ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 57/2011

BETWEEN

John Doe — Appellant

and

The Privacy Commissioner for Personal Data — Respondent

Coram: Administrative Appeals Board

Date of Hearing: 31 August 2012

Date of handing down Written Decision with Reasons: 16 November 2012

DECISION

Background

1. John Doe is a pseudonym of the Appellant used for the purpose of withholding the true name of the Appellant. John Doe realises that the decision of this Board is likely to be uploaded in the website of the Respondent. While John Doe raises no objection to the uploading of this judgment, he is worried that once his true name is revealed in this judgment, it will in turn lead to the unnecessary

disclosure to the public of his mental health conditions as referred to and contained in other court judgments to which he is a party. For this reason the Appellant makes the application to withhold the true name. Although there does not appear to be sufficient evidence to justify the concern or worry of the Appellant, this Board finds that because of the particular health conditions and state of mind of the Appellant, the concern and worry raised is subjectively and genuinely held. Looking at the facts of the case and the issues for determination, this Board is of the view that withholding the real name of the Appellant will not in any appreciable degree affect the purposes and spirit that the hearing before the Board should be public but that it would remove the genuine concern and possible distress of the Appellant. For all these reasons, it is an appropriate case to grant the application and to substitute 'John Doe' for the real name of the Appellant in the judgment.

2. John Doe made a complaint to the Respondent on 28 April 2011. The matters complained of relate to a criminal case and its subsequent appeals. John Doe was convicted of an offence and was put on probation by the trial magistrate. An appeal was made to a High Court judge ("the Appeal Judge") whose name needs not be made known in this judgment lest the true identity of John Doe can be traced inadvertently. The Appeal Judge dismissed the appeal and the subsequent appeal to the Court of Final Appeal ("the CFA") was also dismissed by the time John Doe made the instant complaint to the Respondent. The Respondent declined to initiate a formal investigation into the complaint and notified John Doe of the decision on 19 August 2011. John Doe is now appealing to this Board against this decision of the Respondent.

Decision of the Respondent

3. In the complaint letter John Doe first wrote to the Respondent, it is stated under the heading Data User that the party complained against is the Data user, namely, the High Court and particularly the Appeal Judge. In the same letter the

subject-matters of complaint were set out in details and they all relate to the Appeal Judge personally. It is understandable that the Respondent needs to clarify with John Doe the party complained against, the High Court, or the Appeal Judge or both. In response to the clarification by the Respondent, John Doe confirmed in writing that the party complained against is the Appeal Judge and not the High Court and John Doe also gave the reasons for not naming the High Court as the party complained against[1]. In short, John Doe believed that the Appeal Judge is entirely to blame and his blameworthiness lies in his inappropriate conduct. He concluded that the Appeal Judge should be the proper party to be complained against.

4. It should also be noted that the Respondent and his officers are required by section 37(4) of the Personal Data (Privacy) Ordinance ("the Ordinance") to give appropriate assistance to an individual who wishes to make a complaint and requires assistance to formulate the complaint. The Respondent purportedly offered such assistance to John Doe when its officer advised John Doe during a telephone conversation[2] on 6 July 2011. While he understood the explanation and advice of the Respondent, John Doe maintained that the Appeal Judge should be the Data User, and that the party complained against was to be the Appeal Judge. In this regard, he expressed to the Respondent the intention of filing a complaint against the Judiciary.

5. After accepting the complaint, the Respondent has made some enquiry with the Appeal Judge and the Judiciary. According to the Respondent, the responses and views from the Appeal Judge and the Judiciary do not in any way encourage his decision. It certainly appears to be the case. In his Reasons for Decision, he gave a single ground for his decision in the following terms[3]:

> "6. In view of the fact that the alleged act done by the Appeal Judge was carried out by him in the course of the proceedings and in the performance

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[1] Appeal Bundle at pages 207 and 208
[2] Appeal Bundle at page 364
[3] Appeal Bundle at pages 375 and 376

of his judicial function or the exercise of his judicial power, I am of the view that the matters you complained of were outside the jurisdiction of this Office.

