

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 55/2014

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BETWEEN

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Appellant

and

PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA  
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Coram: Administrative Appeals Board

- Mr. Alan Ng Man-sang (Deputy Chairman)
- Mr. Philip Chan Kai-shing (Member)
- Mr. Nelson Cheng Wai-hung (Member)

Date of Hearing: 12 March 2015

Date of Handing down Written Decision with Reasons: 30 June 2016

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DECISION  
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1. The Appellant in this appeal was a patient of Dr. Choi Sum-hung<sup>1</sup> (“**Dr. Choi**”). Dr. Choi is an orthopaedic specialist and was consulted by the Appellant for her knee pain and other problems between December 2008 and December 2011. According to Dr. Choi, the Appellant last consulted him on 12<sup>th</sup> December 2011. On 2<sup>nd</sup> June 2012, Dr. Choi, through his solicitors Messrs. Mayer Brown JSM (“**JSM**”) issued a letter to the Appellant confirming termination of their doctor-and-patient relationship and explaining the reasons why he could not provide further medical services to her. This sets the scene of the disputes between the Appellant and Dr. Choi, the making of a number of data access requests by the Appellant to Dr. Choi, and the Appellant’s complaints against Dr. Choi<sup>2</sup>.

2. On 6<sup>th</sup> February 2013, the Appellant lodged a complaint with the Respondent against Dr. Choi for not complying with her data access request made on 26<sup>th</sup> November 2012 (“**the 26/11/12 DAR**”)<sup>3</sup>. By letter dated 7<sup>th</sup> February 2013, the Respondent asked the Appellant for further information and supplied her with, *inter alia*, the Respondent’s Complaint Handling Policy (4<sup>th</sup> Revision) (“**the Policy**”).

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<sup>1</sup> At the material time, Dr. Choi was a specialist doctor working for Congruence Orthopaedics & Rehabilitation Centre (“**Congruence**”).

<sup>2</sup> Apart from the complaints to the Respondent, the Appellant has also lodged a complaint against Dr. Choi with the Medical Council of Hong Kong, but no disciplinary action has been taken on the complaint as there was no evidence to support any act of professional misconduct on the part of Dr. Choi, see letter by the Medical Council of Hong Kong to the Appellant dated 16<sup>th</sup> September 2014.

<sup>3</sup> According to the Appellant, no more than 7 data access requests had been made to Dr. Choi prior to the 26/11/12 DAR, see letter by the Appellant to Dr. Choi dated 9<sup>th</sup> May 2013 at Hearing Bundle at pp.205 & 206.

3. According to the letter by JSM to the Appellant dated 14<sup>th</sup> February 2013, the 26/11/12 DAR had been duly replied on behalf of Dr. Choi by their letters dated 27<sup>th</sup> November 2012 and 7<sup>th</sup> December 2012. However, the Appellant made another data access request to Dr. Choi on 24<sup>th</sup> February 2013 (“**the 24/2/13 DAR**”), and for the purpose of this appeal and reasons revealed later in this Decision, the 24/2/13 DAR will be subject to our closer scrutiny. (Hereinafter referred to as “**the DAR Complaint**”)

4. On 19<sup>th</sup> September 2013, the Appellant made a data correction request to Dr. Choi (“**the 19/9/13 DCR**”) along with 14 pages of documents on which the Appellant had handwritten 24 remarks, and asked Dr. Choi to make corrections thereto. On 9<sup>th</sup> November 2013, the Appellant lodged her complaint with the Respondent against Dr. Choi for failing to comply fully with the 19/9/13 DCR. (Hereinafter referred to as “**the DCR Complaint**”)

5. In this appeal, the Appellant appealed against the decision of the Respondent dated 29<sup>th</sup> July 2014 (“**the Decision**”) whereby the Respondent decided to exercise his power under *section 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486)* (“**PD(P)O**”) not to pursue the DAR Complaint further. In a nutshell, the Appellant complained against Dr. Choi, *inter alia*, about the latter’s failure to comply with the 24/2/13 DAR, and that it was totally unnecessary for JSM to access her medical information.

6. The DCR Complaint also culminated in the appeal by the Appellant under Administrative Appeal No. 48/2014 (“**AAB 48/2014**”) whereby the Appellant appealed against the decision of the Respondent dated 4<sup>th</sup> July 2014 not to pursue the DCR Complaint further pursuant to *section 39(2)(d) of PD(P)O*. In gist, the Appellant complained against Dr. Choi for failing to comply fully with the 19/9/13 DCR.

