***Case Title:*** *X v. Privacy Commissioner for Personal Data*

**Case Analysis**

***Meta-Data*:**

* **Case Number**: Appeal No. 15/2019
* **Date of decision**: August 7, 2020
* **Featured case**: N/A
* **Region**: Central Europe and Asia
* **Country**: Hong Kong
* **Type of expression**: Electronic / Internet-based Communication
* **Judicial Body**: Administrative Appeals Board
* **Type of law**: Administrative Law
* **Main Themes**: Defamation / Reputation, Digital Rights
* **Outcome**: Denied Appeal
* **Status**: Closed
* **Tags**: Digital Rights, Personal Data, Right to be forgotten, Extraterritorial Jurisdiction

***Analysis:***

* **Summary and Outcome**:

In 2020 the Hong Kong Administrative Appeals Board determined that the territorial boundary of the Personal Data (Privacy) Ordinance extended only to data users who have operations controlled in or from Hong Kong. The Board rejected an Appeal from an individual who requested that Google LCC delist links from the search engine results because they led to news regarding his arrest for participating in a protest and infringed his right to be forgotten. Through this decision, the Board ensured that there was no independent right to be forgotten under Hong Kong law.

**-Facts:**

On July 2, 2014, the Hong Kong Police arrested several protestors, including the Appellant ("X"), for participating in an unauthorized assembly. As stated by a police report, "the arrested persons refused to leave after a protest, occupied vehicular roads and blocked the traffic, thereby endangering public safety and order" [para.2]. The incident and the names and post-titles of the arrested persons were widely reported in the news and articles.

According to the Appellant, various online forums had disseminated a list of the arrested protestors. Likewise, he claimed that when he searched his name on Google, the results showed links to publications referencing his detention.

On October 19, 2017, the Appellant requested Google LLC to delist the links from the search engine results because "the contents of the links were defamatory, false and not supported by sufficient evidence" [para.5]. However, on November 1, 2017, Google LLC informed X that "they had decided not to take action about the links and encouraged him to resolve any disputes directly with the website owners and individuals who posted the contents" [para.6]. As a result, on May 24, 2018, "X" lodged a complaint against Google LLC with the Privacy Commissioner for Personal Data (The Respondent).

After a thorough examination of the case, on June 19, 2019, the Respondent informed "X" of its decision to "terminate the investigation under section 39(2)(d) of the Personal Data (Privacy) Ordinance ( Ordinance), and in accordance with paragraph 8(e) of their Complaint Handling Policy'' [para. 9]. The Respondent based its decision on four grounds: Firstly, it considered that the complaint could not be pursued since Google LLC was outside the territorial jurisdiction of the Ordinance.

Secondly, the Respondent considered there was a lack of evidence to prove that the contents of the Links were inaccurate. As maintained by Respondent, "X" had failed to provide the necessary justification to demonstrate that there was a *prima facie* case of infringement of the Ordinance.

Thirdly, the Respondent considered that the right to be forgotten was not applicable and that the non-erasure of the data posted through the links could be reasonably justified. The Respondent held that the Ordinance imposes an obligation on data users to erase personal data and that "DPP 2(2) provides that all data users must take all practicable steps to ensure personal data is not kept longer than is necessary to fulfill the purpose for which it is (or is to be) used" [par.13]. Yet, the Respondent held that in the immediate case, the incident related to "X" complaint had aroused broad public concern and thus considered that the information posted through the links was published for journalistic purposes and that there was no unlawful interest in displaying the links.

Additionally, the Respondent stated that while they understood the Appellant's view that the right to be forgotten (RTBF) should be established in Hong Kong, the Ordinance did not explicitly provide an individual with such a right. Regardless, "for the sake of discussion," the Respondent noted that "the right to be forgotten under Article 17 of the General Data Protection Regulation (GDPR) gives an individual a right to require organi[z]ations / businesses to delete his personal data without undue delay under specified circumstances, including where the personal data is no longer necessary in relation to the purposes for which it is collected" [para.22]. However, the Respondent remarked that the purpose of the RTBF is to empower individuals' control over their data rather than allowing them to erase past events indiscriminately. Further, the Respondent claimed that the RTBF was not meant to take precedence over freedom of expression and information, albeit the continued existence and dissemination of the information concerned is prejudicial to the data subject.

Further, the Respondent claimed that the validity of a delisting request should be determined by striking a fair balance between the legitimate interest of Internet users potentially interested in having access to the information and the data subject's fundamental right to privacy and data protection.