7. Having considered all the relevant information available to me and by reason of the circumstances set out above, I decide not to pursue your complaint further under section 39(2) of the Ordinance."

6. In his Reasons for Decision, the Respondent invokes various Articles of the Basic Law in support of his argument. The same argument is repeated in his Statement of Defence filed in this appeal and is elaborated at the hearing. The argument concisely runs as follows. The judicial system is of great importance and is protected by provisions in Articles 80 to 96 of the Basic Law. Particularly Article 85 provides that: "The Courts of Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the Judiciary shall be immune from legal action in the performance of their judicial function. The combined effect of Article 11 and section 2A(1) of the Interpretation and General Clauses Ordinance is that all legislations, both before and after 1997 unification, must be interpreted in such a way that they are not contrary to the Basic Law. The conclusion the Respondent draws from all these is that the legislative intent of the Ordinance is that its application should not impede the exercise of judicial power or judicial proceedings or affect the act done by members of the judiciary in the course of the performance of their judicial function or exercise of their judicial power. Therefore the judicial act of members of the judiciary should not be subject to the regulatory remit of the Ordinance.

Decision of the Board

7. There is one shortcoming in the argument of the Respondent. The Respondent appears to concede that but for the provisions of the Basic Law, the

Ordinance would have applied and impeded the exercise of judicial function and power of judicial officers. In simple terms, the Respondent is impliedly asserting that had a similar complaint been made before 1997, it would be within his jurisdiction to investigate into it.

8. Despite the shortcoming,, the conclusion arrived at by the Respondent is correct. Generally common law is to survive after reunification in 1997. The independence of judiciary is well entrenched in common law before 1997. The various Articles of the Basic Law cited by the Respondent do no more than seek to reiterate those pre-existing common law principles relating to a independent judiciary. The legislative intent of the Ordinance, as contended by the Respondent, can be obtained without praying in aid of the Basic Law.

9. While the conclusion as a matter of law with regard to his jurisdiction is correct, the conclusion as to facts remains to be examined. It is because in the view of the Respondent the acts or omissions complained of are in course of performance of judicial function by the Appeal Judge.

10. The matters complained of by John Doe are correctly and conveniently grouped by the Respondent under four main items as follows[4]:

> (a) The Appeal Judge had unlawfully excluded from the appeal bundle his new evidence regarding two medical defence witnesses and the affidavit of the Duty Lawyer on the 2nd hearing. Both documents were withheld and retained in the office of the Appeal Judge. He submitted a Data Access Request to the Appeal Judge for both documents and considered that the charge asked of him at $4 per page for releasing the documents was excessive;

[4] Appeal Bundle at page 137

(b) The Appeal Judge had collected the transcript of proceedings from the Magistrates' Court on the 2nd hearing by unlawful or unfair means;

(c) The Appeal Judge had failed to inform the Appellant of the reasons for the refusal of two other Data Access Requests made by him regarding the audio record or transcript on the 2nd hearing and the orders made by him in the course of the appeal; and

(d) The Appeal Judge had failed to respond to her Data Correction Request to correct an error of hearing dates contained in the judgment of the Appeal Judge.

11. For the purpose of these proceedings before this Board, the Respondent does not dispute that the documents concerned are or may contain personal data of John Doe. To understand and evaluate the first limb of complaint under Item (a), namely, the exclusion of documents in the appeal bundle, one must bear in mind the nature of an appeal bundle. An appeal bundle serves the purpose of enabling the appeal court to dispose of the appeal properly and expediently. Generally speaking, it is not the duty of the judge whose decision is the subject of a pending appeal to prepare the appeal bundle. Any party to the appeal may apply to the court hearing the appeal to have incorporated into the bundle documents they think relevant. Alternatively, with the leave of the court they may refer to documents not so incorporated in the appeal bundle. On the other hand, a party to the appeal may argue at the hearing of the appeal that certain documents in the appeal bundle are irrelevant and should be ignored by the appeal court in the determination of the appeal. In the course of preparing the appeal bundle, the judge whose decision is being challenged, may be consulted as a matter of convenience, as to which particular documents should or should not be included in the appeal bundle. If the judge in fact advises on that, he does not have to give reasons. In fact it would be most improper to give formal