7. On 28<sup>th</sup> November 2014, the Chairman of the Administrative Appeals Board (“**the Board**”) directed that this appeal and AAB 48/2014 be heard by the same Board one after another.

#### **Parameters of this Appeal**

8. After the Appellant launched the DAR Complaint with the Respondent on 6<sup>th</sup> February 2013, there were approximately 40 subsequent communications between the Appellant and the Respondent from 10<sup>th</sup> March to 1<sup>st</sup> August 2013, through which the Appellant confirmed the following:-

- (a) The DAR Complaint related only to the 24/2/13 DAR, Dr. Choi had failed to provide the Appellant with a full set of medical records and the following items were still outstanding:-

- (i) the email communications between Dr. Choi and Health Concept Limited ("HCL")<sup>4</sup> from 2008 to 2011;
- (ii) the "records pertaining to termination 2009 to 2011";  
and
- (iii) the records of the time Dr. Choi spent for each of the Appellant's 65 consultations between December 2008 and December 2011.

(Hereinafter referred to collectively as "**the Outstanding Items**")

- (b) In compliance with the 24/2/13 DAR, Dr. Choi should not have passed the documents containing the Appellant's personal data to JSM (a large legal firm and the legal representative of Dr. Choi at the material time) and asked JSM to send the Appellant the requested data by email. The Appellant was worried about (i) the security measures taken by JSM to safeguard the documents received from Dr. Choi; (ii) JSM's failure to encrypt the documents when they sent the same to the Appellant by email; and (iii) the period

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<sup>4</sup> HCL is a healthcare group of which Dr. Choi at the material time was one of its panel specialists and Dr. Charles Chan its Medical Director.

of time the documents received from Dr. Choi were retained by JSM.

### **The Decision**

9. As we have said, the Respondent decided to exercise his power under *section 39(2)(d) of the PD(P)O* not to pursue the DAR Complaint further. On 29<sup>th</sup> July 2014, the Respondent wrote to the Appellant, informing the latter of the Decision and enclosing therewith the Reasons for the Decision. According to the Reasons for the Decision, the Respondent's decision not to pursue the DAR Complaint further was in accordance with paragraph 8(e) of the Policy.<sup>5</sup>

10. In the Reasons for the Decision, the Respondent opined that apart from the Appellant's mere allegation that Dr. Choi was in possession of the Outstanding Items, there was no actual information in support of or to prove that Dr. Choi was in fact in possession of the Outstanding items but had withheld them from the Appellant, and therefore concluded that the allegation particularized in paragraph 8(a) hereinabove was unsubstantiated.<sup>6</sup>

11. In the Reasons for the Decision, the Respondent further opined that disclosure of documents containing the Appellant's personal data to JSM by Dr. Choi was for a purpose directly related to the purpose for

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<sup>5</sup> See para.37 of the Reasons for the Decision.

<sup>6</sup> See para.31 of the Reasons for the Decision.

which Dr. Choi intended to use the Appellant's personal data contained in those documents at the time of collection,<sup>7</sup> that such disclosure was for defending his legal rights in Hong Kong, and therefore fell squarely within *Section 60B(c) of PD(P)O*,<sup>8</sup> and that since *PD(P)O* did not prescribe the data user to provide copies of the documents requested in the data access request by any preferred mode of delivery requested by the data subject, the delivery of the requested data to the Appellant *via* email by JSM did not thereby cause Dr. Choi to contravene any requirements under *PD(P)O*.<sup>9</sup>

12. As to the Appellant's worries mentioned in paragraph 8(b) hereinabove, the Respondent in the Reasons for Decision took the view that there was no personal data privacy issue in JSM's handling of the documents containing the Appellant's personal data passed by Dr. Choi to them, that there was no evidence of any leakage of the Appellant's personal data at the material time which caused or might cause unauthorized or accidental access of the same, that in the circumstances, a *prima facie* case of contravention of *Data Protection Principle ("DPP") 4* had not been established, and that as long as JSM was still Dr. Choi's legal representative in handling the dispute between him and the Appellant and any related matter, JSM's possession of the Appellant's personal data was justifiable.

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<sup>7</sup> See para.32 of the Reasons for the Decision.

<sup>8</sup> See para. 33 of the Reasons for the Decision.

<sup>9</sup> See para.34 of the Reasons for the Decision.

