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HCAL 60/2007

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**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

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COURT OF FIRST INSTANCE

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CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

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NO. 60 OF 2007

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BETWEEN

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WU KIT PING

Applicant

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and

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ADMINISTRATIVE APPEALS BOARD

Respondent

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Before: Hon Saunders J in Court

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Date of Hearing: 13 August 2007

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Date of Judgment: 31 October 2007

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Introduction

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1. This application for judicial review concerns the interpretation of the Personal Data (Privacy) Ordinance Cap 486, (the Ordinance).

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2. Central to the resolution of the issues is the interpretation of the expression “personal data” as it is used in the Ordinance.

The circumstances giving rise to the appeal:

3. Ms Wu had been a patient at Yan Oi General Out-patient Clinic. In December 2003, she lodged a complaint with the Department of Health, (the Department), alleging incorrect diagnosis of her condition.

4. In the course of pursuing her complaint, on 29 September 2005, Ms Wu enquired whether, during the Department’s investigation into her complaint, the medical officers concerned had given written explanations or statements, and sought copies of any such statements or explanations concerning her treatment. The Department declined to supply Ms Wu with those statements.

5. On 10 December 2005, Ms Wu made a formal Data Access Request, (the Request), to the Department under s 18 of the Ordinance. The Department agreed to supply the documents, but when Ms Wu received them she found that part of the content, primarily, but not solely, the names of persons involved in making the reports or statements, and the recipients of those reports will statements, had been redacted. In addition, in the body of one document, certain passages had been redacted.

6. Ms Wu was dissatisfied with the redacted statements, and 3 March 2006, complained to the Privacy Commissioner for Personal Data, (the Commissioner), that the Department, by redacting the statements, had failed to comply fully with the Request. The complaint also related to

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delay is in responding to the Request, but this aspect is not relevant to the current proceedings.

7. As to the redaction, the Commissioner determined, pursuant to s 39(2)(d) of the Ordinance that investigation or further investigation of the complaint was unnecessary. The following reason was given:

“With regard to your complaint on contents of the Requested Data, (the Department) stated that some words were blacked out because they were not your personal data. This Office has examined and unedited version of the Requested Data. We agree that the redaction is justified and consistent with the provisions of s 20(1)(b) and 20(2) of the Ordinance.”

8. Ms Wu appealed to the Administrative Appeals Board, (the Board), which confirmed the decision of the Commissioner.

The documents:

9. Both the Board and I have read unedited versions of the documents. There are four documents comprising:

- (i) a two-page letter marked “*Confidential*”, dated 13 January 2004, addressed to the Service Director (Quality & Risk Management) NTWC, captioned “Re: Public Feedback by Patient: Ms Wu Kit-ping HKID (XXXXXX)”. This letter concerned the diagnosis, and the use of medications and medical records of Madam Wu. On the redacted copy, the name of the writer, and the recipient, and certain pronouns were redacted;
- (ii) a one-page statement dated 31 December 2003, captioned “Re: Statement on WU KIT PING’S visit on 26.7.2000 and

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7.9.1998.”. The statement, based on Department of Health medical records, describes the examination diagnosis and treatment of Ms Wu on the two occasions referred to in the caption. The name of the writer and the recipient of the letter, fax and telephone numbers of the writer, and certain pronouns were redacted;

(iii) a one-page letter dated 6 January 2004, addressed to Tuen Mun Hospital, and copied to “Quality & Risk Management NTWC”, captioned “Feedback on Complaint made by Ms Wu Kit-ping HKID (XXXXXX).” The un-redacted portion of the letter refers to the treatment of Ms Wu. Again the name of the writer and recipient of the letter and certain pronouns have been redacted. The whole of the second paragraph and virtually all of the third paragraph has been redacted. The following words in the third paragraph have been left exposed:

“... (redaction) when (redaction) found out misunderstanding arose after Ms Wu had read her patient handheld record.”

(iv) a two-page undated document captioned “Concerning the patient Wu Kit Ping”. The contents of the document concern the diagnosis and medical treatment given to Ms Wu. Again the name of the writer and recipient of the document and certain pronouns have been redacted. The document deals with the diagnosis and medical treatment given to Ms Wu.

10. The areas of redaction therefore fall into two clear categories. They are first, the writer and recipient of the documents, (the redaction of the pronouns means that it cannot be determined by Ms Wu whether the

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author of the documents is one person or more than one person), and secondly the two paragraphs of content in document (iii).

The decision of the Administrative Appeals Board:

11. In its decision, the Board approved, as guidance, certain dicta from Auld J in a decision in *Durant v Financial Services Authority* [2003] EWCA Civ 1746, (Unreported), on the interpretation and scope of the expression “personal data” as that expression is used in the Data Protection Act 1988 (UK).

