

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 56 of 2011

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BETWEEN

LAU YAU MAN

Appellant

and

THE PRIVACY COMMISSIONER

FOR PERSONAL DATA

Respondent

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Coram: Administrative Appeals Board

Date of Hearing: 29 February 2012

Date of Handing Down Written Decision with Reasons: 21 March 2012

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DECISION

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Note: references in this Decision to “AB” are references to the Appeal Bundle, which, with the consent of the parties to the appeal, was received as evidence pursuant to section 21(1)(b) of the Administrative Appeal Boards Ordinance, Cap. 442 and references to “the Ordinance” are references to the Personal Data (Privacy) Ordinance, Cap. 486.

## THE FACTS

1. On 7<sup>th</sup> January 2006, the Appellant handed a bank deposit statement to his friend, one Mr. Yiu Chin-yiu (“Mr. Yiu”), with instructions to pass it on to his family if he were to meet with an “accident”. The Appellant was living with Mr. Yiu at the material time.
2. The Appellant, who gave sworn evidence before us, admitted that he must have given Mr. Yiu the impression that he was contemplating suicide. He was then suffering from a severe cold and insomnia and hence was not in very good condition. The next day, i.e. 8<sup>th</sup> January 2006, Mr. Yiu invited a physician, Dr. Gordon Wong Chun Bun (“Dr. Wong”), to visit their place of residence to examine the Appellant and to assess his condition. Dr. Wong’s attitude at the time was very caring and affable and the Appellant trusted him.
3. Dr. Wong gave the Appellant some medicine which he took and then rested for about 15-20 minutes, after which Dr. Wong then returned to the Appellant’s room with a markedly changed and allegedly hostile attitude. The Appellant claimed that he was then compelled by Dr. Wong and Mr. Yiu to go by taxi to the Accident & Emergency (A & E) Ward of the Queen Mary Hospital (QMH). This was despite the fact that he told them he did not wish to be admitted to a hospital and that, in any event, even if he *were* to be hospitalized, he would rather go to a private hospital instead of QMH. According to the Appellant, when they arrived at QMH, his body was weak, his mind was very “blurred and confused” and he must have been induced to sign some documents which were his hospital admission papers. He was briefly questioned by a doctor at the A & E

and then referred to a lady doctor who interviewed and assessed him for about 20 minutes before he was admitted to the psychiatric ward of QMH.

4. The Appellant said that Dr. Wong must have written a referral letter to QMH to facilitate his admission and hospitalization. This was probably done whilst they were at his home when he was resting after taking Dr. Wong's medicine. The Appellant infers that Mr. Yiu must have given Dr. Wong some of his personal particulars to enable the doctor to write the said referral letter. He suspects that Mr. Yiu had accessed his personal file containing his academic transcripts and work certificates and had discussed them with Dr. Wong.
5. The Appellant was hospitalized at QMH for about a week during which time he was continuously assessed. Such assessment continued during periodic follow-up visits after he was permitted to leave QMH until he was formally discharged from the hospital on 11<sup>th</sup> February 2006.
6. The Appellant was aggrieved about the manner in which he was treated by Dr. Wong and his admission to the psychiatric ward of QMH. On 18th July 2006, he wrote a letter of complaint ("the complaint letter") to Professor S. W. Tang, the Chief of Service (Psychiatry) of QMH (AB, 154), setting out in detail his account of the incident and demanding, inter alia, the deletion of his admission record and a thorough investigation of the admission process.
7. In August 2006, he also complained to the Medical Council of Hong Kong ("the Council") against Dr. Wong, alleging professional misconduct. This complaint was

investigated by the Preliminary Investigation Committee (“PIC”) of the Council (AB, 178-183). On 30<sup>th</sup> August 2007, The Secretary of the Council informed the Appellant that the PIC had considered the complaint and has decided that the case did not constitute professional misconduct and that, accordingly, disciplinary proceedings should not proceed any further (AB, 184).