13. At the substantive hearing of this appeal, the Appellant agreed that there was sufficient compliance with the 24/2/13 DAR. The Outstanding Items once perceived by the Respondent as issues are no longer in issue. Insofar as paragraph 8(a) hereinabove is concerned, the remaining questions are:-

- (a) Whether Dr. Choi had failed to comply with the 24/2/13 DAR within 40 days after receiving it.
- (b) Even if there was out of time compliance with the 24/2/13 DAR, whether, having regard to all the circumstances of the case, any further investigation or action is unnecessary.

### **The 24/2/13 DAR**

14. By the 24/2/13 DAR, the Appellant made the following request for her personal data:-

*“Full set of medical record with all pertinent information about [the Appellant’s] patient care (and termination of care). Please provide an index of what Dr. Choi has in his several inches high multiple medical files before [the Appellant] confirm the ones missing and needed.”<sup>10</sup> (My emphasis)*

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<sup>10</sup> In para.2 under sub-heading “Allegation 1” of the Appellant’s Skeleton Submissions filed for this appeal, the Appellant submitted that Dr. Choi’s clinic only has 1 medical record bundle per patient. It seems clear from that paragraph of the Appellant’s Skeleton Submissions that Dr. Choi’s several inches high multiple medical files (described as “several-inch-high” medical files therein) were the only medical record with all pertinent information about the Appellant.



15. Under footnote 5 of the 24/2/13 DAR, the requestor (i.e. the Appellant) was required to specify clearly and in detail the personal data requested (e.g. personal data contained in appraisal reports, medical records, credit reports) including further information, if any, such as the particular incident or transaction in association with it, the circumstances under which the personal data were collected or held, etc. to facilitate the location of the requested data. It further mentioned that too general a description of the requested data, such as “all of my personal data”, may render the request being refused by the data user (i.e. Dr. Choi) pursuant to *section 20(3)(b) of PD(P)O* where the data user is not supplied with such information as it may reasonably require to locate the personal data to which the request relates.

16. In the 24/2/13 DAR, the Appellant stipulated the period between December 2008 and December 2011 as the period for which the requested data were collected.

17. Under Part V: Exclusions of the 24/2/13 DAR, the Appellant elected to exclude from the personal data requested any personal data which were contained in documents which had previously been provided to her by Dr. Choi (e.g. letters to the Appellant from Dr. Choi or documents Dr. Choi had provided to the Appellant pursuant to a previous request).

18. As to the preferred manner of compliance, the Appellant preferred that she would pick up a copy of the requested data from Dr. Choi's clinic.<sup>11</sup>

19. The 24/2/13 DAR has drawn to the attention of the data user (i.e. Dr. Choi) important information set out under "Important Notice to Data User" thereof. The important information included the following:-

(a) Under paragraph 1

The data user is required by *section 19(1) of PD(P)O* to comply with a data access request **within 40 days** after receiving the same. To comply with a data access request means to supply a copy of the requested data. A mere notification given to the requestor to collect the requested data is insufficient.

(b) Under paragraph 2

If the data user is unable to comply with the data access request within 40 days or has a lawful reason for refusing to comply with the request pursuant to *section 20 of PD(P)O*, the data user must give the requestor written notification of his refusal and his supporting reasons **within the same 40**

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<sup>11</sup> See Part VII of the 24/2/13 DAR.

days period. If the data user does not hold the requested data, he should inform the requestor accordingly within the same 40 days period.

(c) Under paragraph 3

It is an offence not to comply with a data access request in accordance with the requirements of *PD(P)O*.

(d) Under paragraph 7

A data user may refuse to comply with a data access request if ... (b) the data user is not supplied with such information as the data user may reasonably require to locate the personal data to which the request relates; ... (f) in any other case, compliance with the request may for the time being be refused under *PD(P)O*, whether by virtue of an exemption under Part VIII or otherwise.

**The Relevant Contemporaneous Communications**

20. By email dated 25<sup>th</sup> February 2013 (“**the 25/2/13 Email**”), the Appellant clarified with Dr. Choi and Ms Yeung of JSM the description of the requested data in the 24/2/13 DAR. The Appellant said the following in the 25/2/13 Email:-

“... I wanted to clarify that [the 24/2/13 DAR] is requesting everything pertinent to my patient care and termination of care, *which Dr. Choi had not given to me.* This includes content in the several inches high medical file, as well as computer records and hand written notes. This also include physio referrals Dr. Choi issued; as well as communication records (emails, faxes, letters) he had with (to and from) other medical professionals, and with (to and from) me.” (*My emphasis*)

21. By email dated 4<sup>th</sup> March 2013 (“**the 4/3/13 Email**”) (with copies to Medical Protection Society (“MPS”) and JSM), the Appellant emphasized to Dr. Choi the extreme importance of personal privacy to her, told Dr. Choi that she did not want her medical data be passed to unnecessary personnel (with “minimum necessity” to solicitors) without her consent, and reiterated that she wished to pick up medical data directly from his clinic so as to minimize the exposure of her privacy to multiple unnecessary personnel.

