

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 26 OF 2007

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BETWEEN

HOSPITAL AUTHORITY

Appellant

and

PRIVACY COMMISSIONER  
FOR PERSONAL DATA

Respondent  
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Coram: Administrative Appeals Board

Date of Hearing: 28 April 2008

Date of handing down Written Decision with Reasons: 20 April 2010

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DECISION  
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A. Introduction

1. This is an appeal by the Hospital Authority ("HA") against an Enforcement Notice dated 29 June 2007 ("Notice") issued by the Commissioner for Personal Data ("Commissioner") against the HA pursuant to section 50 of the Personal Data (Privacy) Ordinance, Cap 486 ("Ordinance").

2. As shall be apparent from later parts of this Decision, the main issue arising on this appeal is whether the Commissioner misconstrued

Data Protection Principle 4 (“DPP 4”) under Schedule 1 to the Ordinance when he issued the Notice. That issue turns on two short points of statutory interpretation: whether DPP 4 covers “loss” of personal data, and whether “harm” under DPP 4 (a) includes harm to the data subject’s health.

## B. Background

3. The background facts are not in dispute and are summarised below.
4. Tuen Mun Hospital (“TMH”) is and was at all material times a public hospital under the control and management of the HA.
5. The complainant Mdm Choi Tze Ping was a patient of TMH. She was admitted to TMH on or around 26 November 2000 for treatment. Some 15 x-rays were taken of her with her consent between 27 and 30 November 2000.
6. On 8 April 2005, Mdm Choi through her solicitors made a request to TMH for all her x-ray films taken between 26 November and 4 December 2000. However, when TMH processed her request, it was discovered that 6 of her x-ray films (2 taken on 28 November 2000 and 4 taken on 30 November 2000) could not be located.
7. On 16 June 2005, Mdm Choi lodged a complaint to the Commissioner against TMH/HA for failure to locate her 6 x-rays.
8. On 5 July 2005, the Commissioner referred the complaint to TMH for clarification and response.
9. TMH/HA’s response can be summarised as follows:
  - 9.1 There were approximately 45,000 transactions of lending and returning X-ray films (each a “transaction”) in TMH per month involving altogether approximately 500,000 individual x-ray films.
  - 9.2 All x-ray films were placed in different envelopes according to their types and time of examination. Each envelop is marked “Confidential – the enclosed medical imaging records are to be read/handled by related health care professionals only.” Each envelope was also numbered and the type(s), date and number of films were marked on the envelope.

- 9.3 Individual films, however, were not numbered or marked against the type of film or on the envelope.
- 9.4 All envelopes belonging to the same patient were given the same serial number.
- 9.5 All x-ray films were stored in the hospital's x-ray films storage room, which would be locked outside office hours.
- 9.6 All x-ray films were filed by designated staff of the hospital. The films could be loaned to relevant medical officers on a "need to know" and "patient under care" basis.
- 9.7 Lending and returning of x-ray films were recorded in the hospital's computer system. The computer system recorded the file number, the borrowed envelope, the return date and time, and the borrower's details.
- 9.8 On the return of the borrowed envelope, the staff charged with handling the lending and borrowing of the x-rays would verify the information marked on the envelope but will not check the contents.
- 9.9 The reason why the staff would not check the contents of the envelope upon its return is that it was not reasonably practical to do so given the large number of transactions involved and the manpower available.
- 9.10 As stated above, TMH found that the 6 x-ray films of Mdm Choi taken in November 2000 were missing when processing Mdm Choi's request in April 2005. According to TMH's records, the missing x-ray films were put in Mdm Choi's "No 1 envelope". That envelope was loaned out on a few occasions, the last being 24 May 2001 to a staff of the orthopaedics department. A staff of that department returned the envelope on 16 June 2001. In accordance with the procedures described above, the staff handling the loan transaction did not check the contents of the envelope when it was returned.
- 9.11 Despite diligent checking, TMH was not able to locate the missing x-ray films, or find out how or when they were lost or misplaced.

10. TMH also informed the Commissioner that since June 2001, the hospital had begun digitalising x-ray images taken since June 2001 for record keeping purposes. The risk of x-ray images being lost would be significantly reduced once all x-ray films have been digitalised, as relevant users can view the images on computer monitors and where necessary, images could be downloaded onto CDs or DVDs. However, the scheme only applied to x-rays taken after June 2001, and due to the scale of the project it is not known when it will be completed. At the moment, there is no plan to digitalise x-ray films taken before June 2001.

