

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 27 of 2006

BETWEEN

MADAM WU KIT PING

Appellant

and

THE PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA

Coram : Administrative Appeals Board

Date of Hearing : 6 November 2006 and 18 January 2007

Date of handing down Decision with Reasons : 6 March 2007

DECISION

1. This Appeal was brought by Wu Kit Ping (“**Madam Wu**”) against the Privacy Commissioner for Personal Data (“**the Commissioner**”) who refused to carry out or continue an investigation of a complaint initiated by Madam Wu against the Department of Health (“**the Department**”).

2. Madam Wu was a patient at the Yan Oi General Out-patient Clinic. In December 2003, Madam lodged a complaint with the Department alleging, primarily, incorrect diagnosis of her condition by the doctors who treated her.

3. By a letter to the Department dated 29 September 2005, Madam Wu inquired whether during the Department's investigation into her complaint, the medical officers concerned had given written statements or explanation concerning her treatment, and if so, she asked to be provided with copies of such documents. After a series of correspondence, on 29 November 2005, the Department informed Madam Wu that her request was declined.

4. On 10 December 2005, Madam Wu issued what is known as a Data Access Request ("**the DAR**") to the Department under Section 18 of the Personal Data (Privacy) Ordinance ("**the Ordinance**"), requesting to be informed whether a number of doctors identified in name by her in the DAR, or any other doctor, had given any written "explanation/report/statement" on the consultations concerning her, and if so, to be provided with copies of such documents. The DAR was received by the Department on 12 December 2005.

5. Under Section 19 of the Ordinance, the Department had 40 days to respond to the DAR. In the present case, the Department responded on 20 January 2006 by informing Madam Wu that copy of the statements by 4 doctors could be made available to her on payment of photocopying charges. However, no copy of the statements accompanied the Department's reply, presumably because photocopying charges had yet to be collected. The charges were later paid by Madam Wu.

6. On 10 February 2006, Madam Wu lodged a complaint with the Commissioner against the Department. The substance of the complaint was that the Department had failed to comply with her DAR within 40 days after its receipt, and hence a contravention of Section 19 of the Ordinance.

7. On 10 February 2006, the Department sent to Madam Wu copies of 4 statements from the doctors, with parts of their content having been redacted and masked.

8. Madam Wu was dissatisfied with the redacted statements. In her letter to the Commissioner on 3 March 2006, Madam Wu included as part of her complaint an allegation that the Department had concealed information contained in the statements and had therefore failed to comply fully with the DAR.

9. After some preliminary inquiry, in exercise of his power under Section 39(2) of the Ordinance, the Commissioner decided not to carry out or continue an investigation of Madam Wu's complaint. The decision was conveyed to Madam Wu in the Commissioner's letter of 12 June 2006, which also set out the reasons for the decision.

10. Madam Wu filed a Notice of Appeal dated 26 June 2006 against the Commissioner's refusal to investigate her complaint.

11. The issue in this Appeal concerns only the question whether the provision of the redacted statements amounts to proper compliance with the

DAR. The question relating to the requirement of compliance within the 40-day period is not an issue herein.

The Statements

12. At the first day of the hearing of this Appeal, both parties agreed that this Appeal Board should read the unedited version of the statements. The parties further agreed that the Appeal Board should have regard to the nature of the redacted information, even though for obvious reasons the Appeal Board might be prevented from setting out in full their analysis regarding such information in this Decision.

13. The hearing of the Appeal was adjourned to enable the Department to provide the Appeal Board with the unedited version of the statements. This was done during the adjournment.

