

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 2/2018

BETWEEN

HKM

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Ms Elaine LIU Yuk-ling, J.P. (Deputy Chairman)
- Mr CHIN Shing-hoi (Member)
- Ms MAK Yin-mei (Member)

Date of Hearing: 19 September 2018

Date of Handing down Decision with Reasons: 21 December 2018

DECISION

1. This is an appeal against the Respondent's decision not to further investigate the Appellant's complaint against the Equal Opportunities

Commission (“**EOC**”) pursuant to section 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap 486) (“**PDPO**”).

Background facts

2. The background leading to this Appeal was that in February 2014, the Appellant lodged a complaint with the EOC against a male colleague of a company (“**the Company**”) for sexual harassment. In July 2014, the EOC informed the Appellant that her allegation was unsubstantiated. Subsequently, the Appellant’s employment contract was terminated by the Company. The Appellant suspected that this was an act of victimization by the Company. In May 2015, the EOC conducted an interview with the Appellant and advised her of the merits of her complaint. Since then, the EOC did not hear from the Appellant.

3. On 11 October 2016, the Appellant lodged a data access request (“**DAR**”) with the EOC by way of the EOC’s Data Access Request Form (“**EOC DAR Form**”). In the EOC DAR Form, the Appellant requested for:

- “1. ALL records (records herein and below include, but unlimited to, log sheet and/or notes and/memo) (*sic*) of all telephone calls.
2. ALL records of correspondence and emails including its enclosures.
3. ALL records of internal discussions, assessments and meetings.
4. ALL records of one meeting on 22 May 2015 between [the EOC’s] Ms LAI Ka-man and [the Appellant] at the EOC Office.
5. ALL other records in respect of [the Appellant’s] complaint under [the EOC’s] reference number L/M (3252) to EOC/CR/ENQ/SDO.”

4. Under Part VI “Preferred Manner of Compliance” in the EOC DAR Form, the Appellant ticked the option indicating her wish for a copy of the data requested. Nevertheless, she inserted a remark at the peripheral part of the EOC DAR Form requiring the EOC to prepare in a list or table stating each and every single personal data including time, date, context and pages, etc. in the form of PDF; and send to her email address stipulated in the EOC DAR Form.

5. On 18 November 2016 (which was within 40 days upon receiving the Appellant’s DAR), EOC replied to the Appellant in writing stating that:

“The Commission holds a total of 176 pages of the information [the Appellant] requested in Part III of the Form, including all records of telephone calls, records of correspondence and emails together with enclosures, records of internal discussions, assessment and meetings, records of a meeting on 22 May 2015, and other records in relation to the case L/M (3252) to EOC/CR/ENQ/SDO.”

6. It was the EOC’s policy as stated in the “Important Notice to Data Access Requester” (“**the Notice**”) attached to the EOC DAR Form that the completed Form should be sent to “the Director (Complaint Services) and the Chief Legal Counsel for personal data held in public records of enquiries and complaints in respect of anti-discrimination legislation in their respective areas of work”.

7. The Notice also set out the charges which include an “application fee” at HK\$50 per request (which is non-refundable and be paid upon a request is made); and a “processing fee” at HK\$2.5 per page (which represents the work

done incurred including but not limited to vetting, sorting and photocopying of documents involved by the EOC).

8. In respect of Appellant's DAR, the EOC required the Appellant to pay a fee of HK\$490 (being HK\$50 + HK\$2.5 x 176 pages) in complying with the Appellant's DAR.

9. The Appellant was dissatisfied with the EOC's response and lodged a complaint with the Respondent on 30 November 2016 against the EOC for (a) imposing an excessive fee for complying with the DAR; and (b) failing to fully comply with the DAR by not providing her with a list or table stating each and every single personal data.

10. The Appellant has compared the charges levied by EOC with the charges of four other organisations, namely, Ombudsman, Housing Authority, ICAC and Hospital Authority. The Appellant contended that the EOC's charging rate was the most expensive among these organisations and came to the view that the EOC's fees were excessive.

The Respondent's Decision

11. After receiving the Appellant's complaint, the Respondent commenced a formal investigation against the EOC under section 38(a) of the PDPO. In the course of the investigation, the Respondent made enquiries with the EOC, obtained and examined the relevant documents and information. After consideration, the Respondent decided not to further investigate into the Appellant's complaint against the EOC. By a letter dated 21 December 2017, the Respondent informed the Appellant of his decision ("**Respondent's Decision**").

12. In the Respondent's Decision, the Respondent set out the following findings in the investigation against the EOC.

13. The EOC stated that since the Appellant's DAR mainly concerned confidential documents in relation to the handling of a complex complaint, it had to be handled by the case officer concerned except for the clerical tasks, such as photocopying and locating the files, which could be carried out by the secretarial staff in the Complaint Services Division. The EOC also stated that there was no clerical staff in its Complaint Services Division. Both clerical and secretarial duties were handled by the Secretarial staff in that division. The case officer concerned was in the rank of an Equal Opportunities Officer or above.