22. By email dated 6<sup>th</sup> March 2013 (“**the 6/3/13 Email**”) (with copies to MPS, JSM and Clinic Manager of Congruence), the Appellant told Dr. Choi that she would pick up the index first, and then the data from the latter’s clinic directly, and asked Dr. Choi to respect her wish to have data privacy.

23. By an email to MPS dated 9<sup>th</sup> March 2013 (“**the 9/3/13 Email**”), the Appellant attached thereto an excerpt of the MPS guideline<sup>12</sup> and

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<sup>12</sup> Concerning, *inter alia*, what clinical records are.

clarified that she needed a complete set of all records including physiotherapy referrals issued by Dr. Choi, physiotherapy reports from physiotherapists and records pertaining to the justification of abrupt termination of doctor-and-patient relationship between Dr. Choi and her.

24. By letter dated 20<sup>th</sup> March 2013 (“**the 20/3/13 Letter**”), JSM acting for and on behalf of Dr. Choi wrote to the Appellant to put on record that Dr. Choi had already provided a copy of a full set of all medical records, including all consultation notes and physiotherapy records to the Appellant, that Dr. Choi had also provided her with 5 medical reports dated 2<sup>nd</sup> August 2010, 16<sup>th</sup> May 2009, 9<sup>th</sup> October 2010, 4<sup>th</sup> May 2011 and 1<sup>st</sup> February 2013, and to inform the Appellant, *inter alia*, that Dr. Choi did not have a list or an index of documents and had no obligation under *PD(P)O* to create a list or an index of documents.

25. From the correspondence transpired around that time, it is apparent that the Appellant still had serious misgivings about whether Dr. Choi had given her a full set of medical records.

26. By an email to JSM dated 26<sup>th</sup> April 2013 (“**the 26/4/13 Email**”), the Appellant stated that “it appeared there were some confusions with regards to what [the Appellant] requested from Dr. Choi ...”, and attached thereto an amended 24/2/13 DAR (“**the Amended 24/2/13 DAR**”) for further clarification. In the 26/4/13 Email, the Appellant also asked JSM to see the Amended 24/2/13 DAR with clarifications for the Respondent.

In the Amended 24/2/13 DAR marked “Clarification for PCPD, 27 April 2013” the Appellant made the following amended request for her personal data:-

**“Full set of clinical records with all pertinent information about [the Appellant’s] patient care and termination of care (Dec. 2008 – Dec. 2011). This includes (not limited to what are listed here), referrals, consent forms, hand-written notes or forms, scanned documents or forms, all electronic records (except the 45 consultation notes given to [the Appellant] in Dec. 2010, 21 consultation notes given to [the Appellant] in Dec. 2011, and 2 missing notes amended and given to [the Appellant] in Jan. 2012), physio reports, correspondences between health professionals, emails and faxes (except the ones given to [the Appellant]) ...”**

27. Again, the Appellant in the Amended 24/2/13 DAR preferred that she would pick up a copy of the requested data from Dr. Choi’s clinic.

28. By email dated 29<sup>th</sup> April 2013 (“**the 29/4/13 Email**”), JSM for and on behalf of Dr. Choi replied to the 26/4/13 Email and the Amended 24/2/13 DAR. In the 29/4/13 Email, JSM emphasized that Dr. Choi had not received the Amended 24/2/13 DAR before 27<sup>th</sup> April 2013, and that in order to save further time and costs on arguments, they were instructed to provide a copy set of the documents in the “several inches high multiple medical files” mentioned in the 24/2/13 DAR. Thus attached to the 29/4/13 Email a copy set of those documents which, we suppose, included some documents which had already been provided to the Appellant before.

