

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 48/2014

BETWEEN

F

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr. Alan Ng Man-sang (Deputy Chairman)
- Mr. Philip Chan Kai-shing (Member)
- Mr. Nelson Cheng Wai-hung (Member)

Date of Hearing: 12 March 2015

Date of Handing down Written Decision with Reasons: 30 June 2016

DECISION

1. The Appellant in this appeal was a patient of Dr. Choi Sum-hung¹ (“**Dr. Choi**”). Dr. Choi is an orthopaedic specialist and was consulted by the Appellant for her knee pain and other problems between December 2008 and December 2011. According to Dr. Choi, the Appellant last consulted him on 12th December 2011. On 2nd June 2012, Dr. Choi, through his solicitors Messrs. Mayer Brown JSM (“**JSM**”) issued a letter to the Appellant confirming termination of their doctor-and-patient relationship and explaining the reasons why he could not provide further medical services to her. This sets the scene of the disputes between the Appellant and Dr. Choi, the making of a number of data access requests by the Appellant to Dr. Choi, and the Appellant’s complaints against Dr. Choi².

2. One of the Appellant’s complaints against Dr. Choi was made to the Respondent for Dr. Choi’s failure to comply with one of her data access requests which was later confirmed to be the data access request made by the Appellant to Dr. Choi on 24th February 2013 (“**the 24/2/13 DAR**”). (Hereinafter referred to as “**the DAR Complaint**”) The DAR Complaint has led to the appeal by the Appellant under Administrative Appeal No. 55/2014 (“**AAB 55/2014**”) whereby the Appellant appealed against the decision of the Respondent dated 29th July 2014 (“**the**

¹ At the material time, Dr. Choi was a specialist doctor working for Congruence Orthopaedics & Rehabilitation Centre (“**Congruence**”).

² Apart from the complaints to the Respondent, the Appellant has also lodged a complaint against Dr. Choi with the Medical Council of Hong Kong, but no disciplinary action has been taken on the complaint as there was no evidence to support any act of professional misconduct on the part of Dr. Choi, see letter by the Medical Council of Hong Kong to the Appellant dated 16th September 2014.

Decision") whereby the Respondent decided to exercise his power under *section 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486)* ("**PD(P)O**") not to pursue the DAR Complaint further. In a nutshell, the Appellant complained against Dr. Choi, *inter alia*, about the latter's failure to comply with the 24/2/13 DAR, and that it was totally unnecessary for JSM to access her medical information.

3. On 19th September 2013, the Appellant made a data correction request to Dr. Choi ("**the 19/9/13 DCR**") along with 14 pages of documents ("**the Documents**")³ on which the Appellant had handwritten 24 remarks, and asked Dr. Choi to make corrections thereto. On 9th November 2013, the Appellant lodged her complaint with the Respondent against Dr. Choi for failing to comply fully with the 19/9/13 DCR. (Hereinafter referred to as "**the DCR Complaint**") By letter dated 11th November 2013, the Respondent asked the Appellant for further information and supplied her with, *inter alia*, the Respondent's Complaint Handling Policy (5th Revision) ("**the Policy**").

4. In this appeal, the Appellant appealed against the decision of the Respondent dated 4th July 2014 ("**the Decision**") not to pursue the DCR

³ The Documents contained (a) a 5-page medical report written by Dr. Choi for the Appellant on 2nd August 2010 ("**the 2/8/10 Report**"), (b) email communications from the Appellant to Dr. Choi (one dated 10th October 2009, one dated 2nd August 2010, one dated 15th August 2010 and one dated 26th August 2010), (c) a document dated 24th September 2010 composed by the Appellant in which the Appellant set out the symptoms of her various illnesses ("**the 24/9/10 Document**"), (d) part of a medical record dated 15th December 2011 (containing the consultation record on 22nd August 2011), and (e) the Appellant's operation record dated 16th December 2008 ("**the 16/12/08 Operation Record**").

Complaint further pursuant to *section 39(2)(d) of PD(P)O*. In gist, the Appellant complained against Dr. Choi for failing to comply fully with the 19/9/13 DCR.

5. On 28th November 2014, the Chairman of the Administrative Appeals Board (“**the Board**”) directed that AAB 55/2014 and this appeal be heard by the same Board one after another.