8. In April 2007, the Appellant enquired with QMH about the documents submitted to the hospital at the time of his admission. On 25<sup>th</sup> May 2007, QMH provided him with a copy of Dr. Wong’s referral letter. Now pausing here, if one carefully examines the referral letter which is at page 152 of the AB, one would immediately notice that the letter is dated 7<sup>th</sup> January 2006. If the Appellant’s account of the whole incident leading to his admission to the psychiatric ward of QMH is correct, then the letter should have been written on (and dated) the next day, viz. 8<sup>th</sup> January 2006. However, in our view, very little turns on this minor discrepancy. Having regard to the Appellant’s condition at the material time, it would not surprise us that his memory could have been faulty and that the events of 7<sup>th</sup> January and 8<sup>th</sup> January which he described may in fact have occurred on the one and very same day, i.e. 7<sup>th</sup> January 2006.
9. Anyway, the Appellant was not happy with what Dr. Wong had written in the referral letter. On 28<sup>th</sup> June 2011, he lodged a complaint with the Respondent, the Privacy Commissioner for Personal Data (“the Commissioner”), against Dr. Wong for improperly collecting his personal data, preparing the referral letter and improperly disclosing to others his personal data without his consent/approval. He also claimed that the referral letter contains inaccuracies and/or false information.

## THE APPEAL

10. The Commissioner considered the Appellant's complaint and decided not to pursue it any further. The Appellant was so informed by a letter dated 24<sup>th</sup> August 2011 (AB, 186). The Appellant now appeals to this Board against the Commissioner's decision by way of an appeal lodged on 15<sup>th</sup> September 2011 (AB, 115).
  
11. At the hearing of this appeal, the Appellant appeared in person. The Commissioner was represented by counsel, Ms. Unique Leung. Dr. Wong was absent. We were, however, informed that the Appellant's notice of appeal had been served on him in accordance with section 10(b) of the Administrative Appeals Board Ordinance. Notice of the date, time and place of this hearing was also given to him in accordance with section 16 of that Ordinance. In addition, an appeal bundle and a reminder to attend the hearing were also sent to Dr. Wong about three weeks before the hearing. We were satisfied therefore that he was aware of this hearing and had chosen not to appear. Accordingly, we decided that the hearing would proceed despite his absence.
  
12. The Appellant elected to give oral evidence on oath in support of his appeal. He confirmed that everything he wrote in the complaint letter was true. He gave an account of the events which led to his admission to the psychiatric ward of QMH, his medical assessment during his period of hospitalization and his eventual discharge from the hospital as summarized in paragraphs 1-5 above. He claimed that Mr. Yiu was *not* a very close friend and, at the material time, he had known Mr. Yiu for only about a year. He lived with Mr. Yiu in the same apartment because the apartment was near his place of work. He further alleged that Mr. Yiu, who was then a senior survey officer at the

Buildings Department of the HKSAR government, was a psychiatric patient who had a tendency to procure others to be admitted into a psychiatric hospital out of “revenge and spite”. As Mr. Yiu was not a very close friend, he could not have had much knowledge of his (i.e. the Appellant’s) personal and working life or his relationship with his family. As for Dr. Wong, the Appellant said he was a total stranger who knew nothing about him or his family and working life. It is the Appellant’s allegation that Dr. Wong fabricated most, if not the whole, of the material concerning his personal and working life which is contained in the referral letter.

13. It is pertinent to note that, despite Mr. Yiu’s pivotal role in the events which ultimately resulted in his admission to the psychiatric ward of QMH and despite the fact that he claims that Mr. Yiu maliciously procured his admission to the hospital, the Appellant appears to have laid the blame entirely upon Dr. Wong. There is no evidence that he complained about Mr. Yiu’s conduct to any person or organization, such as, for instance, the government, who was then Mr. Yiu’s employer. In the complaint letter, the Appellant said that he was tricked into taking medication which made him weak and confused and, that whilst in such a state, he was dragged into a taxi by Dr. Wong, Mr. Yiu, and a third person (whose identity he did not disclose and who was only referred to as “Eric”). He was then driven to the A & E unit of QMH, where he was induced to sign consent documents for admission into the hospital. Furthermore, it was never explained to him by the hospital staff why he was admitted to the psychiatric ward instead of the general ward (AB, 155).