29. The Appellant eventually received 281 pages of copy medical records from JSM on 29<sup>th</sup> April 2013. However, she still alleged that Dr. Choi had failed to provide her with a copy of the full set of medical records. In the subsequent correspondence with Dr. Choi, the Appellant also complained that notwithstanding her request to pick up copy of her medical records from his clinic, Dr. Choi had violated her privacy by passing her medical records to JSM without her knowledge and consent, and asked JSM to delete and shred copy of her medical records passed to them by Dr. Choi.<sup>13</sup>

30. As we have said, the Appellant, during the substantive hearing of this appeal, agreed that there was sufficient compliance with the 24/2/13 DAR, but disputed Dr. Choi's compliance with the 24/2/13 DAR within 40 days after receiving it. Therefore, we do not think we need to deal with the allegations of the Appellant as to the missing part of her medical records and how JSM replied to those allegations in their correspondence. Even if we need to decide on those allegations, suffice it to say that we would agree with the Respondent's submissions in paragraphs 14, 15, 17 and 18 of the Respondent's Statement relating to the Decision.

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<sup>13</sup> For this purpose, the Appellant made a data access request to JSM on 25<sup>th</sup> October 2013.

## Law

31. Under *section 18(1) of PD(P)O*, an individual may make a request for access to his or her personal data held by a data user, and if the data user holds such data, is entitled to be supplied by the data user with a copy of such data.

32. *Section 19(1) of PD(P)O* requires the data user to comply with the request within 40 days after receiving it.

33. *Section 19(2) of PD(P)O* provides that if the data user is unable to comply with a data access request, the data user must notify the requestor in writing within that 40 days' period that the data user is so unable and of the reasons why the data user is so unable.

34. Under *section 20(3) of PD(P)O*, a data user may refuse to comply with a data access request if:-

“... ”

(b) the data user is not supplied with such information as the data user may reasonably require to locate the personal data to which the request relates;

“... ”

(f) in any other case, compliance with the request may for the time being be refused under [*PD(P)O*], whether by virtue of an exemption under Part VIII or otherwise.”



35. *DPP 2(2) in Schedule 1 to PD(P)O* requires that all practicable steps must be taken to ensure that personal data is not kept longer than is necessary for the fulfillment of the purpose (including any directly related purpose) for which the data is or is to be used.

36. *DPP 3(1) and (4)* provide that personal data shall not, without the prescribed consent of the data subject, be used (including disclosed or transferred<sup>14</sup>) for any purpose other than the purpose for which the data was to be used at the time of collection of the data, or for a directly related purpose.

37. *DPP 4(1)* requires a data user to take all practicable steps to ensure that personal data held by him are protected against unauthorized or accidental access, processing, erasure, loss or use.

38. *Section 60B(c) of PD(P)O* provides that personal data is exempt from the provisions of *DPP 3* if the use of the data is required for establishing, exercising or defending legal rights in Hong Kong.

39. *Section 39(2)(d) of PD(P)O* provides that the Respondent 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

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<sup>14</sup> See *section 2 of PD(P)O*.

circumstances of the case, any investigation or further investigation is for any other reason unnecessary.

40. Paragraph 8(e) under Part (B) of the Policy provides that an investigation or further investigation may be considered unnecessary if:-

"(e) after preliminary enquiry by the [Respondent], there is no *prima facie* evidence of any contravention of the requirements under [PD(P)O]; "

41. If there is no *prima facie* evidence of contravention of PD(P)O by the practice or act complained of, the Privacy Commissioner can exercise his discretion to refuse investigation under *section 39 of PD(P)O*. Complaint about contravention of PD(P)O by others is equivalent to accusation of committing an offence, which is a serious accusation. Therefore, a complaint should have basis, including evidence and justification. The Privacy Commissioner has to consider if there is any basis for the complaint, i.e. *prima facie* evidence and justification, before deciding to investigate; otherwise, it is not only unfair to the party complained against, but also encourages unreasonable complaints and abuse of the complaint mechanism.<sup>15</sup>

42. *Section 21(1) of the Administrative Appeals Board Ordinance (Cap.442) ("AABO")* provides that for the purposes of an appeal, the Board may: (j) subject to *sub-section (2)*, confirm, vary or reverse the decision that

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<sup>15</sup> See *Administrative Appeal No. 32/2004*, para.29 (Chinese Judgment).

is appealed against or substitute therefor such other decision or make such other order as it may think fit. *Sub-section (2)* provides that the Board, in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the respondent with the Secretary to the Board under *section 11(2)(a)(ii)*, if it is satisfied that, at the time of the making of the decision being the subject of the appeal, the appellant was or could reasonably have been expected to be aware of the policy.

### Analysis

#### Whether there was out of time compliance with the 24/2/13 DAR

43. *Section 20(3)(b) of PD(P)O* requires the Appellant to supply Dr. Choi with such information as Dr. Choi may reasonably require to locate the personal data to which the 24/2/13 DAR relates.

