ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 54/2014

BETWEEN

DAVID M WEBB Appellant

and

PRIVACY COMMISSIONER FOR

PERSONAL DATA Respondent

Coram: Administrative Appeals Board
Mr Eugene Fung Ting-sek, SC (Deputy Chairman)
Miss Hattie Cheng Kin-hei (Member)
Dr Cheung Chor-yung (Member)

Date of Hearing: 13 July 2015

Date of Handing down Written Decision with Reasons: 27 October 2015

DECISION

A. INTRODUCTION

1. This is an appeal of Mr David M Webb ("**the Appellant**") against the

decision of the Privacy Commissioner for Personal Data ("**the Respondent**") dated 26 August 2014 to issue an enforcement notice ("**the Enforcement Notice**") pursuant to section 50 of the Personal Data (Privacy) Ordinance (Cap 486) ("**the Ordinance**") to the Appellant.

B. THE RELEVANT BACKGROUND

2. The Appellant is the Founder and Editor of "Webb-site.com" ("**Webb-site**"), an online publication in Hong Kong. Webb-site is a database platform providing online access to information relating to the directors of Hong Kong listed companies, members of public statutory and advisory boards, licensees under the licensing regime of the Securities and Futures Commission, members of the Executive Council, Legislative Council, District Councils, Chief Executive's Election Committee and others.

3. Webb-site has a "search people" function by which a user may search for information of a target person using his or her name as the search term.

4. One female member ("**the Complainant**") of several statutory panels was involved in divorce proceedings and became a party to several court proceedings. There were three judgments concerning her that were handed down in 2000, 2001 and 2002 in open court. They were originally made available by the Judiciary in the Legal Reference System ("**LRS**") with the names of the Complainant, her ex-husband and her children

un-redacted. By using the Complainant's name as the search term, one was able to locate the three judgments in the LRS.

5. In 2010, the Complainant wrote to the Chief Judge of the High Court requesting removal of the judgments from the LRS. The Chief Judge replied to the Complainant stating that since the system of open justice required judgments of the courts be made available to the public for reference, the judgments could not be removed from the Judiciary's website, but would be edited so that the names of the parties and their children would be redacted. Two relevant judgments were subsequently replaced by anonymised version in the LRS.

6. In 2012, the Complainant wrote to the Chief Justice requesting one judgment be removed from the LRS. As a result, the judgment was subsequently replaced by anonymised version.

7. Nonetheless, the Complainant found her name revealed on three hyperlinks on "Who's Who" of Webb-site connecting to the three anonymised judgments in the LRS of the Judiciary's website. Specifically, if a user entered the Complainant's name in the "search people" box, Webb-site would bring the user to the "Who's Who" page of Webb-site where information about the Complainant would be shown. The hyperlinks were embedded under the item "Articles" on the "Who's Who" page. By clicking on "Articles", the three hyperlinks with the judgments' title (referring to the names of the Complainant and her former husband)

would appear. By clicking on the hyperlinks, the user would be taken to the three anonymised judgments in the LRS.

8. On 31 March 2013, the Complainant wrote to the Appellant asking for deletion of the hyperlinks but her request was declined. She then lodged a complaint with the Respondent.

9. The Respondent carried out an investigation pursuant to section 38(a) of the Ordinance and concluded that the Appellant has contravened the requirements of Data Protection Principle 3 ("**DPP3**") in Schedule 1 of the Ordinance by publishing the hyperlinks on Webb-site which effectively disclosed the Complainant's identity in the three anonymised judgments.

10. By a letter dated 26 August 2014, the Respondent served the Appellant with the result of the investigation ("**Result of Investigation**") and the Enforcement Notice directing him to remove the hyperlinks from Webb-site and to confirm his compliance in writing together with supporting evidence.

11. On 11 September 2014, the Appellant lodged an appeal to the Administrative Appeals Board ("**the Board**") against the Respondent's service of the Enforcement Notice.

12. On 8 January 2015, the Complainant withdrew her complaint from the Respondent. On 5 February 2015, the Respondent decided to maintain

the Enforcement Notice issued against the Appellant.

