

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 20/2013

BETWEEN

CHUA CHI HING ANTHONY Appellant

and

PRIVACY COMMISSIONER FOR Respondent
PERSONAL DATA

Coram: Administrative Appeals Board

Mr Chan Chi-hung, S.C. (Deputy Chairman)
Professor Horace Ip Ho-shing (Member)
Miss Catherine Yen Kai-shun (Member)

Date of Hearing: 26 March 2014

Date of Handing down Written Decision with Reasons: 10 June 2014

D E C I S I O N

BACKGROUND FACTS

1. The Appellant applied for an insurance policy to Manulife (International) Limited (“**Manulife**”) on 4 September 2009 (the “**Application**”). As required by Manulife for the purpose of assessing his Application, the Appellant attended a medical examination conducted by Medifast (Hong Kong) Limited (“**Medifast**”) later.
2. The Application was subsequently denied. Upon the Appellant’s request,

Manulife reviewed the Application and with the Appellant's consent obtained his medical records from Pamela Youde Nethersole Eastern Hospital ("PYNEH") for reference. After reviewing the Application, the decision to decline the Application was maintained by Manulife.

3. On 2 September 2010, the Appellant made a data access request to Manulife, requesting for copies of his Medifast report and all the Manulife underwriting reports relating to his Application (the "DAR").

4. Pursuant to the DAR, Manulife supplied to the Appellant with a copy of the following documents on 8 October 2010:-

- (1) The Appellant's medical records with PYNEH;
- (2) A two-page underwriting worksheet of the Application (the "**2-page Underwriting Worksheet**");
- (3) The Appellant's echocardiogram record; and
- (4) The mood questionnaire completed by the Appellant.

5. Manulife informed the Appellant that the information relating to third parties had been redacted from the copy of documents furnished to him. As for the medical examination report of Medifast ("**Medifast Report**"), Manulife stated that it was unable to provide the same to the Appellant because it contained personal information of another individual who did not agree to release that information to him.

6. The Appellant was dissatisfied with Manulife that it had failed to provide him with the following information when complying with the DAR:-

- (1) "the full Medifast report on [the Appellant] concerning medical assessment";
- (2) "the full and all the Manulife underwriting reports, showing how Manulife's doctor assess the East Hosp. Medical Report, which downgraded QMH diagnosis of 'Acute Psy. Episode' to 'Acute Stress Reaction'";
- (3) "how 精算師 assess population data of persons with 'Acute Stress Reaction' the % of which lead to suicide/death/serious diseases in

certain years, the risk of which is so high that Manulife is most likely to pay out”.

7. Hence the Appellant lodged a complaint with the Respondent.

8. The Respondent carried out an investigation pursuant to section 38(a) of the Personal Data (Privacy) Ordinance (Cap. 486) (the “**Ordinance**”) and obtained information and evidence from the Appellant and Manulife. Upon completion of the investigation, the Respondent found that Manulife had contravened section 19(1) of the Ordinance, but decided not to serve an enforcement notice on Manulife.

9. Dissatisfied with the Respondent’s decision, the Appellant lodged the present appeal.

THE INVESTIGATION

10. The investigation concluded with a report dated 26 June 2013. In the report, the Respondent stated that:-

- (1) In relation to the Medifast Report, Manulife could not refuse to provide the Appellant with the Medifast Report because a third party did not agree to disclose his personal data. Manulife was obliged to comply with the DAR as long as that could be done by omitting the personal data of that third party. Although Manulife had released the Medifast Report to the Appellant subsequently in the course of the Respondent’s investigation, it was after the 40-day requirement. Thus, Manulife has contravened section 19 of the Ordinance.
- (2) In light of the remedial action taken by Manulife, the Respondent decided not to issue an enforcement notice against it. The Respondent nevertheless put Manulife on warning that should they fail to observe the relevant requirements under the Ordinance in a similar situation in future, the Respondent should consider taking enforcement action against it.
- (3) As to the underwriting report, Manulife provided the full unedited version of the Underwriting Report to the Respondent in the course

of his investigation, which comprises 10 pages (the “**Full Underwriting Report**”). Manulife stated that it had provided the Appellant, among the Full Underwriting Report, with the 2-page Underwriting Worksheet in pursuant to the DAR. It withheld the remaining 8 pages because they dealt with the information about other individuals and its internal workflow.

- (4) After examining the remaining 8 pages of the Full Underwriting Report, the Respondent was of the view that the information therein was not relevant to the assessment of the Application. In any event, Manulife said it had supplied a copy of the Full Underwriting Report to the Appellant during a meeting (whether it was in the nature of conciliation or investigation as disputed by the Appellant in the hearing of this appeal) conducted by the Equal Opportunities Commission (the “**EOC**”).
- (5) Manulife confirmed that the Full Underwriting Report was the only document containing all records on the underwriting assessment of the Application. In the absence of any evidence to the contrary, the Respondent could not doubt Manulife’s statements and to suspect that Manulife had withheld from the Appellant any of the information required in the DAR.

