

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 42/2016

BETWEEN

WONG SHU LING SHIRL

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board
Mr Eugene FUNG Ting-sek, SC (Deputy Chairman)
Mr LAM Wai-choi (Member)
Dr Thomas SO Shiu-tsung (Member)

Date of Hearing: 22 March 2017

Date of Handing Down Written Decision with Reasons: 16 May 2017

DECISION

A. INTRODUCTION

1. This is an appeal of Ms Wong Shu Ling Shirl (“**the Appellant**”) against the decision of the Privacy Commissioner for Personal Data (“**the**

Respondent") dated 23 June 2016 not to serve an enforcement notice on Town Health Medical & Dental Services Limited ("**Town Health**").

B. THE RELEVANT BACKGROUND

2. The Appellant attended the clinic located at Heng Fa Chuen ("**the Clinic**") operated by Town Health for medical consultation on 20 and 30 November 2014. The attending doctors of the Clinic compiled handwritten medical notes during these two visits ("**the Medical Notes**").

3. On 3 December 2014, the Appellant made a data access request ("**DAR**") on the form specified under the Personal Data (Privacy) Ordinance (Cap. 486) ("**the Ordinance**") to Town Health for "*all medical records (including but not limited to handwritten notes made by attending doctors Mr 王學超 & Ms 胡秀蘭 on 30th November 2014 & 20th November 2014 respectively)*" related to her.

4. Town Health requested the Appellant to fill in its designated "Medical Note Application Form" and imposed an administration fee of HK\$100 plus a copying fee of HK\$5 per page for complying with the DAR. According to the Appellant, she was told by the staff of Town Health that the administration fee of HK\$100 could not be adjusted as the Clinic had to undergo an approval process of her DAR.

5. The Appellant considered the administration fee of HK\$100 to be excessive and refused to pay the fee imposed by Town Health for

complying with her DAR (“**the Fee**”). Town Health refused to comply with the DAR as the Appellant had not paid the Fee.

6. The Appellant then lodged a complaint with the Respondent against Town Health for imposing an excessive fee for complying with her DAR. After receiving the Appellant’s complaint, the Respondent carried out an investigation pursuant to section 38(a) of the Ordinance.

7. At the request of the Respondent, Town Health in its letter dated 11 May 2015 gave an account of the retrieval work of complying with the Appellant’s DAR. Town Health explained that the work would involve its staff finding out the Appellant’s patient number by keying her personal information into the computer, and then manually looking for the medical notes based on her patient number. Whilst stating that the Fee was a standard one, Town Health also provided its breakdown of its costs for the compliance with the DAR. Some of the costs included: (1) cost of management staff administrative work (HK\$41.77), (2) doctor administrative work (HK\$42) and (3) cost of frontline staff administrative work (HK\$2 per page).

8. The Respondent subsequently requested for further breakdown and information of the above costs. In its letter dated 25 July 2015 (wrongly dated to be 25 June 2015), Town Health stated, amongst other things, as follows:

“2. Cost of doctor’s approval

After Central Office has approved, doctor needs to review the

medical record before making the copy.

- *General Consultation Time: Average around 6 minutes/consultation*
- *Consultation fee: HKD\$250*
- *Review of medical note (2 minutes at least): HKD250 / 6 x 2 = HKD\$83.3*

3. Cost of frontline staff copying work, also electricity, paper, ink and printer depreciation:

Approximately HK\$2 / page”

9. In his Result of Investigation dated 23 June 2016 (“**Result of Investigation**”), the Respondent did not find the Fee to be excessive and was of the view that Town Health had not contravened section 28(3) of the Ordinance. In particular, at paragraphs 19 to 21 of the Result of Investigation, the Respondent stated:

