

ADMINISTRATIVE APPEALS BOARD

APPEAL NO. 5/1999

BETWEEN

APPLE DAILY LIMITED

Appellant

PRIVACY COMMISSIONER FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of hearing : 19th November 1999

Date of Decision : 30th November 1999

D E C I S I O N

The appeal

The Appellant is the publisher of the Apple Daily. On 9th June 1998, the Apple Daily published a story which stated that a man was seriously injured by his neighbour. The assailant had already previously attacked the man and his son once about seven months ago. The victims were so frightened of the attack that they had moved to another address. The name of the street to which they moved was reported in the article. The victims complained to the Privacy Commissioner for Personal Data ("the Commissioner") about the report. The Commissioner found that the Appellant had breached Principle 4 of the Data Protection Principles in the

Personal Data (Privacy) Ordinance (“the *Ordinance*”), and issued an Enforcement Notice against the Appellant. The Appellant now appeals against the decision.

The Ordinance

Under section 4 of the *Ordinance* a data user shall not do an act that contravenes a data protection principle. Personal data means any data relating to an individual, from which it is practicable to ascertain his identity and it is in a form in which it is practicable to gain access or process. Data includes information contained in a document. Data user is a person who controls the collection, holding, processing or use of the data. Data subject means the person who is the subject of the data (section 2).

It is not disputed that the Appellant is a data user and the address of the victims is a personal data. It is not necessary to go into detail the Data Principles. Personal data should be collected only for a lawful purpose and in a manner which is lawful (Principle 1); steps should be taken to ensure that the personal data that are collected are accurate (Principle 2); the personal data that are collected should be used for the purpose for which they were collected in the first place (Principle 3); steps should be taken to ensure that the personal data are held securely (Principle 4); information should be available by a data user to others as to his practice and policies in relation to personal

data (Principle 5); a data subject is entitled to ascertain whether a data user holds his personal data and he is entitled to request access to his personal data (Principle 6). Upon receiving a complaint, the Commissioner is to carry out an investigation to see whether any of the principles has been infringed. If yes, the Commissioner may issue an Enforcement Notice against the person who infringed the principles.

The issue

The issue in this appeal is whether the report by the Appellant of the address of the victims falls within the ambit of Principle 4.

"4. Principle 4 — security of personal data

All practicable steps shall be taken to ensure that personal data (including data in a form in which access to or processing of the data is not practicable) held by a data user are protected against unauthorized or accidental access, processing, erasure or other use having particular regard to —

- (a) the kind of data and the harm that could result if any of those things should occur;
- (b) the physical location where the data are stored;
- (c) any security measures incorporated (whether by automated means or otherwise) into any equipment in which the data are stored;
- (d) any measures taken for ensuring the integrity, prudence and competence of persons having access to the data; and
- (e) any measures taken for ensuring the secure transmission of the data."

The Commissioner's view

The Commissioner argued that the disclosure of the address will cause serious harm to the victims because the assailant might have access to the newspaper report and learnt of the new address of the victims and attack them again. Principle 4 is breached because the Appellant is under a statutory duty to take all practical steps to ensure the personal data of the victims are protected against accidental access, having particular regard to the harm that could result from such access or use.

Statutory construction

In our view, Principle 4 does not cover the present situation. As a matter of construction, Principle 4 is clearly intended to ensure that the personal data is stored in a secured manner so that there would not be any **unauthorized or accidental access, processing, erasure or other use of the data**. It refers to the data being held by the data user and steps to be taken to ensure there will be no unauthorised or accidental use of the data. The factors that the data user must consider include the storage (i.e. location); security measures in accessing (both in terms of the equipment and personnel) and transmission of the data. The activities such as "access, process or erasure" which Principle 4 seeks to avoid must be "unauthorised or accidental" in nature. This clearly refers to the security aspect of the protection. The general words

“other use” must be construed by reference to the previous activities such as access, processing and erasure.

The Commissioner has not advanced any argument that the Apple Daily had infringed any of the other Data Principles. In the context of a newspaper, it used the data when it published the data. Once it is published the public will inevitably gain access to it. There is no question of any “unauthorised or accidental” activities arising out of the publication because the data is then made known. Any access to it will not be “unauthorised or accidental”. It is extremely difficult to fit newspaper reporting into the framework of Principle 4, particularly when there is no restriction on the use of the data for the purpose of publication. Access would, of course, mean access by a third party. But it is inappropriate to look at the word ‘access’ in Principle 4 in isolation in order to find a case of infringement of the Principle. The established policy of the Apple Daily at the time of the publication of this report was not to report the data of the victim. It was not observed in the present case. But this cannot be the basis of a finding of “accidental access” of the data by the assailant. Access is gained by reason of the publication and is not accidental in nature.

Legal publication

Our view is supported by the work of *Berthold and Wacks on Data Privacy Law in Hong Kong, Chapter 8* :-

“The OECD (Organisation for Economic Co-operation and Development of Europe) has characterised the security of information systems as the protection of availability, confidentiality, and integrity of data. While principle 4 addresses confidentiality concerns with its reference to access, by also including reference to processing and erasure, it extends to the protection of the availability and integrity of data. The principle therefore adopts a comprehensive approach to data security.”

Professor Wacks is a member of the Law Reform Commission of Hong Kong's Privacy Sub-committee. The guideline of OECD had been endorsed by the Privacy Sub-committee in its Report on reform of the law relating to the protection of personal data of August 1994. The report recommended the legislation which is now the *Ordinance*.

Conclusion

The appeal turns entirely on the construction of Principle 4. As the Commissioner had misconstrued Principle 4, his decision must be quashed and the Enforcement Notice set aside. Having set aside the decision, it is not necessary for us to consider the argument relating to section 50 of the *Ordinance* on the issue of the Enforcement Notice. It is also not necessary for us to express any view on the conflicting interests of freedom of expression by the press and privacy protection. The appeal is accordingly allowed.

Comment

We have sympathy for the victims of the attack. In the light of what had happened to them in the past, their concern for their personal safety is a real one. We urge the Appellant and other news media to exercise caution in their reporting. They should recognize that individuals may be seriously affected by some careless reporting. We are pleased to know that Apple Daily had in June 1998 tendered an apology to the victims in its correspondence with the Commissioner.

A handwritten signature in cursive script that reads "Peter Cheung". The signature is written in black ink and is positioned above a horizontal line.

The Hon Mr Justice Cheung
Deputy Chairman,
Administrative Appeals Board