12. The Board held that the redaction of the four statements did not constitute a breach by the Department of its duty to comply with the Request, and that consequently, the Commissioner was not obliged to carry out will continue an investigation of the complaint emaciated by Madam Wu, which complaint was based upon the redaction.

The issue:

13. The only issue before the Board was the question as to whether the provision of redacted statements amounted to a proper compliance with the Request.

14. The issue in these Judicial Review proceedings is whether the Administrative Appeals Board was wrong in law in holding that the provision of redacted statements was, in the circumstances, lawful.

15. The determination of that issue involves a two-step process. They are:

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- (i) the interpretation of the expression “personal data” in the Ordinance; and
- (ii) the application of that interpretation to the redaction exercise carried out by the Department, in order to determine whether the redaction was lawful.

The purpose of the Ordinance:

16. In order to properly interpret the expression “personal data” it is necessary to have regard to the purpose of the Ordinance. That purpose is described in the long title to the Ordinance in the following terms:

“An Ordinance to protect the privacy of individuals in relation to personal data, and to provide for matters incidental thereto or connected therewith.”

17. Unlike the United Kingdom, Hong Kong does not have any document is similar to the Directive to which the court may look for guidance in the interpretation of the Ordinance. Consequently, the purpose of the Ordinance must be determined from the long title and the general scheme of the Ordinance.

18. The Ordinance commences with Part I, which contains provisions as to interpretation, application, and, in s 4, establishes certain Data Protection Principles. The six Data Protection Principles are set out in Schedule 1 to the Ordinance. Part II of the Ordinance deals with matters of Administration and the establishment of the Privacy Commissioner for Personal Data, his functions and powers and the like. Part III enables the Commissioner to establish codes of practice. Part IV regulates data users and makes provision for registers of data users. Part V makes provision

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entitling access to and correction of personal data. Part VI regulates matching procedures. Part VII deals with inspections complaints and investigations, Part VIII deals with exemptions, Part IX deals with offences, and compensation, and Part X miscellaneous matters.

19. It may be broadly said that with the exception of Part V the Ordinance is concerned with the control of the retention of personal data. Part V is that which is most concerned with a data subjects such as Ms Wu for it is that section of the Ordinance which enables a data subject to access their personal data and to achieve either correction of incorrect data or the erasure of personal data that is no longer require.

20. Consequently, from the long title of the Ordinance, and the scheme of the Ordinance it may be seen that, as far as a data subject is concerned, it is an Ordinance designed to protect the privacy of individuals in relation to personal data, giving them access to that data and the opportunity to correct that data if wrong.

21. In order to protect the privacy of an individual the Ordinance enables an individual to obtain from a data user information about himself so as to enable him to check whether the information is correct, and whether it is being lawfully and properly used with regard to the individual's privacy.

22. The right of an individual, (a data subject) to have access to personal data is contained in the Schedule 1 to the Ordinance which sets out certain Data Protection Principles. Data Protection Principle 6 entitles a data subject to ascertain whether a data user holds personal data of which

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he is the data subject, to request access to his personal data, and, (inter alia),
to request the correction of personal data.

23. Thus, it may be determined that the purpose of the Ordinance
is to protect the privacy of an individual, and to enable an individual to
check on and if necessary rectify, data held by a data user.

The relevant legislation:

24. It is clear that the information contained in the four documents
constitutes “data” as that expression is defined in the Ordinance. That
definition, in s 2, is in the following terms:

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

25. It is equally clear that the Department is a “data user”.

26. In so far as each of the four documents deals with the
examination, diagnosis, and treatment of Ms Wu, it is plain that Ms Wu is
the “data subject” of the documents.

27. The expression “personal data” is defined in the following
terms:

““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

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(c) in a form in which access to or processing of the data is practicable;”

28. Section 18 of the Ordinance provides:

“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.”

A request by a data subject for a copy of data is known as a “data access request”.

29. The right of an individual to obtain data is limited to that individual’s personal data. The expression “such data” in s 18(1)(b) plainly refers to the expression “personal data” in s 18 (1)(a).

30. There is an important distinction between “data”, and a “document”. The interpretation provision of the Ordinance, (s 2) defines the two expressions in the following terms:

““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”

31. The entitlement of a data subject is to know what “personal data” is held by the data user. By the application of the definitions, and s 18(1)(b), the data subject is entitled copy of any representation of

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information, (including an expression of opinion), relating directly or indirectly to the data subject, or from which it is practicable for the identity of the data subject to be directly or indirectly ascertained.

