

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 13/2023

BETWEEN

KO CHAN GOCK WILLIAM Appellant
and
PRIVACY COMMISSIONER FOR Respondent
PERSONAL DATA

DECISION

Coram: Administrative Appeals Board

Miss Lau Queenie Fiona, SC (Deputy Chairman)

Ir Lau Wing-yan (Member)

Mr Edmond Yew Yat-ming (Member)

Date of Hearing: 15 December 2023

Date of Handing Down Written Decision with Reasons: 12 June 2024

DECISION

1. By a Notice of Appeal dated 1 June 2023, the Appellant appeals against the Respondent's decision made on 22 March 2023 (the "**Decision**") to not carry out an investigation in response to the complaint filed by the Appellant against the Appellant's former daughter-in-law, Ms Tang, for disclosing his health and

financial positions to other parties without his consent whilst seeking a divorce with the Appellant's son.

2. Further, by a letter dated 16 August 2023, the Appellant applied for the hearing to take place in private, and also stated that he did not wish for this case to be published to the public. At the hearing, the Board dismissed the Appellant's application for the hearing to take place in private, and the hearing was heard in public.

A. Background

3. Ms Tang filed a divorce petition and commenced matrimonial proceedings (the "**Proceedings**") against the Appellant's son.

4. During the course of the Proceedings, Ms Tang filed various documents, some of which are the subject of complaint by the Appellant.

5. On 31 January 2022, Ms Tang submitted a Form E Financial Statement ("**Form E**"), which was prepared by her legal representatives, to the Court. In answering the question of whether there were "*any other circumstances which you consider could significantly affect the extent of the financial provision to be made by or for you or for any child of the family, including but not limited to earning capacity, disability, inheritance prospects, redundancy, cohabitation plans, and any contingent liabilities*", Ms Tang stated that "*The Respondent may have inheritance prospects from his father as the Respondent is the only son (he has one sister). The Respondent's father was diagnosed with [redacted] a few years ago.*"

6. On 17 November 2022, Ms Tang filed her 4th Affirmation in the Proceedings (the “**Affirmation**”), in which she stated:

“As far as I am aware from what I have been told by the Respondent and his father, and also from my personal experiences with his family, his parents are wealthy. The Respondent’s father was the Director of Water Supplies Department in the Hong Kong Government until about 2007. After he left the Water Supplies Department, he became a non-executive director of Chevalier Group, a publicly listed company on the Hong Kong Stock Exchange. He also enjoyed retiree benefits of civil servants including receiving a lump sum pension, monthly payments and also medical benefits. Before we married, the Respondent was living together with his parents at [address redacted], which is a luxury mansion owned by his parents...”

7. As an exhibit to the Affirmation, Ms Tang submitted to the Court a copy of the land search records (the “**Land Search Records**”) for [address redacted] (the “**Property**”), which showed that the Appellant is one of the co-owners of the Property.

8. On 6 January 2023, the Appellant lodged a complaint with the Respondent against Ms Tang for disclosing his medical condition, employment history and also personal data in the Land Search Records (collectively, the “**Data**”) to the parties to the Proceedings without his consent. The Appellant considered that the disclosure of the Data was in breach of s.64(1)(a) of the **Personal Data (Privacy) Ordinance (Cap. 486)** (the “**PDPO**”) and hence lodged a complaint against Ms Tang to the Respondent.

9. Pursuant to s.64(1)(a) of the PDPO, a person commits an offence if the person discloses any personal data of a data subject which was obtained from a data user without the data user’s consent, with an intent to obtain gain in money or other property, whether for the benefit of the person or another person.

10. After correspondence between the Appellant and the Respondent, on 22 March 2023 the Respondent made the Decision that the Appellant now appeals against. In summary, the Respondent had the following observations and views:

10.1 Since the Data was obtained by Ms Tang through her personal experiences (including communications with the Appellant and his son) as well as from the Land Registry, she was the data user of the Data. Ms Tang's legal representatives only prepared Form E and the Affirmation based on her instructions, and according to ss.2(1) and (12) of the PDPO were therefore not the data user in this case. See paragraphs 14 and 15 of the Decision.