14. A perusal of Dr. Wong’s referral letter (AB, 152-153), however, seems to indicate that it was not Dr. Wong who ultimately made the decision to admit the Appellant to the

psychiatric ward. The letter was dated 7<sup>th</sup> January 2006 and addressed to “A & E/consultant psychiatrist” at QMH. It then goes on to describe Dr. Wong’s observations, findings and case history of the Appellant which he must have obtained as a result of his examination of, and conversation with, the Appellant on 7<sup>th</sup> January 2006. These include, inter alia, some fairly detailed information about the Appellant’s working environment, his personal thoughts about his job, future prospects and relationship with his family. The letter ends with this sentence: “Please kindly assess him & offer him your expert Mx. Thank you.” It is signed “Dr. Wong Chun Bun Gordon. Resident.”

15. From this, we can infer that he was probably assessed by a consultant psychiatrist that day and that it was the psychiatrist who recommended his admission to the psychiatric ward. Indeed, this is consistent with what the Appellant himself said in the course of his oral evidence, viz. that he was interviewed and assessed for about 20 minutes by a lady doctor before his admission. Furthermore, as mentioned earlier, he was continuously monitored and assessed during his stay at the QMH. Even after he was allowed to leave the hospital, he continued to be assessed on follow-up visits until his formal discharge on 11<sup>th</sup> February 2006, by which time it was more than a month after the incident on 7<sup>th</sup> January 2006.

16. We have carefully considered the testimony of the Appellant as well as the documents in the AB. It is the Appellant’s allegation that Mr. Yiu summoned Dr. Wong and disclosed his personal documents to Dr. Wong with the ulterior motive to procure his admission to a psychiatric facility. There is, however, no evidence that Dr. Wong was privy to this alleged ulterior motive, even assuming that it existed. We reject the Appellant’s allegation that Dr. Wong acted with mala fides and tricked and/or coerced

him into being admitted to the psychiatric ward of QMH. In our view, the Appellant's assertion that this took place is inherently implausible. We can see no reason why Dr. Wong would do such a thing. Moreover, the referral letter contained material which Dr. Wong could not possibly have concocted all by himself. Nor was there any reason or necessity for Dr. Wong to have fabricated material in such painstaking detail.

17. Having considered all the evidence before us, we have come to the view that what occurred on 7<sup>th</sup> January 2006 was this: The Appellant was in a very bad condition both in terms of physical state and mood. He gave his friend and fellow lodger (Mr. Yiu) his bank deposit statement and requested Mr. Yiu to hand it to his family should he meet with any "accident". This, presumably, was for the purpose of informing his family how much cash he had with the bank. It is not in dispute that he gave Mr. Yiu the impression that he was contemplating suicide. Mr. Yiu was thus concerned enough to invite Dr. Wong to their apartment to examine the Appellant and to see if anything could (or should) be done. On arrival at the apartment, Dr. Wong observed that the Appellant was in such a state which merited the taking of medication, which he duly provided. He examined and had a conversation with the Appellant, as a result of which, in his professional judgment, he saw the necessity for the Appellant's *immediate* attendance at the Accident & Emergency unit of QMH. He then wrote the referral letter, with the assistance of the information provided by the Appellant in the course of their conversation and, possibly, by Mr. Yiu as well. It is quite apparent to us that the nature of the contents of the letter was such that it could not have been possible for Dr. Wong to have written it just by perusing the academic transcripts or work records of the Appellant. Nor could Mr. Yiu *alone* have enabled him to do so by providing the necessary information, since, on the Appellant's own evidence, Mr. Yiu was by no



means a close friend of his, and hence had very little knowledge of his personal and working life and his relationship with his family. It inevitably follows, therefore, that the referral letter must have been written upon information mostly provided by the Appellant himself and, perhaps, supplemented at some places by Mr. Yiu. Upon arrival at the A & E unit, QMH, the doctor in charge required no more than a very brief exchange with the Appellant before he came to the view that the consultant psychiatrist should be consulted. The consultant psychiatrist then assessed the Appellant and concluded that he should be admitted to the psychiatric ward. These, we think, are the events which led to the Appellant's admission to QMH.

#### THE RELEVANT STATUTORY PROVISIONS

18. With this factual scenario in mind, we shall now proceed to consider Dr. Wong's legal position vis-à-vis the 'privacy laws' as contained in the Ordinance. The following statutory provisions in the Ordinance are relevant to this appeal:

Section 2(1), the "definition section", provides as follows:

"data protection principle" (DPP) means any of the data protection principles set out in Schedule 1

Section 4 provides: A data user shall not do an act, or engage in a practice, that contravenes a data protection principle unless the act or practice, as the case may be, is required or permitted under this Ordinance.

