

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 11/2021

BETWEEN

LEUNG TSAN CHUNG

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Mr Derek Chan Ching-lung, SC (Deputy Chairman)

Mr Cheung Human (Member)

Ms Mindy Ho Sze-may (Member)

Date of Hearing: 13 September 2021

Date of Handing down Written Decision with Reasons: 27 October 2021

DECISION

A. Introduction and Background

1. This is the Appellant's appeal against the Respondent's ("PCPD") decision dated 6 May 2021 ("**Decision**") in which the PCPD refused to carry out an investigation against the Medical Council of Hong Kong ("**MCHK**")

for refusing to accede to his data access request dated 25 September 2020 (“DAR”).

2. The Appellant suffered from ankle injuries, and was treated by a Doctor (“**the Doctor**”) who conducted surgery on him in April 2016. The Appellant was dissatisfied with *inter alia* the surgery and, in March 2018, he lodged a complaint against the Doctor with MCHK for alleged professional misconduct and negligence.

3. On 16 June 2020, the Preliminary Investigation Committee (“PIC”) of MCHK informed the Appellant that it considered there to be insufficient evidence to substantiate his complaints against the Doctor, and had decided that “*the case should not be pursued further and no inquiry was to be held*”. MCHK expressly referred to having considered all the information presented, including “*written explanation by the solicitors on behalf of [the Doctor] and opinion of an independent expert ...*”.

4. The Appellant was not satisfied with the PIC’s decision. On 14 July 2020, the Appellant wrote to MCHK complaining against the MCHK’s failure to give sufficient reasons, in particular MCHK’s reference to having taken into account of the Doctor’s responses and the opinion of an independent expert without the disclosing them to the Appellant. The Appellant described this as a “*Black Box Operation*”. The Appellant in his letter pointed to the fact that the Legal Aid Department had provided him with similar information, and stated that “*in this respect, for justice, PIC has no reason not to provide, unless PIC considered their answers unacceptable*” (emphasis added). Towards the end of this letter, the Appellant wrote:

“I still sincerely wish you would fulfill your duty to provide those answers given by solicitor [of the Doctor] and the independent expert and also the PIC’s opinions about all complaints ... Should you still refuse to provide, I have no choice but go for legal action to obtain those information and even judicial review”.

5. On 25 September 2020, the Appellant submitted the DAR (along with a covering letter) to MCHK demanding the following documents:

- a. All PIC meeting minutes discussing the Appellant’s complaint;
- b. The independent expert report obtained by the PIC in relation to the Appellant’s complaint; and
- c. All replies from the Doctor’s solicitor to the Appellant’s complaint.

6. In the covering letter of the DAR, the Appellant wrote that *“I would like to make it clear that **the purpose of my letter dated 14 July 2020 is complaining against PIC’s maladministration due to violation of the principles of Medical Council as detailed in my letter...**”* (emphasis added).

7. MCHK refused to comply with the DAR, and informed the Appellant of the reasons for its refusal by way of a letter dated 8 October 2020. On 30 October 2020, the Appellant lodged a complaint with the PCPD against MCHK for refusing to accede to his DAR (“**Complaint**”).

8. On 3 November 2020, the PCPD emailed the Appellant “to acknowledge receipt of your communication by this office on 30 October 2020”, and enclosed *inter alia* a copy of the PCPD’s “Complaint Handling Policy”.

9. The PCPD then conducted preliminary inquiries with both the Appellant and MCHK in relation to the Complaint (without invoking its statutory powers of investigation). Notably, the PCPD corresponded with both the MCHK (in respect of its refusal to accede to the DAR) and the Appellant to *inter alia* clarify his intentions for making the DAR. In particular, on 12 November 2020, one of the questions asked by the PCPD to the Appellant was phrased as follows:

“We noted that the DAR was attached to your letter to MCHK entitled ‘Complaint against PIC’s Maladministration’. It is therefore our understanding that the purpose of the DAR was to obtain evidence in support of an alleged maladministration on the part of PIC for deciding not to hold any inquiry against [the Doctor]. Please confirm whether our understanding is correct; if ‘no’, please clarify...”

10. On 16 November 2020, the Appellant replied to the PCPD’s queries. In respect of the question quoted in paragraph 9 above, the Appellant’s answer was a simple “yes”, with no elaboration.

