

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 26/2013

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BETWEEN

YEUNG SZE MAN MICHELLE

Appellant

and

PRIVACY COMMISSIONER  
FOR PERSONAL DATA

Respondent

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Coram: Administrative Appeals Board  
Ms Cissy Lam King-sze (Deputy Chairman),  
Mr Philip Chan Kai-shing (Member)  
Mr Law Chi-yuen (Member)

Date of Hearing: 25 February 2014

Date of handing down Written Decision with Reasons: 7 April 2014

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DECISION

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1. This appeal arises from a complaint under the Personal Data (Privacy) Ordinance, Cap.486 ("the Ordinance") by the Appellant against Eagle Group International Limited ("Eagle Group").

2. As this appeal involves some legal issues and all the relevant documents and correspondence are in English, we have written this decision in English, but Chinese translations will be provided to all parties, namely the Appellant, the Privacy Commissioner for Personal Data ("the Commissioner") and Eagle Group as the party bound.

## Relevant provisions of the Ordinance

3. Save otherwise stated, all statutory provisions referred to below are references to provisions in the Ordinance.

4. Certain parts of the Ordinance were amended at various times. For the purposes of this appeal, we shall examine the Ordinance as it stood at the material time.

5. Under section 2(1),

- (1) “data” (資料) means any representation of information (including an expression of opinion) in any document;
- (2) “personal data” (個人資料) means any data relating directly or indirectly to a living individual and from which it is reasonably practicable to identify the individual concerned;
- (3) “data user” (資料使用者), in relation to personal data, means a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data;
- (4) “data subject” (資料當事人), in relation to personal data, means the individual who is the subject of the data;
- (5) “data access request” (查閱資料要求) (“DAR”) means a request under section 18.

6. Under section 18(1), an individual may make a request (a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject; and (b) if the data user holds such data, to be supplied by the data user with a copy of such data.

7. By section 18(4), a data user who does not hold the data, but controls the use of the data in such a way as to prohibit the data user who does hold the data from complying (whether in whole or in part) with a DAR which relates to the data, shall be deemed to hold those data, and the provisions of the Ordinance shall be construed accordingly.

8. Section 19(1) requires the data user to comply with the request within 40 days after receiving it.

9. By section 20(3)(d), a data user may refuse to comply with a DAR if any other data user controls the use of the data in a way as to prohibit the first-mentioned data user from complying (whether in whole or in part) with the request.

10. Section 21(1) of the Ordinance stipulates that a data user who refuses to comply with a DAR shall by notice in writing inform the requestor of the refusal, its reason, and if section 20(3)(d) is applicable, the name and address of the other data user concerned within 40 days upon receipt of the request.

11. By Section 56 of the Ordinance, personal data held by a data user which consists of a personal reference (a) given by an individual other than in the ordinary course of his occupation; and (b) relevant to another individual's suitability or otherwise to fill any position of employment or office which is presently, or may become, unfilled, is exempt from section 18(1)(b).

12. Section 39(2)(d) provides that the Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case "any investigation or further investigation is for any other reason unnecessary".

13. Part (B) Paragraphs 8(e) and 8(h) of the Commissioner's Complaint Handling Policy (Fifth Revision) ("CHP") provide that an investigation or further investigation may be considered unnecessary if (e), "after preliminary enquiry by the PCPD, there is no prima facie evidence of any contravention of the requirements under the Ordinance" or (h), "given ... other practical circumstances, the investigation or further investigation of the case cannot reasonably be expected to bring about a more satisfactory result".

### **The Relevant Facts**

14. On 5 May 2012, the Appellant attended a job interview with Eagle Group for the position of secretary to managing director, and signed a written authorisation to authorise and permit Eagle Group to obtain and validate her previous employment data.

15. Pursuant thereto, by letter dated 7 May 2012, Eagle Group requested, and subsequently obtained, from the Appellant's former employers, namely American International School ("AIS") and Asahi Iwasawa & Associates ("AIA"), references regarding the Appellant ("AIS reference" and "AIA reference" respectively).