14. There are 4 statements in question:

- (1) A 2-page letter marked "*Confidential*" dated 13 January 2004. It was addressed to the Service Director (Quality & Risk Management) NTWC. The caption of the letter was "*Re: Public Feedback by Patient: Ms Wu Kit-ping HKID: xxxx*"¹ ("**Statement 1**"). The contents of this letter concerned the diagnosis, use of medications and medical records of Madam Wu. On the redacted copy, the names of the sender and the recipient of the letter as well as some of the pronouns were masked;

¹ (ID number omitted from this Decision)

- (2) A 1-page statement dated 31 December 2003 captioned "*Re: Statement on WU KIT PING's visit on 26.7.2000 and 7.9.1998*" ("**Statement 2**"). The names of both the addressee and the writer of the statement, the fax and telephone numbers of the sender, as well as some of the pronouns were masked;
- (3) A 1-page letter dated 6 January 2004 captioned "*Feedback on Complaint made by Ms Wu Kit Ping HKID xxxx*"² ("**Statement 3**"). The contents of this letter concerned the medication prescribed to Madam Wu. The names of the sender and recipient of the letter, as well as some of the pronouns and parts of the contents of the letter had been masked.
- (4) A 2-page undated document captioned "*Concerning the patient Wu Kit Ping*" ("**Statement 4**"). The contents concerned the diagnosis and medical treatment given to Madam Wu. The names of the sender and recipient of the document as well as some of the pronouns had been masked.

15. In this Appeal, there is no dispute that the Department was in possession of copies of the unedited version of the 4 statements when it was served with the DAR.

² (ID number omitted from this Decision)

Relevant Provisions of the Ordinance

16. The issue in this Appeal turns on the interpretation of several provisions of the Ordinance. It may be convenient to set out the relevant provisions here:

- “18. (1) An individual ... may make a request –
- (a) to be informed by a data user whether the data user holds *personal data* of which the individual is the data subject;
 - (b) if the data user holds *such data*, to be supplied by the data user with *a copy of such data*.
19. (1) *Subject to* subsection (2) and *sections 20* and *28(5)*, a data user shall comply with a data access request not later than 40 days after receiving the request.
20. (1) A data user *shall refuse* to comply with a data access request –
- (b) subject to subsection (2), if the data user *cannot comply* with the request without disclosing *personal data of which any other individual is the data subject* unless the data user is satisfied

that the other individual has consented to the disclosure of the data to the requestor;

- (2) Subsection (1)(b) shall not operate –
- (a) so that the reference in that subsection to personal data of which any other individual is the data subject includes a reference to information identifying that individual as the source of the personal data to which the data access request concerned relates *unless that information names or otherwise explicitly identifies that individual;*
- (b) so as to excuse a data user from complying with the data access request concerned to the extent that the request may be complied with *without disclosing the identity of the other individual, whether by the omission of names, or other identifying particulars, or otherwise.”*

(emphases added)

17. Section 2 provides the following definitions:

“personal data” means *any data* –

- (a) *relating* directly or indirectly *to* a living individual;
 - (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
 - (c) in a form in which access to or processing of the data is practicable;
- (emphases added)

“data” means any representation of information (including an expression of opinion) in any document, and includes a personal identifier;

“document” includes, in addition to a document in writing –

- (a) a disc, tape or other device ... etc.”

18. There is no dispute in this case that Madam Wu is the data subject and the Department a data user.

19. The combined effect of Sections 18 and 19 gives a data subject a right to be supplied with a copy his “*personal data*” held by the data user. It is important to note the distinction between “data” and “document”. Section

18(1)(b) speaks of the supply of “*a copy of such data*”, *not* a copy of the document.

20. Consistently, in providing for the manner of compliance with a data access request, Section 19(3) and (4) makes reference to “*a copy of the personal data*” as distinct from a copy of the document to be supplied.

21. Hence, the scope of a data user’s duty to comply with a data access request under Section 19 extends only to supplying a copy of the *personal data* of the data subject, and not a copy of the document in which the data is contained.

Personal Data

22. In deciding whether, or to what extent, the 4 statements were “*personal data*”, Madam Wu urged this Appeal Board to adopt what she called the “totality approach”. The essential part of her argument is as follows:

“(a) Totality approach versus word-by-word approach

In order to decide whether the information is someone’s personal data, a functional test should be applied. If it is the minutes, one should ask what is the purpose of the meeting?