“19. ... As I have not been provided by Town Health with the information regarding the hourly rate of its staff involved in the labour costs of “HK\$41.77” and “HK\$2” respectively, I have to make reference to other sources. The statistics from the Census and Statistics Department appears to be a reliable reference to calculate the reasonable cost. According to its statistics published, the average monthly salary of a “general office clerk” was HK\$13,230 in December 2014, the time when Ms Wong’s DAR was lodged. Based on this figure, the average hourly rate of a “general

office clerk” is HK\$76.33 [i.e. HK\$13,230 x 12 months / (52 weeks x 5 days) / 8 hours]. Based on this rate, the amount of HK\$41.77 as quoted by Town Health equals to about 33 minutes [i.e. HK\$41.77 / HK\$76.33 x 60 minutes = 32.83 minutes] of work of a “general office clerk”. A reasonable estimate of the time to be taken for completing all the tasks stated in paragraph 18 above will be more than 33 minutes, and hence, I am satisfied that the amount of HK\$41.77 charged for “management staff administrative work” by Town Health is on its face not excessive, after taken into account the estimated time for taking the direct and necessary steps in complying with the DAR and the average hourly rate of a general office clerk to perform the tasks involved.

20. Town Health also charged the review of the Medical Notes by the doctor concerned at HK\$83.30. As medical record is sensitive personal data of a patient, I accept that it is necessary for a doctor to take a quick look at the document(s) requested, before releasing a copy of the same to Ms Wong in order to ensure the accuracy of its content. Town Health claimed that the doctor concerned would require at least two minutes to review the Medical Notes. This means that he would be charging at a professional rate of not exceeding HK\$2,499 per hour. I find that both the hourly rate and the time to be taken for reviewing the Medical Notes not excessive.

21. In view of the foregoing, I consider these two items of labour costs, HK\$41.77 + HK\$83.30 = HK\$125.07, to be permissible

charging items as they represent Town Health's direct and necessary costs for complying with the DAR."

10. By a letter dated 23 June 2016, the Respondent sent the Result of Investigation to the Appellant and informed her of her right to object to the decision not to serve an enforcement notice on Town Health under section 47(4) of the Ordinance.

11. On 18 July 2016, the Appellant lodged an appeal to the Administrative Appeals Board ("**the Board**") against the Decision.

C. THE RELEVANT STATUTORY PROVISIONS AND THE RELEVANT PRINCIPLES

12. Section 28 of the Ordinance relevantly provides:

"(1) A data user shall not impose a fee for complying or refusing to comply with a data access request or data correction request unless the imposition of the fee is expressly permitted by this section.

(2) Subject to subsections (3) and (4), a data user may impose a fee for complying with a data access request.

(3) No fee imposed for complying with a data access request shall be excessive.

...

(5) A data user may refuse to comply with a data access request unless and until any fee imposed by the data user for complying with the request has been paid.

...”

13. Sections 47(3) and 47(4) of the Ordinance provide:

“(3) Where the Commissioner has completed an investigation initiated by a complaint, he shall, in such manner and at such time as he thinks fit, inform the complainant of—

- (a) the result of the investigation;*
- (b) any recommendations made to the relevant data user under subsection (2)(b);*
- (c) any report arising from the investigation that he proposes to publish under section 48;*
- (d) any comments made by or on behalf of the relevant data user on any such recommendations or report;*
- (e) whether or not he has served, or has decided to serve, an enforcement notice on the relevant data user in consequence of the investigation;*
- (f) if the Commissioner has not so served, and has decided not to so serve, such enforcement notice, his right to object thereto under subsection (4); and*

(g) *such other comments arising from the investigation as he thinks fit to make.*

...

(4) *The complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person, or either) may appeal to the Administrative Appeals Board against a decision of the Commissioner—*

(a) *to the effect that he has not served, and has decided not to serve, an enforcement notice on the relevant data user in consequence of the investigation concerned; and*

(b) *of which the complainant was informed in the notice concerned under subsection (3) served on him.”*

14. Section 21(1)(j) of the Administrative Appeals Board Ordinance (Cap. 442) provides:

“For the purposes of an appeal, the Board may - (j) subject to subsection (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit”.