C. THE RELEVANT STATUTORY PROVISIONS

13. DPP3 relevantly provides:

> *"(1) Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose.*
>
> ...
>
> *(4) In this section –*
>
> ***new purpose**, in relation to the use of personal data, means any purpose other than—*
>
> *(a) the purpose for which the data was to be used at the time of the collection of the data; or*
>
> *(b) a purpose directly related to the purpose referred to in paragraph (a).* "

14. Section 2 of the Ordinance contains the following definitions:

> (1) "***use**, in relation to personal data, includes disclose or transfer the data*";
>
> (2) "***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";

(3) "***data subject**, in relation to personal data, means the individual who is the subject of the data*";

(4) "***data user**, in relation to personal data, means a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data*".

D. THE GROUNDS OF APPEAL

15. In his Notice of Appeal and his Representations dated 16 February 2015, the following substantive grounds were relied upon by the Appellant to contend that the Respondent erred in making his decision:

(1) Failure to properly take into account the Respondent's earlier decision as endorsed on appeal by the Board, in Administrative Appeal No. 36 of 2007 ("**AAB 36/2007**") ("**Ground 1**");

(2) Failure to properly take into account jurisprudence of the Court of Appeal articulated in *TCWF v LKKS* (CACV 154 & 156 of 2012) in a judgment handed down on 23 July 2013 ("**Ground 2**");

(3) Failure to properly take into account the requirements of Article 27 of the Basic Law ("**BL 27**") and the Hong Kong Bill of Rights ("**BOR**") ("**Ground 3**");

(4) Erroneous interpreting the term "data user" to embrace persons who merely read or collect and aggregate personal information in and from the public domain ("**Ground 4**").

16. In his oral submissions before the Board, the Appellant relied on sections 51A and 60B(a) of the Ordinance as additional defences. After the hearing was adjourned, the parties provided the Board with written submissions on the two provisions and such submissions have been duly considered by the Board.

E. GROUND 1 – AAB 36/2007

17. In the Result of Investigation, the Respondent considered, amongst other things, that:

(1) the Appellant was the "data user" (§26 of Result of Investigation);

(2) the Appellant as the data user had to comply with the requirements of DPP3 when he used and disclosed the personal

data of the Complainant collected from the three judgments, even though they were available in the public domain (§27 of Result of Investigation);

(3) the issue was whether the Appellant's act of publishing the hyperlinks on Webb-site was consistent with the purpose of uploading the three judgments to the LRS by the Judiciary (§28 of Result of Investigation);

(4) the original purpose of publishing the three judgments did not include the purpose of identifying the parties in the judgments (§34 of Result of Investigation);

(5) the Appellant's linking of the Complainant to the three anonymised judgments and revealing her identity on Webb-site was not serving a purpose the same as or directly related to the Judiciary's purpose of making the anonymised judgments publicly accessible (§39 of Result of Investigation);

(6) the Appellant had contravened DPP3 by publishing the hyperlinks on Webb-site which effectively disclosed the Complainant's identity in the three anonymised judgments (§48 of Result of Investigation).

18. Effectively, the Respondent's view was that the Appellant breached

DPP3 because he used the data from the three judgments for a "new purpose" without the consent of the Complainant.

19. In this appeal, the Appellant argued that his purpose in collecting the data from the three judgments was reporting and publication, that he did not subsequently adopt a "new purpose" within the meaning of DPP3, and that DPP3 was therefore not breached. In advancing this argument, the Appellant relied on AAB 36/2007.

20. In AAB 36/2007,

(1) the appellant filed a claim against three local newspapers for reporting news concerning mental patients in an adverse manner thereby contravening the Disability Discrimination Ordinance;

(2) the appellant served upon newspaper X a writ of summons and newspaper X on the following day published an article regarding the appellant's claim in the court proceedings which also disclosed the identity of the appellant;

(3) the appellant was dissatisfied with newspaper X in disclosing his name and the fact that he was mentally ill in the article and complained to the Respondent that newspaper X had contravened the requirements of the Ordinance;

(4) the Respondent considered that there was no prima facie evidence to support the appellant's complaint and that it was not necessary to conduct an investigation on the complaint; and

(5) the appellant lodged an appeal with the Board against the Respondent's decision and the Board upheld the Respondent's decision and dismissed the appeal.

21. The Appellant submitted that AAB 36/2007 establishes the proposition that "purpose" in DPP3 refers to the purpose of the data collector and not the purpose of the data subject. He argued that Webb-site collected personal data from the three judgments and his purposes included publication of the data on Webb-site. This purpose, he argued, did not change at any time. In advancing this argument, the Appellant regarded himself as the "data collector" for the purpose of DPP3.

