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ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 42 of 2006

BETWEEN

KWAN PUI FUN APPELLANT

and

THE PRIVACY COMMISSIONER RESPONDENT

FOR PERSONAL DATA

Coram: Administrative Appeals Board

Date of Hearing: 31 January 2007

Date of handing down Decision with Reasons: 6 March 2007

DECISION

Introduction

1. By a Complaint Form dated 7 April 2006 and received on 13 April 2006, the Appellant lodged a complaint with the Privacy Commissioner for Personal Data (“the Commissioner”) against the Yan Chai Hospital (“the Hospital”).

2. By a decision dated 29 June 2006, the Commissioner decided not to carry out an investigation into the Appellant's complaint.

3. By Notice of Appeal dated 16 August 2006, the Appellant appealed against the Commissioner's decision to this Board.

The Appellant's complaint

4. The Appellant's complaint is as follows. On 10 August 2002, the Appellant was admitted to the Accident and Emergency Department of the Hospital. The Appellant alleged that 4 doctors of the Hospital collected her medical records from another hospital or hospitals of the Hospital Authority without her consent. The Appellant claimed that based on these medical records, a doctor (or doctors) in the Hospital completed prescribed Forms 1, 2 and 3 ("the Forms") under section 35A(1) of the Mental Health Ordinance, Cap 136, for the making of an application to the District Court for her detention, stating in the Forms that the Appellant was suffering from mental illness.¹

5. An order was apparently made by the court pursuant to that application, pursuant to which the Appellant was detained in a mental institution until around end of 2004 or early 2005.

1. The prescribed forms are found in the Schedule to the Mental Health Regulations, Cap 136A. It can be seen that only Forms 1 and 2 are forms in support of an application to remove a patient to a mental hospital for detention and observation. Form 3 is the form of the order to be made by the District Judge. It is clear that the matters to be stated in Forms 1 and 2 are mainly medical opinion. See also section 31(1A) of the Mental Health Ordinance.

6. The Appellant strongly believes that the medical records obtained by the doctors of the Hospital contained incorrect information concerning her mental status. It is not necessary for present purposes to set out what she believed was said in those medical records. For present purposes, it suffices to record that the Appellant strenuously asserted that she had never suffered from any mental illness, yet the medical records obtained by the Hospital allegedly suggested that she had a history of mental disorder.

7. The Appellant accordingly complained to the Commissioner that the Hospital should not have collected her medical record without her consent. She also wanted the Hospital to disclose to her the medical records so obtained, in order that she could know who made up the alleged false medical records which led to her alleged wrongful detention, and so that she could take steps to have those records rectified.

The Commissioner's reasons for refusing to carry out an investigation

8. According to the written reasons enclosed with his letter to the Appellant dated 29 June 2006, the Commissioner refused to carry out an investigation on two main grounds.

9. First, section 39(1)(a) of the Personal Data (Privacy) Ordinance, Cap 486 ("PDPO"), gave the Commissioner a discretion not to carry out an investigation if the complainant has had actual knowledge of the act or practice complained of for more than 2 years immediately preceding the date when the Commissioner received the complaint, unless the Commissioner is satisfied that in all the circumstances of the case it is proper to

carry out an investigation. In this case the events complained of took place on 10 August 2002, which was some 3 years and 8 months before the Appellant made her complaint. There was nothing to suggest that the Appellant was unaware of the grounds of her complaint, nor was there any reason advanced explaining the delay.

10. Secondly, the Commissioner took the view that the statements made by the doctor (or doctors) of the Hospital in the Forms were matters of medical opinion, and that the Commissioner would not be in a position to comment on the accuracy or otherwise of an opinion made by a medical professional.

11. The Commissioner therefore considered that any investigation was unnecessary under sections 39(1)(a) and 39(2)(d).

The Appellant's grounds of appeal

12. The Appellant's Notice of Appeal set out two main grounds. First, she claimed that she was unable to identify the party complained against because she was compulsorily detained, and she was not able to lodge a complaint within the 2-year period.

13. Secondly, the Appellant claimed that the Commissioner was in error to accept the allegedly wrong statements in the Forms that she was suffering from mental illness without even carrying out any investigation.

Issue on appeal

14. It is apparent from the above recitation of the relevant circumstances that the issue for determination of this appeal is

whether the Commissioner has erred in refusing to carry out an investigation into the Appellant's complaint.