The Decision

6. After the Appellant lodged the DCR Complaint,

(a) the Respondent has identified from the Documents 24 “correction requests” made by the Appellant to Dr. Choi in the 19/9/13 DCR;

(b) there has been various communications between the Appellant and the Respondent, where the Appellant:-

(i) confirmed that she no longer pursued 2 “correction requests” (later described as Entries A and H in the Reasons for the Decision and referred to

hereinbelow as Requests A and H) since Dr. Choi had already made the corrections⁴;

(ii) clarified that no correction was required regarding 1 “correction request” (later described as Entry J in the Reasons for the Decision and referred to hereinbelow as Request J)⁵; and

(iii) confirmed that she only targeted the “correction requests” at the 2/8/10 Report and a consultation note dated 21st June 2011 compiled by Dr. Choi (“the 21/6/11 Note”)⁶.

7. It is undisputed that the Appellant obtained the 2/8/10 Report and the 21/6/11 Note from Dr. Choi by way of an earlier data access request.

8. As we have said, the Respondent decided to exercise his power under *section 39(2)(d) of the PD(P)O* not to pursue the DCR Complaint further. On 4th July 2014, the Respondent wrote to the Appellant, informing the latter of the Decision and enclosing therewith the Reasons for the Decision. According to the Reasons for the Decision, the

⁴ See para.4 of the Reasons for the Decision.

⁵ See para.4 of the Reasons for the Decision.

⁶ The Documents did not contain the 21/6/11 Note, but the “correction request” in respect of the 21/6/11 Note was mentioned at page 2 of the email from the Appellant to Dr. Choi dated 26th August 2010 – a document forming part of the Documents.

Respondent's decision not to pursue the DCR Complaint further was in accordance with paragraph 8(e) and (h) of the Policy.⁷

9. In the Reasons for the Decision, the Respondent has identified the 24 "correction requests" in the Documents by Entries A to X⁸, and annexed thereto as "Annex 3" is a table containing Entries A to X and the respective position and response of Dr. Choi and the Appellant ("the Table")⁹. For convenience and ease of reference, we shall refer to the 24 "correction requests"—Entries A to X hereinbelow separately as Request A to Request X respectively.

10. In the Reasons for the Decision, the Respondent took the following views as regards Requests A to X:-

(a) Since Requests Q, V, W and X did not concern the 2/8/10 Report or the 21/6/11 Note, they fell outside the scope of the DCR Complaint.¹⁰

(b) As regards Requests B and C, Dr. Choi had already added remarks to the 2/8/10 Report clarifying "recently" as meaning "recent to the consultation on 2nd December 2008", and "yesterday" as meaning "the day before the consultation

⁷ See para.28 of the Reasons for the Decision.

⁸ See para.2 of the Reasons for the Decision.

⁹ See para.5 of the Reasons for the Decision, and Annex 3 thereto.

¹⁰ See para.4 of the Reasons for the Decision.

on 20th December 2008”.¹¹

- (c) As regards Requests D, E, G and R, their accuracy could not be verified under the circumstances of the present case, and Dr. Choi had already complied with the 19/9/13 DCR relating to Requests D, E, G and R by adding relevant footnotes and sending the Appellant the 2/8/10 Report and the 21/6/11 Note bearing the same as required under *section 25(2) of PD(P)O*.¹²
- (d) Request F did not concern personal data inaccuracy as it was essentially a matter of different interpretations on the meaning of “regular” follow-up consultations between the Appellant and Dr. Choi.¹³
- (e) Request I did not constitute data inaccuracy.¹⁴
- (f) Request K was a clinical diagnosis made by Dr. Choi at the material time. It was beyond the jurisdiction of the Respondent to determine whether the opinion concerning the medical condition of a patient was accurate or not, and the Respondent refrained from commenting whether there was

¹¹ See para.17 of the Reasons for the Decision.

¹² See para.21 of the Reasons for the Decision.

¹³ See para.22 of the Reasons for the Decision.

¹⁴ See para.23 of the Reasons for the Decision.

any data inaccuracy regarding Request K.¹⁵

(g) Requests L, M, N, O, S, T and U were not data correction requests under *PD(P)O* because the Appellant only requested Dr. Choi to add new contents to or elaborate on certain contents in the 2/8/10 Report, and they fell outside the jurisdiction of the Respondent because what should be included in a medical report was a matter of professional judgment by the medical practitioner.¹⁶

(h) Request P itself did not concern any data inaccuracy issue.¹⁷

Ambit of this Appeal

11. At the substantive hearing, the Appellant stated her position in this appeal. In the course of taking the Appellant through the Table, she informed the Board that she would only pursue this appeal against the Decision in relation to Requests D, E, F, G, K, R, U, V and X.

