

[ENGLISH TRANSLATION]

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 36/2007

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BETWEEN

TUNG LAI LAM

Appellant

and

THE PRIVACY COMMISSIONER

FOR PERSONAL DATA

Respondent

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Coram: Administrative Appeals Board

Date of Hearing: 27 December 2007

Date of Handing Down Written Decision with Reasons: 5 March 2008

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DECISION  
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1. The Appellant Mr Tung Lai Lam filed his claim in the District Court on 5 July 2007 (“**the Claim**”) against three local newspapers for reporting news concerning mental patients in an adverse manner and therefore contravened the Disability Discrimination Ordinance. In the Claim, the third defendant was “Ming Pao (Ming Pao Enterprise Corporation Ltd)”. As the Appellant and the Respondent of the present case both agreed that Ming Pao was a newspaper under Ming Pao Enterprise Corporation Ltd (“**MPECL**”) and that the

businesses of MPECL included Ming Pao, for the purpose of the present case, there was no need to distinguish between MPECL and Ming Pao.

2. According to the Appellant, he served upon Ming Pao a writ of summons by registered mail in the afternoon of 5 July 2007. Ming Pao reported the case the next day (i.e. 6 July). The news report (“**the Report**”) is translated as follows:

“Alleging 3 newspapers of discrimination against mental patients and claiming for damages

[Ming Pao] A mental patient yesterday filed a claim under the Disability Discrimination Ordinance in the District Court against 3 newspapers for reporting news concerning mental patients in an adverse manner. This hurts most of the mental patients and their families, widens the chasm of misunderstanding of the public on the mental patients and hinders their recovery. Damages in the total sum of \$65,000 and written apologies to the mental patients were sought against the newspaper.

Alleging adverse news reporting affects recovery

The Plaintiff Tung Lai Lam claimed against the Sun of the Oriental Press Group Ltd, the Apple Daily of the Next Media and Ming Pao of the Ming Pao Enterprise Corporation Ltd. In the writ personally written by him, Tung disclosed himself as a mentally ill person and alleged that 3 news articles reported by the Sun from last September to May this year had used negative and discriminatory wordings to malign the mental patients and therefore sought damages of \$60,000 from the newspaper. He also claimed damages of \$4,000 from the Apple Daily, which was alleged to have made two discriminatory reports. Ming Pao

was alleged to have made a discriminatory report as well and a claim for damages of \$1,000 was sought [Case No. DCE05/07].

3. The Appellant was dissatisfied with Ming Pao of disclosing his name and the fact that he was mentally ill in the Report, and complained to the Privacy Commissioner for Personal Data ("**Privacy Commissioner**") that Ming Pao had contravened the requirements of the Personal Data (Privacy) Ordinance ("**the Ordinance**").

4. The Privacy Commissioner considered that there was no prima facie evidence to support the Appellant's complaint and it was not necessary to conduct an investigation on the Appellant's complaint. The Privacy Commissioner notified the Appellant on 14 August 2007 that he had decided not to commence or continue investigation of the Appellant's complaint under section 39(2)(d) of the Ordinance ("**Decision of No Investigation**").

5. The Appellant lodged an appeal with the Board on 5 October 2007 against the Privacy Commissioner's Decision of No Investigation.

### **Grounds of Appeal**

6. In Annex (c) of the Notice of Appeal, the Appellant listed out the grounds of his appeal. He had also elaborated his grounds during hearing of the present appeal. The Appellant's grounds may be summarised as follows:

- (1) The Appellant considered that the purpose and manner of Ming Pao's collection of his personal data were "unlawful" and therefore had contravened Data Protection Principle ("**DPP**") 1 in Schedule 1 to the Ordinance;
- (2) Ming Pao has not informed the Appellant or hinted to him in advance that his name and mental health data would be used in news activities;

- (3) As Ming Pao was one of the defendants in the Claim, the writ of summons had to be served upon it. Other newspapers had to pay at the Registry of the District Court before accessing the writ of summons (“**the Writ of Summons**”). It was unfair for Ming Pao to report the Claim ahead of other newspapers. This contravened breached DPP 1 which requires the means of data collection must be fair;
- (4) Ming Pao had not obtained the Appellant’s consent for using his name and mental health data in news activities;
- (5) The Appellant’s personal data in the Writ of Summons was intended to be used in legal proceedings only, and its original purpose had no relation to news reporting. Ming Pao has unlawfully changed the use of the data to that of news reporting;
- (6) In addition to compliance with DPPs 1 and 3, Ming Pao had the legal obligation to consider the impact and harm which might be caused to the Appellant if his personal data was disclosed. The Appellant believed that under the spirit of the Ordinance, Ming Pao was not allowed to unreasonably disclose his personal data without his consent, thus causing harm to him;
- (7) The Privacy Commissioner was oppressive towards the Appellant owing to his disability, and deprived him of his right to complain.

