. 47/2004, Decision dated 6 December 2005, paragraphs 18-19).

38. Therefore, this Board’s function is not to substitute the Respondent’s statutory role and function to re-investigate into the Complaint. This Board is to consider whether there is sufficient evidence and reason(s) to disturb the Respondent’s exercise of discretionary power under the Ordinance, and whether

the reasons relied on in the Decision by the Respondent are wrong or unreasonable.

The First Ground of the Decision

39. In *Ho Mei Ying v The Privacy Commissioner for Personal Data* (Administrative Appeal No. 52/2004, Decision dated 18 April 2006, paragraphs 17-18), the Board held that the Respondent's discretion under section 39(1) of the Ordinance is wide, and it was reasonably open to the Respondent to come to the view that further investigation of the relevant complaint was unnecessary in view of the voluntary remedial action taken by the person complained against.

40. A breach of the Data Protection Principles under the Ordinance does not *per se* give rise to any liability, whether civil or criminal. Therefore, even when the Respondent found that the Person Bound's conduct violated Principle 3, what the Respondent could have done in the circumstances was at most to issue an enforcement notice under section 50 of the Ordinance, requiring the Person Bound to remedy the said flaws. Criminal liability on the part of the Person Bound may arise under section 50A of the Ordinance only if the Person Bound fails to comply with the enforcement notice.

41. The Person Bound confirmed to the Respondent that he would abide by the principle of "need-to-know" when he accesses any patient's Electronic Health Record on the eHRSS in future to ensure strict compliance with Data Protection Principles under the Ordinance.

42. In the premises, had the Respondent continued to investigate into the Complaint, no better result would have been yielded than what the Person Bound

had already voluntarily undertaken in writing in terms of remedial measures, which in any event would have been what an enforcement notice would have been intended and achieved.

43. In any event, the Respondent took a concrete follow-up action, namely, issuing a written warning to the Person Bound and referring the case to the eHR Office (paragraphs 15-16 of the Decision). It is within the power of the Respondent to decide whether an enforcement notice under section 50 of the Ordinance would be necessary given the nature, extent and seriousness of the violation.

44. In the written representation submitted by the Person Bound to the Board dated 14 December 2020, he also indicated that he had started to implement some additional measures. Notwithstanding that the Person Bound only took these measures after being informed of the Respondent's Decision, it shows that the Respondent's Decision has sufficient deterrent and remedial effect. The additional measures included:

- (1) The Person Bound has recorded and will continue to record the time and purpose of access each time when he accesses the eHRSS;
- (2) The Person Bound is the only medical professional who can access and review the eHRSS. He has familiarised himself with the Code of Practice for Using Electronic Health Record for Healthcare, the relevant sections in the Ordinance and the Electronic Health Record Sharing System Ordinance (Cap. 625);
- (3) The Person Bound has strengthened the security system for the computers in his consultation room, including setting up a firewall and updating the password for accessing the eHRSS regularly; and

- (4) The Person Bound has instructed all assistants at the medical centre to complete an online self-learning privacy workshop designed for medical personnel. The Person Bound has also explained to all assistants the key points in the Guidelines and the Code of Practice relating to the Ordinance.

45. In the present case, the breach was once off, the only person who obtained the personal data of the Appellant was the Person Bound and that there is no evidence to contradict the Person Bound's explanation in the May Letter. The breach committed by the Person Bound cannot be said to be serious, extensive or occasioning any actual and substantial damage to the Appellant. The Appellant at the appeal hearing submitted that the incident of the breach was not a serious matter when the Appellant's main concern is the conduct of the Person Bound in the way he treated the Appellant and the medicines prescribed to him.

46. This Board is therefore of the view that it is reasonable and within the Respondent's discretion to decide that after finding a breach, issuing a written warning to the Person Bound and referring the matter to eHR Office, further investigation is unnecessary under the framework and legislative intent of the relevant sections of the Ordinance.

The Second Ground

47. The gist of the Appellant's Second Ground was that the Respondent did not order the Person Bound to provide pecuniary compensation, or publish apology in public to the Appellant, as requested by the Appellant, despite the finding that the Person Bound had breached Principle 3.

48. The powers of the Respondent are defined and conferred by the Ordinance, in particular section 8 of the Ordinance, which reads, *inter alia*,

“8. Functions and Powers of the Commissioner

(1) The Commissioner shall-

...

(h) perform such other functions as are imposed on him under this Ordinance or any other enactment.”

49. The investigative powers of the Respondent are set out in part 7 of the Ordinance. There are no powers conferred therein for the Respondent to provide civil remedies, including an order for the Person Bound to provide pecuniary compensation or publish apology in public to the Appellant. This Board confirmed this position with Ms. Ng, who acted on behalf of the Respondent, at the appeal hearing.

50. At the appeal hearing, this Board also referred the Appellant to the Ordinance and explained to him that the Respondent simply has no power under the Ordinance to grant the remedies the Appellant requested. It is noted that the Appellant did not make any submissions on this preliminary observation by this Board made at the appeal hearing since according to the Appellant he had not read the Ordinance and he was not interested to do so.

51. By virtue of section 66(1) of the Ordinance, an individual who suffers damage by reason of a contravention of a requirement under the Ordinance by a data user and, which relates, whether in whole or in part, to personal data of which that individual is the data subject, shall be entitled to compensation from that data user for that damage. Nonetheless, section 66(5) of the Ordinance requires the

proceedings to be brought by an individual under section 66(1) at the District Court.

52. In addition, section 66B(1) of the Ordinance enables a person who may institute proceedings to seek compensation under section 66 of the Ordinance to make an application to the Privacy Commissioner for Personal Data for assistance in respect of those proceedings.

53. Notwithstanding the procedure set out in section 66 of the Ordinance, instead of initiating an action at the District Court, the Appellant requested the Respondent to order compensation to be made by the Person Bound to the Appellant, which the Respondent obviously does not have power to do.

54. This Board also notes that, the Person Bound had already apologised in writing to the Appellant for the violation of his privacy through his Solicitors in the May Letter, the contents of which had been duly explained to the Appellant by the Respondent on phone. As a general observation, this Board sees no reason for the Appellant to insist that the Person Bound is not regretful for the breach of privacy principle.

55. By reason of the above, the relief the Appellant requested from the Respondent is clearly outside the scope of power of the Respondent under the Ordinance. It is, therefore, lawful and reasonable for the Respondent to refuse to make the order requested by the Appellant.

56. This Board therefore accepts and agrees with the Respondent's Second Ground in support of the Decision.

Costs

57. The Respondent and the Person Bound indicated at the end of the hearing that in the event that the appeal is dismissed, they would not seek costs against the Appellant. In the circumstances, for the above reasons the Board makes an order dismissing the appeal with no order as to costs.

(signed)

Erik Ignatius Shum Sze-man

(Deputy Chairman)

Administrative Appeals Board