12. A summary of Requests D, E, F, G, K, R, U, V and X, and the respective position and response of Dr. Choi and the Appellant are tabulated as follows:-

¹⁵ See para.24 of the Reasons for the Decision.

¹⁶ See paras.25 and 26 of the Reasons for the Decision.

¹⁷ See para.27 of the Reasons for the Decision.

| Request | Requested correction | Position and response / other remarks |
|---------|---|---|
| D | It was stated in the 2/8/10 Report that: “ <i>Ms. Hong attended my clinic again on 24th December 2008. She reported that ... her right knee pain has flared up after walking for <u>4 hours</u></i> ” (emphasis added). The Appellant stated that she could not walk for more than 0.5 hour at the material time and therefore she requested Dr. Choi either to remove “4 hours” or to change it to “0.5 hour”. | Dr. Choi had added a footnote to reflect the Appellant’s opinion. |
| E | It was stated in the 2/8/10 Report that: “ <i>On 15th January 2009, Ms. Hong reported ... after prolong walking/standing for over <u>4 hours</u>, she may feel swelling and hotness in her right knee</i> ” (emphasis added). The Appellant stated that she could not walk or stand for more than 0.5 hour at the material time and therefore she requested Dr. Choi either to remove “4 hours” or to change it to “0.5 hour”. | Dr. Choi had added a footnote to reflect the Appellant’s opinion. |
| F | It was stated in the 2/8/10 Report that: “ <i>Ms. Hong has regularly followed up in my clinic</i> ” at the period concerned in Request F. The Appellant stated that she had consulted Dr. Choi at the material time but those were not regular follow-ups. She therefore requested Dr. Choi to amend the same. | Dr. Choi considered that there was no data inaccuracy. |
| G | It was stated in the 2/8/10 Report that: “ <i>Because of these <u>flare ups</u>, Ms. Hong was started on amitriptyline by her general practitioner</i> ” (emphasis added). The Appellant stated that back pain instead of flare ups was the cause, and therefore requested Dr. Choi to change “ <i>flare ups</i> ” to “ <i>back pain</i> ”. | Dr. Choi had added a footnote to reflect the Appellant’s opinion. |
| K | It was stated in the 2/8/10 Report that: “ <i>Clinically bilateral <u>flat foot</u> is noted</i> ” (emphasis added). The | Dr. Choi stated that this was a |

| | | |
|---|--|---|
| | Appellant stated that: “PolyU physio, podiatrists from QMH, another private podiatrist and Dr. Wong confirmed I do not have flat foot”, the Appellant therefore requested Dr. Choi to remove “flat foot” from the 2/8/10 Report. | clinical diagnosis made by him at the material time. |
| R | The Appellant referred to the 21/6/11 Note and clarified that she were not “[s]een by <u>QMH</u> and advise to have repeat MRI ...” (emphasis added). She stated that the consultation and advice was given by a Dr. Chien Ping instead of Queen Mary Hospital. She therefore requested Dr. Choi to change “QHM” to “Dr. Chien Ping”. | Dr. Choi had added a footnote to reflect the Appellant’s opinion. |
| U | On a copy of the 24/9/10 Document, the Appellant requested Dr. Choi to add her neck condition into the 2/8/10 Report. | Not a data correction request under PD(P)O. |
| V | On a copy of the 24/9/10 Document, the Appellant requested Dr. Choi to add her neck condition into her “Oct. 2010 report”. | Outside the scope of the DCR Complaint. |
| X | On a copy of the 16/12/08 Operation Record, the Appellant requested Dr. Choi to clarify whether the “degenerative horizontal tear” mentioned therein was a degenerative tear or not. | Outside the scope of the DCR Complaint. |

Law

13. According to *section 2(1) of PD(P)O*, “data” means any representation of information (including an expression of opinion) in any document, and includes a personal identifier. In the same provision,

“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; and (c) in a form in which access to or processing of the data is practicable.

14. A data subject is entitled to request for the correction of personal data. However, the way to exercise such right is prescribed in *PD(P)O*.

