

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 33 OF 2017

BETWEEN

X

Appellant

and

PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board
Mr Paul LAM Ting-kwok, SC (Chairman)
Mr LAM Tak-hing (Member)
Mr TSANG Mo-chau (Member)

Date of Hearing: 2 August 2018

Date of Handing down Written Decision with Reasons: 12 September 2018

DECISION

A. INTRODUCTION

1. Pursuant to an anonymity order made on 25 June 2018, the name of the Appellant will appear as Letter "X" in this Decision. This is an appeal brought

by X against the decision of the Respondent, namely, the Privacy Commissioner for Personal Data (“the PCPD”), whereby the PCPD decided not to pursue further a complaint made by X against C-Mer Eye Care Holdings Limited (“C-Mer”). X complained that, in the application proof prospectus of C-Mer for its intended listing on the Main Board of the Stock Exchange of Hong Kong (“SEHK”), C-Mer disclosed matters relating to her medical history and her involvement in legal proceedings with Hong Kong (International) Eye Care Group Limited (“Hong Kong Eye Care”) and Dr Lam Shun Chiu Dennis (“Dr Lam”).

2. The main issues in this appeal are, firstly, whether the information disclosed in the relevant part of the above-mentioned document made by C-Mer contained the personal data of X; and if so, whether disclosure of the same was exempted on the ground that it was for a purpose required by law.

B. THE FACTS

3. X had received treatments from Dr Lam of Hong Kong Eye Care. On 23 March 2016, she commenced legal proceedings in the High Court of Hong Kong against Dr Lam and Hong Kong Eye Care to claim damages for medical negligence. The particulars of this litigation, including X’s name, had been reported by the mass media in Hong Kong and could be found in the entry concerning Dr Lam in the Wikipedia.

4. Dr Lam is the founder, an executive director, chairman of the board of directors, the chief executive officer, and one of the principal shareholders of C-Mer, which is a company incorporated in the Cayman Islands. Hong Kong Eye Care is a wholly-owned subsidiary company of C-Mer.

5. On 20 July 2017, C-Mer uploaded an application proof of C-Mer (“the

Application Proof”) onto the website of the SEHK. In the English version, under the section entitled “Business”, at p. 161 of the Application Proof, it was stated that:

Legal proceedings Hong Kong	Legal consequence/ramification
<p><i>Possible medical negligence</i></p> <p>1. Dr Dennis LAM and HK Eye Care (collectively, the “Defendants”), a wholly-owned subsidiary of our Company, are involved in a civil litigation before the High Court of Hong Kong in which the plaintiff, who is one of our patients in Hong Kong and an Independent Third Party, claims against the Defendants for medical negligence in pre-surgical treatment and post-surgical treatment. The legal proceedings were commenced in March 2016. The alleged negligence includes allegations against Dr Dennis LAM for his failure to give proper advice and treat and control the dry eye condition before and after undertaking a refractive surgery to cure myopia at our eye hospital in Shenzhen.</p> <p>The plaintiff claims total damages of HK\$24.6 million for damages which include the past and future inconvenience and loss arising from the alleged negligence on the part of the Defendants. The writ of summons was issued on 23 March 2016, and the proceedings are still in the preliminary stage without any date set for exchange of evidence, pre-trial review and trial.</p>	<p>Dr Dennis LAM and we have sought legal advice from Hoosenally & Neo and are advised by the legal adviser to Dr Dennis LAM and HK Eye Centre on the alleged medical negligence that, with the support of reports from leading experts in clinical ophthalmology, there can be no negligence or any failure on the part of Dr Dennis LAM in undertaking the surgery and pre-surgical and post-surgical treatments. The legal advice received by Dr Dennis LAM and us also suggests that the claim for damages by the plaintiff of HK\$24.6 million is manifestly excessive and totally unrealistic. Based on the advice from Hoosenally & Neo, our Directors are of the view that there is no evidence to justify a claim by the plaintiff of any significant amount.</p> <p>Based on the current timetable, the Directors anticipate that if the matter has not been struck-out by the court, the trial would be taken place during the first quarter of 2019. In light of the foregoing and based on the advice received by our Board on the latest development of the claim, our Directors do not consider that such claim is material to our business in terms of amount of claim as well as the nature of the allegations. On this basis, our Directors do not consider it necessary to make any provision for the possible damages that may be borne by us if the plaintiff successfully claims against the Defendants.</p>

6. The listing application of C-Mer was successful. X's medical history and her involvements in the litigation proceedings with Hong Kong Eye Care and Dr Lam was disclosed at p. 180 of the prospectus of C-Mer issued on 29 December 2017 ("the Prospectus"). The Prospectus was registered with the Hong Kong Companies Registry on 28 December 2017. C-Mer has been listed on the SEHK since 15 January 2018.