22. In our view, we do not consider that the decision in AAB 36/2007 assists the Appellant in the present case.

(1) Two main issues arise for the purpose of determining whether DPP3 is applicable. The first (the consent issue) examines whether the prescribed consent of the data subject is obtained. The second (the purpose issue) examines whether the purpose for which the data user is now using the personal data ("**the Current Purpose**") is a "new purpose" within the meaning of

DPP3 (namely a purpose other than (a) the purpose for which the data was to be used at the time of the collection of the data, or (b) a purpose directly related to the purpose referred to in paragraph (a), collectively as "**the Excepted Purposes**").

(2) In AAB 36/2007, the Board was concerned with the application of the former version of DPP3 as set out in §21 of the Decision. We have considered the wording of the former version of DPP3 and believe that the same two issues would similarly arise in that version.

(3) As far as the purpose issue is concerned, it is necessary to make a comparison between the Current Purpose and the Excepted Purposes to see if they are consistent. The Board in AAB 36/2007 carried out this exercise and answered it in the affirmative in §24 of the Decision; it held that there was no contravention of DPP3 on the part of newspaper X.

(4) One of the arguments of the appellant in AAB 36/2007 was that he disclosed his own personal data in the Writ of Summons solely for the purpose of legal proceedings and that original purpose had no relation to news reporting. He therefore argued that his personal data could not be used by newspaper X without his consent within DPP3. The Board rejected this argument and stated at §§23 and 25 the following:

"23. It should be noted that the original purpose in DPP3 refers to the purpose of the data collector at the time of the collection of data, not the will or purpose of the data subject. In most cases (especially when the data is not directly collected from the data subject, just as the present case), when the data collector collects the data, he does not know the data subject's will at all, and even has not met the data subject. DPP3 requires that personal data shall only be used for the original purpose at the time of collection or a directly related purpose. The original purpose at the time of collection refers to the purpose of the data collector, not the purpose of the data subject.

25. The Appellant stated that he disclosed the personal data in the Writ of Summons solely for the purpose of the legal proceedings. The original purpose had no relation to news reporting. As mentioned above, DPP3 requires that personal data shall only be used for the original purpose at the time of collection or a directly related purpose. The original purpose at the time of collection refers to the purpose of the data collector, not the purpose of the

data subject. Therefore, when deciding if there was any contravention of DPP3, the Board took into account [newspaper X's] original purpose of collecting the Personal Data, not the Appellant's purpose in disclosing his personal data in the Writ of Summons."

(5) In our view, the Board's conclusion is clearly correct. The appellant's argument in AAB 36/2007 did not involve the making of the relevant comparison between the Current Purpose and the Excepted Purposes. The appellant was himself the data subject and was not the data user. Therefore, his own purpose was not relevant in ascertaining the Current Purpose (i.e. the purpose for which the data user is now using the personal data). On the facts of the case, the Board in that case came to the view that the person who collected the data was newspaper X and that it was newspaper X's purpose that was relevant.

(6) In the present case, the Appellant argued that he was the person who collected the relevant personal data, and that his purpose for using the data and his purpose when he collected the data were the same. He relied on what the Board said in AAB 36/2007 regarding "the purpose of the data collector" to support his argument. In our view, his reliance on AAB 36/2007 is misplaced. All the Board decided in that case was that the data

subject's purpose is irrelevant for the purpose of DPP3 and that, on the facts of the case, it was the purposes of newspaper X (being the data user as well as the person who collected the data) that were relevant in ascertaining whether there was any contravention of DPP3. The same reasoning cannot be applied in the present case because (a) the Appellant does not contend that the data subject's purpose (i.e. the Complainant's purpose) is relevant for the purpose of DPP3, and (b) there is more than one person in this case who has collected the Complainant's personal data (namely the Judiciary and the Appellant).

(7) One should go back to the wording of DPP3 and carry out the relevant comparison exercise. As mentioned earlier, it is necessary to compare the Current Purpose (i.e. the purpose for which the data user is now using the personal data) with the Excepted Purposes. On a proper construction of subsection (4) of DPP3, it seems to us that the phrase "*the purpose for which the data was to be used at the time of the collection of the data*" refers to the purpose for which the data was originally collected. On the facts of this case, such original purpose would be referable to the purpose of the Judiciary being the person who first collected the relevant data. Therefore, on the facts of this case, we consider that the relevant comparison is between the purpose for which the Appellant used the personal data, and the purpose for which the Judiciary collected the personal data.

