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ABSTRACT

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This column provides a country by country analysis of the latest legal developments, cases and issues relevant to the IT, media and telecommunications' industries in key jurisdictions across the Asia Pacific region. The articles appearing in this column are intended to serve as 'alerts' and are not submitted as detailed analyses of cases or legal developments.

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1. Hong Kong

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1.1. Navigating the Webb: a private or public affair?

On 27 October 2015, the Administrative Appeals Board ("AAB") dismissed an appeal made by Mr. David Webb ("Webb") against an enforcement notice issued by the Hong Kong Privacy Commissioner ("PC") requiring Webb to remove certain hyperlinks from his website ("Webb Case"). The hyperlinks to 3 anonymised judgments in effect revealed the identity of an individual involved in the 3 cases. The decision of the AAB has again brought to the forefront the restrictions on using publicly available data under the Personal Data (Protection) Ordinance (Cap. 486) ("PDPO").

1.1.1. The Webb case

Webb was the founder and operator of a website ("Webb Website") that included a search function allowing users to find information concerning a particular individual using his/her name. The Website was intended to provide access to information concerning directors of Hong Kong listed companies, members of the public statutory and advisory boards, licensees

of the Securities and Futures Commission, members of the Legislative Council, and so on.

A member of a statutory panel ("Complainant") had 3 judgments issued in 2000, 2001 and 2002 in open court concerning her divorce. The judgements originally contained the names of the Complainant, her ex-husband and their children. The judgments were made available by the Judiciary in the Legal Reference System ("LRS"). In 2010 and 2012, based on an application issued by the Complainant, the High Court ordered that the 3 judgments be anonymised. The Complainant subsequently discovered that a search of her name conducted on the Webb Website resulted in hyperlinks to the 3 anonymised judgments on LRS. This therefore enabled her to be identified as the subject of the 3 judgments. The Complainant lodged a complaint with the PC in 2013.

The PC conducted an investigation and found that Webb had breached Data Protection Principle 3 of the PDPO ("DPP 3") by incorporating hyperlinks on the Webb Website to the anonymised judgments, without the Complainant's prior consent. DPP 3 prohibits personal data from being used for purposes not directly related to the original purpose of collection, unless the data subject has provided his/her consent.

On 26 August 2014, an enforcement notice was issued by the PC against Webb requiring him to remove the hyperlinks from the Webb Website. On 11 September 2014, Webb lodged an appeal with the AAB against the PC's decision.

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On 27 October 2015, the AAB upheld the PC's decision. The AAB found the Judiciary's primary purpose in relation to the judgements was to enable them to be utilised "as legal precedents on points of law, practice and procedure of the courts and of public interests"¹. Therefore, Webb's use of the Complainant's personal data and the hyperlinks amounted to a new purpose, which required the Complainant's prior consent pursuant to DPP 3.

Webb argued that DPP 3 did not apply in respect of publicly available data – "the legislative intent of the Ordinance is to keep private data private, and not to make public data private"². However, the AAB rejected Mr. Webb's assertion and confirmed that DPP 3 applies equally to the collection of personal data from the public domain.

1.1.2. *The Hong Kong position*

Contrary to Webb's quips and allegations, the Webb Case is not in fact a case concerning the "right to be forgotten". Instead, it concerns the use of publicly available data and breach of DPP 3. Whether or not personal data is made publicly available, the protection provided by the PDPO still applies.

The Webb Case is not the first time that restriction on the use of publicly available personal data has come under the scrutiny of the PC. Most notably, in August 2013, the former PC published an investigation report on the "Do No Evil" app, which compiled litigation and bankruptcy data on individuals from public sources, allowing users to make searches against specific individuals. The "Do No Evil" app was found by the former PC to be in breach of DPP 3.

In August 2013, the former PC issued a Guidance on Use of Personal Data Obtained from the Public Domain. The test to be applied as to whether or not a data user can use personal data obtained from a public database (without the express consent of the data subject) is:

- (a) whether or not the data user's use of the personal data falls within the original purpose of collection and use of the personal data; and, if not
- (b) whether a reasonable person in the data subject's shoes would find the re-use of the personal data as unexpected, inappropriate or otherwise objectionable, taking into account the context in which the data was collected and the sensitivity of the data.

1.1.3. *Right to be delinked?*

In May 2014, the European Court of Justice ("ECJ") issued a landmark decision on the so-called "right to be forgotten". The decision required a leading Internet search engine to de-link search results to a 1998 newspaper article concerning the complainant's insolvency.

By contrast, the Webb case concerns the wider question of whether or not people can re-use publicly available personal data, e.g. by compiling data on an individual from publicly available sources. We note that the Webb Case could not be further from the ECJ "right to be forgotten" case. The complainant in

this case had already asked the judiciary to "de-link" her by having the three judgments in question anonymised. Webb in essence "re-linked" her to the judgments through his actions on the Website.

The ECJ's decision affirmed the right of individuals under certain conditions to ask search engines to remove links to information about them which is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing. Other jurisdictions have followed suit, and have issued decisions which indicate a "right to be forgotten" (or perhaps more aptly termed as the "right to be delinked"). In December 2015, the courts of Japan ordered that a search engine remove search results that linked to information concerning the complainant's arrest and conviction three years prior, for breaching child prostitution and pornography laws. This is the first case in Japan decided specifically on the basis of the "right to be forgotten". A previous decision issued in Japan was determined based on the complainant's right to privacy. The presiding judge in the December 2015 case, expressed the opinion that criminals are entitled to undergo rehabilitation with a clean slate after a certain period of time had passed. The search engine has appealed the decision.

In Hong Kong, whilst considering the topic of the "right to be forgotten", the former PC expressed the following opinion in June 2014³:

"the approach [the ECJ] has taken is not applicable under the [PDPO]. . . [the search engine] is not a data user as it does not collect personal data. . . Rather, it acts as an intermediary that only provides a facility for web users to gather information dispersed in various websites".

1.1.4. *Implications of the Webb case*

The Webb Case involved a breach of DPP 3, i.e. using personal data for a new purpose without having obtained the data subject's prior consent. The decision issued by both the PC and the AAB is consistent with the position taken so far by the regulators concerning the nature of public data, i.e. simply because personal data is publicly available, does not give people a blanket right to use it however they want.

The Webb Case makes it clear that any claim for a right to freedom of speech must be balanced against an individual's right to privacy. The questions to be considered are: is the data so revealed of a legitimate public concern? Is the re-use of the personal data within the original purpose of collection? Is the re-use something that a reasonable person would find unexpected, inappropriate or otherwise objectionable? Each case will turn on its facts, and the narrow nature of the AAB's decision in the Webb Case has left room for future decisions to be issued that would effectively protect freedom of speech and public interest.

1.1.5. *Conclusion*

Different means have been utilised by individuals to try and "forget" their past. Whilst each may have overlapping features

¹ https://www.pcpd.org.hk/english/files/casenotes/AAB_54_2014.pdf.

² Ibid 1.

³ https://www.pcpd.org.hk/english/news_events/commissioners_message/blog_26062014.html.

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