15. *Data Protection Principle ("DPP") 6(e) in Schedule 1 to PD(P)O* provides:

“A data subject shall be entitled to-

...

- (e) request the correction of personal data;
- (f) be given reasons if a request referred to in paragraph (e) is refused; and
- (g) object to a refusal referred to in paragraph (f).”

16. As defined in *PD(P)O*, “data correction request” means a request under *section 22(1) of PD(P)O*.

17. *Section 22(1) of PD(P)O* provides:

- “(1) Subject to subsections (1A) and (2), where-
 - (a) a copy of personal data has been supplied by a data user in compliance with a data access request; and
 - (b) the individual, or a relevant person on behalf of the

individual, who is the data subject considers that the data is inaccurate,
then that individual or relevant person, as the case may be, may make a request that the data user make the necessary correction to the data.”

18. According to *section 2(1) of PD(P)O*, “inaccurate”, in relation to personal data, means the data is incorrect, misleading, incomplete or obsolete.

19. To exercise the right to request for data correction, the data subject has to follow the mechanism set out in *section 22(1) of PD(P)O*. Clearly, a “data correction request” has to be preceded by a “data access request”.

20. *Section 24(3)(b) of PD(P)O* provides that a data user may refuse to comply with a data correction request if the data user is not satisfied that the personal data to which the request relates is inaccurate. Where there is dispute as to fact, the role of the Privacy Commissioner is to consider whether there are reasonable grounds for a data user to be not satisfied such personal data is inaccurate. The data user's decision should not be based solely on his subjective view; there has to be facts to substantiate his view.¹⁸

¹⁸ See *Administrative Appeal No. 22 of 2000*, 30 January 2001 (Chinese Judgment) at para.9.

21. *Section 24(3)(d) of PD(P)O* further provides that a data user may refuse to comply with a data correction request if the data user is not satisfied that the correction which is the subject of the request is accurate.

22. *Section 25(2) of PD(P)O* further provides that where the personal data to which a data correction request relates is an “expression of opinion” (which is provided for in *section 25(3) of PD(P)O* to include an assertion of fact which is unverifiable or in all the circumstances of the case, is not practicable to verify) and the data user concerned is not satisfied that the opinion is inaccurate, then the data user shall make a note (whether annexed to that data or elsewhere) of the matters in respect of which the opinion is considered by the requestor to be inaccurate, and attach a copy of the note to the written notice of refusal sent to the requestor as required under *section 25(1) of PD(P)O*.

23. *Section 39(2)(d) of PD(P)O* provides that the Privacy Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case, any investigation or further investigation is for any other reason unnecessary.

24. Paragraph 8(e), (h) and (j) under Part (B) of the Policy provides that an investigation or further investigation may be considered unnecessary if:-

"e) after preliminary enquiry by the [Privacy Commissioner], there is no *prima facie* evidence of any contravention of the requirements under [PD(P)O];

...

h) given the conciliation by the [Privacy Commissioner], remedial action taken by the party complained against or other practical circumstances, the investigation or further investigation of the case cannot reasonably be expected to bring about a more satisfactory result;

...

j) The ulterior motive of the complaint in question is not concerned with privacy and data protection."

25. If there is no *prima facie* evidence of contravention of PD(P)O by the practice or act complained of, the Privacy Commissioner can exercise his discretion to refuse investigation under *section 39 of PD(P)O*. Complaint about contravention of PD(P)O by others is equivalent to accusation of committing an offence, which is a serious accusation. Therefore, a complaint should have basis, including evidence and justification. The Privacy Commissioner has to consider if there is any basis for the complaint, i.e. *prima facie* evidence and justification, before deciding to investigate; otherwise, it is not only unfair to the party complained against, but also encourages unreasonable complaints and abuse of the complaint mechanism.¹⁹

¹⁹ See *Administrative Appeal No. 32/2004*, para.29 (Chinese Judgment).

26. Section 21(1) of the Administrative Appeals Board Ordinance (Cap.442) (“AABO”) provides that for the purposes of an appeal, the Board may: (j) subject to *sub-section (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. *Sub-section (2)* provides that the Board, in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the Respondent with the Secretary to the Board under *section 11(2)(a)(ii)*, if it is satisfied that, at the time of the making of the decision being the subject of the appeal, the appellant was or could reasonably have been expected to be aware of the policy.