10.2 Further, as the Data was disclosed to the parties because of the Proceedings between Ms Tang and the Appellant's son, with the purpose of Ms Tang's use of the Data being for supporting her petition against the Appellant's son and establishing or defending her legal rights, such use and disclosure of the Data was exempted from Data Protection Principle 3 by virtue of s.60B(c) of the PDPO. See paragraphs 16 and 17 of the Decision.

10.3 Whilst the Appellant had alleged that Ms Tang had breached s.64(1)(a) of the PDPO:

10.3.1 One of the essential elements of such an offence would be that the personal data concerned was obtained from a data user without the data user's consent. In the present case, the Appellant was the data subject of the Data, and his medical condition and employment history were obtained by Ms

Tang through her personal experiences rather than from another data user. Thus, s.64(1)(a) of the PDPO was not applicable.

10.3.2 As for the Land Search Records, Ms Tang had submitted those to the Court to show that the Appellant was one of the owners of the Property, which was consistent with the purpose prescribed by the Land Registry in the declaration for use of the Land Registry's online services. Thus, there was no contravention of s.64(1)(a) of the PDPO, Data Protection Principle 1 and/or Data Protection Principle 3.

See paragraphs 18 to 22 of the Decision.

10.4 For all the above reasons, the Respondent decided not to carry out an investigation into the case under s.39(2)(d) of the PDPO. This was also in accordance with paragraph 8(e) of the Respondent's Complaint Handling Policy. See paragraph 23 of the Decision.

11. The Appellant was dissatisfied with the Decision and lodged the present appeal.

B. Application for the hearing to take place in private

12. Insofar as the Appellant's application for the hearing to take place in private is concerned, the parties both made written submissions. In his letter dated 16 August 2023, the Appellant set out the reasons for his application. The Respondent filed submissions on 16 November 2023, explaining why the Respondent objected to the Appellant's application for the hearing to be

conducted in private. The Appellant did not file submissions in reply, and also did not make further oral submissions at the hearing.

13. As stated in paragraph 2 above, at the hearing the Board dismissed the Appellant's application for the hearing to take place in private, and now gives its reasons.

14. Generally speaking, the starting point is that proceedings are held in public and the parties are named in judgments. See **Re BU [2012] 4 HKLRD 417**, §10.

15. Insofar as proceedings before the Board are concerned, s.17 of the **Administrative Appeals Ordinance (Cap. 442)** (the "AABO") is entitled "*Hearings to be in public except in special circumstances*", and s.17(1) and (2) state the following:

"(1) Subject to subsections (2) and (3), the hearing of an appeal to the Board shall be in public.

(2) Where the Board hearing an appeal, after consulting the parties to the appeal, is satisfied that it is desirable to do so, it may by order—

(a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; and

(b) give directions prohibiting or restricting the publication or disclosure to some or all of the parties to the appeal, or to some or all of the persons who may be present, of evidence given before the Board or of any matter contained in any document lodged with the Board or received in evidence by

the Board, whether or not it has given directions under section 14 in respect of any such evidence, matter or document.”

16. The general principles on whether a hearing shall be held in private are summarised in **Asia Television Ltd. v. Communications Authority [2013] 2 HKLRD 354**, §§19-36:

“19. First and foremost, ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’: R v Sussex Justices, ex p McCarthy [1924] 1 KB 256, 259, per Lord Hewart CJ. Open administration of justice is a fundamental principle of common law: Scott v Scott [1913] AC 417; R v Chief Registrar of Friendly Societies, ex p New Cross Building Society [1984] QB 227; Re BU [2012] 4 HKLRD 417. It is of great importance, from the perspective of administration of justice, for a number of reasons. The public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public’s confidence in the administration of justice. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties’ or witnesses’ identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. R v Legal Aid Board, ex p Kaim Todner [1999] QB 966, 977E/F-G.

20. Second, from the litigants’ perspective, open justice also gives effect to their rights to a public hearing guaranteed in art.10 of the Hong Kong Bill of Rights.