11. There were further inquiries made by the PCPD of the Appellant, which led to the Appellant setting out his complaint and the factual background of the complaint in a fairly comprehensive written document (undated) that was

received by the PCPD on 23 February 2021. The Appellant wrote in the last paragraph of this document:

“46. I have no choice. Application for judicial review of their wrong decision was my only way. In this respect, on 25/9/2020, I requested PIC to provide (a) the minutes of PIC’s meetings about my complaint, (b) [the Doctor’s] solicitors’ answers to my complaint items and (c) the independent expert’s record for submission to the Court because they are my essential evidences ... however, on 8/10/2020, PIC unreasonably refused to provide. I therefore sought PCPD’s assistance on 30/10/2020.” (emphasis added)

12. On 6 May 2021, the PCPD issued the Decision stating that the PCPD will not carry out an investigation into the Complaint pursuant to s.39(2)(ca) and 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap 486) (“**PDPO**”). The Appellant now appeals against the Decision.

13. Having considered the written and oral submissions of the Appellant and the PCPD, the Board considers that the Appellant’s appeal should be dismissed. The reasons are as follows.

B. The PCPD’s Decision

14. Before examining the merits of the Appellant’s appeal, it is important to note the scope and basis of the Decision, in particular what the Decision did *not* decide.

15. In the Decision, the PCPD decided “*not to carry out an investigation*” into the Complaint by relying on its discretion under s.39(2)(ca) and s.39(2)(d) of the PDPO, and in accordance with paragraphs 8(d), (h) and (j) of the Complaint Handling Policy. The relevant provisions in s.39 read as follows:

“(2) *The Commissioner 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 circumstances of the case—*

.....

(ca) the primary subject matter of the complaint, as shown by the act or practice specified in it, is not related to privacy of individuals in relation to personal data;

(d) any investigation or further investigation is for any other reason unnecessary.”

16. In the Complaint Handling Policy, paragraph 8 sets out the PCPD’s policy in respect of s.39(2) of the PDPO, and the grounds upon which the PCPD may refuse to carry out or decide to terminate an investigation. Paragraph 8(d) refers to “*the primary subject matter of the complaint is considered not to be related to personal data privacy, e.g. the complaint stems essentially from consumer, employment or contractual disputes*” (emphasis added). Paragraph 8(j) refers to one of the circumstances in which the PCPD may consider an investigation to be unnecessary, namely “*the ulterior motive of the complaint*

*in question is not concerned with privacy and data protection” (emphasis added)*¹.

17. As the Complaint Handling Policy was emailed to the Appellant on 3 November 2020 (see paragraph 8 above), the Appellant must have been aware, or reasonably be expected to have been aware, of the said policy. This Board must therefore have regard to this policy under s.21(2) of the Administrative Appeals Board Ordinance (Cap 442).

18. The PCPD considered that the Appellant’s “*purpose of making the DAR was to locate information for other purposes, not for examination of your own personal data*” (§22 of the Decision), namely “*...to gather evidence to support [the Appellant’s] allegation that there was maladministration on the part of the PIC, and to commence a judicial review application against PIC for their allegedly wrong decision on your complaint against [the Doctor].*” (§23 of the Decision). The evidence upon which the PCPD relied is set out in §22(a)-(c) of the Decision:

“(a) You wrote to MCHK on 14 July 2020 complaining against the dismissal of your complaint by PIC, and requested MCHK to provide you with [the Doctor’s] Submissions, the Expert’s Opinion and PIC’s opinions about your complaint. It was indicated in your letter that your purpose of obtaining those documents was to find out why PIC had dismissed your complaint against [the Doctor]. Seeing no positive response from MCHK, you sent another letter on 25 September 2020 reiterating your request by attaching the DAR form mentioned

¹ The PCPD clarified at the oral hearing that it would not be relying on paragraph 8(h) of the Complaint Handling Policy.

in paragraph 11 above. As such, it appears to us that your DAR was primarily prompted by MCHK's refusal to provide documents to you;

- (b) By a letter dated 16 November 2020, you confirmed to this Office that the purpose of your DAR was to **obtain evidence in support of an alleged maladministration** on the part of PIC for not holding any inquiry against [the Doctor]; and*
- (c) In your statement mentioned in paragraph 14 above, you stated that application for **judicial review of PIC's wrong decision was your only choice**, and the documents requested by you were your essential evidence" (emphasis added)*

19. We would stress that the Decision did not in any way decide whether MCHK was right (or wrong) in refusing to comply with the DAR.

20. At the oral hearing, Ms Liu² confirmed that, although the PCPD set out MCHK's responses to its preliminary inquiries at §§15–18 of the Decision, the PCPD had not come to any conclusion on the merits or otherwise of MCHK's responses, and did not rely on them in coming to the Decision. The Decision itself expressed no finding as to whether MCHK's responses were accepted by the PCPD or not.

