

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 17 of 2004

BETWEEN

WU KIT PING

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

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Coram : Administrative Appeals Board

Date of Hearing : 14 December 2004

Date of Handing Down Decision with Reasons : 17 December 2004

DECISION

The appellant Wu Kit Ping was a patient of Yan Oi General Out-patient Clinic (the "Clinic").

2. On 13.11.2003, the appellant made a Data Access Request ("DAR") to the Clinic. The requested data described on the DAR Form are:

"medical records (Please also indicate the names and Medical Council of Hong Kong's registration numbers of the doctors. If possible, please also indicate the name and Medical Council of Hong Kong's registration number of the doctor who wrote the 2000 analytical report.)

3. On 24.11.2003, Mr. Edwin Chow of the Tuen Mun Hospital (the “Hospital”) wrote back to the appellant acknowledging receipt of the DAR. The appellant was asked to pay \$165 initial processing fee for duplicating medical notes and films and to contact a Ms Chan to clarify the type of data she requested.

4. Three days later, on 27.11.2003, the appellant wrote to the Hospital enclosing a \$165 cheque. In the letter, the appellant clarified the data she requested as follows:

“Year 2003

Medical Council of Hong Kong’s registration number for Dr. Leung Pak Ki and Dr. Law Tung Chi.

Year 1998 to 2002

Consultation summary (Please also indicate the name and the Medical Council of Hong Kong’s registration number of the doctors)

2000 X-ray report and film (please also indicate the name and the Medical Council of Hong Kong’s registration number of the doctor who wrote the report)

Year before 1998

Consultation summary only.”

5. On 24.12.2003, exactly 40 days after she made her DAR, the appellant complained to the Privacy Commissioner for Personal Data (“the Commissioner”) that the Clinic had failed to comply with the statutory requirement that a DAR should be complied with by the data user within 40 days after receipt of the DAR.

6. On 29.12.2003, the Commissioner acknowledged receipt of the appellant’s complaint and informed her that her complaint was then being handled. A few days later, on 2.1.2004, the Hospital informed the appellant of the fee for duplicating the medical notes and X-ray films and at the same time asked the appellant to note that the films would only be duplicated on receipt of payment.

7. On 7.1.2004, the appellant sent a cheque of \$729 in payment of the duplicate notes and films. The appellant obtained the medical notes and films on 15. 1.2004. On the same day, the appellant informed the Commissioner that she had reduced the amount of requested data and had paid the amount for processing her data.

8. On 29.1.2004, the Commissioner informed the appellant that there was no evidence of any contravention of s. 19 of the Personal Data (Privacy) Ordinance (the “Ordinance”) on the part of the Clinic or the Hospital and no investigation would be carried out in respect of the appellant’s complaint. The Commissioner gave the following reasons for his decision:

1. the Hospital had within 40 days after receipt of the DAR advised the appellant of the initial processing fee and had thereafter on payment of the fee by the appellant, provided the appellant with the requested data. Compliance with the DAR was therefore within 40 days as required under s. 19 of the Ordinance.
2. The registration number of a medical practitioner is not the appellant’s personal data within the meaning of the Ordinance and therefore the Hospital or Clinic was not obliged to provide her with such data.

9. On 2.2.2004, the appellant wrote to the Commissioner objecting to the Commissioner’s decision. She argued that the demand by the Hospital for payment of an initial processing fee was not a compliance with the DAR. She confirmed that her complaint was limited to this respect and since her request for third party information was not under the Ordinance, no investigation thereof would be required.

10. On 11.2.2004, the Commissioner wrote to the appellant and confirmed his decision. The appellant was not satisfied with the decision and wrote to the Commissioner again on 21.2.2004. In her letter, she repeated her interpretation of the 40 day period under s. 19 of the Ordinance. She maintained that the data user had to send the

required information to the data requestor within the 40 day period, otherwise it would be a breach of the section.