C. X'S COMPLAINT AND PCPD'S DECISION

7. On 10 August 2017, X filed a written complaint form to the PCPD dated 8 August 2017 with an attachment dated 10 August 2017 setting out her grounds of complaint. In short, X complained that the above passage at p. 161 of the Application Proof referred to X's medical history and her involvements in the litigation proceedings with Hong Kong Eye Care and Dr Lam ("the Relevant Information"); and such information constituted her personal data, which C-Mer disclosed without her consent.

8. By a notice with written reasons dated 12 October 2017, PCPD notified X that it had decided not to pursue X's complaint further pursuant to s.39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486) ("the PDPO"), and paragraph 8(e) of the Complaint Handling Policy (Fifth Revision) of PCPD. ("the PCPD's Decision")

9. S.39(2)(d) of the PDPO provides that:

"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 regarded to all the circumstances of the case –
any investigation or further investigation is for any other reason

unnecessary.”

10. Paragraph 8(e) of the Complaint Handling Policy of PCPD provides that:

“8. Section 39(1) and (2) of the Ordinance contain various grounds on which the Commissioner may exercise his discretion to refuse to carry out or decide to terminate an investigation. In applying some of those grounds, the PCPD’s policy is as follows:

...

(e) after preliminary enquiry by the PCPD, there is no prima facie evidence of any contravention of the requirements under the Ordinance.”

11. In the written reasons for its Decision, PCPD opined that C-Mer was the data user of the Relevant Information. It took the view that:

(a) The Relevant Information did not constitute X’s personal data because X’s name was not mentioned in the Application Proof and X’s identity could not be discerned from the Relevant Information alone.

(b) Further, even if someone combined the Relevant Information and other information reported in the mass media, there was no reasonable grounds to put the blame on C-Mer which complied with the relevant laws and regulations to disclose the Relevant Information. Further, it would be unreasonable to ask C-Mer not to disclose the Relevant Information if X’s identity had already been disclosed through some other channels.

The PCPD therefore concluded that the PDPO was inapplicable in X's complaint case.

D. THIS APPEAL

12. By a Notice of Appeal dated 8 December 2017, X lodged with the Administrative Appeals Board an appeal against the PCPD's Decision. She set out 5 grounds of appeal in the Notice of Appeal. However, she has abandoned the 5th ground before the hearing of this appeal. Hence, only 4 grounds of appeal remain.

13. Pursuant to s.11 of the Administrative Appeals Board Ordinance (Cap. 442), on 13 February 2018, the PCPD filed a written statement relating to its Decision. On 21 February 2018, C-Mer, as the person bound by the PCPD's Decision, filed its written submissions.

14. For the hearing of this appeal, X adopted her written Response filed on 21 March 2018 as her skeleton submission; PCPD filed its skeleton submission on 26 July 2018, and C-Mer filed its skeleton submission on 27 July 2018. At the hearing of this appeal, we have heard oral submission from the legal representatives acting for X, PCPD and C-Mer.

15. It is common ground that the hearing of this appeal before the Board is a hearing *de novo* (*Li Wai Hung Cesario v Administrative Appeals Board*, CACV 250/2015 (15/6/2016), §6.1). We shall proceed to consider the merits of the 4 grounds of appeal in the light of the all materials put before, and submissions made to, us.

E. GROUND 1

16. Ground 1 reads “The Commissioner erred in fact and in law in deciding that the Relevant Information did not constitute personal data.” The main and key issue in this appeal is whether the Relevant Information contained the personal data of X.