32. The entitlement is to a copy of the data, it is not an entitlement to see every document which refers to a data subject.

33. An important conclusion as to the limitations of the right of the data subject to obtain information arises from the foregoing.

34. It is not the purpose of the Ordinance to enable an individual to obtain a copy of every document upon which there is a reference to the individual. It is not the purpose of the Ordinance to supplement rights of discovery in legal proceedings, nor to add any wider action for discovery for the purpose of discovering the identity of a wrongdoer under the principles established in *Norwich Pharmacal v Commissioners of Customs and Excise* [1974] AC 133. That conclusion is entirely in accord with the decision of Deputy Judge Muttrie in *Gotland Enterprises Ltd v Kwok Chi Yau* [2007] HKLRD 236, at 231-2.

The protection of the privacy of the maker or provider of data:

35. The legislation recognises that circumstances may arise when it is important that the identity of a person supplying data concerning a data subject should not be learned by the data subject. The most obvious example, (and I hasten to add that it is not the situation in this case), is where an informant reports an alleged breach of law to an authority. The person alleged to have breached the law, the data subject, is entitled to be

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informed of the substance of the information reported, and to request correction of the information where appropriate. But the withholding of the identity of the informant is appropriate, because, if the identity of the informant were released, not only would that informant, but other potential informants, be reluctant to supply information in the future.

36. The legislation achieves this end in s 20, which, (as far as is relevant in this case), reads:

“20. Circumstances in which a data user shall or may refuse to comply with data access request

(1) A data user shall refuse to comply with the 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 the 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.”

37. The effect of s 20(1)(b) is plain. Setting aside for the moment the consequences of s 20(2), if in the course of complying with a request

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by a data subject for the disclosure of that data subject’s personal data, the personal data of some other individual must be disclosed, then, unless that other individual has consented to the disclosure of his personal data, the request must be refused.

38. The source of the personal data of Ms Wu, contained in the four documents, is the maker of the reports or statements concerning her examination, diagnosis and treatment. The present case raises the clear issue of the necessary conclusion that the name of the maker of a report on a data subject, is the personal data of the maker of the report, and not the personal data of the data subject. If the name of the maker of the report is not the personal data of Ms Wu then she will not be entitled to a copy of that data.

39. The apparently draconian consequences of s 20(1)(b) are ameliorated by s 20(2). It does so in two ways.

40. First, by s 20(2)(a), the restriction on the disclosure of personal data of one data subject, which might disclose the personal data of and other data subject, operates only where the maker of the report, that is the source of the personal data to which the data access request is concerned, is named or explicitly identified.

41. If the person who examined diagnosed and treated Ms Wu is not named in the report, it is likely that by deduction or inference Ms Wu will know the name of that person, if it had been given to her, for example, at the time of treatment. The fact that that deduction or inference may be made is not a barrier to the disclosure of Ms Wu’s personal data.

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42. To go back to the example given in paragraph 35 above, the anonymous complaint, it may well be that the data subject may be able to determine, by deduction or inference from the data comprising the complaint, the identity of the complainant. But unless the data names or otherwise explicitly identifies the complainant, the fact that the complainant’s identity might be determined by deduction or inference is not a barrier to the disclosure of the data.

43. Second, by s 20(2)(b), if the data access request for personal data may be adequately met with, without disclosing the identity of either a complainant in the case of an anonymous complaint, or the author of a report in the case of a report containing personal data, then the data access request must be complied with.

44. The effect of s 20(2)(b) is that if the data user can supply to the data subject his personal data, without the disclosure of the identity of the source of the information, then a means to supply the data must be found. It will be no answer for the data user to deny access to the personal data following a Request simply because the name of the author of a report is on the document containing the personal data. A purposive interpretation must be given to the legislation in order to achieve the delivery of the personal data to the data subject upon receipt of the Request.

45. The obvious way to achieve this in most cases will be the redaction of the identity of the source of the information, be he an anonymous complainant, or merely the maker of a report. That redaction enables the data subject to examine for correctness or otherwise his personal data, and at the same time maintains the privacy of personal data

to which the maker of the report is entitled under the provisions of the Ordinance. In this respect it must be remembered that the purpose of the Ordinance is to enable a data subject to examine his or her own data, it is not to enable a data subject to locate information for other purposes, such as litigation.

Conclusion as to redaction of identities:

46. For the foregoing reasons it is plain that the redaction of the identity of the maker and recipient of the various reports may properly be undertaken, as those persons are entitled to have their personal data kept private. But by the redaction Ms Wu has been supplied with all of the personal data that concerns her, in order that, in accordance with the purpose of the Ordinance, she may examine that data and ensure that it is correct.