16. On 31 May 2012, the Appellant, by way of a letter in English, made a DAR under section 18(1) ("DAR1") to Eagle Group requesting for her "personal reference return" from AIS and AIA.

17. On 4 June 2012, the Appellant called Eagle Group 3 times concerning DAR1 and was verbally told that her request was refused.

18. On 5 June 2012, the Appellant lodged a complaint against Eagle Group to the Office of the Commissioner ("PCPD").

19. On 6 June 2012, by means of a standard DAR form issued by the PCPD, the Appellant made a second DAR to Eagle Group ("DAR2") for "all reference letters" regarding her from AIS and AIA.

20. By letter dated 9 July 2012 ("the 9 July Reply"), Eagle Group through its solicitors, Messrs. Chan & Young, informed the Appellant that Eagle Group was unable to comply with DAR2, citing section 56 of the Ordinance.

21. In response to enquiries from the PCPD, by letter of 20 July 2012, Messrs. Chan & Young confirmed that Eagle Group possessed the AIS Reference and the AIA Reference; and that the references were issued to Eagle Group on the basis that they would be kept strictly confidential; the references together with various documents, including the 9 July Reply, were supplied to the PCPD.

22. By letter of 31 July 2012, the PCPD made further enquiries with Messrs. Chan & Young concerning the 9 July Reply and the relevance of section 56 of the Ordinance.

23. Messrs. Chan & Young replied by letter of 13 August 2012 in which they argued that as the references were provided by the individuals, namely the Managing Director of AIA and the Assistant Manager of AIS and "*Given that [AIA] is an Accountants and Management Consultants firm, whereas [AIS] is, as the name suggests, a school, it seems more probable than not that issuing personal references to*

*an ex-employee by those individuals is unlikely to be in the ordinary course of their respective occupations”.*

24. Messrs. Chan & Young further informed the PCPD that Eagle Group had contacted both AIS and AIA to see if they would agree to the release of the Appellant's personal references; and in respect of AIS, its Assistant Manager had called and said that the information *“was provided between company and company, and such information should not be released to the staff according to usual practice”.*

25. Disagreeing with Messrs. Chan & Young's view of section 56, the PCPD made further enquiries with them by letter of 20 August 2012.

26. In reply by letter of 27 August 2012, Messrs. Chan & Young referred the PCPD to, inter alia, Eagle Group's said letter of 7 May 2012 to AIS and AIA respectively in which Eagle Group expressly stated that *“we will assure you that all information provided will be kept strictly confidential”* (“the Assurance”). Messrs. Chan & Young contended that it was clearly based on the Assurance that AIS and AIA provided the personal references, so that if Eagle Group released the references without AIS and AIA's consents, Eagle Group would face potential law suits from the two organisations.

27. Dissatisfied with the answers, by letter of 28 September 2012 to Eagle Group, the PCPD commenced formal investigation against Eagle Group under section 38(a) of the Ordinance. The letter stated that the PCPD opined that Eagle Group's reliance on section 56 was not justified in the circumstances. As regards the question of confidentiality, the PCPD considered that the Assurance was too general without specifying any details or scope.

28. Following that, Messrs. Chan & Young, wrote to AIS and AIA again by letters of 5 and 8 October respectively to seek their consents to the release of the relevant references.

29. Following the further requests, consent to the release was successfully obtained from AIA.

30. AIS, on the other hand, made it clear in its letter of 11 October 2012 that it was not prepared to give such consent. It stated: *“Please note that the subject Confidential Assess Form was completed for Eagle Group with the understanding*

*specified on the Eagle Group request letter dated 07 May 2012 ...". It then drew attention to the Assurance. It continued to say that: "With good intention and respect to the Eagle Group, the comments on the Confidential Assess Form are completed objectively and endure no negative implication to the named applicant. However, with due respect, [the Assurance] provided by Eagle Group should be honored and maintained."*

31. By letter of 19 October 2012, Messrs. Chan & Young informed the Appellant that consent had been obtained from AIA and its reference in edited form (see page 232 of the Appeal Bundle) was enclosed therewith and sent to the Appellant. They further informed the Appellant that AIS maintained its decision to refuse consent whereby Eagle Group was unable to provide the Appellant with the reference requested.