15. The appeal before the Board is a hearing *de novo*. This means that the nature of the hearing before the Board is by way of rehearing on the

merits, and not simply by way of review. See *Li Wai Hung Cesario v Administrative Appeals Board* (unreported, CACV 250/2015, 15 June 2016) §6.1 (Cheung JA).

D. THE APPELLANT'S APPEAL

16. In this appeal, the Appellant stated in her Grounds of Appeal that she (1) only appeals against the Respondent's determination in paragraph 20 of the Result of Investigation and (2) does not take issue with the Respondent's conclusions in paragraphs 18 and 19 of the Result of Investigation. In other words, the Appellant accepts in this appeal that the amount of HK\$41.77 Town Health charged for "management staff administrative work" is not excessive. She only challenges the Respondent's conclusion in relation to the doctor's cost of HK\$83.30 for reviewing the Medical Notes as claimed by Town Health.

17. In her Skeleton Submissions filed for the hearing, the Appellant advanced two grounds to support her appeal.

(1) First, she contends that there is no evidentiary basis for the Respondent to find that Town Health's cost of the doctor's work was HK\$83.30, and that the Respondent should have disallowed such a sum claimed by Town Health.

(2) Second, even if Town Health's claim for the cost of doctor's work should be allowed, the actual costs incurred should have been

found to be below HK\$100, and that the Respondent should have concluded that the Fee charged was excessive.

E. DISCUSSION

E1. The Appellant's First Ground

18. The Appellant contends that (1) the evidential burden of proving that the cost of doctor's work was the direct and necessary costs of complying with the DAR fell on Town Health, and (2) Town Health has not provided any valid justification for the doctor's work.

19. We are unable to agree with the Appellant's contention that there is no evidence to justify the involvement of a doctor in the approval of the DAR by Town Health.

(1) In paragraph 8 above, we have already quoted what Town Health stated in its letter of 25 July 2015 to the Respondent regarding the cost of doctor's approval. Town Health considered it necessary for a doctor to review the Medical Notes before releasing them to the Appellant. It further stated that a doctor would require at least 2 minutes to review them and explained how the cost of the doctor's involvement (in the sum of HK\$83.30) was arrived at.

(2) Before Town Health issued the letter of 25 July 2015, there was a telephone conversation between Mr Jeffrey Ma of Town Health

and one of staff at the Respondent's Office on 3 July 2015. In that conversation, Mr Ma stated that the medical records were sensitive data and therefore their release needed to be approved.

- (3) From the information provided by Town Health, we consider that the Respondent's conclusion at paragraph 20 of the Result of Investigation (that the hourly rate and the time taken for reviewing the Medical Notes by Town Health was not excessive) was reasonable.

- (4) In particular, we believe there was sufficient evidential basis for the Respondent to come to the view that it was necessary for a doctor to review the Medical Notes before releasing them to the Appellant. In the conversation between Town Health and the Respondent's Office on 3 July 2015, it had already been pointed out that medical records are sensitive information. This is not something which is difficult to understand as medical records contain information of a very private nature. A patient may not wish others to know about his/her medical condition, illness or disease, and his/her medical records should therefore be handled with particular care. The Medical Notes sought by the Appellant were prepared by two doctors. In these circumstances, we believe it was necessary for a doctor to review the Medical Notes before releasing them to the Appellant. We disagree with the Appellant's contention that it was unnecessary for Town Health to involve a doctor in reviewing her DAR.

(5) In *Commissioner of Correctional Services v Privacy Commissioner for Personal Data* (AAB Decision 37/2009; 31 December 2010, a differently constituted Administrative Appeals Board was of the view that “*whether a fee purportedly imposed is excessive or not is to be considered according to the circumstances of each case*” [paragraph 41] and that “*the word “excessive” in [section 28(3) of the Ordinance] should be construed as confining the fee only to cover those costs which are directly related to and necessary for complying with a DAR*” [paragraph 46].

