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Navigating the Webb: A Private or Public Affair?

By Gabriela Kennedy and Karen H.F. Lee

On 27 Oct. 2015, the Hong Kong 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 three anonymised judgments in effect revealed the identity of an individual involved in the three 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).

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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 three judgments issued in 2000, 2001 and 2002 in open court concerning her divorce. The judgments 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 three judgments be anonymised. The Complainant subsequently discovered that a search of her name conducted on the Webb Website resulted in hyperlinks to the three anonymised judgments on LRS.

This therefore enabled her to be identified as the subject of the three 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.

Contrary to Webb's quips and allegations, the Webb Case is not in fact a case concerning the "right to be forgotten."

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

On 27 Oct. 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." 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." 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.

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" (15 WDPR 17, 8/21/15). 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 restrictions 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.

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 to 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 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 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." Previous decision issued in Japan were determined based on the complainant's right to privacy. The presiding judge in the December 2015 case, expressed the opinion that criminals are entitled 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

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to be forgotten", the former PC expressed the following opinion in June 2014[3] :

"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."

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.

Conclusion

Different means have been utilised by individuals to try and "forget" their past. Whilst each may have overlapping features it is important not to get them confused. The EU's "right to be forgotten" has not yet been directly tested in Hong Kong, and complainants are instead relying on DPP 3 and defamation allegations to try and "de-link" and "de-list" unfavourable content concerning themselves. For example, in August 2012, an individual commenced proceedings against a major search engine claiming damages for defamation in relation to the words that appear as a result of the auto-complete feature when the plaintiff's name is entered into the search engine. The plaintiff in this case did not seek to exercise a "right to be forgotten" or any personal data privacy rights—instead, he relied on an allegation of defamation, which turned on whether or not the search engine could be held to be a "publisher" given the auto-complete function it offered. On 5 Aug. 2014, the Court of First Instance rejected the search engine's request for summary dismissal of the claim, on the basis that it believed the plaintiff had a good arguable case. The search engine filed an appeal, and the case is still pending.

So far, complaints based on breach of DPP 3 have proved effective against data users who have compiled information or links regarding an individual obtained from public sources (e.g. the Do No Evil case and Webb Case). The real test will come when a complaint is issued against a search engine that automatically generates results and is not seeking to identify an individual—can they truly be said to be a data user and thereby subject to the PDPO? At this point, it seems that the answer would be no, as the search engine is not "compiling information about an identified person or about a person whom the data user intends or seeks to identify."[4] .

One thing is certain, namely that once in the public domain, no data can ever really "forgotten." The information may be harder to find, but it still remains in the Internet matrix.

[3] Privacy Commissioner for Personal Data, Hong Kong, Right to be Forgotten, The Commissioner's Blog (June 26, 2014).

[4] *Eastweek Publisher Limited & Another v. Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83; and Ibid 3