Our Views

Requests V and X

27. The purpose of Requests V and X was to seek corrections to the Medical Report compiled by Dr. Choi dated 9th October 2010 (“the 9/10/10 Report”) and the 16/12/08 Operation Record respectively.

28. As we have said, to exercise the right to request for data correction, the data subject has to follow the mechanism set out in *section 22(1) of PD(P)O*, and a “data correction request” has to be preceded by a “data access request”. The Appellant has adduced no evidence showing that the 9/10/10 Report and the 16/12/08 Operation Record were obtained by her under any of her previous data access requests made to Dr. Choi.

In fact, it was the Appellant's confirmation that she only targeted the "correction requests" at the 2/8/10 Report and the 21/6/11 Note in the DCR Complaint. In our view, Requests V and X fall outside *section 22(1) of PD(P)O* and are not competent requests for the Respondent to enforce under *PD(P)O*.

29. It was held in *Kwan Pui Fun v The Privacy Commissioner for Personal Data*, Administrative Appeal No. 42 of 2006 (a case involving a different context) that the Board was not in a position to find any error in the Respondent's view that he would not be in a position to determine whether the opinions of the doctors concerning the mental condition of the complainant contained in the prescribed Forms (for the making of an application to the District Court for the complainant's detention under *Mental Health Ordinance (Cap.136)*) were accurate or not, and that was clearly something beyond the scope of the Respondent's duty.

30. As regards Request X, what the Appellant intended to correct was a medical opinion (i.e. the horizontal tear was a degenerative tear) of Dr. Choi in the 16/12/08 Operation Record. We take the view that unless there is clear, compelling and competent evidence to show that the medical opinion expressed by Dr. Choi in the 16/12/08 Operation Record was inaccurate, the Respondent cannot be criticized for accepting Dr. Choi's position that his medical opinion was not inaccurate. In this case, such clear, compelling and competent evidence to show the inaccuracy of

Dr. Choi's medical opinion is lacking.²⁰ If Request X were a competent request, we would order that Dr. Choi shall make a note (whether annexed to the 16/12/08 Operation Record or elsewhere) of the matters in respect of which his medical opinion is considered by the Appellant to be inaccurate pursuant to *section 25(2) of PD(P)O*.

31. As regards Request V, the Appellant requested Dr. Choi to add her neck condition to the 9/10/10 Report. The Appellant has not submitted that without mentioning her neck condition in the 9/10/10 Report, the 9/10/10 Report or any part thereof or any data therein was considered by her as inaccurate.

32. In paragraph 3 of the Grounds of Appeal, the Appellant advanced in a broad sense that "data inaccuracy due to omission" should be considered as a data correction request.²¹ In our view, it is too broad to become a statement of principle, and may even lead us astray. In some circumstances, omission to state some information no doubt will lead to inaccurate personal data. For instance, if a person's name is JC Johnson-Smith, accidental omission to state Johnson (a material part of his surname) in that person's name will render the data inaccurate. In a case where JC Johnson-Smith is a young man, failure to state that JC Johnson-Smith is young will unlikely lead to inaccurate data. However,

²⁰ Nothing mentioned in paragraph 1 of the Grounds of Appeal annexed to her Notice of Appeal dated 22nd July 2014 ("the Grounds of Appeal") amounts to such clear, compelling and competent evidence.

²¹ In paragraph 3(n) of the Grounds of Appeal, the Appellant further advanced that if "data inaccuracy by omission" did not fall within the jurisdiction of *PD(P)O*, there would be a loophole in the system.

in an application for elderly allowances, failure to state that JC Johnson-Smith is young may be misleading and lead to inaccurate data because only elderly people can apply for elderly allowances and his act of applying for elderly allowances must carry a connotation that JC Johnson-Smith is an elderly man. Therefore, whether omission to state some information can be escalated into inaccurate personal data as defined in *section 2(1) of PD(P)O* must depend on the nature of the information omitted and the context in which the omission came about.

33. After reading the 9/10/10 Report again, we cannot come to the view that absent mention of the Appellant's neck condition in the 9/10/10 Report, the 9/10/10 Report or any part thereof or any data therein could be regarded as inaccurate. In our view, Request V was not a legitimate data correction request.