(6) In our view, we find the cost of doctor’s review (in the sum of HK\$83.30) to be directly related to and necessary for complying with the DAR.

20. At the hearing, the Appellant also referred us to two Case Notes published on the Respondent’s website in relation to case no. 2015C02 and case no. 2007C19. We do not find either of Case Notes to be of assistance in the determination of the issues in this appeal. The question of whether or not a fee is excessive pursuant to section 28(3) of the Ordinance is a question of fact and its answer must depend on the particular circumstances of each case. In any event, the Appellant has not identified any principle from the two cases which is said to be of application in the present appeal.

21. Further, the Appellant also raised a procedural fairness point in her oral submission at the hearing in relation to the Respondent’s investigation.

The Appellant contended that it was procedurally unfair for the Respondent to allow Town Health several opportunities to justify the Fee before coming up with HK\$83.3 as the cost of doctor's approval. At the hearing, the Respondent described this as the "accommodating approach".

- (1) In particular, we note the following statement in Town Health's letter of 25 July 2015: "... *thank you for your understanding to let us revise and calculate the items based on your suggestions*". This statement suggests that Town Health's figures were provided as a result of certain "suggestions" made by the Respondent.
- (2) At the hearing, the relevant officer at the Respondent's Office denied that any such suggestions had been made to Town Health. Town Health did not appear at the hearing and was not in a position to clarify the statement in its letter of 25 July 2015. In the circumstances, we are not in a position to question the Respondent's denial of making suggestions to Town Health in relation to the revision of the figures.
- (3) Be that as it may, we wish to point out that it is of fundamental importance for the Respondent to remain completely impartial in any investigation. On the face of the above-quoted statement made by Town Health in its letter of 25 July 2015, we can understand why the Appellant would feel aggrieved by the procedure adopted by the Respondent and would question if the Respondent had carried out his investigation in a non-partisan way. However, in the light of the Respondent's denial and the

non-appearance of Town Health at the hearing, we have no sufficient basis to find that there was any procedural unfairness in the Respondent's investigation.

22. For these reasons, we reject the Appellant's first ground.

E2. The Appellant's Second Ground

23. As a second ground, the Appellant contends that even if the Board finds that the cost of the doctor's approval should be allowed, the actual cost incurred should have been below the Fee. This ground is advanced as an alternative to the first ground.

24. In particular, the Appellant asks the Board to have regard only to the figures put forward by Town Health in its letter of 11 May 2015 (which described the "cost of management staff administrative work" to be HK\$41.77 and the "doctor administrative work" to be HK\$42.0), and disregard those set out in Town Health's letter of 25 July 2015.

25. It is indisputable that Town Health had put forward two different sets of figures on two previous occasions. However, we do not have sufficient basis to accept the first set of figures and ignore the second set.

(1) We note that Town Health described the two sets of figures differently in its two letters. In its letter of 11 May 2015, Town Health stated the cost of "doctor administrative work" to be

HK\$42.0, and no breakdown was provided. In its letter of 25 July 2015, Town Health stated the “cost of doctor’s approval” to be HK\$83.3, and provided a basis as to how the figure was arrived at.

- (2) In these circumstances, it appears that Town Health had revised its cost of the doctor’s work in its subsequent letter (of 25 July 2015) and provided a more cogent basis to justify the doctor’s cost. We therefore cannot simply disregard the figures set out in Town Health’s letter of 25 July 2015 and instead adopt the earlier figures given by Town Health.

26. The second ground is also rejected.

F. CONCLUSION

27. For the above reasons, we are not satisfied that Town Health’s cost for reviewing the Medical Notes by a doctor (at HK\$83.3) was excessive pursuant to section 28(3) of the Ordinance. The Respondent was entitled to come to the decision not to serve an enforcement notice on Town Health under section 47(4) of the Ordinance. The Appellant’s appeal is accordingly dismissed.

(signed)

(Mr Eugene FUNG Ting-sek, SC)
Deputy Chairman
Administrative Appeals Board