² Ms Joyce Liu, Assistant Legal Counsel of the PCPD

C. The Parties' Submissions

21. The Appellant raised five grounds of appeal in the Notice of Appeal dated 21 May 2021:

- a. The Decision did not consider the repeal of the old regulation 12(2) of the Medical Practitioners (Registration and Disciplinary Procedure) Regulation Cap 161E, which had in effect provided that neither the complainant nor the defendant had any right to access to any document submitted to the PIC. The Appellant's point is premised on the proposition that the repeal of that regulation positively gave him a right of access;
- b. The Decision did not consider the fact that the Hospital Authority and the Legal Aid Department had already provided him with similar information/documents when he requested them, hence there was no reason for MCHK to withhold them;
- c. The Decision was wrong to have accepted the MCHK's explanations as to why they refused to comply with the DAR;
- d. The PCPD never advised the Appellant that any documents provided by MCHK pursuant to his DAR could not be used for judicial review. The Appellant stated that if he had been so informed, he "*would definitely [not use them for judicial review] and declare in writing that I only use those documents for examination of my own personal data, not for any other purpose including judicial review*". In the Appellant's skeleton argument

as well as in the oral hearing itself, the issue concerning the Appellant's purpose of the DAR was further split into three arguments:

- i. The PCPD's question as contained in its letter dated 12 November 2020 (set out in paragraph 9 above) proceeded on the wrong premise, with the Appellant submitting that there was nothing in the material then available to the PCPD to substantiate the premise of the question;
 - ii. That same question "trapped", or "misled" the Appellant into answering "yes", "*to avoid giving the impossible clarification*"; and
 - iii. In any event, the Appellant had no intention of using the data requested in his DAR for judicial review. In the oral hearing, the Appellant stated that he wanted the requested documents to "find out the truth" about his complaint to MCHK ("尋求事實真相"), and to understand why the Doctor was not held responsible by MCHK.
- e. The PCPD was wrong to rely on *Wu Kit Ping v Administrative Appeals Board* [2007] 4 HKLRD 849.

22. We note that the first three grounds of appeal relate to, substantively, whether the PCPD correctly assessed the merits of MCHK's refusal to comply with the DAR. However, we stress again that that was not the effect of the Decision. The PCPD only decided that it was not going to investigate into the

matter. This appeal is limited only to the PCPD's decision to *refuse to carry out an investigation against MCHK*, and not to the merits of MCHK's refusal.

23. In the Statement of the Respondent filed by the PCPD for this appeal, the PCPD made some substantive submissions as to whether it considered that MCHK was required to disclose the documents sought in the DAR. These substantive responses did not feature in the Decision itself. At the oral hearing, Ms Liu fairly accepted that she would not rely on those submissions in upholding the Decision.

24. The Board was also notified that the PCPD had filed a number of documents with the Board which comprised of documents requested in the DAR, but those documents had not been made available to the Appellant. Although the PCPD had originally sought to rely on the contents of those documents in the Statement of the Respondent (in response to the Appellant's grounds of appeal concerning the merits of MCHK's refusal to comply with the DAR), it is inappropriate for the Board to place any weight on them. Firstly, if the Board is to pass judgment on the merits of MCHK's refusal to comply with the DAR, MCHK must be given a right to be heard. Secondly, the Appellant has had no opportunity to respond to those documents in this hearing because he had not been given access to them. As such, the Board has refrained from reading those documents. We also remind ourselves not to place any weight on the PCPD's submissions in relation to those documents. At the oral hearing, Ms Liu also fairly accepted that she would not be relying on the paragraphs in the Statement of the Respondent relating to those documents.

D. Discussion

25. Bearing in mind the above, we turn to assess whether the PCPD acted lawfully in refusing to carry out an investigation into the Appellant's complaint.

26. It is trite that a data access request is not intended to allow the applicant to obtain information for the commencement of legal proceedings. In *Wu Kit Ping v Administrative Appeals Board* [2007] 4 HKLRD 849, at §34, Saunders J said:

"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 and others 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] 1 HKLRD 226, at pp. 231-232". (emphasis added)

27. *Wu Kit Ping* is a reflection of the wider principle that the PDPO is intended to protect the *privacy* of a person. Data access requests are designed to allow applicants to find out how their personal data is being used (or misused), and to correct any inaccuracies in his/her data. It would be contrary to the spirit of the PDPO to allow an applicant to obtain all documents that merely *contain* his personal information for purposes that are unconnected with

his privacy. As Mimmie Chan J put it in *Chan Shu Chun v Dr Kung Yan Sum* [2020] HKCFI 360:

“The mischief which the Ordinance was intended to address was the misuse and retention of personal data collected, and the objective it was intended to achieve was to provide for the right of an individual to access the personal data collected by a data user, to prevent it from being misused and to correct any inaccuracy of the data collected.”

