

Extract of the decision of the directions hearing

Background

1. In 2018, a Disciplinary Committee (the “**DC**”) was constituted to deal with the Complaint against the Respondents.
2. After the DC was constituted, an anonymous letter with accompanying documents addressed to the Chairman of the DC and quoting the HKICPA’s reference number for the disciplinary proceedings was received by the HKICPA. The DC invited submissions from the parties and was informed by the Respondents that various anonymous complaint letters accompanying documents had previously been received by the Institute. The Respondents had repeatedly requested disclosure of such anonymous complaint letters and documents but such letters and documents had not been disclosed.
3. The Complainant maintained that the anonymous complaint letters and documents were not relevant to the Complaint. Further, the Complaint was a whistleblowing case and the anonymous complainant had specifically requested that the letters shall not be disclosed to protect himself/herself. The Complainant argued that the informer privilege should be available to anonymous complainants or whistleblowers as a matter of public policy since potential informants would be deterred from coming forward if they were not afforded protection.
4. The Respondents requested the DC to direct the Complainant to disclose documents from the anonymous complaint, including all anonymous complaint letter, correspondence, and any other documents obtained in the course of investigation which are relevant to the disciplinary proceedings. A directions hearing was held. The DC was to consider in the present case:
 - (a) Whether the documents from the anonymous complaint letters (including all anonymous complaints, correspondence, and any other documents obtained in the course of investigation) (the “**Unused Materials**”) are relevant to the disciplinary proceedings; and
 - (b) Whether such documents are subject to informer privilege as a species of public interest immunity.
5. The DC’s decisions are extracted in the ensuing paragraphs.

Relevance

6. The DC considered judicial decisions including *Securities and Futures Commission v Wong Yuen Yee & Ors* [2017] 1 HKLRD 788 and *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336. The court held in those cases that the duty of disclosure by the prosecution in criminal proceedings is equally applicable to the disciplinary proceedings. Disclosure is not limited to evidence which will advance the case of the accused but all the material evidence which the prosecution have gathered and from which the prosecution have made their own selection of evidence.

7. Given the severity of the potential outcome of disciplinary proceedings, the court held that a "*generous view of relevance*" that is applicable to the prosecution in criminal proceedings should be adopted in disciplinary or regulatory cases. Under this approach, a document would be relevant if it **may** lead the other party to further inquiries, unless it is obviously irrelevant even on the generous test. Recognising that the Complaint could have serious consequences on the career, reputation and livelihood of the Respondents, the DC decided that the aforesaid generous test is applicable.
8. The DC applied the relevant tests and found that the Unused Materials were relevant to the Complaint. The Unused Materials include 8 anonymous complaint letters enclosing various purported internal documents of the Respondents. The DC was satisfied that the Unused Materials which have been received by the Institute formed part of the materials that were reviewed in the course of the Institute's investigation, and that the Institute had previously selected a number of these documents in support of their case against the Respondents. For those within the Unused Materials which had not been included in the Complainant's case, the DC was of the view that such documents have been considered by the Complainant at some stage during the investigation.
9. In particular, the Unused Materials were held to have been "*obtained from the investigation of the transactions that are eventually relied upon and complained of*" in the proceedings as per the case of *Wong Yuen Yee*. They were not regarded as "obviously irrelevant" given that they all relate directly to the transactions being the subject matter of the Complaint. Finally, the DC observed that the Institute did not have the background knowledge possessed by the Respondents with regards to the Unused Materials and was not privy to the potential arguments and strategy of the Respondents who may be able to put a different light on the documents, or who may be prompted to pursue further and potentially fruitful line of enquiries which may eventually advance the Respondent's case or damage the Complainant's case.

Public Interest Immunity and Informer Privilege

10. On informer privilege as a species of public interest immunity to justify the non-disclosure of the Unused Materials, the DC considered judicial decisions including *Competition Commission v Nutanix Hong Kong Limited and others* [2018] 3 HKC 173, the *Wong Yuen Yee* and the *Lee Ming Tee* case. In those cases, the Court found that an informer's identity is privileged from disclosure in criminal or civil proceedings also applies to informers to disciplinary proceedings. The privilege covers not only the informer's name but any information that singly or in combination might tend to reveal his or her identity. However, informer privilege is not absolute and is subject to exceptions. The Court would need to balance the public interest in the protection of informers and the interests of the person seeking disclosure.
11. The DC also considered the Guidance Notes for Filing a Complaint (the "**Guidance Notes**") that was available on the Institute's website. The Guidance Notes informs an anonymous complainant that **relevant** information will be disclosed to the CPA. The DC was of the view that the Guidance Notes were in line with legal position in Hong Kong and the DC was obliged to apply the Guidance Notes.

12. After balancing the public interest in the protection of the anonymous complainant and the countervailing interests advanced by the Respondents seeking disclosure, the DC found that, as a matter of fairness, the Respondents should be given the opportunity to represent on the allegations made by the anonymous complaint in the Unused Materials. Also relevant to the DC's balancing exercise is the fact that there was no evidence to show that the Unused Materials could reveal the identity of the anonymous complainant, and that if the identity of the anonymous complainant is already known to the Respondents, there is little point in withholding the Unused Materials from disclosure.

Directions

13. The DC directed that all anonymous complaints, letters, documents and communication received by the Institute in connection with the Complaint were relevant to the proceedings and should be disclosed to the Respondents and the DC with immediate effect.