(HCAL 1050/2000)

As the nature of the documents is explanations written by the doctors on my medical consultations, those documents are my personal data. If a document itself is my personal data, any material part of it is also my personal data.”

23. Madam Wu further referred to the case of *Durant v. The Financial Services Authority* [2003] EWCA Civ 1746. *Durant* was a decision of the English Court of Appeal in relation to the Data Protection Act 1998. That case concerned requests made by the applicant for access to information held by the Financial Services Authority (FSA), a regulatory authority. The applicant sought various information obtained by the FSA in the course of its investigation of a complaint made by the applicant against Barclays Bank. One of the issues in that case concerned whether the information relating to the investigation of the complaint initiated by the applicant was the applicant’s “personal data” as defined in the 1998 Act. The definition of “personal data” under the 1998 Act is similar but not identical with our Ordinance.

24. The applicant in *Durant* contended for a wide interpretation of the term to include any information retrieved as a result of a computer search under his name and practically anything on file from which he could be identified or from which it was possible to discern a connection with him. In rejecting such an interpretation, Auld LJ made the following observations:

“26. The intention of the Directive [the 1995 European Commission Data Protection Directive], faithfully reproduced in the Act, is to enable an individual to obtain from a data controller’s filing system, whether computerized or manual, his personal data, that is, information about himself. It is not an entitlement to be provided with original or copy documents as such, but, as section 7(1)(c)(i) and 8(2) provide, with information constituting personal data in intelligible and permanent form. ...

27. In conformity with the 1981 Convention and the Directive, the purpose of section 7, in entitling an individual to have access to information in the form of his ‘personal data’ is to enable him to check whether the data controller’s processing of it unlawfully infringes his privacy and, if so, to take such steps as the Act provides, ... to protect it. It is not an automatic key to any information, readily accessible or not, of matters in which he may be named or involved. ...

28. It follows from what I have said that not all information retrieved from a computer search against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on whether it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest, for example, as in this case, an investigation into

some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity."

25. Madam Wu stressed the need to have regard to the focus of the document. She argued that in the present case the focus of the 4 statements was she herself and the medical consultations on her. As such, there was no other "data subject" in those statements, and accordingly "the totality" of those statements constituted her "personal data".

26. The Appeal Board is unable to accept the entirety of that argument.

27. In the present case, as is already noted, the duty imposed upon the Department on receipt of the DAR is (subject to Section 20) to supply a copy of the "personal data" held by them of Madam Wu. The question, first and foremost, is to determine what amounts to "personal data" of Madam Wu in the 4 statements. Here, having regard to the several limbs in the definition of "personal data", no issue arises in relation to the identifiability of Madam Wu as the data subject (paragraph (b) in the definition), nor the practicability of access to the redacted information (paragraph (c)). The only question concerns whether the redacted information should properly be considered as "*relating to*" Madam Wu, directly or indirectly (paragraph (a)).

28. While mindful of the difference in wording between the Data Protection Act and the Ordinance, the Appeal Board considers Auld LJ's observations in *Durant* useful guidance on the approach to interpreting the term "personal data". As is apparent from the judgment, Auld LJ's observations were made in the context of the issue whether the data in question (which clearly identified the data subject) could be said to "relate to" the data subject. The context in which the data appears is, therefore, clearly an important consideration.

29. It must, however, be appreciated that in the definition of "personal data", it is "*the data*" as distinct from the document or its content, that must "relate to" the data subject. One has to differentiate between the data (or information) which relates to the data subject and that which does not. In other words, it would be erroneous to say that just because a document (be it a statement, meeting minutes, or otherwise) has the data subject as its focus or that it deals with a subject matter that concerns the data subject, all other information mentioned in such connection should then be treated as "relating to" the data subject and hence his "personal data". This Appeal Board finds nothing in the judgment of *Durant* to support such an approach. In fact, the Appeal Board reads Auld LJ's remarks to be exclusionary in effect, that is, not all information consisting of a mere mention of the data subject qualifies as "personal data", and hence one needs further to have regard to the relevance and proximity of the information to the data subject himself. Those remarks do not support the converse proposition that Madam Wu sought to advance as a "totality approach" in her argument.