44. We do not agree with the Respondent that the 24/2/13 DAR clearly indicates that a full set of the medical records and an index of all the documents contained in the several inches high multiple medical files were the 2 items of personal data requested by the Appellant.<sup>16</sup> On a fair reading of the 24/2/13 DAR (in particular in light of Part V: Exclusions of the 24/2/13 DAR), it is unclear as to whether this was so. In our view, the 24/2/13 DAR is also open to an interpretation that the Appellant requested first from Dr. Choi an index of all the documents contained in

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<sup>16</sup> See paragraph 26 of the Respondent's Statement relating to the Decision.

the several inches high multiple medical files, then from the index supplied, worked out what documents she did not have, and thereafter requested from Dr. Choi the documents which she did not have. This interpretation makes greater sense since prior to the 24/2/13 DAR, the Appellant had already received from Dr. Choi copy of medical records and reports from time to time in compliance with the Appellant's various data access requests. This interpretation also tallies with the 25/2/13 Email where the Appellant clarified that the 24/2/13 DAR was requesting everything pertinent to her patient care and termination of care, which Dr. Choi had not given to her. We are alive to the 29/4/13 Email where the Appellant clarified that she needed a complete set of all records. In light of the background, this may probably mean that the Appellant requested from Dr. Choi all medical records which she did not have so that she could have a complete set of all records. All the aforesaid only highlight the fact that the personal data requested by the Appellant in the 24/2/13 DAR were so unclear that further clarification was required before it could be complied with. We understand that Dr. Choi did not have a list or an index of documents requested and had so informed the Appellant. This adds further uncertainty as to how the 24/2/13 DAR could be complied with since Dr. Choi was under no obligation to create a list or an index of documents.

45. In *Wu Kit Ping v Privacy Commissioner for Personal Data*, Administrative Appeal No. 17 of 2004 (17 December 2004), the Board held at para.24 that where the type and scope of data to which a data

access request related were obviously so unclear that further clarification was required before it could be complied with, the data access request might be regarded as incomplete and should not have been accepted for processing, and that in such circumstances, the time to comply with the data access request did not start to run until a properly completed data access request was received.<sup>17</sup>

46. In our view, the 24/2/13 DAR lacks clarity and clearness. In the run-up to the Amended 24/2/13 DAR, it was unreasonable to expect Dr. Choi to comb through his medical records and previous records of compliance with the Appellant's various data access requests made in the past few years to determine what documents Dr. Choi had not yet given to the Appellant thereunder. It was incumbent on the Appellant to clarify the scope of the documents requested in the 24/2/13 DAR before the 40-day period started to run for Dr. Choi to comply with the 24/2/13 DAR. This, the Appellant has done so by the Amended 24/2/13 DAR. In our view, the Amended 24/2/13 DAR was clear and complete to exact compliance and therefore, it was only until the receipt of the Amended 24/2/13 DAR on 27<sup>th</sup> April 2013<sup>18</sup> that the 40-day period commenced.

47. Granted that the Appellant eventually received 281 pages of copy medical records from JSM on 29<sup>th</sup> April 2013 and the Appellant's concession at the substantive hearing of this appeal that there is no

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<sup>17</sup> The appellant subsequently appealed against the decision of the Board, see *Wu Kit Ping v Administrative Appeals Board* [2007] 2 HKC 450. However, this part of the Board's decision on the 40 days' time limit under section 19(1) of PD(P)O has not been overruled by the Court of Appeal.

<sup>18</sup> See the 29/4/13 Email.

dispute as to the sufficiency of compliance with the Amended 24/2/13 DAR, we hold that there was no out of time compliance with the 24/2/13 DAR. Since there was no *prima facie* breach of *section 19(1) of PD(P)O* or *DPP 6(b)(i)*, the Respondent is entitled to exercise his discretion not to investigate further pursuant to *section 39(2)(d) of PD(P)O* and paragraph 8(e) under Part (B) of the Policy.

48. We further hold that even if there was out of time compliance with the 24/2/13 DAR, any further investigation or action is unnecessary. As long as Dr. Choi has complied with the Amended 24/2/13 DAR (which is not in dispute), there would be no need for the Respondent to direct Dr. Choi to remedy the breach. It is also difficult to conceive any appropriate step which can be taken by Dr. Choi to prevent any recurrence of the like breach. If any future data access requests made are legitimate, Dr. Choi of course has to comply with them. If he considers that those requests are unclear, he may refuse to comply with them subject to the right of the requestors to challenge his refusal before the Respondent. Any unjustifiable refusal will carry a criminal sanction under *PD(P)O*. Accordingly, we agree with the Respondent that any further investigation will not lead to any enforcement action against Dr. Choi.