DPP 1(1) in Schedule 1 provides:

Personal data shall not be collected unless-

- (a) the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;
- (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and
- (c) the data are adequate but not excessive in relation to that purpose.

DPP 1(2) in Schedule 1 provides:

Personal data shall be collected by means which are-

- (a) lawful; and
- (b) fair in the circumstances of the case.

DPP 2(1)(a) in Schedule 1 provides:

All practicable steps shall be taken to ensure that personal data are accurate having regard to the purpose (including any directly related purpose) for which the personal data are or are to be used.

DPP 3 in Schedule 1 provides:

Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than-

- (a) the purpose for which the data were 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)

Section 39(1)(a) provides, *inter alia*, that the Commissioner may refuse to carry out or continue an investigation initiated by a complaint if the complainant has had actual knowledge of the act or practice specified in the complaint for more than 2 years immediately preceding the date on which the Commissioner received the complaint, unless the Commissioner is satisfied that in all the circumstances of the case it is proper to carry out or continue, as the case may be, the investigation.

Section 39(2)(d) provides, inter alia, that the Commissioner may refuse to carry out or continue 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 unnecessary.

CONTRAVENTION OF THE DATA PROTECTION PRINCIPLES?

19. We can see no contravention of DPP 1(1) by Dr. Wong. The personal data of the Appellant was collected by Dr. Wong for the purpose of enabling/assisting A & E and the consultant psychiatrist at QMH to assess the Appellant's medical condition. It was for a lawful purpose directly related to a function or activity of Dr. Wong as the Appellant's attending physician. The collection of the data was necessary for and directly related to that purpose. We also see no evidence that the data collected was in any way excessive in relation to that purpose.
  
20. As regards DPP 1(2), the Appellant complains that the data was unlawfully and unfairly collected without his prior consent or approval. We do not accept this submission. As we said earlier, we have considered the evidence and we reject the Appellant's allegation that Dr. Wong acted with mala fides or was guilty of any improper conduct in relation his treatment of the Appellant (a conclusion which, incidentally, the Council's PIC also arrived at after an investigation of the case). We also find (for the reasons set out at paragraph 17 above) that the referral letter must have been written with information provided by the Appellant himself, supplemented at times by that provided by Mr. Yiu. Accordingly, we find that Dr. Wong's collection of the Appellant's personal data was neither unlawful nor unfair in the circumstances.

21. As to the accuracy of the data, even assuming that there were parts of the data contained in the referral letter which was inaccurate, we note that DPP 2(1) requires the data user to take all *practicable* steps to ensure accuracy. We agree with the Commissioner's submission that "practicable" must mean *reasonably* practicable and that the principle does not impose an absolute duty on the data user to *guarantee* the accuracy of the said data. The Appellant's contention is that Dr. Wong should not have relied solely upon the information provided by Mr. Yiu and the personal documents of the Appellant which he and Mr. Yiu found at the apartment. It is submitted that Dr. Wong should have contacted his parents and verified the accuracy of the data with them. The Appellant argues that, in failing to do so, Dr. Wong was in breach of DPP 2(1). As we have already mentioned, we think that Dr. Wong relied on information provided by the Appellant himself as well as that coming from Mr. Yiu and the Appellant's personal documents shown to him by Mr. Yiu. It is therefore not true to say that he relied *solely* on Mr. Yiu and the Appellant's personal documents found at the apartment. Besides, it has to be appreciated that Dr. Wong was a complete stranger to the Appellant and his family. Mr. Yiu was, on the Appellant's own evidence, not a very close friend of his and did not give (nor could he have given) any information to Dr. Wong about the Appellant's parents, let alone the means by which they may be contacted. Having regard to the urgency of the situation, it was quite reasonable, in our view, for Dr. Wong to have omitted to contact the Appellant's parents to verify the accuracy of the data he had collected. We therefore see no basis for holding that Dr. Wong had contravened DPP 2(1).

22. We find, accordingly, that there was neither contravention of any DPP, nor of any other requirement in the Ordinance.