### **The Personal Data**

7. In the present case, the Appellant’s complaint involved two kinds of his personal data (collectively “**the Personal Data**”):
  - (1) His name;
  - (2) He was a mentally ill person.
8. The Personal Data could be found in the Writ of Summons.

9. As mentioned above, Ming Pao was one of the defendants of the Claim. According to the Appellant in the appeal hearing, he served the Writ of Summons upon Ming Pao in the afternoon of 5 July 2007. Thus, Ming Pao could readily collect the Personal Data from the Writ of Summons.

10. Nevertheless, a writ of summons is a document available to the public for search. Order 63, rule 4(1) of the Rules of the District Court stipulates that:

“Any person shall, on payment of the prescribed fee, be entitled during such hours as the Registrar may direct to search for, inspect and obtain a copy of any of the following documents filed in the Registry, namely-

(a) the copy of any writ of summons or other originating process;”

11. Hence, even if Ming Pao did not collect the Personal Data from the Writ of Summons served by the Appellant, Ming Pao could still collect the Personal Data from copy of the Writ of Summons by paying the prescribed fee at the Registry of the District Court.

12. Therefore, it can reasonably be inferred that Ming Pao collected the Personal Data from the Writ of Summons. There is no evidence showing that Ming Pao collected the Personal Data from other sources. The Appellant also believed that Ming Pao collected the Personal Data from the Writ of Summons.

### **Ming Pao’s Purpose of Collection of the Personal Data**

13. Ming Pao is a newspaper of the MPECL. In general, news reporting is a function of a newspaper and collection of data (including personal data) is also for the purpose of news reporting. In the present case, evidence showed that Ming Pao had used the Personal Data in news reporting. As mentioned above, Ming Pao disclosed the Personal Data in the Report on 6 July 2007. There is no evidence showing that Ming Pao had used the Personal Data for other purposes.

14. Hence, it can reasonably be inferred that Ming Pao collected the Personal Data for the purpose of news reporting and not for other purposes. In

fact, the Appellant affirmed that Ming Pao collected the Personal Data for the purpose of publishing the Reports on 6 July 2007.

### **Ming Pao's Means of Collection of the Personal Data**

15. The major issue in dispute was the Appellant believed that Ming Pao collected the Personal Data from the Writ of Summons served by him. He considered that such means of collection was unlawful and unfair. Ming Pao must pay the fee at the Registry of the District Court for access to the Writ of Summons, before it could be regarded as lawfully and fairly collected the Personal Data from the Writ of Summons.

16. The Board did not agree with the Appellant. Even if Ming Pao collected the Personal Data from the Writ of Summons served upon it by the Appellant, the means of collection was not in breach of the law. The law does not prohibit Ming Pao from using the Personal Data it collected from the Writ of Summons served upon it by the Appellant for news reporting. No matter Ming Pao collected the Personal Data from the Writ of Summons served upon it or filed at the District Court, Ming Pao was not in breach of the law. The law does not differentiate these two means of collection in terms of legality.

17. With regard to collection of personal data, DPP 1(2) stipulates that:

- “(2) Personal data shall be collected by means which are-
  - (a) lawful; and
  - (b) fair in the circumstances of the case.
  
- (3) Where the person from whom personal data are or are to be collected is the data subject, all practicable steps shall be taken to ensure that-
  - (a) he is explicitly or implicitly informed, on or before collecting the data, of-
    - (i) whether it is obligatory or voluntary for him to supply the data; and
    - (ii) where it is obligatory for him to supply the data, the consequences for him if he fails to supply the data; and

- (b) he is explicitly informed-
  - (i) on or before collecting the data, of-
    - (A) the purpose (in general or specific terms) for which the data are to be used; and
    - (B) the classes of persons to whom the data may be transferred; and
  - (ii) on or before first use of the data for the purpose for which they were collected, of-
    - (A) his rights to request access to and to request the correction of the data; and
    - (B) the name and address of the individual to whom any such request may be made...

18. The Appellant believed that Ming Pao scooped other newspapers by publishing the Report of the Claim on 6 July because it could collect the Personal Data from the Writ of Summons served by the Appellant. The Appellant considered that such means of collection was unfair to other newspapers and contravened DPP1(2), which requires that data shall be collected by fair means.

19. The Board does not agree with the Appellant. The Board is of the view that DPP 1(2), which requires collection of data by fair means, is enacted to protect the personal privacy of data subjects. The long title of the Ordinance provides that "An Ordinance to protect the privacy of individuals in relation to personal data, and to provide for matters incidental thereto or connected therewith". Personal privacy refers to the privacy of data subjects, and the DPPs in Schedule 1 are also enacted to protect the privacy of data subjects. DPP1(2), which requires collection of data by fair means, is to ensure that data will not be collected under the circumstances which are unfair to the data subjects. The provision refers to the fairness to data subjects, not to others. For example, a data user collects personal data by misleading or oppressive means. Even if the means of collection is lawful, it may be unfair to the data subject and thus contravenes DPP 1(2)(b). In the present case, if (as the Appellant said) Ming Pao collected the data from the Writ of Summons served by the Appellant, the Board does not see any unfairness caused to the Appellant in

such means of collection. Ming Pao simply collected the Personal Data from the court document received and held by it, and the process and means of collection were not unfair to the Appellant. Even though Ming Pao scooped other newspapers by reporting the Claim, it would be unfair to other competitors in the industry at most, but not to the data subject. In fact, such unfairness in competition has no relation to privacy. Hence, Ming Pao's unfairness to other newspapers did not constitute unfairness to the Appellant and this could not be his grounds for complaint. Accordingly, the Board does not accept the Appellant's contention that Ming Pao has contravened DPP 1(2)(b).