17. X’s case is that the Relevant Information referred to X’s medical history and her involvements in the litigation proceedings with Hong Kong Eye Care and Dr Lam. To be more specific and accurate, p. 161 of the Application Proof contained the following information:

- (a) A patient in Hong Kong had commenced legal proceedings against Hong Kong Eye Care and Dr Lam for medical negligence in pre-surgical and post-surgical treatment.
- (b) The legal proceedings were commenced by a writ of summons on 23 March 2016, and were still at a preliminary stage.
- (c) The patient alleged that Dr Lam had failed to give proper advice and treat and control the dry eye condition before and after undertaking a refractive surgery to cure myopia at the eye hospital in Shenzhen.
- (d) The patient claimed a total sum of HK\$24.6 million.

18. It is not in dispute that such information constituted “data”, which has been defined in s.2 of the PDPO as:

“any representation of information (including an expression of opinion) in

any document, and includes a personal identifier.”

19. The question is whether the Relevant Information constituted the “personal data” of X. S.2 of the PDPO provides that:

“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 ...”

In the same section, “practicable” is defined to mean “reasonably practicable.”

20. The first requirement is that the data must relate directly or indirectly to a living individual. PCPD and C-Mer do not dispute that the Relevant Information met the first requirement. What is in issue is the second requirement.

21. As to the second requirement that the data must be one from which it is practicable for the identity of the individual to be directly or indirectly ascertained. P. 161 of the Application Proof did not disclose the name of X. Hence, the identity of the individual involved, namely, X, could not be directly ascertained from the Relevant Information. The critical question is whether it was reasonably practicable to ascertain X’s identity indirectly from the Relevant Information. It is vital to bear in mind that the test is “reasonably practicable”, not simply “practicable”, let alone “possible”.

22. X submits that, at p. V-2 of the Application Proof, it was stated that the letter of advice issued by Hoosenally & Neo in respect of a claim for medical negligence against Dr Lam and C-Mer would be available for inspection. That was clearly a

reference to the legal advice given in relation to the claim referred to at p. 161 of the Application Proof.

23. We accept that it was reasonably practicable to seek inspection of the letter of advice from Hoosenally & Neo. At the hearing, upon our request, C-Mer produced a copy of the letter of advice dated 29 December 2017. C-Mer also confirmed that no one had actually inspected the letter of advice. Most importantly for the present purpose, the name of X had been redacted in the letter. It was impossible to find out or ascertain the name of X from that letter.

24. X also submits that, under Order 63, rule 4(1) of the Rules of the High Court (Cap. 4A), any person shall, on payment of the prescribed fee, be entitled during such hours as the Registrar may direct to search for, inspect and obtain a copy of any writ of summons filed in the Registry. As the date of the writ of summons was included in the Relevant Information, it would be open to an interested party to search the daily log book kept by the Registry; and as the name of the defendants were known, it would be possible to identify the writ of summons; and the name of X could then be found out. We were also told that it would only cost about HK\$18 to search in the Registry for the writ of summons. We accept that, insofar that the Relevant Information contained the date of the writ, the name of the defendants and the nature of the legal proceedings, it contained data from which it would be “possible” for the identity of X to be indirectly ascertained. However, we are not satisfied that it contained data from which it was “reasonably practicable” for the identity of X to be indirectly ascertained. To begin with, the identity of the plaintiff in those legal proceedings was immaterial; it is inconceivable why a potential investor would be interested in his/her identity at all. Moreover, for anyone who intended to rely on Order 63, rule 4 of the Rules of the High Court to find out the identity of X, he/she would need to have the requisite legal knowledge about this rule, or he/she would need to seek legal advice on

possible means to find out the identity of X first; after that, he/she would need to take the trouble of attending the Registry (either by himself/herself or through an agent) to search the daily log book; and then, he/she would need to pay a small fee to obtain a copy of the writ of summons. If he/she sought assistance from a lawyer, it was most likely that he/she would need to incur some legal expenses. Having regard to the degree of legal knowledge, efforts, time and expenses required in order to ascertain the identity of X by such means, we are not convinced that the requirement of “reasonably practicable” was satisfied.

25. For these reasons, we are not satisfied that the Relevant Information constituted the personal data of X. Ground 1 is, therefore, rejected.

26. On this ground alone, the appeal should be dismissed. However, for the sake of completeness, we shall consider the other grounds of appeal.

F. GROUND 2

27. Ground 2 reads “The Commissioner took into consideration irrelevant matters when deciding the Relevant Information did not constitute personal data.”