47. The redaction of the pronouns, whilst being unnecessarily pedantic, is equally lawful.

The extent of the scope of “personal data”:

48. The definition of the “personal data” to which a data subject is entitled to access is set out in para 27 above. It plainly does not extend to the identity of a complainant or the maker of report concerning the data subject.

49. Ms Wu argued, relying primarily on the argument in *Durant*, that she was entitled to the totality of the reports because the information contained therein, and redacted fell within the scope of personal data

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“relating directly or indirectly” to her.

50. It is plain that the identity of the maker of the reports, or the recipient of the reports do not fall within that scope. Even if they did, the redaction is perfectly lawful pursuant to s 20(2)(b).

The redaction of content in document (iii):

51. Because the entitlement of data subject is to his own personal data, and not to a copy of every document in which there is a reference to the data subject and important conclusion follows. If in a document, the maker of the document expresses an opinion about a data subject, that opinion will constitute personal data to which the data subject will be entitled to access. However, an opinion expressed in the same document, by the maker of the document, about the maker of the document himself, unless relating indirectly to the data subject, will not constitute the personal data of the data subject.

52. It is into this category that the redactions contained in the document (iii), the letter of 6 January 2004, falls. I have examined carefully the statements made in the redacted portions of that document.

53. The second paragraph, fully redacted, contains an expression of opinion by the maker of the report as to his own conduct. The first sentence of that paragraph is directed precisely at the maker’s conduct, in the maker’s professional capacity, of the treatment of Ms Wu. It is an opinion which relates directly to the data subject, and consequently falls within the definition of “personal data”.

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54. Although the identity of the giver of the opinion may be determined by inference, (that person’s explicit identity having been redacted), from Ms Wu’s knowledge of the surrounding circumstances, that is not a ground upon which to refuse disclosure of the data: s 20(2)(a).

55. I accordingly conclude that the redaction of the first sentence of the second paragraph in document (iii) cannot be justified in law.

56. The second sentence of the second paragraph is a general statement by the maker of the document. It is of broad general application and neither directly nor indirectly relates to Ms Wu. It was accordingly lawfully redacted.

57. The first sentence of the third paragraph falls precisely within the same category as the second sentence of the second paragraph. Again, it was lawfully redacted.

58. The second sentence of the third paragraph, while referring to Ms Wu, uses the reference to Ms Wu having read her patient handheld record as the stimulus to an expression of a general opinion, and not an opinion relating directly or indirectly to Ms Wu. I am satisfied that that portion of the sentence which was redacted has been lawfully redacted.

59. The third sentence of the third paragraph also falls in the same category as the second sentence of the second paragraph, and I am satisfied that it was lawfully redacted.

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Conclusion as to redaction of content in document (iii):

60. I accordingly conclude that the Department, and the Board were wrong in law in redacting the first sentence of the second paragraph of the letter of 6 January 2004. In all other respects the redactions were lawful.

The relevance of Durant:

61. The Board, whilst being mindful of the difference in the wording between the Data Protection Act and the Ordinance considered that Auld LJ’s observations in *Durant* were a useful guide on the approach to interpreting the term “personal data”. The Board correctly appreciated the important distinction between data and a document, and, I am satisfied, correctly rejected Ms Wu’s argument that the dicta in *Durant* entitled her to the totality of the documents in question.

62. That said, I have come to the conclusion that the substantial differences between the English legislation and the Hong Kong legislation means that great care must be taken in attempting to apply either arguments or principles used in the English cases when considering issues arising under the Ordinance.

63. Consequently, rather than attempt to approach the issues on same point of view as the English courts I have found it more appropriate to examine the language of the legislation and to attempt to discern its true interpretation. A consequence of that exercise has been that, in broad terms, I have reached the same conclusions as did the English court in

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Durant.

Conclusion:

64. Except as indicated in respect of the first sentence of the second paragraph of document (iii), the decision of the Board is upheld. The Department must supply to Ms Wu a copy of document (iii), with that first sentence in the second paragraph exposed.

65. I am very grateful to Mr Sakhrani who appeared as Amicus, for his competent and well researched argument which was of great assistance.

66. Ms Wu has succeeded, albeit only in a minor part, in challenging the actions of the Department and the decision of the Privacy Commissioner for Personal Data. She has represented herself throughout. In all the circumstances there will be no order for costs.

(John Saunders)
Judge of the Court of First Instance
High Court

Applicant in person

Mr Sanjay Sakhrani, of counsel, *Amicus Curiae*, instructed by the Registrar of the High Court