32. By letter of 19 October 2012 Messrs. Chan & Young informed the PCPD of their above correspondence with AIS, AIA and the Appellant.

33. By email dated 9 December 2012 from the Appellant to Miss Ho of the PCPD, the Appellant authorised the PCPD to contact AIS directly regarding her complaint.

34. Subsequently, the Appellant made DARs to AIS and AIA directly. As far as AIA was concerned, according to the Telephone Attendance Notes at page 256 of the Appeal Bundle, AIA provided the Appellant with a copy of the reference letter identical to the copy provided by Eagle Group to the Appellant.

35. As regards the DAR to AIS ("DAR3"), the same was sent to AIS on 18 February 2013, to request "*to collect all my personal details & reference which [AIS] had provided to [Eagle Group] (in hard copies)*".

36. By letter dated 11 March 2013, AIS replied as follows: "*Referring to your [DAR3] sent to [AIS] on 18 February 2013 demanding a copy of the Private and Confidential reference requested by [Eagle Group] on May 2012, we have checked through your personnel file and hereby inform you that such reference was deleted after fulfilling [Eagle Group's] request; therefore, no copy of such would be available to you.*"

37. The Appellant, through her mother, Madam Tam, had informed the PCPD of DAR3, but did not provide them with a copy of DAR3 or AIS's reply.

38. By letter of 23 August 2013, the Commissioner informed the Appellant of her decision not to continue further investigation and sent therewith her “Reasons for decision not to continue an investigation” (the Decision”). Dissatisfied with the Decision, the Appellant lodged her appeal to us on 19 September 2013.

### **Our Decision**

39. It is clear from the correspondence that Eagle Group has duly informed the PCPD that it holds personal data of which the Appellant is the data subject, namely references given by AIS and AIA. Thus compliance with section 18(1)(a) is not in issue. The issue is section 18(1)(b), the supply of copies to the Appellant.

40. As regards the AIA Reference, the Commissioner considered that as the Appellant had obtained copies of the AIA Reference, the complaint relating to the AIA Reference had been resolved and no further investigation was necessary. It is not clear from the appeal notice whether the Appellant accepts this part of the Commissioner’s decision. In any event, we do not see what further investigation could be carried out with regard to the AIA Reference and we accept and agree with the Commissioner’s decision insofar as the AIA Reference is concerned.

41. As regards the AIS Reference, the Commissioner took the view that the exemption stipulated in section 56 was not applicable because the reference was not given by an individual other than in the ordinary course of his occupation. We agree with that view. The person who gave the reference gave it in her capacity as the Assistant Manager of AIS. We cannot find any interpretation other than that she did so in the ordinary course of her occupation.

42. The Commissioner next looked at section 20(3)(d) of the Ordinance. The Commissioner considered that the issue was whether AIS controlled the use of the AIS Reference in a way to prohibit Eagle Group from complying with the DARs. The Commissioner then went on to consider the three elements necessary to establish a case of breach of confidence (as per the decision of Rhind J in *Li Yau-Wai, Eric v Genesis Films Ltd* [1987] HKCU 20, although express reference to that authority was not given in the Decision).

43. The Commissioner took the view that all three elements were present; and concluded that AIS had prohibited Eagle Group to release the AIS Reference so that Eagle Group was by virtue of section 20(3)(d) entitled to refuse to comply with the

Appellant's DARs insofar as the AIS Reference was concerned.