By referring to NT1 & NT2 v. Google LLC [2018] EWHC 99 (QB), the Respondent argued that in "X" case, the RTBF was not applicable since the information on the applicant's arrest was published through the links: could have been sensitive but was not intrinsically of private nature; the fact that the press widely reported it was a foreseeable consequence of the applicant's actions; it did not constitute hate speech or libel; there was no evidence showing that it was inaccurate, irrelevant, or excessive; and the matters reported of the incident aroused broad public concern and continued to form a basis for many discussions in society.

Fourthly, the Respondent considered that the Appellant's reputation was outside the scope of its attributions. The Respondent cited the Administrative Appeals Board's Administrative Appeal No. 49/2005 to highlight that false information and fabricated evidence did not fall under the definition of personal data and therefore was not protected by the Ordinance.

Finally, the Respondent said that it was not able to comment on whether the links to the publications were defamatory or if Google LLC was a publisher of such allegedly defamatory materials generated by its search engines. Similarly, it pointed out to the Appellant that if he considered that Google LLC had published defamatory information against him, the matter could be resolved through legal channels rather than personal data protection.

On July 2, 2019, the Appellant lodged an appeal against the Respondent's decision with the Administrative Appeals Board (the Board) and, on the same date, filed an application for an anonymity order.

On September 11, 2019, the Respondent filed a statement, and on October 3, Google LLC filed its written submissions. Lastly, in October, the Appellant filed a statement of response to reply to the Respondent's statement and the written submissions of Google LLC.

**-Decision Overview:**

In the present case, the main issue for the Administrative Appeals Board to analyze was if the territorial scope of the Personal Data (Privacy) Ordinance applied to Google LLC and, if so, whether the search engine could be held responsible for not deleting the information the Appellant´s requested.

The Board started by examining the Appellants request for anonymity. As a general rule, the Board stated that all its hearings were to be public as per Section 17 of the Administrative Appeals Board Ordinance (Cap. 442). However, the precept also established it could make an exception if, after consulting with the parties, it considered desirable to prohibit or restrict the publication or disclosure to some or all parties to the appeal.

The Board then held that any restriction on open administration of justice must balance all pertinent rights and freedoms, such as the principle of open justice from the litigants' perspective, the public's point of view. Further, the Board stated that the case law very often expressed the requirement of necessity to justify a restriction on open justice.

According to the Board, the requested anonymity concerned the Appellant's name and particulars; therefore, disclosing such information opposedwhat the Appellant pursued in his claim.

On that account, the Board held that "[i]t be an irony and will frustrate the said legitimate purpose of the Appellant if in course of this appeal the hearing of which it is open to the public and the Decision also to be published to the public if the information to the Appellant seeks to protect were to be made public" [para. 24].

Also, the Board noted that the issues presented in "X" appeal were matters of legal nature that did not relate to the Appellant's identity. Consequently, the Board held that the public nor the Respondent and Google LLC did not have an interest in the context of the Appellant and granted his request for anonymity.

The Board then examined the main seven issues it had identified to respond to the parties' concerns.

*1. What is the territorial scope/jurisdiction of the Ordinance*

The Respondent and Google LLC. submitted that the territorial scope of the Ordinance only covered personal data of which the control takes place in Hong Kong. Whereas the Appellant claimed that the Ordinance had an extra-territorial effect, the Respondent had "power to enforce the Ordinance provisions even when it was situated and controlled the use of data in Hong Kong. "X" claimed that the purpose of the Ordinance, as stated in Chapter 17 of the report of the Law Reform Commission ("the LRC") on Reform of the Law Relating to the Protection of Personal Data published in 1994 ("the LRC Report"), was validated by section 33 of the Ordinance, gave rise to the extra-territorial jurisdiction of the Ordinance.

The Board established that the wordings used in Chapter 17 of the LRC Report and section 33 of the Ordinance were not identical. It pointed out that "Chapter 17 provides for "processing of personal data in Hong Kong", whereas Section 33(l)(a) provides for "personal data the collection, holding, processing or use of which takes place in Hong Kong "[par. 56]. Additionally the Board held that the contexts of chapter 17 of the LRC Report and Section 33 of the Ordinance were different, "since Section 33 deals with the specific transfer of specific data out of Hong Kong, and not general matters of use or control of any data in Hong Kong" [para. 57] and in contrast, Section 33 references persons outside Hong Kong. Thus the Board held that the Appellant's reference to said provisions did not render any assistance in his argument of the extra-territorial effect of the Ordinance.