THE HEARING

11. On 26 March 2014, this appeal was heard.

12. The Appellant sought to adduce a new bundle of documents to show what documents he had received from the EOC. He said that examination of that bundle would show that he had never received the Full Underwriting Report from Manulife during the EOC meeting, as the Full Underwriting Report is not amongst that bundle.

13. The Respondent opposed the Appellant’s application. Mr Lau, Counsel for the Respondent, said that since the Respondent was not equipped with those documents at the time when the decision was made, they should not be admissible in this Appeal.

14. This appeal is a de novo hearing. The Board should also be flexible and liberal in admission of evidence, and should as much as possible and practicable consider all relevant evidence now available, unless the conduct of resisting this appeal by the Respondent is prejudiced by the late admission of evidence or new evidence. In the present case, any such prejudice can be mitigated by proper directions as to the conduct of this appeal (see directions given below).

15. Therefore, we directed that those documents to be admitted as evidence of this appeal. We further directed that:-

- (1) There be liberty to the Respondent and Manulife to file and serve further written submissions limited to matters arising from those documents, within the next 7 days from the date of the hearing;
- (2) There be liberty to the Appellant to file and serve a written reply submission within 7 days after the receipt of such written submissions by the Respondent and Manulife.

16. Since the Appellant also disputes the Respondent's decision that the remaining 8 pages of the Full Underwriting Report fell outside the scope of the DAR, the Board had directed the Respondent to bring a copy of the Full Underwriting Report to this hearing.

17. In order to determine whether that issue as to the 8 pages, the Board directed that:-

- (1) The Full Underwriting Report be admitted as evidence of this appeal;
- (2) The Appellant be served a copy of the Full Underwriting Report and the Report be restricted only to him and his representative Mr. Kenny Wan for the purpose of this appeal only;
- (3) There be liberty to the Appellant to file and serve further written submissions limited to matters arising from the Full Underwriting Report within the next 7 days from the date of the hearing;
- (4) There be liberty to the Respondent and Manulife to file and serve written reply submissions within 7 days after the receipt of the Appellant's submissions.

18. The further submissions were later submitted after extensions of time had

been granted. Despite objection from the Respondent, the Board accepted the further written submissions from the Appellant outside the directions set out above. All oral and written submissions have been carefully considered by the Board.

ISSUES

19. The issues raised in this appeal for the Board's decision are:-

- (1) In relation to the contravention in respect of the Medifast Report, whether the discretion should be exercised in not issuing an enforcement notice against Manulife for their contravention of the Ordinance?
- (2) In relation to the Underwriting Report, whether it was correct that Manulife only had to provide the 2 relevant pages of the Underwriting Report to the Appellant?
- (3) Whether the Respondent was correct to hold that Manulife held no other personal data of the Appellant that Manulife was required to supply to him pursuant to the DAR?

THE RELEVANT LEGISLATION

20. An individual has right to make a data access request for his personal data under section 18 of the Ordinance:-

“(1) An individual, or a relevant person on behalf of 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.”

21. The obligation to comply with a DAR is stipulated under section 19 of the

Ordinance:-

- “(1) Subject to subsection (2) and sections 20 and 28(5), a data user must comply with a data access request within 40 days after receiving the request by —*
- (a) if the data user holds any personal data which is the subject of the request—*
 - (i) informing the requestor in writing that the data user holds the data; and*
 - (ii) supplying a copy of the data; or*
 - (b) if the data user does not hold any personal data which is the subject of the request, informing the requestor in writing that the data user does not hold the data.”*

22. With respect to enforcement notice, section 50 of the Ordinance reads:-

- “(1) If, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user is contravening or has contravened a requirement under this Ordinance, the Commissioner may serve on the data user a notice in writing, directing the data user to remedy and, if appropriate, prevent any recurrence of the contravention.*
- (1A) An enforcement notice under subsection (1) must—*
- (a) state that the Commissioner is of the opinion referred to in subsection (1) and the reason for that opinion;*
 - (b) specify—*
 - (i) the requirement which, in the opinion of the Commissioner, is being or has been contravened; and*

- (ii) *the act or omission that constitutes the contravention;*
- (c) *specify the steps that the data user must take (including ceasing any act or practice) to remedy and, if appropriate, prevent any recurrence of the contravention;*
- (d) *specify the date on or before which the steps must be taken; and*
- (e) *be accompanied by a copy of this section.*

...