Application for disclosure of documents

15. At the hearing, the Appellant made an application for disclosure of the following documents:

- 15.1 the Forms;
- 15.2 the referral letter to the Kwai Ching Hospital (where the Appellant was detained);
- 15.3 medical records in relation to the Appellant compiled by the 4 doctors of the Hospital;
- 15.4 documents in the possession of the police relating to the Appellant's detention and admission to hospital;
- 15.5 consolidated medical records held by the Hospital Authority in relation to the Appellant's detention;
- 15.6 reports of the Social Welfare Department in relation to the Appellant's detention.

16. The Board rejected the application principally on the ground that the Appellant has not demonstrated why these documents, even if they existed, could be relevant to the appeal. Moreover, the Board was not satisfied that it should accede to the application at this late stage, without any good reason being advanced as to why the application had not been made earlier.

17. The Board therefore proceeded to consider the substantive issue raised in this appeal.

Commissioner's discretion under section 39(1)(a) of PDPO

18. Section 39(1)(a) of the PDPO provides as follows:

“Notwithstanding the generality of the powers conferred on the Commissioner by this Ordinance, the Commissioner may refuse to carry out or continue an investigation initiated by a complaint if-

(a) the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) has had actual knowledge of the act or practice specified in the complaint for more than 2 years immediately preceding the date on which the Commissioner received the complaint, unless the Commissioner is satisfied that in all the circumstances of the case it is proper to carry out or continue, as the case may be, the investigation;”

19. It is clear that the Commissioner has a discretion to decide whether to investigate into a “stale” complaint. It must be stressed that the discretion is vested with the Commissioner and this Board should be slow to interfere with the discharge of his statutory duty unless there are good grounds to show that his discretion has been exercised erroneously.

20. At the hearing, the Appellant confirmed that she was compulsorily detained since August 2002 and was not discharged until around end 2004/early 2005. The Respondent did not challenge her evidence. Accordingly, the Board is prepared to proceed on the basis that the Appellant was discharged in early

2005. That may explain why she did not lodge her complaint within 2 years of the occurrence of the events complained about, but does not provide any explanation as to why the Appellant did not lodge her complaint after her discharge until April 2006.

21. The only ground advanced by the Appellant at the hearing to explain the delay was that she was not “completely discharged” until much later than early 2005, because after her physical discharge from the institution she still had to return for follow-up out-patient visits, and she alleged that she had been threatened by the staff of the institution not to complain against anybody, who told her that she was still under close monitoring and they would be checking on her from time to time. However, the Appellant was not able to inform the Board when the follow-up treatments ended.

22. The Board is unable to accept the Appellant’s allegations of threats. The Board considers that such allegations are inherently incredible. Moreover, the Appellant was not able to give any cogent account of the occasions when such threats were allegedly made, who made such threats and what exactly was said.

23. The Board therefore rejects the reasons advanced by the Appellant as to why she was unable to lodge the complaint well before April 2006.

24. In the Board’s view, the Commissioner was entitled to take the view that there was no good explanation for the delay.

Section 39(2)(d) of PDPO

25. The Board also considers that it is not in a position to find any error in the Commissioner’s view that he would not be in a

position to determine whether the opinions concerning the mental condition of the Appellant contained in the Forms were accurate or not. That is clearly something beyond the scope of the Commissioner's duty.

26. In the circumstances, the Board considers that the Commissioner was entitled to decide not to carry out an investigation by reason of section 39(2)(d) of the PDPO, which provides as follows:

“The Commissioner may refuse to carry out or continue 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.”

27. It should also be noted that the collection of medical records of a patient by a medical practitioner for the purpose of the patient's treatment is not, without more, an unlawful or unfair means of data collection and does not offend against any Data Protection Principles under the PDPO. There was thus nothing inherently wrong in the doctors of the Hospital obtaining the Appellant's medical records.

Conclusion

28. For these reasons, the Board is of the view that the Commissioner's decision cannot be faulted. This appeal must be dismissed.

29. It should be clear from the above that in the determination of this appeal, the Board does not have to decide whether the Appellant's allegations as to the events of August 2002 are true or not. For the avoidance of any possible doubt, the Board makes it clear that nothing in this Decision should be treated as acceptance of the Appellant's allegations.

30. Finally, the Appellant requested that the Board's decision should not disclose her name or identity. However, the hearing took place in public in accordance with section 17(1) of the Administrative Appeals Board Ordinance ("AABO") and the Appellant did not make any application to have any part of the hearing held in private. Furthermore, the power under section 17(2) of the AABO does not appear to allow the Board to keep confidential the name of the Appellant. In any case, even if the Board does have such power, it cannot see any valid reason why it should accede to her request. Accordingly the application is denied.



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