11. On 7.4.2004, the Commissioner replied to the appellant as follows:

“...it does not appear to this Office that a data user should be held liable for failing to comply with a DAR in contravention of section 19(1) if he has within the 40 day period informed the requestor of the fee imposed for complying with the request and provided the requestor with the requested data within reasonable time after receipt of the fee.”

12. On 29.4.2004, the appellant lodged her notice of appeal to this Board against the decision of the Commissioner on 29.1.2004. Under the Administrative Appeals Board Ordinance, a notice of appeal should be lodged within 28 days of the decision appealed against. The appellant’s notice of appeal was therefore out of time. On 4.5.2004 this Board granted the appellant leave to appeal out of time and accepted her notice of appeal.

13. In her grounds of appeal, the appellant argued that when s. 19 of the Ordinance which requires a data user to “comply with a data access request within 40 days of the receipt of the request” is read together with s. 28(6) of the Ordinance which defines “comply with a data access request” as “supplying a copy of the personal data to which the request relates”, it is clear that the Clinic or Hospital had failed to comply with s. 19.

14. The Commissioner in his statement of response gave his view on the interpretation of s. 19 as follows:

“...It has been clearly stated in the Decision Letter that there was no evidence indicating the TMH or YOGOC had failed to comply with the DAR in accordance with s. 19 because TMH, acting on behalf of YOGOC, had responded within 40 days by advising the initial fee as the Appellant requested and thereafter provided the requested data as soon as practicable after payment of the fee. In coming to the said

conclusion, the Respondent took into account of the following facts:

1. TMH promptly replied to the Appellant in 10 days after receipt of the Form;
2. after the Appellant confirmed the particular data under request and paid the initial processing fee, TMH in 36 days processed the DAR, examined the records, located the relevant document and then informed the Appellant of the fee for obtaining copies of the documents, and
3. full payment was made on 7 January 2004 and the requested data were sent out on 15 January 2004.”

15. The Commissioner further maintained that a data user is entitled under s. 28 to impose a fee for processing a DAR and there was no time limit within which the data user should comply with the request after payment of the fee. When s. 28 and s.19 are read together, the data user should provide the requested data within a reasonable time after receipt of payment of the fee. If a data user has within 40 days after receipt of the DAR informed the requestor of the fee to be paid and provided the requested information within a reasonable time after receipt of the payment thereof, there would be no contravention of s. 19.

16. The question before this Board is primarily the meaning of s. 19(1) of the Ordinance.

17. s. 19 (1) & (2) of the Ordinance are as follows:

“ (1) Subject to subsection (2) and sections 20 and 28(5), a data user shall comply with a data access request not later than 40 days after receiving the request.

(2) A data user who is unable to comply with a data access request within the period specified in subsection (1) shall –

(a) before the expiration of that period –

(i) by notice in writing inform the requestor that the data user is so

unable and of the reasons why the data user is so unable; and

(ii) comply with the request to the extent, if any, that the data user is able to comply with the request, and

(b) as soon as practicable after the expiration of that period comply or fully comply, as the case may be, with the request.”

18. Section 28(5) is as follows:

“(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.”

19. Section 28(6) which is also relevant is as follows:

“(6) Where -

(a) a data user has complied with a data access request by supply a copy of the personal data to which the request relates; and

(b) the data subject or a relevant person on behalf of the data subject, requests the data user to supply a further copy of those data,

then the data user may, and notwithstanding the fee, if any, that the data user imposed for complying with that data access request, impose a fee for supplying that further copy which is not more than the administrative and other costs incurred by the data user in supplying that further copy.”

20. In our opinion, section 19(1) requires the data user to comply with the data access request within 40 days after receipt thereof, but subject to payment of such fee as the data user may impose under s.