The Board considered that the scope and provisions of section 33 of the Ordinance dealt with a specific area of transborder transfer of data did not suggest any intention of the legislature to widen the applicability of the Ordinance to persons outside of Hong Kong.

Moreover, the Board held that Applicant had relied on three cases that were decided in a completely different context and were irrelevant to the present case. In the Board's view, "X" had failed to point out substantive and convincing materials both within and outside of the Ordinance to support his claim of the extra-territorial nature of the Ordinance.

Further, the Board held that the general principle that local legislation had no extra-territorial effect unless vital leads to the contrary were strong. Accordingly, the Board determined that there was nothing to suggest that the Ordinance would catch and apply its force to persons outside of Hong Kong in the context of privacy protection of data.

The Board found that the scope/territorial jurisdiction of the Ordinance only covers persons being data users who have operations controlled in or from Hong Kong.

*2. Whether the Application of the Ordinance was based on the "control requirement" and "processing requirement"*

The Appellant submitted that the Control Requirement and the Processing Requirement were both sufficient requirements under the Ordinance such that if Google LLC operations satisfied either one of the two requirements which take place in Hong Kong, then Google LLC maintainedoperations within Hong Kong to be caught by the scope of the Ordinance.

The Board held that "X" interpretation of a processing requirement meant that there was a "real and substantial processing of data which covers the collection, holding, processing and use in Hong Kong, yet this would imply a broader meaning to the word processing.

In contrast, the Respondent maintained that the Control Requirement is the sole test. In contrast, Google LLC submitted that both requirements form the necessary prerequisites so that both have to be operated in Hong Kong.

The Board maintained that, for the jurisdiction of the Ordinance to apply, the sole and proper test was to consider whether the data user controls all or any part of the data cycle (i.e., collection, holding, processing, and use) in or from, Hong Kong.

*3. Whether Google LLC lies Outside of the Territorial Jurisdiction of the Ordinance*

According to the Board, it was evident that Google LLC and not Google HK operated Google search. Google LLC did not have any establishments or offices in a company based in Hong Kong as submitted by Google LLC. The Board acknowledged that even though search results were available on the Google HK website, it was not a significant factor since the data centers in Asia were located in Singapore and Taiwan. Similarly, the Board recognized that the search engine that conducted the processing of browser search commands was situated outside Hong Kong.

According to the Board, the jurisdiction and power of the Respondent were limited and did not extend to regulate and control the conduct of a foreign body such as Google LLC, whose operations were not controlled within or from Hong Kong; hence the search engine did not fall within the scope of "data user" under the Ordinance.

The Board determined that such conclusions and findings were sufficient to dispose of and dismiss the appeal.

*4. Whether there was Collection of Data in Hong Kong*

The Board found that there was no collection of data in Hong Hong since all the operations of Google LLC took place outside of Hong Kong and that the collection of data on the website through the internet did not require to be done physically in Hong Kong.

*5. Whether there was processing or Holding of Data in Hong Kong*

In light of the previous, the Board considered that there was no processing or holding of data in Hong Kong.

*6. Whether Google LLC was a user of data*

The Board held that even though Google LLC did not fall under the territorial scope of the Ordinance, it fell within the definition of data user under section 2(1) of the Ordinance. Said provision states, "Google LLC uses the data collected which can identify the subjects for display in its search engine definition" [para.84]. Thus, the Board considered that if not for the Ordinance did not apply to Google LLC because of the jurisdictional issue; it would have been considered a data user under the Ordinance.

*7. Whether Google LLC acted in breach of DPP 2(2) or Section 26 (1) of the Ordinance*

Even though the Board had resolved the issue of the extra-territorial effect of the Ordinance, it considered that it was not strictly necessary to express any views on "whether Google LLC acted in contravention of Data Protection Principle 2 (2) (DDP2(2)) or in breach of section 26 (1) of the Ordinance for failing to erase the personal data of the Appellant from the search engine upon his request" [para. 85]. Regardless, the Board briefly addressed the legal issues of the RTBF and the criteria set out in the UK case of NT1 & NT2.

The Board argued, although the RTBF is not an independent right, it is not irrelevant since the Ordinance does provide that data should be erased under the DDP2(2) and section 26(1) of the Ordinance on the grounds of data inaccuracy, or where the data should not be kept longer than necessary, respectively.