reasons on record lest it may inevitably be misunderstood that he is defending his judgment or rewriting it. It is trite law, that for justice to be seen to be done, a judge cannot defend or improve on his judgment once given with a view to defeat the appeal. In the most unlikely if not inconceivable event, the judge gives his reasons, the appeal court would decide on the relevancy of these documents invariably without recourse to these reasons. The issue of relevancy of the documents would be determined by referring to the judgment being challenged and the arguments presented by the parties to the appeal. Therefore the exclusion or inclusion of a particular document in the appeal bundle does not affect any right of any party to the appeal to argue properly their respective case before the appeal court. For these reasons, it is most doubtful, to say the very least, that the judge at the first instance is performing a judicial act or a judicial function when he so takes part in assisting the preparation of the appeal bundle. Looking at it in another angle, the appeal court is seised of the matter under appeal, and the judge has no part to play in adjudicating on the merits of the appeal, and such adjudication falls entirely within the jurisdiction of the appeal court.

12. In the instant case the Appeal Judge has already performed his judicial function regarding the appeal from the Magistrates' court. He has no judicial function to play with regard to merits of the appeal to the Court of Appeal or the Court of Final Appeal. It is not quite appropriate to regard his assistance in the preparation of the appeal bundle as his judicial act or function. Having said that, this Board is of view the Respondent's decision not to follow up the matters of complaint under the first limb of Item (a) can be justified for other reasons given below.

13. Whoever prepares the appeal bundle, it must be under the overall direction and supervision of the court hearing the appeal. It is clearly part of judicial proceedings before the CFA. The legislative intent of the Ordinance is not for the Respondent to interfere with the judicial proceedings. Before this Board and before

the Respondent, it is not a question whether the privacy of personal data is protected or not by the Ordinance. It is the question whether the Respondent has the jurisdiction to interfere with the judicial proceedings. If any allegation arising from the breach of the provisions of the Ordinance, any party to the proceedings and indeed any persons aggrieved can make an application to the Court seised of the matter, to have the evidence otherwise admissible to be excluded on the ground of breach of the provisions of the Ordinance. One must be bear in mind that it is the Judiciary who bears the ultimate and competent responsibility for interpreting the provisions of the Ordinance and to determine if there is any breach. Therefore it is nothing unfair or unjust that the Respondent has no jurisdiction to interfere with the judicial proceedings under the pretext of investigating into a complaint.

14. Even if this Board is wrong in coming to this conclusion, there are good reasons not to investigate into the preparation of the appeal bundle. Firstly, as has been said, the exclusion of the documents, is inconsequential to the outcome of the appeal. Secondly, the alleged exclusion of the documents concerned, even if improper, does not amount to any breach of the data protection principle.

15. As to the second limb of complaint under Item (a), namely the non-compliance of a Data Access Request which this Board understands was made after the conclusion of court proceedings, different consideration applies. There were no judicial proceedings pending and it cannot be said that any investigation into the complaint would impede with the judicial act or interference with the independence of the Judiciary or the like. In fact the judiciary is not taking this point. The Judiciary was willing to supply the documents requested but on payment of charges at $4 per sheet. A letter written on behalf of the Registrar, High Court has responded to the Data Access Request in the following terms:

> "--- (the requested documents) are in the custody of the Clerk to (the Appeal Judge's) Office.

As a party to the case you may apply for the release of the documents, (the Appeal Judge) will grant your application subject to your payment of a charge of $1,072 at ($4 per page).