28(5), failing which the data user may refuse to comply with the request. Section 19(2) enables a data user who is unable to comply with the request within the prescribed period, to comply in part or in full within a reasonable time after the prescribed period. Section 28(6) refers to “complying with a data access request by supplying a copy of the personal data to which the request relates”. Thus, “to comply with the request” must mean to supply the requested data in the DAR. Any other meaning would lead to absurdity. The fact that a data user may under s.28 impose a fee for complying with the request does not change his obligation to supply the requested data if the fee is paid. It follows that the data user must supply the requested data within 40 days of the receipt of the DAR unless the requestor fails to pay the fee or subsection (2) applies. An acknowledgment of receipt of the DAR or the issue of a notice of demand for a fee within the 40 day period, without more, is insufficient to discharge that obligation.

21. We consider that if the data user imposes a fee for complying with the DAR, the data user should notify the requestor of it within such time after receipt of the DAR as to enable payment to be made and the requested data be supplied to the requestor within the 40 day period. After all, the purpose of prescribing the 40 day period is to enable the requested data to be supplied to the requestor without delay. We do not agree with the contention of the Commissioner that s.19(1) and 28(5) when read together enable the data user to supply the data within a reasonable time after receipt of the payment of the fee provided that the data user has notified the requestor of the fee with 40 days of receipt of the DAR. If that is the case, the section would have properly spelt it out and would not have required compliance with the request strictly within the period prescribed.

22. Of course, if the requestor refuses to pay the fee, the data user may refuse to comply with the request in which case, the request lapses and the data user’s obligation under s. 19(1) is discharged. If payment of the fee is made so near the end of the 40 day period so that the data user is unable to supply the requested data within that time, the data user may pray in aid of s. 19(2) and by notifying in writing the requestor of the reason for failing to comply within time, the data user may comply with the request after the 40 day period.

23. We do not see how the Hospital, by
- a. responding within 10 days after receipt of the appellant's data access request, demanding clarification of the request and payment of a fee for initial processing;
 - b. informing the appellant 36 days later of the fee for duplicating her medical notes and X-ray films; and
 - c. supplying requested data to the appellant two weeks thereafter, after appellant had paid the fee a week earlier,

could be regarded as having complied with s. 19(1). It should be noted that from the time of making the DAR, it took 60 days for the appellant to finally obtain the requested data. If the Hospital's inability to comply with the request in time was due to the clarification sought from the appellant, the Hospital should have notified the appellant under s.19(2) giving that as the reason for the delay. If that was done, compliance with s. 19(1) would no longer be a question. Regrettably neither the Clinic or Hospital had seen fit to do so.

24. We are further of the opinion that where the type and scope of data to which a DAR relates are obviously so unclear so that further clarification is required before it can be complied with, the DAR may be regarded as incomplete and should not have been accepted for processing. In such circumstances, the time to comply with the DAR does not start to run until a properly completed DAR is received. However, in the case before us, the appellant's DAR though required some clarification was regarded as complete and accepted for processing by the Hospital on 24.11.2003. The time for compliance therefore started to run from that date.

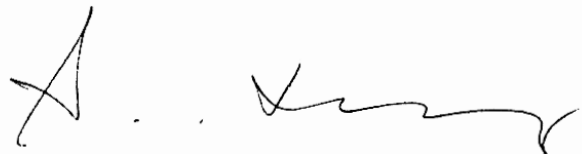
25. For these reasons, we conclude that the Commissioner should not have refused to investigate the appellant's complaint.

26. Notwithstanding the above conclusion, having regard to all the circumstances of the case, we do not think it would serve any useful

purpose for the Commissioner to carry out an investigation of the case for the following reasons:

1. The appellant had obtained her medical reports and X ray films.
2. The appellant conceded that the third party information sought in her data access request was not within the scope of the Ordinance and there was no obligation to supply to her such data.
3. Therefore, the appellant's data access request had been substantially complied with, albeit belatedly not within the period prescribed in s. 19(1).
4. In the opinion of this Board, the Clinic or Hospital had failed to act in accordance with the requirements of the Ordinance.
5. The Commissioner may having regard to our opinion in this case, consider it appropriate to advise the Clinic or Hospital as to their future handling of DAR.

27. Accordingly we allow the appeal with no order as to costs.



(Arthur LEONG)

Chairman

Administrative Appeals Board