We refer to Section G below for our views on this comparison exercise.

23. Accordingly, we do not consider the Respondent had failed to properly take into account AAB 36/2007. Ground 1 is therefore rejected.

F. GROUND 2 – *TCWF v LKKS*

24. The Appellant sought to rely §§30 and 32 of the Court of Appeal's Judgment in *TCWF v LKKS* (unreported, CACV 154 & 166/2012, 29 July 2013) to contend that he was not in breach of DPP3. In *TCWF v LKKS*, Lam JA at §§30 and 32 said:

> "*30. At this juncture, it is useful to identify different aspects of open justice which, although related, may involve different balances being struck. First, open justice implies members of the public (including the public media) would have access to the hearing. Second, members of the public may seek access to the documents filed and used at the hearing but not expressly read out at the hearing. Third, members of the public may report or publish information on what actually happened at the hearing. Fourth, the judgment of the court is published generally without any redaction. Fifth, open justice also means that the names of the parties would be made known to the public without any anonymity.*

> *32. In the matrimonial context, the practice in Hong Kong is that even though an appeal is heard in open court, the names of the parties are anonymized in the daily cause list and the judgment of the court. This is particularly so in children cases. This gives some protection to the privacy of the parties. However, unless the court grants a specific injunction, it is not against the law to publish the names of such parties if their identities were known. This is the position even if the proceedings take place in private, see Sections 3 and 5 of the Judicial Proceedings (Regulation of reports) Ordinance, Cap 287...*" [emphasis added]

25. Specifically, the Appellant relied on the underlined statement quoted above to support his argument.

26. The quoted passages from *TCWF v LKKS* must be understood in their proper context. The issue before the Court of Appeal was whether the substantive appeal in a matrimonial case should be conducted in chambers (not open to the public). In §§22 to 46, the Court of Appeal discussed the relevant general principles. Lam JA in §30 was referring to the different aspects of open justice in general. In §32, his Lordship referred to the Hong Kong practice in the matrimonial context regarding the anonymisation and publication of the parties' names. We note that there was no reference to the Ordinance or DPP3 in the Judgment. This

suggests that there was no issue of personal data protection in that case and the Court of Appeal was not concerned with the application of any provisions of the Ordinance.

27. In our view, we do not read what was said by Lam JA in §§30 and 32 of *TCWF v LKKS* as providing any defence or exemption to a contravention of DPP3.

28. Accordingly, we do not believe the Respondent can be criticised for failing to properly take into account what the Court of Appeal said in *TCWF v LKKS* in issuing the Enforcement Notice. Ground 2 is therefore rejected.

G. WHETHER THE DATA WAS USED FOR A NEW PURPOSE

29. As mentioned in Section E above, we consider the relevant comparison in DPP3 is between the purpose for which the Appellant used the personal data, and the purpose for which the Judiciary collected the personal data.

30. Judiciary's purpose:

(1) On the Judiciary's website, the following statements can be found:

"*Judgments which are of significance as legal precedents*

on points of law, practice and procedure of the courts and of public interests from the following courts delivered between 1946 and 1948, and from 1966 onwards are available on this website :

- *Court of Final Appeal (since its establishment in 1997)*
- *Court of Appeal of the High Court*
- *Court of First Instance of the High Court*
- *District Court*
- *Family Court*
- *Lands Tribunal*"

(2) Accordingly, it seems to us that the Judiciary's principal purposes in collecting personal data are to enable their judgments to be utilised as "*legal precedents on points of law, practice and procedure of the courts and of public interests*".

(3) These purposes are in our view entirely consistent with what Sachs LJ said in *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 at 92B-C:

> "*What in that state of affairs is the purpose of law reports? There is in substance only one purpose. To provide essential material for the study of the law – in the sense of acquiring knowledge of what the law is, how it is developing and how it applies to the enormous range of*

human activities which it affects."

31. Appellant's purpose: the Appellant claimed that his purpose of using the Complainant's personal data in Webb-site was reporting and publication for general use. There was nothing to suggest that the Appellant's purpose was in any way related to the law.