21. Third, from the public’s point of view, open justice, which carries with it the freedom to attend proceedings and to report on them, gives substance to the media’s right to freedom of expression including the freedom to seek and impart knowledge, guaranteed under art.16(2) of the Hong Kong Bill of Rights. Likewise, it enables the public to enjoy their right to seek and be imparted with knowledge guaranteed under the same article.

22. Fourth, all this means that any restriction on open administration of justice necessarily represents a compromise between these important interests, rights and freedoms, and must be justified by considering and balancing all pertinent interests, rights and freedoms, including in particular those mentioned above.

23. Fifth, the case law has firmly established that the following considerations or matters do not by themselves justify any restriction on open administration of justice:

(1) Publicity of litigation leading to embarrassment and inconvenience: *Re Wong Tung Kin* [1989] 1 HKLR 93; *Ex parte New Cross Building Society*, at p.235F.

(2) Publicity leading to economic damage, even very severe economic damage: *R v Dover Justices, ex p Dover District Council and Wells* (1992) 156 JP 433.

(3) Professional embarrassment and possible damage to professional reputation: *Ex parte Kaim Todner*, at pp.975H-976C.

(4) The parties' agreement that the proceedings be held in private: *Ex parte Kaim Todner*, at p.977C-E.

(5) The mere fact that the subject proceedings etc which gave rise to a judicial review application were held in private: *Re The Takeovers & Mergers Panel* [1996] 2 HKLR 60; *Sit Ka Yin Priscilla v Equal Opportunities Commission* [1998] 1 HKC 278.

24. Viewed in terms of the balancing exercise described above, it may be said that the right to privacy underlying some of these considerations or matters is in itself insufficient to justify a departure from the general rule of open justice (see also para.31 below).

25. This is hardly surprising. After all, unwanted publicity, embarrassment and so forth are some of the normal incidence of litigation. They are some of the inevitable consequences of open justice. As a general rule, no one involved in litigation, particularly the initiating party of litigation, can complain. In many but certainly not all cases, if parties desire secrecy, they may, where appropriate, go for arbitration, mediation or some other form of alternative dispute resolution.

26. Sixth, however, open justice is, from the perspective of proper administration of justice, just a means, albeit an important one, to an end, that is, doing justice between the parties concerned: *Scott v Scott*, at p.437; *Ex parte New Cross Building Society*, at p.235E. It therefore follows that where open administration of justice in a case would frustrate that ultimate aim of doing justice, it is a most important if not decisive consideration to take into account when balancing the relevant interests, rights and freedoms involved, to decide whether open justice should be restricted, and if so, by what means and to what extent.

27. The case law has very often expressed this in terms of a requirement of 'necessity', that is, where justice would be frustrated if open administration of justice in a particular case is not restricted, then, to the extent necessary to prevent that from happening, there may be a restriction on doing justice openly.

28. This requirement of 'necessity' is founded on the common law, and has also found expression in art.10 of the Hong Kong Bill of Rights and, in the case of the Court of Final Appeal, s.47(3) of the Hong Kong Court of Final Appeal Ordinance. Article 10 of the Hong Kong Bill of Rights relevantly provides that the press and public may be excluded from a hearing 'to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.

29. Obvious examples here include proceedings involving wards of court or mentally incapacitated persons. Another example is proceedings for the protection of secret process. *Scott v Scott*, at p.437.

30. All this must be understood in terms of the balancing exercise described above given that different and sometimes competing interests, rights and freedoms are or may be at stake. This is all the more so when quite often, one is concerned with a risk that justice cannot be done (if it is to be administered openly), rather than a certainty that this will be so. In that type of situation, the court's task is to balance that risk (and other relevant interests etc) against other competing considerations and come up with an answer that best serves the situation at hand.

31. Seventh, apart from the interests of justice, there are other similarly important considerations that may justify restrictions on open justice. Thus art.10 of the Hong Kong Bill of Rights also mentions 'reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of all parties so requires' as exceptions to the requirement of a public hearing. See, for instance, *Re Guardian News and Media Ltd* [2010] 2 AC 697 (right to respect for private and family life).