28. It is unnecessary for us to deal with this ground of appeal. As this hearing is a hearing *de novo*, irrespective of what considerations PCPD had taken into account in reaching its Decision, we shall consider, and we have indeed considered, the matter afresh.

G. GROUND 3

29. Ground 3 reads “The Commissioner failed to consider whether C-Mer used the Relevant Information for the purpose of drafting C-Mer’s Prospectus without

the Appellant's prescribed consent, in contravention of Data Protection Principle 3 of the PDPO."

30. Data Protection Principle ("DPP") 3 in Schedule 1 of the PDPO provides that:

"(1) Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose.

...

(4) In this section – new purpose, in relation to the use of personal data, means any purpose other than –

(a) the purpose for which the data was to be used at the time of the collection of the data; or

(b) a purpose directly related to the purpose referred to in paragraph (a)."

31. S.60B of the PDPO provides that:

"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."

32. S.3 of the Interpretation and General Clauses Ordinance (Cap. 1) provides that, firstly, "enactment" has the same meaning as Ordinance; and, secondly, "Ordinance" means:

- “(a) any Ordinance enacted by the Legislative Council;
- (b) any Ordinance adopted by virtue of Article 160 of the Basic Law as a law of the Hong Kong Special Administrative Region;
- (c) any subsidiary legislation made under any such Ordinance except any such subsidiary legislation which has pursuant to Article 160 of the Basic Law been declared to be in contravention of the Basic Law; and
- (d) any provision or provisions of any such Ordinance or subsidiary legislation.”

33. The issue is whether, assuming that the Relevant Information constituted the personal data of X, it was exempted from DPP3 because of s.60B(a) of the PDPO. To answer this question, it is necessary to consider the relevant rules and regulations concerning the content of an application proof.

34. S.38(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (“the C(WUMP)O”) provides that:

“...every prospectus... must state the matters specified in Part I of the Third Schedule...”

35. Paragraph 3, Part I of the Third Schedule of the C(WUMP)O sets out the matters to be specified in a prospectus:

“Sufficient particulars and information to enable a reasonable person to form as a result thereof a valid and justifiable opinion of the shares or

debentures and the financial condition and profitability of the company at the time of the issue of the prospectus, taking into account the nature of the shares or debentures being offered and the nature of the company, and the nature of the persons likely to consider acquiring them.”

36. Rule 12.01A of the Main Board Listing Rules of SEHK provides that:

“A new applicant must publish its Application Proof on the Exchange’s website in accordance with rule 2.07C and Practice Note 22.”

37. Rule 2.07C(1)(b)(ii) of the Main Board Listing Rules provides that:

“... the listed issuer or new applicant must submit to the Exchange through HKEx-EPS for publication on the Exchange’s website a ready-to-publish electronic copy of each of the prospectus and any application forms. The copies must be submitted to the Exchange at the same time as they are sent to shareholders by the listed issuer or, in the case of a new applicant, their distribution to the public commences...”

38. Paragraph 9 of the Practice Note 22 to the Rules Governing the Listing of Securities provides that:

“A new applicant must submit its Application Proof through HKEx-ESS for publication on the Exchange’s website:

- (a) in the case of a new applicant for listing equity securities, at the same time the new applicant files a listing application with the Exchange;
- or

(b) in the case of a new CIS applicant required to publish its Application Proof under rule 20.25, at the same time the new CIS applicant files an authorisation application with the Commission.”

39. Rule 11.06 of the Main Board Listing Rules provides that:

“... listing documents must contain all of the specific items of information which are set out in either Part A, B, E or F of Appendix 1 (as the case may be)...”

40. Rule 11.07 of the Main Board Listing Rules provides that:

“...all listing documents... must, as an overriding principle, contain such particulars and information which, according to the particular nature of the issuer and the securities for which listing is sought, is necessary to enable an investor to make an informed assessment of the activities, assets and liabilities, financial position, management and prospects of the issuer and of its profits and losses and of the rights attaching to such securities.”

41. Part A of Appendix 1 of the Main Board Listing Rules sets out the contents of listing documents in the case where listing is sought for securities of an issuer no part of whose share capital is already listed, which include:

“Financial information about the group and the prospects of the group –

40. Particulars of any litigation or claims of material importance pending or threatened against any member of the group, or an appropriate negative statement.”