44. The Commissioner went on to say: *“However, even if a data access request is refused based on section 20(3)(d), there is an alternative for the requestor to make a request to the party that ultimately controls the use of the data (even if it does not physically hold such data) as notified by the data user. In this regard, I note that you have already pursued AIS directly for a copy of your personal data contained in the AIS Reference, and in the premises, I consider that further investigation of this case is unlikely to yield better results.”*

45. We are troubled by the Commissioner’s conclusion with regard to section 20(3)(d) of the Ordinance. DAR3 and the earlier DAR1 and DAR2 are intrinsically linked by the same set of facts. They requested for the same data, although made to different persons. By section 18(4) and section 20(3)(d), either one must comply with section 18(1). AIS cannot be allowed to blow hot and cold at the same time. In the correspondence between AIS and Eagle Group, the Assurance was discussed and relied on. But confidentiality is not a reason stipulated in the Ordinance to permit a data user to refuse to comply with a DAR. It is not a reason afforded to a data user who received the data upon an assurance of confidentiality, nor is it a reason afforded to a data user who supplied the data on the strength of such an assurance. A person who is sent a DAR must look to the Ordinance to ascertain his right and obligation. AIS’s reply to DAR3 as well as its correspondence with Eagle Group were far from satisfactory. It did not state its position with regard to section 18(4). Did it prohibit Eagle Group from complying with the Appellant’s DARs or did it not? If it did, then section 18(4) would be applicable to AIS. If it did not, then section 20(3)(d) could not apply to extricate Eagle Group. AIS’s stance was ambiguous and contradictory and clearly requires further investigation.

46. Representative of the Commissioner, Ms. Chan, told us that the PCPD could not commence an investigation against AIS unless and until the Appellant had made a formal complaint against AIS, which she never did. We have looked at the various telephone attendance notes. We do not understand why the Appellant, or rather, her mother, Madam Tam, acting as her representative, did not want to supply the PCPD with DAR3 or AIS's reply. We can see no good reason for their attitude. It appears that Madam Tam had a lot of misconceived ideas about the works and workings of the PCPD. In any event, given the Appellant’s email of 9 December 2012, the PCPD has the Appellant’s authority to contact AIS directly. If the Appellant maintains her position and refuses to make a formal complaint against AIS, then the PCPD can, and



should, make enquiries with AIS as part of the present investigation into the complaint against Eagle Group. AIS's position directly affects the question whether section 20(3)(d) is or is not applicable.

47. In conclusion, we do not agree that further investigation is unnecessary in the circumstances. Section 39(2)(d) of the Ordinance as well as paragraphs 8(e) and 8(h) of the CHP are not applicable.

48. In the premises, we allow the appeal. By section 21(1)(j) of the Administrative Appeals Board Ordinance, Cap.442 ("AABO"), we reverse the Commissioner's decision not to continue further investigation as far as the AIS Reference is concerned. By section 21(3) of the AABO, we order that the case being the subject of the appeal as so determined be sent back to the PCPD to continue further investigation, including, but not limited to, enquiry with AIS to ascertain whether AIS denies that section 18(4) is applicable to AIS, and if so, the reason thereof.

49. Finally, we wish to make clear our position in relation to one matter. The Appellant did not appear before us at the hearing of the present appeal. She authorised her mother, Madam Tam, to appear on her behalf. The Appellant's father was also present and allowed to speak. In the course of the hearing, Madam Tam made numerous allegations and accusations against various officers of the PCPD. As we have told her, this Board is not the proper venue to examine or rule on these allegations and accusations. Likewise, we must make it very clear here that, although we have allowed the appeal, our decision by no means accepts or endorses, and must not be seen as accepting or endorsing, those allegations and accusations. If the Appellant and/or her parents wish to pursue these allegations and accusations, they must pursue them elsewhere.

(signed)

(Ms Cissy Lam King-sze)

Deputy Chairman

Administrative Appeals Board