32. Eighth, where justice can be administered openly in the case itself, but to do so would or might jeopardise some right or interest of one or both of the parties outside of the case, whether open justice should be restricted and if so, the manner and extent of restriction, must be considered by conducting the balancing exercise already described. One common example is cases concerning refugees or torture claimants where it is said that the life, limb or liberty of the refugee or torture claimant or their family

is or may be put at risk in the absence of some form of restriction on open justice: R (Kambadzi) v Secretary of State for the Home Department [2011] 1 WLR 1299; Re BU (supra).

33. *The present case falls within this category of cases. As mentioned, it was not Mr Yu's case that justice cannot be done between the parties in the appeal itself if it were to be heard in open court. Rather, counsel's principal argument was that open administration of justice in this appeal would jeopardise the applicant's right to a fair hearing in the ongoing investigation guaranteed under art.10 of the Hong Kong Bill of Rights. The argument can only be resolved by conducting the balancing exercise described above.*

34. *Ninth, there are other miscellaneous but by no means insignificant considerations that, if relevant, should be taken into account in conducting the balancing exercise. For instance, the nature of the proceedings is relevant: Ex parte Kaim Todner, at p.978C-D/E. In particular, proceedings by way of judicial review relate to decisions made in the public field, and as a general rule, they must be held in public, as the public has a legitimate interest to be informed about them, unless justice would be denied: Re The Takeovers & Mergers Panel, at p.62D; Sit Ka Yin Priscilla v Equal Opportunities Commission, at p.281D. This is an additional consideration to the general consideration about the media's and the public's right to know based on art.16(2) of the Hong Kong Bill of Rights discussed in para.21 above.*

35. *Moreover, it is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of proceedings: Ex parte Kaim Todner, at p.978D/E-G.*

36. *Tenth, where restriction on open justice is justified, it may take many forms, depending on how all pertinent interests, rights and freedoms should best be balanced. For instance, in the present case, the applicant asks for a blanket order for the hearing to be held in camera. Alternatively, it asks for a partial censor of the contents of the submissions to be ventilated in open court. Sometimes, a court may impose reporting restrictions on proceedings held in public. At other times, the court may simply restrict the identification of the parties involved in the proceedings: Re Guardian News and Media Ltd; Re BU."*

17. In summary, it is clear that:

17.1 Under s.17 of the AABO, appeal hearings “shall” be in public, although the Board has a discretion to direct that a hearing or part of a hearing shall take place in private.

17.2 Open administration of justice is a fundamental principle, and is of great importance from the perspective of administration of justice, from the litigants’ perspective and also the public’s point of view.

17.3 Open justice is, from the perspective of proper administration of justice, just a means, albeit an important one, to an end, that is, doing justice between the parties concerned. Where justice would be frustrated if open administration of justice in a particular case is not restricted, then, to the extent necessary to prevent that from happening, there may be a restriction on doing justice openly.

18. In the present case, the Appellant has not persuaded us that the hearing should be in private. The onus is on the Appellant to show that the general rule of open justice should not apply, and we do not consider that he has discharged such onus.

19. First, whilst the Appellant seeks to rely on confidentiality as a reason for the hearing to be in private, we do not agree that he has shown what “sensitive information” is involved in this case that, if disclosed, could have “severe consequences” for all parties involved. This allegation is neither particularised nor substantiated by evidence.

20. Secondly, we do not agree with the Appellant that the subject matter of the case involves personal or private matters which merit a private hearing. In particular, we note that publicity of litigation leading to embarrassment and inconvenience has been established by case law to not by itself justify any restriction on open administration of justice. See Asia Television Ltd. v. Communications Authority, §23(1); Chao Pak Ki, Raymond & Another v The Hong Kong Society of Accountants [2004] 2 HKC 469, §12.

21. Thirdly, whilst the Appellant has argued that there may be concerns regarding the safety and security of individuals involved in the case, he has again not particularised how that is so, nor adduced evidence to make good his claim.

22. Further, we agree with the Respondent's submissions that it is not unreasonable to regard the Appellant, being the person who initiated the present proceedings, as having accepted the normal incidence of the public nature of the proceedings. See Chao Pak Ki, Raymond & Another v The Hong Kong Society of Accountants, §14.