20. The Board also does not accept the Appellant's contention that Ming Pao had not informed him or hinted to him in advance that it would use the Personal Data in news activities. If Ming Pao collected the Personal Data directly from the Appellant (e.g. by interviewing the Appellant), Ming Pao certainly needed to comply with DPP 1(3) by explicitly informing the Appellant that the data would be used for news reporting. However, as mentioned above, Ming Pao did not collect the Personal Data from the Appellant, but from the Writ of Summons. Hence, DPP1(3) is not applicable to the present case, and Ming Pao had no obligation to inform the Appellant of the purpose or use of the Personal Data on or before collection of the data.

### **Did Ming Pao Contravene DPP3 in Disclosing the Personal Data**

21. DPP3 stipulates that:

“3. Principle 3-use of personal data

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 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).”

22. DPP 3 clearly states that if the data subject has not given his prescribed consent, personal data shall only be used for the purpose for which it was to be used at the time of the collection (“**Original Purpose**”), or a directly related purpose (“**Related Purpose**”). In other words, if the data is used for the Original Purpose or a Related Purpose, no prescribed consent of the data subject is required.

23. It should be noted that the original purpose in DPP 3 refers to the purpose of the data collector at the time of the collection of the 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.

24. As mentioned in paragraphs 13 and 14 above, it is obvious that Ming Pao’s original purpose of collecting the Personal Data was for news activities. Hence, the use of the Personal Data in reporting the Claim by Ming Pao was consistent with the original purpose and there was no contravention of DPP 3.

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 Ming Pao’s original purpose of collecting the Personal Data, not the Appellant’s purpose in disclosing his personal data in the Writ of Summons.

### **Impact and Harm to the Appellant**

26. According to the Appellant, in addition to compliance with DPPs 1 and 3, Ming Pao had legal obligation to consider the impact and harm caused to the Appellant when disclosing his personal data. In other words, the Appellant considered that even if Ming Pao had not contravened DPP1 and 3, Ming Pao could not “unreasonably” disclose his personal data.

27. The requirements of the Ordinance on the use of personal data are clear. The legal standard is not one of “reasonableness” in considering whether the use or disclosure of personal data contravenes DPP 3. Neither do other provisions of the Ordinance require “reasonableness” as the criteria for using or disclosing personal data. Nor does the Ordinance specify under what kind of circumstances should the use of data be regarded as “reasonable” or “unreasonable”. “Reasonableness” in the use of data usually depends on the nature of the data (e.g. sensitivity of the data or the kinds of persons who are vulnerable to harm). There is no definition of sensitive data in the Ordinance. The Board opines that if it is the legislative intent of the Ordinance to impose “reasonableness” as a criterion for use of data in DPP 3, one cannot explain why such provision is not expressly made. Obviously, the legislative intent is to strike a balance between freedom of speech and personal privacy. With regard to disclosure of personal data, emphasis of the Ordinance is on DPP 3, instead of “reasonableness in the use of data” as alleged by the Appellant.

28. In view of the above, the Board does not accept the Appellant’s argument that Ming Pao has legal obligation under the Ordinance to consider the reasonableness of disclosing the Personal Data and to consider the harm and impact caused to him. Whether Ming Pao has contravened the code of professional conduct to be observed by a responsible newspaper, it is not a factor to be considered by the Privacy Commissioner or the Board. If the Appellant is dissatisfied with this, he should lodge complaints with relevant professional bodies, but not with the Privacy Commissioner.

**The Privacy Commissioner was “oppressive” towards the Appellant owing to his disability**

29. The Appellant accused the Privacy Commissioner of oppressing him owing to his disability and denying him the right to complain. This is a very serious accusation.

30. The Board is of the view that such serious allegation is totally unfounded without any evidence in support. The Privacy Commissioner’s Decision of No Investigation has no relation to the Appellant’s disability at all.

**Our Decision**

31. Based on the above grounds, the Board opines that there is no prima facie evidence proving contravention of the Ordinance by Ming Pao. The Privacy Commissioner’s Decision of No Investigation is correctly made.

32. The appeal is thus dismissed and the Privacy Commissioner’s Decision of No Investigation is upheld.

(Signed)

(Mr Horace Wong Yuk-lun, S.C.)

Deputy Chairman

Administrative Appeals Board