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| Author(s) | Wacks, R |
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COMMENT



Privacy and Process

At the heart of our data protection legislation is the proposition that data relating to an identifiable individual may be used or disclosed only for the purpose for which the data were collected or for some directly related purpose — unless the data subject consents. This is expressed in the Personal Data (Privacy) Ordinance as the third of six so-called data protection principles, which, though central to the statute, are contained in Schedule 1.¹

While it is subject to a number of exemptions,² the requirement of limiting the use of personal data to purposes for which the 'data subject' has given 'prescribed consent'³ is a formidable restriction of a wide range of activities.⁴ It is not altogether surprising, therefore, that an attempt has now been made to deploy it in the course of civil litigation.⁵

The plaintiffs were injured when the canopy of a first floor of a building collapsed. They sought non-party discovery of witness statements that had been given to the police in their investigation of the case. The Commissioner of Police objected on the ground that it would contravene data protection principle 3.⁶ The argument turned on the fact that the exclusive purpose for which the statements were given was to facilitate a criminal investigation. The plaintiffs were now seeking to use them in their civil action.

Our legislation, unlike that of the United Kingdom,⁷ contains no exemption where disclosure is required by court order in the course of legal proceedings. But s 58 of the ordinance does exempt from data protection principle 3 the use of personal data for purposes of 'the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons ... (if such) ... use would be likely to prejudice any

¹ On the significance and operation of this and other principles, see Mark Berthold and Raymond Wacks, *Data Privacy Law in Hong Kong* (Hong Kong: FT Law & Tax Asia Pacific, 1997), especially ch 7. I am indebted to Robin McLiesh, former Deputy Privacy Commissioner for Personal Data, for drawing this case to my attention and for his comments thereon.

² The exemptions include the use of personal data in the 'public interest,' for domestic purposes, for security, defence and international relations, for law enforcement, to protect whistle-blowers and journalistic sources, and for research.

³ This is a fundamental term defined in s 2 (3) to mean '(a) the express consent of the person given voluntarily,' but '(b) does not include any consent which has been withdrawn by notice in writing served on the person to whom the consent has been given ...' See Berthold and Wacks (note 1 above), pp 94-5.

⁴ There is, I think, merit in extending the philosophy of data protection norms to privacy concerns in general, especially in our digital society. See Raymond Wacks, 'Data Privacy: Reforming the Law' (1996) 26 HKLJ 149, and Raymond Wacks, 'Towards A New Legal and Conceptual Framework for the Protection of Internet Privacy' (1999) 2(4) Irish Intellectual Property Review 13.

⁵ *Tse Lai Yin, Lily and Others v The Incorporated Owners of Albert House and Others* [1999] HCPI 828/97.

⁶ Force is given to these principles by s 4, which provides that a data user shall not breach any of them. Offences are created in s 64.

⁷ See s 34(5)(a) of the Data Protection Act 1984.

of (these) matters ...⁸ The question, in other words, is whether the use of the witness statements in a civil suit is exempt from principle 3 because the purpose is to remedy unlawful conduct.

Suffiad J had no doubt that it was, holding that an action in tort for damages constitutes the 'remedying ... of unlawful or seriously improper conduct.' In any event, data protection principle 3 permits secondary use of personal data for a purpose 'directly related' to the original use; this affords, in effect, an additional exemption. The witness statements obtained by the police were for the purpose of investigating the accident to determine whether charges might be laid. The civil action concerned the same event and hence he held there was no need for the subject of the data, the witnesses, to consent to a use so closely linked to its original use.

This argument must, with respect, be treated with caution. It is important that the 'exemption' in s 58(2) be narrowly construed. The test has two limbs; this judgment addresses only the first, contained in s 58(2)(a), ie whether the use of the data is for one of the purposes referred to in s 58(1). But there is a second limb, in s 58(2)(b), which requires, in effect, that the purpose concerned would be likely to be prejudiced if the data were not used in the proposed manner. In other words, the court appears to have *assumed* that such prejudice (to the remedying of unlawful or seriously improper conduct etc) would indeed result. But, if a fundamental element in the ordinance is not to be frustrated, circumspection is required. If they are to reduce, let alone eliminate, the essential requirement of data subject consent, the courts must proceed with extreme caution.

On its facts the decision is a sensible one, as is the suggestion that the standard forms of witness statements be amended to remove any doubt that such statements may be used in proceedings directly related to the purpose for which they were initially provided. This should ensure that witnesses actually consent — in advance — to the use of their statements in related proceedings. The reach of the ratio should be so circumscribed. This will not be the last time that privacy and the administration of justice need to be reconciled.⁹ The balance struck is never uncontentious.

*Raymond Wacks**

⁸ This is a reworking of the rather tortuous drafting of the section.

⁹ The problem arises most frequently in the case of media reports of court proceedings involving the private (usually sex) lives of parties. See Raymond Wacks, *Privacy and Press Freedom* (London: Blackstone Press, 1995), pp 43-7. But see *Kwan Chi On v Hong Kong Baptist University* [1998] 1 HKC 88 (delivery up of personal data), and *Man Hok Pui v Man Leung Yuk Sin* [1988] Suit No 1425 (personal data sought in divorce summons).

* Professor of Law and Legal Theory, University of Hong Kong.