I here return the Personal Data (Privacy)Ordinance Data Request Form---together with a copy of your ID card.--"

16. John Doe is particularly not satisfied that his Data Access Request was returned. This is understandable because the reasons for returning the request are not made clear in the letter. If it meant that the Appeal Judge or the High Court cannot be served at all the Data Access Request, it would not be right. The relevant issue before this Board is that whether the Data Request has been complied with. Whether it is wise and proper to return the Data Access Request is beside the point. The complaint by John Doe is that the charges are unreasonable. This issue can be sorted out quite easily. The charges must be promulgated by the Director of Accounting Services as it is so stated[5] in the Judiciary's website about personal data policy. There is no material before this Board whether the charge is what that has been so promulgated. Looking at the amount of the charge, there is nothing to suggest that it is unreasonable by itself and there must be some evidence to suggest that it has not been so promulgated by the Director of Accounting Services. It is a serious allegation against the administration of the Judiciary to levy a charge not properly promulgated as it would have been unlawful. John Doe should have adduced some evidence to support such serious allegation, and the Respondent cannot be criticised for not finding it out for the Respondent. But of course, the Respondent could have verified the matter one way or the other to assist John Doe. It is a matter of his discretion. He has not exercised this discretion because he chooses to rely on the single ground of lack of jurisdiction. As John Doe has indicated he might make a complaint against the Judiciary, it is not proper or appropriate to express any view on this issue.

[5] Appeal Bundle at page 363

17. In so far as the Appeal Judge is concerned, he is not a Data User. The Respondent has so advised John Doe and it is difficult to understand that his decision is not based on this. The Appeal Judge, like any other judicial officers, only has the custody of the case files for his convenience, say preparing himself for the hearing, or writing judgment, etc. In the instant case, there is no reason for him to keep the case file or the appeal bundle, containing the documents. The evidence suggests that it was in the custody of his clerk. His clerk in turn has custody of these court documents, be they in the appeal bundle or in the case file. These documents form part of the court record. The keeper and custodian of the court record is the Registrar of the High Court. Judges' clerks are merely his delegates in having custody of the documents. John Doe must have appreciated this point when he correctly made the Data Access Request to the High Court and not to the appeal judge or his clerk. And the response letter was correctly made on behalf and in the name of the Registrar, High Court.

18. To sum up, the decision whether to release the documents and on what charges is not a judicial act of the Appeal Judge. The reason given by the Respondent is therefore not valid. His decision can be justified for other reasons. Firstly, the Appeal Judge is not the Data User. Secondly, the Data Access Request is not made to the Appeal Judge. Technically for this reason alone he is under no obligation to make any response at all. Thirdly, the ultimate decision as how to comply with a Data Access Request made to the High Court lies in the Office of Registrar, High Court. In the process of decision, the Registrar may delegate his duty to his subordinate staff, or to consult the judge (obviously, to see if he has any objection or observation as he is the one most familiar with the case). Whatever the Appeal Judge's view is, it is the Registrar's administrative and not judicial decision as to how to respond to the Data Access Request. The Registrar cannot hide behind the view of the Appeal Judge if he adopts the same, nor the Appeal Judge can be held responsible to the Data Subject for his view.

19. The complaint under Item (b) has no merit at all. The transcript is clearly relevant to John Doe's appeal before the Appeal Judge. He complained about the trial magistrate and his own defence lawyer. These issues cannot be satisfactorily resolved without the transcript. There is no question of unfairness or impropriety in collecting these data. This should be obvious even to those not so legally trained. John Doe should have appreciated that as he himself is now seeking the transcript of the hearing before the Appeal Judge in order to make good his complaint against his impropriety. In any event he has not pointed out to the Respondent what unfairness there is, and this Board cannot see any unfairness. There is no breach of any of the requirements of the Data Protection Principles. The Respondent fails to rely on this simple reason. The reason for this, this Board ventures to suggest, is that to do so, he would be seen as interfering with the judicial act, or performance of judicial duty. For the same reasons given above, this Board finds that the Respondent's conclusion however is correct in that he has no jurisdiction to investigate into such complaint. Again it can be reiterated that John Doe is not beyond the protection of the Ordinance. This Board only rules that it is not within his jurisdiction to investigate for reasons already given. To use the instant case to illustrate this point, John Doe, could have, if he had not already done so, objected to the calling of transcript before the Appeal Judge. He could have argued for the same point in his subsequent appeal. Furthermore, if he failed to raise this issue before the Appeal Judge or the CFA, or had raised it but lost, it would be good reasons for the Respondent to exercise his discretion not to pursue the complaint, even if contrary to the finding of this Board that he has the jurisdiction to investigate into the matter.