### C. Commissioner's Findings

11. The Commissioner in his Investigation Report dated 29 June 2007 ("Report") found that:

- 11.1 X-ray films are personal data of the patient. They record the physical conditions of the patient at a particular time and are not replaceable if accidentally disclosed or lost. Due to the potential harm to the patient's diagnosis and treatment resulting from the loss of such data, the Commissioner was of the view that TMH should take more rigorous measures over the security and supervision in handling and storage of x-ray films: Report para 14.
- 11.2 In the circumstances of this case, TMH should in accordance with Data Protection Principle 4 adopt reasonably practicable steps to ensure the x-rays held by the hospital are securely stored and transmitted within the hospital to guard against such films from being lost or misplaced, so as to ensure that such data would be protected against unauthorized or accidental access, processing, erasure or other use: Report para 15.
- 11.3 TMH should take reasonably practicable steps to ensure that all loaned out x-rays are being returned. What was required was that the staff handling the returned envelopes should check that the correct x-rays, in terms of content and number, are inside the returned envelopes: Report paras 16-20.
- 11.4 The explanation given by TMH, ie, lack of manpower, was not accepted. First, x-ray films are important personal data of the patients. The hospital had the duty to ensure security of such data and lack of manpower could not reduce or exempt the hospital from such duty. Secondly, the current

procedure could only ensure the return of the correct envelope, and cannot ensure the return of the envelope's content. Thirdly, the patient's name and reference number is on each x-ray film. It was only a matter of requiring the staff handling the return to take the x-ray film out to verify the data. Such extra procedure would not involve large amount of manpower: Report para 21.

11.5 TMH should also prescribe a period within which the x-ray films ought to be returned, and a mechanism for requesting extensions of loans and reminders for return: Report para 22.

11.6 For these reasons, TMH was in breach of DPP 4: Report paras 23-24.

#### D. Issuing of Notice and Appeal

12. Accordingly, the Commissioner issued the Notice requiring TMH:

“1. To review the TMH's current procedures on storage and retrieval of x-ray films that have not been digitalised, and draw up a set of policies, execution method and/or procedures to ensure the x-ray films are not misplaced or lost, and [the HA] should pay particular attention to the following:-

[(1) and (2) are not relevant for present purposes]

(3) on the return of the borrowed x-ray films require the relevant staff to check that the returned x-ray films are those belonging to the relevant patient and that no borrowed item is missing.” (in translation)

13. From that Notice the TMH/HA appeal to this Board.

#### E. Steps taken by TMH/HA after issue of the Notice

14. It is appropriate to record that since receiving the Notice, TMH/HA have taken conscientious steps to improve upon the security procedures over x-ray films loan transactions. Given the obvious deficiency in the system as revealed by this case, and TMH/HA's duty of care to their patients, it is understandable that such steps are being taken to improve the system.

15. What, for the purpose of this appeal, is significant is that TMH/HA proposed (without prejudice to this appeal) to implement procedures whereby the staff handling the return of x-ray films would check the contents of the envelope to verify that the x-ray films belong to the correct patient and also the correct number of x-ray films. It is unnecessary to rehearse here the procedures proposed by TMH/HA which are contained in two letters from their solicitors dated 19 December 2007 and 14 January 2008 (see: Appendices B7(i) and B8(i) to the Amended Notice of Appeal). These steps would require TMH/HA to employ extra manpower and space but this TMH/HA have agreed to do.

16. There is thus no longer any issue over any of the matters specifically raised in the Notice.

17. TMH/HA hoped that with the introduction of these procedures, it would not be necessary to pursue this appeal. However, the Commissioner did not find the procedures acceptable.

18. In particular, the Commissioner's position is that the proposed procedures are still inadequate in that the whole lending cycle involves only 1 counting and identity verification, ie, when the x-ray films are returned. The Commissioner opined that even under the proposed procedures, if a film is lost, it would still be unclear as to whether the loss occurred before or after it is sent to the borrower. Since the goal of the directions under the Notice is to ensure no loss of films, the Commissioner "advised" TMH/HA to incorporate pre-lending procedures before lending out the films in the draft procedures: see Commissioner's letters dated 18 January and 30 January 2008 (Appendices B8(ii) and (iv) to the Amended Notice of Appeal).