32. We do not believe the Appellant's purpose of using the Complainant's personal data (i.e. reporting and publication for general use) can be said to be consistent with the Judiciary's purposes of publishing the judgments (i.e. to enable their judgments to be utilised as "*legal precedents on points of law, practice and procedure of the courts and of public interests*"). In other words, the Appellant used the relevant personal data for a "new purpose" within the meaning of DPP3. Therefore, it seems to us that the Respondent was correct in coming to the view that the Appellant had contravened DPP3.

33. It is convenient at this juncture to deal with an argument raised by the Appellant in this appeal. The Appellant argued that DPP3 does not apply to collection of data from the public domain. He argued that if the DPPs apply to public domain personal data, then any person who reads, sees or hears public domain personal data in the media, and records it, either in writing or electronically, is a data user, and that would include recording the TV news, putting newspaper clippings in a filing system, writing about it in emails, or disclosing it on a blog such as Facebook or Twitter. He

contended that the application of DPPs to such a broad class of users would make administration of the law wholly impracticable, and that the legislative intent of the Ordinance is to keep private data private, and not to make public data private.

34. The Respondent submitted that in order to amount to collection of personal data within the meaning of the Ordinance, the collecting party must be compiling information about an individual. Therefore, the Respondent contended that a person who carries out the activities described by the Appellant is prima facie not considered as compiling information about another individual, and the provisions of the Ordinance do not come into play. Further, the Respondent considered that where there is compilation of information involving identification of a particular individual, the exemption under section 52 of the Ordinance would apply so long as the data is held for the compiler's personal or recreational purposes.

35. We consider the Respondent's submission regarding the essence of collection of data to be supported by what the majority of the Court of Appeal said in *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83. At p 90I-J, Ribeiro PJ said:

> "*It is, in my view, of the essence of the required act of personal data collection that the data user must thereby be compiling information about an identified person or about a person whom the data user intends or seeks to identify. The data*

collected must be an item of personal information attaching to the identified subject ..."

This was repeated by Godfrey VP at p 102D.

36. Further, the Court of Appeal in *Re Hui Kee Chun* (unreported, CACV 4/2012, 1 February 2013) held that DPP3 is directed against misuse of personal data regardless of whether the relevant personal data has been published elsewhere or is in the public domain. At §52, Chu JA (with whom Yeung VP and A To J agreed) said:

> *"It is irrelevant that the name, employment and job title of Mr Tam could be ascertained from other sources or had been carried in the newspapers reports or were otherwise publicly available. DPP 3 prohibits the use of personal data without the consent of the data subject for a purpose different from the original collection purpose or directly related purpose. It is directed against the misuse of personal data and it matters not that the personal data involved has been published elsewhere or is publicly available. This is entirely consistent with the objective of the PDPO to protect personal data."*

It appears to us that this authority is directly against the Appellant's submission.

37. The Appellant sought to distinguish *Re Hui Kee Chun* on the basis that the facts in that case were very different from those in the present appeal. We do not find this to be a sufficient basis to distinguish the case. We consider what Chu JA said at §52 to be general principles applicable in other cases including the present appeal.

38. For these reasons, we are unable to accept the Appellant's contention that DPP3 does not apply to collection of data from the public domain.

H. GROUND 3 – BL 27 & BOR

39. BL 27 relevantly states:

> *"Hong Kong residents shall have freedom of speech, of the press and of publication ..."*

40. Article 16 of the BOR (section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383)) is headed "Freedom of opinion and expression" and provides:

> *"(1) Everyone shall have the right to hold opinions without interference.*
>
> *(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of*

frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary-

(a) for respect of the rights or reputations of others; or

(b) for the protection of national security or of public order (ordre public), or of public health or morals."

41. The Appellant argued that the application of DPP3 to restrict the repetition of public domain personal data is unconstitutional because it violates BL 27 and Article 16(2) of the BOR. The Appellant accepted that Article 16(3) of the BOR imposes restrictions on the right of freedom of expression under Article 16(2) and such restrictions must be necessary for respect of the rights or reputations of others. He contended that the restriction imposed by DPP3 is ineffective (and therefore unnecessary) because it can be circumvented by publishers collecting data from overseas or by Hong Kong residents travelling overseas to access the data. He also contended that the restriction would place a local publisher at a competitive disadvantage to overseas publishers and that the collateral damage would be disproportionate.