14. The EOC provided a breakdown of the tasks involved in handling the Appellant's DAR, the time spent for the tasks and the staff costs incurred. The EOC also illustrated that the total actual costs incurred were far more than the fee of \$490 that was imposed on the Appellant.

15. The Respondent evaluated the information provided by the EOC, and found that:

- (1) The photocopying costs of the 176 pages of documents was not excessive.
- (2) EOC had rightly excluded the costs of its managerial staff who reviewed or advised on the Appellant's DAR.
- (3) EOC should not charge for the labour costs of the case officer in preparing write-up to seek legal advice.
- (4) The Respondent identified the tasks that were direct and necessary for complying with the Appellant's DAR. The costs incurred in

completing these tasks were higher than the fee charged the Appellant.

- (5) The Respondent came to the decision that the fee charged by the EOC was not excessive.

16. The Respondent's view was that the costs for complying with a DAR may vary not only with the scope and complexity of the request, but also with different data users. The fact that other public organisations might charge less does not mean that the fee imposed by the EOC for complying the DAR is excessive.

17. As to the Appellant's complaint against EOC for not complying her DAR by providing her with a list of the information in PDF form, the Respondent's view was that it is for the data requestor to identify the data he or she requires and not for the data user to prepare a full or consolidated list for the data requestor to pick and choose.

Grounds of Appeal

18. On 17 January 2018, the Appellant appealed to this Board against the Respondent's Decision. Her grounds of appeal are that (1) the Respondent was bias; and (2) the Respondent's Decision was against known facts and evidence.

19. The Appellant complained that the Respondent gave full weight on the information and breakdown of calculations provided by the EOC but rejected all the evidence provided by her on the comparison of the flat rate fees charged by different public organisations.

20. At the hearing, the Appellant further argued that her complaint was on the flat rate fee charged by the EOC, which on the face of it was higher than the flat rate fee charged by the other public organisations, therefore, according to the Appellant, the fee imposed by the EOC was excessive. She argued that the Respondent had shifted the focus from flat rate fee (which is the subject matter of her complaint) to the actual costs.

21. As to the second ground, the Appellant argued that the reply given by the EOC's letter dated 18 November 2016 was a mere notification, it was too general and vague, falling short of "ascertainment and confirmation". She argued that the EOC had not fulfilled the requirement of "informing" her.

22. The Appellant further argued that the Respondent hid the facts that she requested to be "informed", and not for the provision of copy.

Determination

23. This Board hears and determines administrative appeals before it by way of rehearing on the merits and not simply by way of review (*Li Wai Hung Cesario v Administrative Appeals Board & anor*, unreported, CACV 250/2015, 15.6.2016).

24. To consider whether the Respondent was correct in its approach or was bias in the determination of the two issues raised by the Appellant (namely (a) the fee imposed by the EOC is excessive; and (b) the EOC should provide her with a list of the information in PDF form instead of copies of the documents), one shall first consider the relevant legal principles that govern the requirements on the compliance of data access requests.

25. The starting point is to consider the provisions in the governing legislation, the PDPO.

Approach in determining whether the fees are excessive

26. Section 28(3) of the PDPO provides that “no fee imposed for complying with a data access request shall be excessive.”

27. Under section 28(5) of the PDPO, a data user may refuse to comply with a data access request unless and until any fee imposed by the data user for complying with the request has been paid.

28. In the PDPO, there is no definition on the meaning of the word “excessive”.

29. The board in *Commissioner of Correctional Services v Privacy Commissioner for Personal Data*, AAB No. 37 of 2009, 31 December 2010, has laid down the principles in determining whether the fees charged are excessive. The board held that:

- (1) In not fixing the amount of fees in the legislation (whether by way of a schedule or by rules or subsidiary legislation), the legislature must have recognised that the costs for complying with a data access request may vary not only with the scope and complexity of the data access request in question, but also with different data users.
- (2) By not stipulating fixed-sum fees in the legislation, the legislature intends to allow data users of different circumstances (companies

of different sizes, with different resources, etc.) some flexibility in the imposition of fees. In short, whether a fee imposed is excessive is to be considered in the circumstances of each case.