Further, the Board summarized the findings and criteria established in the Court of Justice of the European Union (CJEU) case of Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja Gonzalez (C-131/12, 13 May 2014) and the United Kingdom case of NT1 & NT2 v Google LLC [2019] QB 344. Consequently, the Board held that the factors set out in such cases could be considered appropriate when assessing data erasure principles.

Finally, the Board dismissed the Appellant's appeal. Additionally held that given that both the Respondent and Google LLC indicated that they would not seek costs against the Appellant made any order as to costs of the appeal.

***Direction:***

* **Outcome**: Expands Expression

This decision expands freedom of expression since it established that the territorial jurisdiction of the Personal Data (Privacy) Ordinance only extends to data users who have operations controlled in or from Hong Kong. Likewise, through this ruling, the Board clarified that the “right to be forgotten” did not exist under Hong Kong’s privacy law.

***Perspective***:

* **Related International and/or regional laws**:
  + Organisation for Economic Cooperation and Development Guidelines
* **National law or jurisprudence**:
  + Personal Data (Privacy) Ordinance
    - Section 39(2)(d)
    - Section 33(l)(a)
    - Section 26(1)
    - Data Protection Principle 2
  + Complaint Handling Policy
    - paragraph 8(e)
  + Law Reform Commission on Reform of the Law Relating to the Protection of Personal Data
    - Chapter 17
  + Administrative Appeals Board Ordinance
    - Section 17 (Cap. 442)
  + Asia Television Ltd v Communications Authority [2013] 2 HKLRD 354
  + HKSAR v Cheuns Kwun Yin (2009) 12 HKCFAR 568
  + HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574
  + Medical Council of Hong Kong v Chow Siu Shek (2000) 3 HKCFAR 144
  + Town Planning Board v Society for the Protection of the Harbour Ltd (2004) 7 HKCFAR 1
  + Town Planning Board v Society for the Protection of the Harbour Limited
  + AttorneyGeneral v Prince Ernest Augustus of Hanover [1957] AC 436
  + PCCW-HKT Telephone Ltd v Telecommunications Authority (2005) 8 HKCFAR 337
  + Director of Lands v Yin Shuen Enterprises Ltd (2003) 6 HKCFAR 1
  + Commissioner of Police v Privacy Commissioner for Personal Data [2012] 3 HKLRD 710
  + Shi Tao v The Privacy Commissioner for Personal Data (unrep., Administrative Appeal No. 16/2007
  + Oriental Press Group Ltd v Google LLC [2018] 1 HKLRD 1042
  + David M Webb v Privacy Commissioner for Personal Data (unrep., Administrative Appeal No. 54/2014，27 October 2015).
  + HKSAR v Wons Tak Keum (2015) 18 HKCFAR 62

**Other national law or jurisprudence**:

* EU, Draft Directive
* EU, General Data Protection Regulation
* European Union, Regulation (EU) 2016/679
* Australia, Privacy Act, section 5B(1A)
* UK, Data Protection Act 1998
* [CJEU, Google Spain v. Agencia Española de Protección de Datos (AEPD), C-131/12 (2014)](https://globalfreedomofexpression.columbia.edu/cases/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos-aepd/)
* [UK, NT1 & NT2 v Google LLC [2019] QB 344](https://globalfreedomofexpression.columbia.edu/cases/nt1-nt2-v-google-llc/)
* [UK , Attorney General v Prince Ernest Augustus of Hanover [1957] AC 436](http://www.uniset.ca/other/cs6/ernestaugustus.html)
* [UK, Lawson v Serco Ltd [2006] ICR 250](https://www.bailii.org/uk/cases/UKHL/2006/3.html)

***Significance***:

* This case did not set a binding or persuasive precedent either within or outside its jurisdiction. The significance of this case is undetermined at this point in time.
* **Related Cases**: Self-generated
* **Date updated**: N/A

***Docs***:

* **Official Case Documents**:

Judgment (in English):

<https://www.pcpd.org.hk/english/enforcement/decisions/files/AAB_15_2019.pdf>

* **Reports, Analysis, and News Articles**:
  + Case Notes,
  + Charmaine Koo, Territorial limitation of data protection law and the “right to be forgotten” in Hong Kong – A landmark decision by the Administrative Appeals Board, DEACONS
    - <https://www.deacons.com/2021/02/05/territorial-limitation-of-data-protection-law-and-the-right-to-be-forgotten/>