23. Section 21(2) of the Ordinance 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 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. A copy of the Commissioner's Complaint Handling Policy had been sent to the Appellant under cover of letters dated 29<sup>th</sup> July and 24<sup>th</sup> August 2011 (AB, 185 & 186-9) and duly lodged with the Secretary under section 11(2)(a)(ii) of the Ordinance. Part B, paragraph 8(d) of the Commissioner's Complaint Handling Policy states that the Commissioner may refuse to carry out or continue an investigation "if after enquiry by the PCPD, there is no prima facie evidence of any contravention of the requirements of the Ordinance". We are satisfied that the Appellant was, or could reasonably have been expected to be aware, of this policy at the time of the making of the decision which is now being appealed against. We find that the Commissioner was correct in deciding not to investigate, or further investigate, the Appellant's complaint (i) in accordance with his stated policy and (ii) also by reason of the fact that, as we have so held above, there has been no contravention of any DPP or any other requirement of the Ordinance.

THE COMMISSIONER'S DISCRETION UNDER SECTION 39(1)(a) & 39(2)(b)

24. Quite apart from our finding that there has been no breach of any DPP for the reasons we have explained above, we also find that the Commissioner was fully entitled to

refuse to carry out or continue the investigation of the Appellant's complaint pursuant to section 39(1)(a) of the Ordinance. It is not in dispute that the Appellant had been aware of the existence of the referral letter since May 2007. The Council's PIC investigation into the conduct of Dr. Wong was concluded in August 2007. The complaint to the Commissioner was not lodged until 28<sup>th</sup> June 2011.

25. The Appellant's explanation for lodging the complaint some 4 years after he first became aware of the referral letter is that he was not aware, until a very late stage, that the office of the Commissioner could be a channel for the redress of his grievances which arose as a result of the said letter. The Commissioner submits, however, that this ignorance on the part of the Appellant does not per se amount to a valid reason for extending the time within which he must lodge his complaint and relies on the previous decision of this Board in AAB No. 11 of 2009 as authority for this proposition.

26. We have little doubt that where a complainant does not lodge his complaint to the Commissioner within 2 years after having actual knowledge of the act or practice specified in the complaint, the Commissioner will have a discretion to refuse to carry out or continue an investigation initiated by the complainant's complaint, unless the Commissioner is satisfied that, in all the circumstances of the case, it is proper to carry out or continue the investigation. Ms. Leung informed us that one example of a situation where the Commissioner might decide it would be "proper" to carry out or continue an investigation despite the complaint being lodged after the lapse of the stipulated two-year time limit is where the issues raised by the complaint might have far-reaching implications beyond the immediate parties themselves and would generally affect many others who are, or might be, in similar situations. It is submitted that no

such situation exists in the present case, nor are there any other circumstances which might (or should) lead the Commissioner into thinking that it would be “proper” to continue with the investigation of the Appellant’s complaint. We respectfully agree with this submission, and we can see no reason for holding that the Commissioner had erred in exercising his discretion not to carry out or to continue with the investigation of the complaint in the particular circumstances of this case.

27. For what it is worth, we are also of the view that, in the circumstances of the case, the Commissioner was correct to conclude, pursuant to section 39(2)(b) of the Ordinance, that any investigation or further investigation of this case was unnecessary.

#### CONCLUSION

28. It follows from the foregoing that this appeal should be dismissed. We hereby dismiss the appeal and exercise our power under section 21(1)(j) of the Ordinance to affirm the decision of the Commissioner.

#### COSTS

29. It remains for us to deal with the question of costs. Section 21(1)(k) of the Administrative Appeals Board Ordinance, Cap. 442 gives the Board power, subject to section 22, to make an award to any of the parties to the appeal of such sum, if any, in respect of the costs of and relating to the appeal. Normally, in civil litigation, the general rule is for costs to follow the event. However, as far as this Board is concerned, the rule is modified to some extent by section 22(1), which provides that:

The Board shall only make an award as to costs under section 21(1)(k)-

(a) against an appellant, if it is satisfied that he has conducted his case in a frivolous or vexatious manner; and

(b) against any other party to the appeal, if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.

30. Despite having decided to dismiss his appeal, we are unable to go as far as to say that the Appellant has conducted his case in a frivolous or vexatious manner. We therefore make no order as to costs.

(signed)

(Mr. Thong Keng-ye)

Deputy Chairman

Administrative Appeals Board