Request U

34. Like Request V, the Appellant requested to add her neck condition to the 2/8/10 Report, and has not submitted that without mentioning her neck condition in the 2/8/10 Report, the 2/8/10 Report or any part thereof or any data therein was considered by her as inaccurate.

35. We have read the 2/8/10 Report again. We do not think that absent mention of the Appellant's neck condition in the 2/8/10 Report would render the 2/8/10 Report or any part thereof or any data therein

inaccurate. We also notice from paragraph 3(e) and (f) of the Grounds of Appeal that almost all the evidence referred to by the Appellant shows that her neck condition only became acute after the compilation of the 2/8/10 Report.

36. Accordingly, Request U was not a legitimate data correction request to exact statutory compliance under *PD(P)O*.

Request F

37. Under Request F, what the Appellant sought to amend is a convenient statement made by Dr. Choi conveying relevant facts personally perceived by him (i.e. the Appellant's follow-ups with him) or to use older language, a "compendious mode" of relating such facts – "Ms. Hong has regularly followed up in my clinic" in the 2/8/10 Report. The relevant time frame for the application of this statement of Dr. Choi is since 15th January 2009. The Appellant disputed this statement of Dr. Choi; she stated that she had consulted Dr. Choi at the material time but there were no regular follow-ups.

38. In our view, there were reasonable grounds for Dr. Choi not to be satisfied that such statement was inaccurate. According to Dr. Choi, the Appellant had regular follow-up consultations with him in February, March, April, May, June, July and August 2009, and the consultation details could be found in the clinical records which had already been sent

to the Appellant for several times.²² Furthermore, the Appellant of her own volition has admitted that she had attended regular follow-ups with Dr. Choi from 13th February to 7th March and from 7th May to 8th October 2009.²³

39. Accordingly, the Respondent's decision that Request F did not concern personal data inaccuracy cannot be faulted.

Request K

40. The Appellant requested Dr. Choi to remove "*flat foot*" from the 2/8/10 Report. The correction requested relates to a clinical diagnosis which falls within the province of Dr. Choi, not the Respondent. Although we do not accept that it is beyond the Respondent's jurisdiction to determine whether the medical opinion is accurate or not, the Respondent nevertheless should be slow to form a view contrary to the medical opinion of Dr. Choi. As we have opined, unless there is clear, compelling and competent evidence to show that the medical opinion expressed by Dr. Choi in the 2/8/10 Report was inaccurate, the Respondent should defer to Dr. Choi's medical opinion and his position that he was not satisfied that his medical opinion was inaccurate.

²² See letter from JSM to the Respondent dated 25th March 2014.

²³ See email from the Appellant to Dr. Choi dated 26th August 2010 contained in the Documents.

41. The Appellant stated that: “*PolyU physio, podiatrists from QMH, another private podiatrist and Dr. Wong confirmed I do not have flat foot*”. Relevant to Request K is the email from the Appellant to JSM dated 27th October 2013²⁴ whereby the Appellant asked Dr. Choi to refer to “the foot assessment report given to him by the lady who made the orthotics for [her] foot and knee pains” and stated that “[t]he lady printed a foot-print and the foot-print showed that [the Appellant] have high arch (not flat foot).” The Appellant referred to the Respondent in her fax to the Respondent dated 18th November 2013²⁵, a copy of her foot-print mentioned above and, according to the Appellant, an excerpt from a medical record of an orthopaedic doctor dated 9th January 2012 opining “examination: the foot has no flat foot ...” The copy foot-print adduced is neither here nor there. The excerpt of the medical report dated 9th January 2012 does not show the provenance of the medical report. Neither does the excerpt link the finding of the examination therein with the Appellant. We do not accept that the Appellant has adduced clear, compelling and competent evidence to show (a) that the clinical diagnosis of Dr. Choi was inaccurate and (b) that there were no reasonable grounds for Dr. Choi not to be satisfied that his clinical diagnosis was inaccurate.

42. Accordingly, we shall order that Dr. Choi do make a note in terms of that “according to the patient, she suffered no flat foot” and annex the same to the 2/8/10 Report pursuant to *section 25(2) of PD(P)O*.

²⁴ See Hearing Bundle at p.122.

²⁵ See Hearing Bundle at pp.262, 472.

Requests D, E, G and R

43. By Requests D, E and G, the Appellant seeks 3 corrections to the 2/8/10 Report, and by Request R, 1 correction to the 21/6/11 Note.