20. As to matters complained of under Item (c) and (d), at the beginning of the hearing, this Board enquired among other matters whether the audio recording and the written transcript are personal data or contain personal data of John Doe. John Doe was quick to seize the opportunity to point out that it was never an issue raised by the Respondent. He is right and as a result the Respondent concedes that for the

purpose of this appeal, the Respondent would not take the point that John Doe is not entitled to their access or to have errors in them corrected.

21. Again deciding whether those documents should be released is again not a judicial act or in the performance of a judicial duty of the Appeal Judge or the Registrar. The documents form part of the court record and the ultimate responsibility as to how to comply with the Data Access Requests lies with the Registrar, High Court and not with the Appeal Judge. The complaint against the Appeal Judge personally is misconceived. For this it is not necessary to repeat the reasons given above. Suffice to repeat that the Data Access Requests were not made to the Appeal Judge and this alone can justify the decision of the Respondent.

22. As to the Data Correction Request, the Respondent at first was reluctant to accept that John Doe might be right about the mistake of the hearing date recorded in the judgment of the Appeal Judge. John Doe immediately point out the evidence in support of his contention. This coupled with the fact that the Judiciary never in its correspondence denied the mistake, it is something the Respondent should look into before rejecting John Doe's contention.

23. John Doe quite reasonably suggested he would not pursue the complaint in this aspect, if the correction had in fact been done. But he said it had not. A telephone call to the clerk of the Appeal Judge to see if he or she has put in a Corrigendum would have settled the matter amicably. After all it is the common and usual duty of the Respondent to attempt a reconciliation. However this simple task the Respondent was not willing to do even if given time by this Board because according to his recent check presumably on the Judiciary website, the questionable hearing date had not been changed. The probability that the Appeal Judge retains a copy of his own judgment for reference or for other purpose cannot be ruled out. However it is pointless to ask the Appeal Judge to correct his own copy without amending formally the court record. It is the formal correction that matters and not

the copy in the hand of the Appeal Judge. The only way to correct this error, if in fact there is one as alleged, is for the clerk to the Appeal Judge to issue a corrigendum. Again it is the primary duty of the Registrar, High Court to make sure the court record is correct. A wrong hearing date in the judgment is a serious matter. A hearing must be listed in advance and it is necessary part of open justice. A court hearing not listed smacks of secret justice. Further it may also entail unforeseen and undesirable consequence for the party concerned. For instance, the judgment with incorrect hearing date would tend to defeat an alibi of John Doe when he claims some years later that he is in court before the Appeal Judge on the date which was not shown but should have been shown in the judgment.

24. There are other allegations against the Appeal Judge's conduct but which have nothing to do with the personal data of John Doe. The most notable allegation is the allegedly inappropriate remarks the Appeal Judge made at the appeal hearing advising John Doe on the course he should take in the appeal proceedings. Whether such remarks have been made and whether it is appropriate has nothing to do with the personal data of John Doe. Such allegations have rightly not been taken into consideration by the Respondent and it serves no useful purpose of this appeal to have them repeated here.

25. For all the above reasons, in particular, that the Data Access Requests and the Data Correction Request were not made to the Appeal Judge, the decision of the Respondent cannot be faulted. This Board therefore dismisses the appeal.

Costs

26. The Respondent intimates he may ask for costs of this appeal. As discussed above, the basis for the Respondent's decision is not free from defects. The grounds for his decision involve complicated legal arguments. Without hearing further

arguments, this Board is not prepared to find the conduct of the Appellant is frivolous or vexatious.

(Signed)

(Mr Yung Yiu-wing)
Deputy Chairman
Administrative Appeals Board