- (3) In striking the balance between the interest of the data user and the data requestor, and having fully noted that there may be more than one way to comply with a request, the legislature intends to lean in favour of the data requestor. Under section 28(4) of PDPO, where a data user may comply with a data access request in one of 2 or more forms, the data user is, irrespective of the form in which he complies with the request, prevented from imposing a fee higher than the lowest fee charged for complying with the request in any of those forms.
- (4) The word “excessive” in section 28(3) should be construed as confining the fee only to cover those costs which are directly related to and necessary for complying with a data user request. The fee that one can impose under section 28(2) is cost-related, but this does not mean that the data user can recover all its actual costs incurred. A data user can only recover such costs as are shown to be directly related to and necessary for complying with a data user request.
- (5) The evidential burden of proof is on the data user to show that the fee it imposed is not excessive, namely, that it does not go beyond the direct and necessary costs incurred for the compliance with the data user request in question.

- (6) The board further noted that “direct and necessary” is not the same as “reasonable”. An item of cost that is reasonably incurred may not be necessary, it depends on the circumstances of the case.
- (7) There is no restriction prohibiting the data user from charging a fee that is less than the direct and necessary costs incurred, or to waive a fee that he may otherwise be entitled to charge. If a flat rate fee is charged, so long as the flat rate fee that is imposed is lower than the direct and necessary costs for complying with a data access request, it is unobjectionable. There is no need for the data user to ensure that the fee imposed must exactly match the direct and necessary costs for complying with the data access request in question.

30. It is thus clear that one has to take into account the factual circumstances of each case to determine whether or not a fee imposed on a DAR is excessive. It is recognised that the fees that may be imposed for a DAR vary with different data users. Therefore, a simple comparison of the flat rate fee charged by different organisations does not assist in determining whether or not the fee is excessive.

31. In this case, the Respondent sought information from the EOC (which bears the evidential burden to show that the fee is not excessive) on the breakdown of its costs in complying with the DAR, and to consider whether or not the fee actually imposed on the Appellant exceeds the direct and necessary costs incurred for complying with the DAR. This approach cannot be flawed.

32. The Respondent had not wholly accepted the EOC’s calculation in his Decision. The EOC claimed that the actual costs necessary for it to comply with the DAR is HK\$2,321. This does not include the costs of EOC’s

managerial staff and in-house legal counsel who spent time in reviewing or advising on the DAR. The Respondent took the view that EOC had rightly excluded the costs of its managerial staff who reviewed or advised on the Appellant's DAR. Nonetheless, the Respondent also considered that the EOC should not charge for the labour costs of the case officer in preparing write-up to seek legal advice. The Respondent came to the view that the estimated total direct and necessary costs for complying with the Appellant's DAR would be HK\$590 (being \$138 x 3 hours + \$176 photocopying costs). This estimated total direct and necessary costs is higher than the fee imposed on the Appellant in the sum of HK\$490. On this basis, the Respondent considered that the fee imposed is not excessive. There is no evidence to suggest that the Respondent was bias in handling this matter.

On request for provision of a list

33. Section 18(1) of the PDPO provides that:

- “(1) An individual, or a relevant person on behalf of 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;
 - (b) if the data user holds such data, to be supplied by the data user with a copy of such data.”

34. Section 19(1) of the PDPO provides that:

“(1) Subject to subsection (2) and sections 20 and 28(5), a data user must comply with a data access request within 40 days after receiving the request by –

(a) if the data user holds any personal data which is the subject of the request –

(i) informing the requestor in writing that the data user holds the data; and

(ii) supplying a copy of the data; or

(b) if the data user does not hold any personal data which is the subject of the request, informing the requestor in writing that the data user does not hold the data.”

35. The requirements under section 19(1)(a) are clear, if the data user holds any of the requested personal data, it shall under section 19(1)(a)(i) inform the requestor that it holds the data, and then under section 19(1)(a)(ii), supply a copy of the data.

36. In the *Hong Kong Polytechnic University v Privacy Commissioner for Personal Data*, AAB No. 24 of 2001, 27 May 2002, the board has held that it is without statutory basis and legally incorrect to require a “thorough search” and the compilation of a consolidated list. It is for the data requestor to identify the data he or she requires and not for the data user to prepare a full or consolidated list for the data requestor to pick and choose.

37. The EOC has already complied with section 19 of the PDPO by informing the Appellant by letter of 18 November 2016 that it holds the information that was requested by the Appellant, and the EOC was ready to

provide copy of the information to the Appellant on payment of a fee. The Appellant has no right to require the EOC to provide a list of the information to her. The Respondent thus came to the conclusion that continuation of the investigation in this matter was not necessary.

Conclusion

38. We have carefully reviewed all the facts and the submission of both parties, we consider that there is no merits in the Appellant's allegation that the Respondent was bias in handling her complaint, neither was there any merits in the allegation that the Respondent's Decision was made against the known facts and evidence.

39. In the circumstance, this appeal is unanimously dismissed.

(signed)

(Ms Elaine LIU Yuk-ling, J.P.)

Deputy Chairman

Administrative Appeals Board