- (2) *In deciding whether to serve an enforcement notice the Commissioner shall consider whether the contravention to which the notice relates has caused or is likely to cause damage or distress to any individual who is the data subject of any personal data to which the contravention relates.”*

23. The policy of the Respondent on enforcement notice is also stated under the Complaint Handling Policy of the Office of the Respondent (which does not really add anything to the provisions by the Ordinance itself):-

“(D) Issuing an enforcement notice under section 50

- 13. *As the result of an investigation, if the Commissioner is of the opinion that the relevant data user is contravening or has contravened a requirement under the Ordinance, the Commissioner will have the discretionary power to serve on the data user an enforcement notice under section 50(1) directing the relevant data user to take such steps (including ceasing any act or practice) and/or measures to remedy and if appropriate, prevent any recurrence of the contravention.*
- 14. *Under section 50(2), in deciding whether to serve an*

enforcement notice in the circumstances, the Commissioner shall consider whether the contravention to which the notice relates has caused or is likely to cause damage or distress to the relevant data subject.”

ANALYSIS AND DECISION

(1) THE MEDIFAST REPORT – WHETHER THE DISCRETION SHOULD BE EXERCISED IN NOT ISSUING AN ENFORCEMENT NOTICE AGAINST MANULIFE FOR THEIR CONTRAVENTION OF ORDINANCE

24. It is not in dispute that Manulife has contravened section 19 of the Ordinance by not providing the Appellant the Medifast Report within 40 days of his DAR. The only issue before the Board is whether the discretion should be exercised in not issuing an enforcement notice against Manulife.

25. As set out above, there is a discretion under section 50 of the Ordinance as to whether to issue an enforcement notice. The consideration for the discretion is provided by the Ordinance under section 50(2), that is “*whether the contravention to which the notice relates has caused or is likely to cause damage or distress to any individual who is the data subject of any personal data to which the contravention relates*”.

26. Mr Lau, Counsel for the Respondent, correctly pointed out that the Respondent has no power to order any monetary compensation to the Appellant. In the present case of contravention, an enforcement notice can only order the data user to remedy the contravention.

27. As stated in the Respondent’s website as to the policy of the Ordinance, it is remedial in nature, as opposed to punitive. The Board agrees with such view. The Board shall take a broad practical view of the matter and examine what could be the damage or distress caused to the Appellant by reason of Manulife’s contravention, and what remedy can be brought by issuance of an enforcement notice.

28. Despite the denial by the Appellant at the hearing, the Board finds that the

Medifast Report has been released to the Appellant, albeit much later than the 40-day requirement. This is supported by a telephone conversation on 21 June 2013 between the Appellant and a Personal Data Officer of the Respondent and evidenced in the relevant contemporaneous telephone record.

29. Due to its contravention, Manulife was given a warning by the Respondent to deter it from future contravention of the Ordinance. We see no further remedial actions could be taken. An enforcement notice in this regard would be futile and serve no useful purpose.

30. Bearing in mind the remedial nature of the Ordinance and the overall practicality in this matter, this Board is of the view that the discretion should be exercised in not issuing an enforcement notice.

(2) UNDERWRITING REPORT – WHETHER THE RESPONDENT WAS CORRECT TO CONCLUDE THAT MANULIFE ONLY HAD TO PROVIDE THE 2-PAGE UNDERWRITING WORKSHEET TO THE APPELLANT

31. Any person has a right under section 18 of the Ordinance to make a DAR for his personal data. Personal data is defined under section 2 as:-

“personal data (個人資料) 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*
- (c) in a form in which access to or processing of the data is practicable.”*

32. If one simply takes the widest literal meaning of the section, the scope of personal data can be so wide that information even with the slightest connection to the data subject has to be disclosed to the data subject. This interpretation would place a heavy burden on the data user to retrieve the requisite data and expose the data user to a risk to disclosure of third party information in order to comply with a DAR.

33. In **Wu Kit Ping v Administrative Appeals Board** [2007] 5 HKC 450, the applicant was a patient at an out-patient clinic of the Department of Health. She lodged a complaint with the Department alleging incorrect diagnosis of her condition. She sought copies of written explanations or statements of medical officers concerning her treatment but the Department declined. The applicant made a DAR to the Department but was later supplied with documents which had been redacted. Dissatisfied, she complained to the Privacy Commissioner for Personal Data, claiming that the Department had failed to comply fully with the DAR. The Commissioner decided that the investigation of the complaint was unnecessary because the redacted words were not her personal data, and having examined the unedited documents, the Commissioner agreed that the redactions were justified. The applicant appealed to the Administrative Appeals Board, which confirmed the Commissioner's decision. The applicant applied for judicial review of the decision of the Board in relation to the redactions.