42. Essentially, the Appellant's arguments are that DPP3 is ineffective in

certain circumstances and would produce disproportionate damage to certain people in Hong Kong. We do not believe these grounds are sufficient to render DPP3 unconstitutional.

43. The Appellant referred to *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 where the Court of Final Appeal at §33 said that "*the constitutional requirement of necessity involves the application of a proportionality test*". This proposition is well-established. The Court of Final Appeal further stated at §35 that in the application of a proportionality test, a proper balance must be struck.

44. The need to carry out a balancing exercise is accepted by the Appellant. In his oral submissions, he submitted:

> *"That of course calls for a balancing of rights. It asks whether the Respondent's objective of applying the PDPO to public domain data, purportedly to protect privacy, is sufficiently important to justify limiting freedom of expression in Hong Kong."*

45. We believe the relevant balancing exercise was carried out by the Respondent. In §§42 and 43 of the Result of Investigation, the Respondent stated:

> *"42. Whether the published data concerns matters of public*

interest is a factor that I will take into account when striking the balance between freedom of press and data privacy. In considering whether public interest is served in any news reporting, our stance is that 'public interest must involve a matter of legitimate public concern. There is a distinction to be drawn between reporting facts capable of contributing to a debate of general public interest and making tawdry descriptions about an individual's private life'. Clearly, the three judgments are matrimonial proceedings affecting the parties to the marriage and their children but no one else. The nature and contents of the three judgments concern only the Complainant's private life, not her public life.

43. In weighing the freedom of press and expression against the personal data privacy of the Complainant, I conclude that the disclosure of the identity of the Complainant in the three judgments does not serve to promote the transparency of operations of companies, governments, regulators and controlling shareholders; as well as opposing all forms of public vices and protection of minority interest. The balance should be tipped in favour of protecting the personal data of the Complainant in the three edited judgments."

46. We do not think that the conclusion arrived at by the Respondent was unreasonable after performing the relevant balancing exercise.

47. For the above reasons, we are unable to agree with the Appellant that the Respondent failed to properly take into account the requirements in BL 27 and Article 16(2) of the BOR. Ground 3 is therefore rejected.

I. GROUND 4 – MEANING OF "DATA USER"

48. In §11 of his Representations dated 16 February 2015, the Appellant submitted that the Respondent erroneously interpreted the term "data user" to embrace persons who merely read or collect and aggregate personal information in and from the public domain. This was advanced as his fourth and last ground of appeal.

49. It seems to us that this ground is effectively the same as the argument advanced by the Appellant that DPP3 should not be applicable to public domain personal data. We are not persuaded by this argument and we repeat what we said in §§33 to 38 above.

J. OTHER GROUNDS - SECTIONS 51A & 60B(a)

50. As mentioned earlier, the Appellant in his oral submissions sought to rely on sections 51A and 60B(a) of the Ordinance to contend that DPP3 is not engaged in the present case.

51. Section 51A of the Ordinance provides:

> *"(1) Personal data held by a court, a magistrate or a judicial officer in the course of performing judicial functions is exempt from the provisions of the data protection principles and Parts 4 and 5 and sections 36 and 38(b).*
>
> *(2) In this section—*
>
> ***judicial officer** has the same meaning given by section 2 of the Judicial Officers Recommendation Commission Ordinance (Cap 92)."*

52. The Appellant argued that the effect of section 51A is that all personal data that appears in judgments is exempt from all the data protection principles, including DPP3.

53. On its face, it seems to us that section 51A provides an exemption to the court, the magistrates and judicial officers in the course of performing judicial functions in relation to personal data from certain provisions of the Ordinance. This reading is reinforced by the Consultation Document on Review of the Personal Data (Privacy) Ordinance dated August 2009 which sets out the background in relation to this provision. At pp 84-85 of the Consultation Document, the following was stated:

> *"Proposal No. 39: Exemption for Personal Data Held by the Court or Judicial Officer*

- *To add a new provision so that the PDPO shall not apply to personal data held by the court or judicial officer in the course of the exercise of judicial functions.*

(Background: Personal data may be handled by the courts and the judicial officers in the course of the exercise of judicial functions. However, the PDPO does not contain any express provision exempting such personal data from the application of the PDPO. The proposal gives recognition to judicial independence and immunity.)"