28. The PCPD made the Decision on the basis that the Appellant had sought the information specified in the DAR in order to commence legal proceedings against the Doctor and/or MCHK. At §22 of the Decision, the PCPD set out three letters where the Appellant evinced such an intention. In the Board’s view, the PCPD had more than sufficient grounds to come to that conclusion.

29. In the oral hearing before the Board, the Appellant explained that the PCPD had misunderstood his intentions. He said that it had never been his intention to commence judicial review proceedings against MCHK. He explained that he was very unlikely to succeed in seeking judicial review, and that he did not have the time and energy to do so because he is already 74 years old.

30. The Appellant then explained that his purpose of making the DAR was to “find out the truth” about his complaint to MCHK (“尋求事實真相”), and to understand why the Doctor was not held responsible by MCHK.

31. The Board is sympathetic to the Appellant's wishes to find out the truth. However, such a purpose is not related to the *privacy* of the Appellant, or how his personal data is being used by MCHK. The facts of this case are not dissimilar to the decision of *郭露萍 v 個人資料私隱專員* AAB 10/2020³.

32. In *郭露萍*, Kwok was an employee of the Vocational Training Council ("VTC"). In 2014 she was relocated from the VTC's Wanchai School to its Shatin School; and in 2015 she was dismissed by VTC. In 2019, she made a data access request with VTC which was rejected. She then lodged a complaint with the PCPD as to VTC's refusal. The PCPD refused to investigate into the matter, relying on s.39(2)(ca) of the PDPO.

33. In her appeal to the Administrative Appeals Board, Kwok alleged that the PCPD had wrongly assumed that it was her intention to commence legal proceedings against VTC. At §§35-36 of the Judgment, the Board stated as follows:

“35. 在聆訊時，上訴人重申答辯人只是揣測其提出查閱資料要求的理由，並指其當時沒有想過以此方式索取文件或資料用作指控證據以便控告職訓局。上訴人指，當她於2019年向職訓局提出查閱要求時，只有參閱公署的查閱資料表格，該表格沒有一個地方令其覺得可以用以控告他人。” (emphasis added)

³ The decision was cited by the PCPD in the Decision and in their Statement of the Respondent for this appeal, but a copy was not made available to the Appellant before the oral hearing. A copy of this decision was given to the Appellant at the hearing, and the Board offered to adjourn the oral hearing so that the Appellant would have a chance to consider the case. The Appellant declined the adjournment.

“36. 上訴人在回答本委員會的提問時確認，她提出查閱資料要求是希望進一步瞭解職訓局對她的紀律處分及解僱她的決定是如何產生，以及有關原因和其合理性。上訴人補充指，她被解僱一事至今已有 5 至 6 年時間，其提出查閱要求只是希望取回其個人資料，令其知道發生了什麼事，心安理得，對自己和家人都有個交代，其取得資料亦未必一定會控告職訓局。”

(emphasis added)

34. The Board accepted that Kwok’s purpose for making the data access request was to find out the truth about her dismissal (還原事實真相). However, applying *Wu Kit Ping*, the Board held that such a purpose was nonetheless unrelated to Kwok’s *privacy*: 郭露萍 at §37(2). The Board therefore held that the PCPD was entitled to refuse to investigate Kwok’s complaint pursuant to s.39(2)(ca) of the PDPO: 郭露萍 at §38.

35. In the present case, the Appellant stated before this Board that he made the DAR to “find out the truth” about MCHK’s refusal of his complaint against the Doctor. Even if that was true, the Appellant’s concerns “about the truth” are not related to his privacy or data protection, such as how his medical data was being retained, used or misused by the MCHK. Accordingly, the PCPD was entitled to refuse to investigate the Appellant’s complaint pursuant to s.39(2)(ca) and 39(2)(d) of the PDPO.

E. Disposal of the Appeal

36. For the reasons given above, the Board would dismiss the appeal.

37. The Board is sympathetic towards the Appellant's position as an aggrieved patient in attempting to find out why his complaint against the Doctor was not accepted by MCHK. However, the PDPO is designed only to deal with information requests that relate to the *privacy* of a person, nothing more. It is therefore not the proper way for the Appellant to find out more about his complaint to MCHK.

38. As to costs, the PCPD has indicated in the oral hearing that it will not be seeking legal costs against the Appellant. We therefore make a costs order nisi that there be no order as to costs. This order nisi will become absolute within 14 days unless an application is received from any party within this 14-day period to vary the same.

(signed)

(Mr Derek Chan Ching-lung, SC)

Deputy Chairman

Administrative Appeals Board