19. It is of course the case that the Notice only referred to checking of the films inside an envelope upon return of the envelope. Pre-lending procedure is not mentioned at all in the Notice.

20. Since there is no longer any dispute over the steps proposed to be taken by TMH/HA in relation to the points raised in the Notice, the Board could not determine whether the Commissioner's requirement over pre-lending procedures, which only arise in the course of TMH/HA's attempt to comply with the Notice, is reasonably practicable and has to be complied with.

21. Further, the Board has no jurisdiction under section 21 of the Administrative Appeals Board Ordinance, Cap 442, to declare or determine whether an Enforcement Notice has been complied with.

22. In the circumstances, the only matter that the Board can properly determine, if at all, is the question whether the Commissioner was right to issue the Notice in the first place. To this central issue the Board now turns.

F. Whether DPP 4 covers “loss” of data

23. DPP 4, in so far as relevant, is in the following terms:

“4. Principle 4 – security of personal data

All practicable steps shall be taken to ensure that personal data ... 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 ... 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 measure taken for ensuring the secure transmission of the data.”

24. On this issue, the argument of Mr Johnny Mok SC on behalf of TMH/HA is simple. DPP 4 covers unauthorised or accidental “*access, processing, erasure or other use*” of personal data. “Loss” is not covered hence DPP 4 does not apply.

25. In response, Mr Chris Cheng, Legal Counsel for the Commissioner, argues that loss of data is covered by DPP 4 and refers to the OECD Security Safeguards Principle (see Chapter 12 of the Law Reform Commission’s “Report on Reform of the Law Relating to the Protection of Personal Data”, Topic 27) which states that:

“Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification or disclosure of data.”

26. Mr Mok retorts that the omission of the word “loss” in DPP 4 as enacted actually supports his contention that “loss” is not covered.

27. We are unable to agree with Mr Mok. In our view, the purpose of DPP 4 is to protect against unauthorized or accidental use or erasure of personal data. Plainly, if personal data is lost, this will give rise to risk of unauthorized or accidental use of personal data. Moreover, unauthorized or accidental erasure of data would result in the loss of such data.

28. In our view, adopting a purposive construction of the Ordinance, although the word “loss” is not used, it is reasonably clear that DPP 4 covers loss of personal data arising from security breaches.

G. Whether “harm” under DPP 4(a) includes harm to data subject’s health

29. The second point taken by Mr Mok on behalf of TMH/HA is that the Commissioner in issuing the Notice committed an error of law in that he took into account an irrelevant consideration, namely, the harm to the data subject’s health as opposed to harm to her privacy.

30. Mr Cheng, on behalf of the Commissioner, submitted that “harm” in DPP 4 (a) is not so restricted.

31. Since “harm” is not defined in the Ordinance, it is necessary to consider the legislative intention behind DPP 4 to ascertain whether “harm” in DPP 4(a) extends to harm to the data subject other than harm to his privacy.

32. The object of the Ordinance is to protect the privacy of individuals in relation to personal data: see Long title to the Ordinance. But all sorts of harm may be caused to a data subject from a breach of his privacy. For example, an unauthorised or accidental disclosure of a data subject’s personal particulars such as his name and ID card number could give rise to financial loss if such data is misused by a thief. If Mr Mok were right, the harm “to his pocket” is not harm “to his privacy” and is outside the scope of DPP 4. This cannot be right.

33. In our view, the reading of DPP 4(a) advanced by Mr Mok is too narrow. It seems to us that unauthorised or accidental access, processing, erasure or other use of personal data would itself be harm to the data subject’s privacy, so “harm that could result” from these things occurring must be intended to refer to harm consequent upon the breach of privacy.

34. We note in passing that Mr Mok relies on an earlier decision of this Board chaired by Mr Justice Cheung (as he then was) in *Apple Daily Limited v Privacy Commissioner for Personal Data*, Appeal No 5 of 1999 (30 November 1999). The issue in that case was whether a newspaper report containing the street address of a person fell within DPP 4. The Board held that it did not since there was no “unauthorised or accidental access, processing or erasure” of personal data. We do not think that case has any relevance to the case before us.

#### H. Disposal

35. Accordingly, this appeal must be dismissed.



(Mr Jat Sew-tong, SC)  
Deputy Chairman  
Administrative Appeals Board