44. The nub of these 4 corrections relates to what the Appellant had told Dr. Choi during the relevant consultations. Since Dr. Choi considered that there was no means to verify what was actually said by the Appellant during the relevant consultations, he added 3 footnotes to the 2/8/10 Report²⁶ and 1 footnote to the 21/6/11 Note²⁷ and sent to the Appellant a copy of the 2/8/10 Report and the 21/6/11 Note with footnotes together with his written notice of refusal²⁸ in compliance with *section 25(1) and (2) of PD(P)O*.

45. At the substantive hearing, all the parties were *ad idem* in that it was appropriate for Dr. Choi to engage *section 25(2) of PD(P)O* to comply with the 19/9/13 DCR, but were divided on how the footnotes should be framed. After discussing with the parties, the Appellant and the Respondent agreed that the contents of the footnotes be begun by “According to the patient, she told the doctor during the relevant consultation” instead of “According to information provided by the patient subsequent to the relevant consultation and the date of this report”.

²⁶ See Hearing Bundle at p.528.

²⁷ See Hearing Bundle at p.529, Medical Record dated 29th May 2012 containing the 21/6/11 Note.

²⁸ See letter from JSM to the Appellant dated 14th April 2014, Hearing Bundle at pp.523-529.

However, Ms Yeung of JSM acting for Dr. Choi opposed the above contents of the footnotes agreed by the Appellant and the Respondent, and submitted that such contents would carry an imputation that Dr. Choi had failed to record the information supplied by the Appellant during the relevant consultations. In order to do justice to all the parties, we amend the contents of the footnotes agreed by the Appellant and the Respondent in the following way:-

(a) Request D

“According to the patient, she told the doctor during the relevant consultation (which is disputed by the doctor) that her right knee pain had flared up after walking for “0.5 hour” (instead of “4 hours”) with associated swelling.”

(b) Request E

“According to the patient, she told the doctor during the relevant consultation (which is disputed by the doctor) that she might feel swelling and hotness in her right knee after prolong walking/standing for over “0.5 hour”, but not “4 hours”.”

(c) Request G

“According to the patient, she told the doctor during the relevant consultation (which is disputed by the doctor) that she was started on amitriptyline by her general practitioner because of “back pain”, but not because of the “flare ups”.”

(d) Request R

“According to the patient, she told the doctor during the relevant consultation (which is disputed by the doctor) that she was advised by “Dr. Chien Ping”, instead of “QMH” to repeat the MRI.”

46. Accordingly, we shall order the following:-

- (a) that Dr. Choi do make a note in terms of paragraph 45(a), (b) and (c) hereinabove and annex the same to the 2/8/10 Report pursuant to *section 25(2) of PD(P)O*; and
- (b) that Dr. Choi do make a note in terms of paragraph 45(d) hereinabove and annex the same to the Medical Record dated 29th May 2012 (containing the 21/6/11 Note) pursuant to *section 25(2) of PD(P)O*.

Conclusion

47. For the reasons above, this appeal should be allowed to the extent of paragraphs 42 (for Request K) and 46 (for Request D, E, G and R) hereinabove, and we so order. For the sake of completeness and clarity, this appeal relating to Requests F, U, V and X should be dismissed.

48. Before we leave this appeal, we need to mention one matter. That is, when we declined the Appellant's application for an order to require Dr. Choi to be present and questioned at the substantive hearing of this appeal, we have reserved our reasons for such a decision to be given in our Decision on this appeal and AAB 55/2014. This we now do.

49. *Section 15 of AABO* provides that any of the parties to an appeal may at any time ... request the Board to issue a notice in writing to any person named in the application requiring him to appear before the Board to give evidence and to produce any document relating to the appeal that is in his possession or under his control.

50. It is apparent from the issues raised in this appeal and our analysis thereof that this appeal does not involve any factual disputes between the Appellant and Dr. Choi and that the evidence of Dr. Choi is neither necessary nor crucial for the determination of this appeal. Therefore,

this appeal does not call for the appearance of Dr. Choi before the Board to give evidence.

51. As to costs, since the Appellant, the Respondent and the legal representative of Dr. Choi have not pressed for a costs order against each other, we decide that there be no order as to costs.

(signed)

(Mr. Alan Ng Man-sang)

Deputy Chairman

Administrative Appeals Board