23. In the premises, at the hearing the Board dismissed the Appellant's application for the hearing to be heard in private. Further, for the same reasons, the Board sees no reason why this Decision should not be published or should be made inaccessible to the public.

C. The Appellant's grounds of appeal

24. The Appellant's grounds of appeal are as follows:

24.1 The Respondent has not explained the rationale why Ms Tang has the privilege to disclose the Data to other parties in the Proceedings without the Appellant's consent ("**Ground 1**").

24.2 The Respondent failed to give the Appellant an interview to explain further ("**Ground 2**").

D. Ground 1: Failure to explain rationale?

25. Ground 1 alleges that the Respondent did not explain its rationale for why Ms Tang was able to disclose the Data to other parties in the Proceedings without the Appellant's consent. However, the Board does not consider this allegation to be factually correct. As set out below, the Respondent did explain its rationale. Ground 1 must therefore fail.

26. The fact that the Respondent did in fact explain its rationale is sufficient to dispose of Ground 1. In any event, for completeness, the Board briefly considers and addresses other arguments made by the parties as well. The Board's observations in that regard is also relevant to the discussion under Section E below.

27. The contents and reasoning in the Decision are summarised at paragraph 10 above, and in particular, the Board notes that paragraphs 16 and 17 of the Decision explained that as the Data was disclosed to the parties because of the Proceedings between Ms Tang and the Appellant's son, with the purpose of Ms Tang's use of the Data being for supporting her petition against the Appellant's son and establishing or defending her legal rights, such use and disclosure of the Data would be exempted from Data Protection Principle 3 by virtue of s.60B(c) of the PDPO.

28. S.60B of the PDPO states:

“Personal data is exempt from the provisions of data protection principle 3 if the use of the data is—

(a) required or authorized by or under any enactment, by any rule of law or by an order of a court in Hong Kong;

(b) required in connection with any legal proceedings in Hong Kong; or

(c) required for establishing, exercising or defending legal rights in Hong Kong.”

29. As the Respondent has pointed out, in matrimonial proceedings, both parties are under a duty to give the Court full, frank and clear disclosure of their finances and assets, and other relevant circumstances. It appears that Ms Tang disclosed the Appellant’s medical condition as part of other circumstances (including inheritance prospects) which Ms Tang considered relevant to the Proceedings. As can be seen from paragraph 5 above, the topic of inheritance prospects was specifically referred to in the question that Ms Tang was answering in the Form E.

30. Although the Appellant has pointed out that the Proceedings were between his son and Ms Tang, and that the Appellant was not a party, we agree with the Respondent that s.60B of the PDPO is drafted widely and is not stated to be limited to the use of personal data of the parties named in the court proceedings.

31. The Appellant has emphasised that he is still alive, and he objects to Ms Tang’s reference to the Appellant’s son having any inheritance prospect vis-à-vis the Appellant. The Appellant’s son also argued on behalf of the Appellant that “inheritance prospect” means that it is only if a relative has died, and that

relative's estate is being dealt with, that there would be any inheritance prospect that could be referred to in Form E; he argued that "inheritance prospect" cannot refer to the Appellant since he is still alive. We specifically invited the Appellant's son to identify authority to support such proposition, but he was not able to do so. We do not see any proper legal basis for such a narrow reading of the word "prospect". The ordinary meaning of "prospect" is much wider than what the Appellant's son and/or the Appellant presently contend for.

32. Further, the Affirmation appears to have been made pursuant to a Court order to address "*the quantity and nature of the funds of the Respondent's father [i.e. the Appellant] that was used to purchase [the Property]*".

33. Whilst the Appellant argues that the Proceedings are only between his son and Ms Tang, so his wealth and the Property should not be relevant, as explained by the Appellant himself at pages 2, 3 and 7 of his Statement dated 20 September 2023, Ms Tang had given disclosure about the Property to demonstrate that the Appellant is wealthy and is a joint owner of the Property, and that the Appellant had gifted the amount of HK\$5 million to his son and Ms Tang to purchase the Property, so that she was entitled to 50% beneficial interest in this amount of money.