34. Saunders J, affirming the decision of the Board, held that:-

- (1) The purpose of the Ordinance was 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.
- (2) The individual data subject was not entitled to obtain a copy of every document upon which there was a reference to him. It was not the purpose of the Ordinance to supplement the rights of discovery in legal proceedings, nor to add any wider action for discovery for the purpose of discovery the identity of a wrongdoer under the principles established in **Norwich Pharmacal v Commissioners of Customs and Excise** [1974] AC 133.
- (3) The entitlement of a data subject under the Ordinance was to know what personal data was held by the data user and to a copy of that data: **Gotland Enterprises Ltd v Kwok Chi Yau** [2007] 1 HKLRD 226 followed.
- (4) If the maker of the document expressed an opinion about a data subject, that opinion would constitute personal data to which the data subject would be entitled to access.
- (5) However, an opinion expressed in the same document by the maker

of the document about himself, unless it related indirectly to the data subject, would not constitute the personal data of the data subject.

35. At the hearing, the parties agreed it is common ground that the 2-page Underwriting Worksheet containing the personal data of the Appellant was given to him within 40 days pursuant to the DAR.

36. Mr Wan said that the Appellant had never received the Full Underwriting Report until the hearing to date. He also found that the 2-page Underwriting Worksheet that the Appellant received within the 40-day period pursuant to the DAR and the one received during the EOC meeting were different.

37. Mr Lu, Legal Counsel of Manulife, pointed out that the difference is due to the operation of different systems in generating the worksheets. Their contents were the same.

38. Having considered the two versions of the 2-page Underwriting Worksheet, the Board finds that there is no material difference between the two.

39. The next question is: whether the 8 remaining pages contained the personal data of the Appellant that was subject to the DAR and should have been given to the Appellant as required by the Ordinance? If the answer is yes, Manulife would have contravened the Ordinance by failing to supply the 8 remaining pages to the Appellant within 40 days.

40. What can be distilled from Saunders J decision in **Wu Kit Ping** (supra) is that one has to approach the issue with common sense and practicality, and that each case is a matter of degree and fact, as to whether the data passed the threshold and thus was required to be provided pursuant to a DAR. While the data subject has a right to know what personal data the data user possesses, he is not entitled to every document simply when there may be a reference to him.

41. Although there were certain references to the Appellant among the 8 remaining pages of the Full Underwriting Report, they did not relate to the personal data of the Appellant. Instead, the references were only made as part of the internal workflow within Manulife and the handling of the Appellant's complaint by different personnel.

42. Therefore, having considered the 8 pages carefully itself, the Board is clearly of the view that Manulife did not have to provide to the Appellant the 8

remaining pages of the Full Underwriting Report. Having provided with the 2-page Underwriting Worksheet, Manulife had complied with the DAR.

(3) WHETHER THE RESPONDENT WAS CORRECT TO HOLD THAT MANULIFE HELD NO OTHER PERSONAL DATA OF THE APPELLANT AND WAS REQUIRED TO SUPPLY TO HIM PURSUANT TO THE DAR

43. The Respondent in both of his results of investigation and his written statement for this appeal submitted that there was no evidence to show that Manulife held other document or record containing the Appellant's personal data.

44. The Appellant maintained that Manulife was holding other personal data of him that had not been disclosed pursuant to the DAR. However, Mr Wan was unable to point to any evidence to support his allegation.

45. We agree with the Respondent. Manulife stated that it did not have possession of any documents and the Full Underwriting Report was the only document containing all records on the underwriting process of the Application. The Board should not accede to what amount simply to an invitation by the Appellant to speculate as to whether Manulife had withheld any other information that it was bound to disclose pursuant to the DAR. The Appellant, as the data subject, ought to have some evidence to support such allegation. There is none.

46. The Ordinance has offered protections to the data subject by imposing serious consequences on the data user for this kind of situation. Section 50B(1)(c) provides that any person who makes a statement which he knows to be false or does not believe to be true, or otherwise knowingly misleads the Respondent or any other person in the performance of his functions, commits an offence and is liable on conviction to a fine and imprisonment.

47. Therefore, in the absence of any contrary evidence, the Board finds that Manulife did not withhold any other personal data that ought to be disclosed pursuant to the Appellant's DAR.

48. Thus, except as to the contravention of the Ordinance in supplying the Medifast report only after 40 days, there was no other contravention by Manulife.

49. For the above reasons, this appeal is dismissed and the decisions of the Respondent are upheld in full.

CONCLUSION AND ORDERS

50. This appeal is dismissed, with no order as to costs.

(signed)

(Mr Chan Chi-hung, S.C.)
Deputy Chairman
Administrative Appeals Board