Whether it was a contravention of a requirement (i.e. a data protection principle) under *PD(P)O* for Dr. Choi to pass the documents containing the Appellant's personal data to JSM

49. During the doctor-and-patient relationship between 2<sup>nd</sup> December 2008 and 12<sup>th</sup> December 2011, Dr. Choi's purpose of collecting the Appellant's personal data was to handle matters relating to her medical condition and treatment. It is indisputable that on 29<sup>th</sup> April 2013, JSM passed 281 pages of copy of medical records ("**the Documents**") to the Appellant in order to comply with the Amended 24/2/13 DAR. Judging from the context of this case, it is plain that the purpose for which Dr. Choi disclosed the Documents to JSM was in relation to the 24/2/13 DAR and the reason why the Appellant requested the Documents from Dr. Choi was to enable her to continue medical treatment with some other suitable doctor(s). We accept that the purpose for which Dr. Choi passed the Documents to JSM was related to the purpose of collecting the personal data contained in the Documents from the Appellant. Accordingly, we agree with the Respondent that there was no *prima facie* case of contravention of *DPP 3* on the part of Dr. Choi.

50. Suffice it to say that our foregoing view has disposed of this remaining issue. But, out of deference to the arguments advanced by the parties, we need to say this. Dr. Choi engaged JSM at the time when the doctor-and-patient relationship between him and the Appellant was tense. The Appellant expressed dissatisfaction against Dr. Choi and his staff. This led to the formal termination of the doctor-and-patient relationship on 2<sup>nd</sup> June 2012, the lodging of various complaints and the making of various data access requests and data correction requests by

the Appellant against Dr. Choi. In the midst of this confrontational and litigious atmosphere, it is quite natural and indeed reasonable for Dr. Choi to seek legal advice on various legal matters arising from the incident including how to comply with various data access requests made by the Appellant. As we have said, insofar as the Documents are concerned, the purpose for which Dr. Choi passed the Documents to JSM was in relation to the 24/2/13 DAR on which legal advice was sought by Dr. Choi from JSM. It should also be borne in mind that non-compliance with the data access request provisions under *PD(P)O* will carry legal consequence and even criminal sanction. This renders it all the more reasonable for Dr. Choi to seek legal advice from JSM on how to comply with the 24/2/13 DAR so as to avoid any future legal consequence and criminal sanction. Although the Appellant has indicated her preferred manner of compliance in the 24/2/13 DAR and the Amended 24/2/13 DAR, i.e. she would pick up a copy of the requested data from Dr. Choi's clinic, it is nevertheless not a mandatory requirement under *PD(P)O* for a data user to comply with any preferred mode of delivery requested by a data subject.

51. *Section 60B(c) of PD(P)O* provides that personal data is exempt from the provisions of *DPP 3* if the use of the data is required for establishing, exercising or defending legal rights in Hong Kong. It would be too artificial to suggest that *section 60B(c) of PD(P)O* should be restricted to situations where legal proceedings, legal claims or complaints have been commenced or lodged against the relevant data user.



There may be cases where the relevant data user would like to take legal advice on the appropriate prophylactic actions to be taken in a bid to prevent the situation from ballooning into a formal dispute, or for the purpose of defending his legal rights in the future potential dispute. Such cases must, in our view, fall within the purview of *section 60B(c) of PD(P)O*. Therefore, even if there were a breach of *DPP 3*, the exemption provided for under *section 60B(c) of PD(P)O* would be applicable in this case. The Respondent's conclusion on this aspect cannot be faulted.

52. The Appellant has expressed some worries over (a) the security measures taken by JSM to safeguard the Documents received from Dr. Choi; (b) JSM's failure to encrypt the Documents when they sent the same to the Appellant by email; and (c) the period of time the Documents received from Dr. Choi were retained by JSM. There is however no evidence of leakage of her personal data as a result of JSM's failure to adopt adequate security measures, or to encrypt their email when sending the Documents to her.<sup>19</sup> In the circumstances, it is justifiable for the Respondent to conclude that the Appellant has failed to establish a *prima facie* case of contravention of *DPP 4* on the part of Dr. Choi.

53. Given that the Appellant's complaints against Dr. Choi are on-going and JSM is Dr. Choi's legal representative in handling the

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<sup>19</sup> We are aware of the Appellant's complaint of leakage of her personal data on Asiaexpat, but such complaint, in our view, is neither here nor there; there is nothing to show that it was JSM who leaked her personal data on Asiaexpat and more importantly, JSM is not a party complained against in the DAR Complaint and in this appeal.