34. In other words, Ms Tang was using the Data in connection with the Proceedings for the purposes of establishing and/or defending her legal rights. As explained at paragraphs 16 and 17 of the Decision, this is why Ms Tang was able to disclose the Data in the Proceedings without the Appellant's consent.

35. We also agree with the Respondent that it has explained at paragraphs 18 to 22 of the Decision why s.64(1)(a) of the PDPO does not apply to the present case.

36. The Board has been informed that Ms Tang apparently ultimately did not succeed in the allegations she made in the matrimonial proceedings, and from that perspective we can understand why the Appellant may feel aggrieved. However, we note the Respondent's submission that the Respondent could not wait for the outcome of the Proceedings to determine whether there had been any infringement of the PDPO. In that regard, whilst we have some sympathy for the Appellant, we take the view that there is no proper basis to require the Respondent to wait for, or to take into consideration, the ultimate result of the Proceedings before determining whether there has been any infringement of the PDPO or whether s.60B applies. The ultimate outcome of the Proceedings is a separate question from the possible infringement of the PDPO and the applicability of s.60B.

37. Finally, insofar as the meaning of the word "required" in s.60B is concerned, we agree with the Respondent's submission that the word "required" probably does not mean there is a question of necessity when considering whether personal data can be disclosed. See Chan Yim Wah Wallace v New World First Ferry Services Ltd [2015] 3 HKC 382, §95.

38. In conclusion, Ground 1 fails.

E. Ground 2: No interview for the Appellant to provide further explanation

39. Next, we turn to Ground 2, namely the Appellant's complaint that the Respondent did not give him an interview to explain further.

40. According to the Respondent's records, the Appellant did not make any request to the Respondent for an interview, and as the Respondent has pointed out, the Appellant has not provided any evidence to show that the Respondent refused to grant him an interview to explain further. In the premises, we consider that Ground 2 fails.

41. Further, and in any event, the Board accepts the Respondent's submission that the manner in which the Respondent conducts its investigation may differ depending on the nature and background of each complaint case, and it is within the Respondent's authority to decide whether an opportunity should be given to the Appellant to respond or provide supplemental information. See 鄧志雄與個人資料私隱專員, AAB 62/2016, 15 April 2019, §34. The Board notes that in the present case, after considering the Appellant's complaint form, the Respondent did make further enquiries with the Appellant on 2 February 2023, in response to which the Appellant provided further information by an email dated 9 February 2023.

42. The Board also accepts the Respondent's submission that the Respondent has a wide discretion to decide whether to carry out or continue an investigation. See Ho Mei Ying v The Privacy Commissioner for Personal Data, AAB 52/2004, 18 April 2006, §17. Under s.39(2)(d) of the PDPO, the Respondent may refuse to carry out or continue an investigation initiated by a complaint if she is of the opinion that, having regard to all the circumstances of the case, any investigation is for any other reason unnecessary. So long as the decision is reasonable, lawful and made under the prescribed procedures, the Board should not intervene. See 梁惠貞女士與個人資料私隱專員, AAB 47/2004, 6 December 2005, §10.

43. Having taken into account all the matters discussed in Section D above, the Board considers that there is no proper basis to impugn the Respondent's decision not to carry out an investigation into the case. The Board considers that such decision was lawful and reasonable, and that there is no basis for the Board to interfere with the Decision.

44. In conclusion, Ground 2 fails.

F. Conclusion

45. For all the above reasons, the Appellant's appeal is dismissed.

46. Whilst the Respondent had at paragraph 34 of its Statement dated 30 August 2023 reserved her position on costs, the Respondent ultimately did not seek costs. Thus, the Board makes no order as to costs.

(signed)

(Miss Lau Queenie Fiona, SC)

Deputy Chairman

Administrative Appeals Board

Appellant: Acted in person, assisted by Mr Patrick Ko Po-tat, Authorized representative for the Appellant

Respondent: Represented by Ms Dorothy Fung, Legal Counsel (Acting)