54. As the Appellant has never been a judicial officer and the relevant personal data was never held by him in such a capacity, we are unable to see how section 51A of the Ordinance can exempt him from the application of DPP3.

55. Section 60B of the Ordinance provides:

"Personal data is exempt from the provisions of data protection principle 3 if the use of the data is—

(a) required or authorized by or under any enactment, by any rule of law or by an order of a court in Hong Kong;

(b) required in connection with any legal proceedings in

Hong Kong; or

(c) required for establishing, exercising or defending legal rights in Hong Kong."

56. The Appellant's argument ran as follows:

(1) "Rule of law" is defined in section 2 of the Ordinance to include "a rule of common law".

(2) There is a common law principle of open justice: *Ng Shek Wai v The Medical Council of Hong Kong* [2015] 2 HKLRD 121 at §§46 and 47.

(3) Therefore, the disclosure of the data in public registers (and hence its onward disclosure by other publishers) is exempt from DPP3 because its disclosure is authorised by the common law principle of open justice.

57. We are unable to accept this argument.

(1) On its proper construction, it seems to us that section 60B(a) exempts the application of DPP3 if the use of personal data is required or authorised by any statutory provisions (i.e. "*any enactment*"), any principles of law (i.e. "*any rule of law*"), or any orders made by a court (i.e. "*an order of a court in Hong*

Kong").

(2) We find this construction supported by what was said in the Consultation Document on Review of the Personal Data (Privacy) Ordinance dated August 2009 dealing with the introduction of section 60B:

> *"Proposal No. 33: Use of Personal Data Required or Authorized by Law or Related to Legal Proceedings*
>
> - *To create an exemption from DPP 3 for use of personal data required or authorized by or under law, by court orders, or related to any legal proceedings in Hong Kong or is otherwise for establishing, exercising or defending legal rights.*
>
> *(Background: A data user may be required or authorized by or under law, by the court to disclose information which may contain personal data. However, under DPP 3, personal data shall not be used for any purpose other than the original purpose of collection or its directly related purposes unless the prescribed consent of the data subject is obtained. Moreover, under the existing provisions, the exemption from application of DPP 3 does not cover the use of personal data required or authorized*

by or under law or court orders, or related to legal proceedings or for establishing, exercising or defending legal rights. It is reasonable and legitimate for data users to change the use of personal data in such circumstances. It is, therefore, necessary to create an exemption from DPP 3 for such use of personal data so that a data user would not run the risk of contravening DPP 3 in such circumstances.)"

(3) The existence of a common law principle of open justice cannot be disputed. It is necessary to bear in mind what the principle entails. The principle ensures the transparency of legal process and the open administration of justice; it allows the public to know and be informed about the workings of the law: *TCWF v LKKS* (unreported, CACV 154 & 166/2012, 29 July 2013) at §§26, 30 (Lam JA); *Ng Shek Wai v The Medical Council of Hong Kong* [2015] 2 HKLRD 121 at §§59-62 (G Lam J).

(4) In our view, the Appellant did not use the personal data of the Complainant to publish the hyperlinks on Webb-site as required or authorised by the principle of open justice. There is no principle of law that requires the Appellant to publish the personal data of the Complainant on Webb-site. Indeed, as mentioned earlier, the Appellant's purpose of using the relevant personal data was not in any way related to the law.

58. Accordingly, we do not think section 60B(a) of the Ordinance provides an exemption to him from the application of DPP3.

59. The Appellant further submitted that the exemptions in sections 51A and 60B(a) attach to the personal data, and not the data user, and therefore the Complainant's personal data in question can be used without restrictions. We do not consider either section 51A or section 60B(a) has the effect as contended for by the Appellant, and therefore do not accept his submissions.

(1) DPP3 is concerned with the use of personal data. When personal data is being used, it would invariably be used by a person, namely the data user.

(2) Therefore, insofar as any exemption is applicable to DPP3, we believe such an exemption has to be considered in the context of personal data being used by a data user. We do not believe it is right to attribute the exemption solely to the personal data, and argue that the same data can be repeatedly used on a different occasion in the future without any control under DPP3.

60. Therefore, we do not consider sections 51A and 60B(a) assist the Appellant in this appeal.

K. CONCLUSION

61. For all of the reasons above, the Appellant's appeal is dismissed with no order as to costs.

(signed)

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