Appellant's complaints, JSM's continued possession of her personal data for the time being is fully justified. Furthermore, JSM are obliged to follow the Guide to Professional Conduct on "Duty of Confidentiality" and circular on "Storage and Destruction of Old Files" issued by the Law Society of Hong Kong. Every solicitor has a legal and professional duty to his clients to hold in strict confidence all information concerning their business and affairs acquired in the course of his professional relationship with his clients. There are also guidelines for the solicitors to follow with regard to retention period, storage and destruction of old files. In our view, these professional inbuilt safeguards would make contravention of *DPP 2 and 4* more unlikely (if not impossible).

### **Conclusion**

54. In light of the aforesaid reasoning, this appeal should be dismissed and we so order. However, we cannot leave this appeal without mentioning 2 matters.

55. In this appeal, the Appellant has accused Dr. Choi of making various false representations. In substance, this accusation is a complaint of breach of *section 50B(1)(c) of PD(P)O*. We hold that any complaint of breach of *section 50B(1)(c) of PD(P)O* does not fall within the jurisdiction of the Board because such complaint is not a complaint referred to in *sections 37 and 2(4) of PD(P)O*.

56. Under *sections 37 and 38 of PD(P)O*, where the Respondent receives a complaint that an act or practice relating to a personal data may be a contravention of a requirement under *PD(P)O*<sup>20</sup>, the Respondent shall, subject to *section 39 of PD(P)O*, carry out an investigation in relation to the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a requirement under *PD(P)O*.

57. *Section 39 of PD(P)O* prescribes the circumstances under which the Respondent may refuse to carry out or decide to terminate an investigation initiated by a complaint. If the Respondent decides to terminate an investigation initiated by a complaint before its completion, the Respondent must, as soon as practicable by notice in writing served on the complainant, inform the complainant of the decision and the reasons for the decision. An appeal may be made by the complainant to the Board against any refusal or termination of an investigation by the Respondent.

58. An investigation into a possible offence under *section 50B(1)(c) of PD(P)O* is not a matter falling within the investigative role of the Respondent under *sections 37, 38 and 39 of PD(P)O*, and therefore a matter outside the jurisdiction of the Board.<sup>21</sup> Furthermore, a decision to

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<sup>20</sup> Under *section 2(4) of PD(P)O*, a contravention of a requirement under *PD(P)O* means where the data user has done/is doing an act, or engaged/engaging in a practice, in contravention of a data protection principle.

<sup>21</sup> Under *section 64B of PD(P)O*, a complaint or information in respect of an offence under *PD(P)O* may be made to or laid before a magistrate within 2 years from the date of commission of the offence.

investigate into and/or prosecute for a possible offence under *section 50B(1)(c) of PD(P)O* is not a relevant decision of the Respondent under the *Schedule to AABO* to which *AABO* applies<sup>22</sup>. The long and short of our view is that even if Dr. Choi has made false statements/representations, it does not mean that there would be any possible contravention of the requirements under *PD(P)O*, i.e. any data protection principle for the jurisdiction of the Board to be engaged.

59. The final matter which we have to mention is that when we declined the Appellant's application for an order to require Dr. Choi to be present and questioned at the substantive hearing of this appeal, we have reserved our reasons for such a decision to be given in our Decision on this appeal and AAB 48/2014. This we now do.

60. *Section 15 of AABO* provides that any of the parties to an appeal may at any time ... request the Board to issue a notice in writing to any person named in the application requiring him to appear before the Board to give evidence and to produce any document relating to the appeal that is in his possession or under his control.

61. It is apparent from the issues raised in this appeal and our analysis thereof that this appeal does not involve any factual disputes between the Appellant and Dr. Choi and that the evidence of Dr. Choi is neither necessary nor crucial for the determination of this appeal. The

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<sup>22</sup> See *section 3(a) of AABO*.

Appellant's further allegation of various false statements/representations made by Dr. Choi involves a complaint of breach of *section 50B(1)(c) of PD(P)O* which, as we have opined, does not fall within the jurisdiction of the Board, and therefore does not call for the appearance of Dr. Choi before the Board to give evidence.

62. As to costs, since the Respondent and the legal representative of Dr. Choi have not pressed for a costs order against the Appellant, we decide that there be no order as to costs.

(signed)

(Mr. Alan Ng Man-sang)

Deputy Chairman

Administrative Appeals Board