42. Paragraph 4.1 of Part E of Appendix 1 of HKEX Guidance Letter No. GL86-16 provides that:

“Set out below is a list of key areas that can be found in the “Business” section in listing documents...

<i>Key areas</i>	<i>Examples</i>	<i>Relevant guidance</i>
<i>Litigation</i>	<ul style="list-style-type: none"> ● <i>Whether an applicant is subject to actual or threatened material claims or litigations and their impact on an applicant's operations, financials and reputation</i> ● <i>Whether an applicant's directors are involved in the above claims and litigations and if yes, whether they are able to comply with Main Board Rules 3.08 and 3.09 (GEM Rules 5.01 and 5.02)</i> 	

43. X submits that the Listing Rules and other requirements imposed by SEHK do not constitute requirements required by an “enactment” within the meaning of s.60B(a) of the PDPO. The short answer is that although the Listing Rules and other requirements imposed by SEHK do not, by themselves, constitute “enactments”, they must be considered in the light of section 3, Part 2 of the Securities and Futures (Stock Market Listing) Rules (Cap. 571V), which provides that:

“An application for the listing of any securities issued or to be issued by the applicant shall –

- (a) comply with the rules and requirements of the recognized exchange company to which the application is submitted (except to the extent

that compliance is waived or not required by the recognized exchange company);

- (b) comply with any provision of law applicable; and
- (c) contain such particulars and information which, having regard to the particular nature of the applicant and the securities, is necessary to enable an investor to make an informed assessment of the activities, assets and liabilities and financial position, of the applicant at the time of the application and its profits and losses and of the rights attaching to the securities.”

44. There cannot be any dispute that the “recognized exchange company” mentioned in s.3(a) refers to SEHK. It is therefore a statutory requirement to comply with the above-mentioned relevant Listing Rules and requirements imposed by SEHK in the present context. Putting aside the Listing Rules and requirements imposed by SEHK, C-Mer was obliged under s.3(c) to provide the particulars of pending legal proceedings, as they were clearly information necessary to enable an investor to make an informed assessment of the financial position, etc., of C-Mer.

45. The next issue is whether the Relevant Information constituted particulars of litigation or legal proceedings required to be disclosed. Section 3, Part 2 of the Securities and Futures (Stock Market Listing) Rules, the relevant Listing Rules and requirements imposed by SEHK, do not specify what are the particulars which need to be disclosed. In our view, they must include any information which a reasonable potential investor may regard as relevant in assisting him/her to assess the financial position, or prospects, of the company to be listed.

46. As mentioned, the Relevant Information contained the date when the legal proceedings were commenced, a brief description of the medical negligence claim, the amount of the claim, and the stage of the legal proceedings. It is essential to bear in mind that C-Mer is engaged in the provision of ophthalmic services. As acknowledged at pp. 21-22 of the Application Proof, one of the business risks that it faces is medical negligence claims due to the service provided by its associated companies and its ophthalmologists. In our view, all the Relevant Information were matters that a reasonable potential investor may regard as relevant in assessing the financial position, and prospects, of C-Mer. The nature of the medical negligence claim would have a bearing on the potential impact on the reputation of C-Mer, which may in turn affect its prospects. The size of the claim would have direct potential implications on the financial position of the company. The time when legal proceedings were commenced, and the stage of the legal proceedings, would indicate how imminent or remote the company may suffer any adverse impact due to the legal proceedings.

47. For these reasons, we are satisfied that, assuming that the Relevant Information constituted X's personal data, disclosure of the Relevant Information was required by an enactment in Hong Kong, and was therefore exempted from DPP3. It follows that Ground 3 must be rejected.

H. GROUND 4

48. Ground 4 reads "The Commissioner failed to consider whether C-Mer failed in discharging its obligations in ensuring the content of C-Mer's Prospectus complies with PDPO."

49. This ground does not add anything to the grounds already considered above.

I. CONCLUSION AND ORDER

50. For the above reasons, we dismiss the appeal. All parties indicated at the end of the hearing that they would not make any application for costs. Accordingly, there will be no order as to costs.

(signed)

(Mr Paul LAM Ting-kwok, SC)

Chairman

Administrative Appeals Board