30. The Appeal Board has also considered the decision of 曹元緒 v. 行政上訴委員會, HCAL 1050/2000. Suffice it to say that nothing in that judgment supports the so-called “totality approach”.

31. On an examination of the 4 statements, the Appeal Board has come firmly to the view that none of the information that identifies or pertains to the makers and the recipients of those statements is “personal data” of Madam Wu. Information of the identity of the makers and recipients clearly do not “relate to” Madam Wu, whether directly or indirectly. Moreover, the redaction of such identity has not in any way affected the integrity of the information or data which does relate to her. Apart from Statement 3 (which will be dealt with separately below), Madam Wu is quite able to read and see in Statements 1, 2 and 4 all the information *about herself* – which is all that to which she is entitled – without the disclosure of the information concerning the makers and recipients of the respective statements. In this connection, the Appeal Board also considers the redacted pronouns in Statements 1, 2 and 4 not to be data or information relating to Madam Wu, and hence also not her “personal data”. The same conclusion applies also to the identity of the person whose name had been covered in the first line of the body of the letter in Statement 1.

32. As for Statement 3, insofar as the identifying information of the maker and recipient as well as some of the pronouns had been masked, the same reason applies and the Appeal Board does not consider such information to be “personal data” of Madam Wu. In addition, certain parts of the content of Statement 3 were also redacted. Having examined those parts in the unedited

version of Statement 3, the Appeal Board is clearly of the view that the information set out in the redacted parts cannot properly be regarded as “relating to” Madam Wu within the intention of the Ordinance. The Appeal Board would hold that such parts of the content of Statement 3 had been properly redacted.

33. For the foregoing reasons, none of the redacted information in the 4 statements amounts to “personal data” of Madam Wu. Accordingly, Madam Wu’s complaint of non-compliance with her DAR on the basis of the redaction of the 4 statements is misconceived.

Section 20 of the Ordinance

34. In the present case, as already discussed above, the redacted information forms no part of Madam Wu’s personal data and is therefore not subject to disclosure under the DAR. Accordingly, the present Appeal fails at the first hurdle, and it is strictly unnecessary to decide on the application of Section 20(1)(b), that is, whether it can be said that “*the data user cannot comply with the request without disclosing personal data of which any other individual is the data subject ...*” (emphasis added).

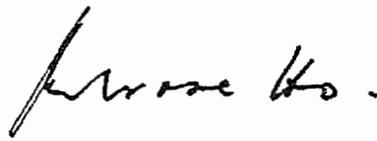
35. However, it is worth referring to the following observations of Auld LJ in *Durant* (although, again, mindful of the fact that they were made in the context of a differently worded statutory regime), which are informative on the subject:

“65. The first is to consider whether information about any other individual is *necessarily* part of the personal data that the data subject has requested. I stress the word ‘necessarily’ for the same reason that I stress the word ‘cannot’ in the opening words of section 7(4), ‘Where a data controller *cannot* comply with the request without disclosing information about another individual who can be identified from the information’. If such information about another is not necessarily part of personal data sought, no question of section 7(4) balancing arises at all. The data controller, whose primary obligation is to provide information, not documents, can, if he chooses to provide that information in the form of a copy document, simply redact such third party information because it is not a necessary part of the data subject’s personal data.” (emphasis as in the original)

36. The comment of Auld LJ regarding redaction of third party information is reflected in sub-section (2)(b) of Section 20. However, as the question does not arise for consideration, the Appeal Board does not wish to express further views on the subject.

Conclusion

37. For the foregoing reasons, as the redaction of the 4 statements does not constitute a breach by the Department of its duty to comply with the DAR, the Commissioner was entitled not to carry out or continue an investigation of the complaint initiated by Madam Wu on that basis. The Commissioner's decision is accordingly confirmed.

A handwritten signature in black ink, appearing to read "Ambrose HO", with a stylized flourish at the end.

(Ambrose HO, SC)

Deputy Chairman

Administrative Appeals Board