

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 12/2015

BETWEEN

LO WONG CHI YIN

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Ms Cissy Lam King-size (Deputy Chairman)
- Mr Cheng Wai-lung (Member)
- Mr Tsang Mo-chau (Member)

Date of Hearing: 15 September 2015

Date of Handing down Written Decision with Reasons: 2 December 2015

DECISION

1. The Appellant is an assistant inspector of the Non-attendance Cases Team ("NAC Team") of the Education Bureau ("EDB"). Mr. Lai Chi-Fai ("Mr. Lai") is the team leader of a sub-team of the NAC Team and the Appellant's immediate supervisor. Mr. Lai is "the person bound by the decision appealed

against” under section 11(1)(a) of the Administrative Appeals Board Ordinance (“the AAB Ordinance”).

2. On 12 November 2014, the Appellant lodged a complaint with the Office of the Privacy Commissioner for Personal Data (“PCPD”) against Mr. Lai. By letter dated 20 March 2015, the Deputy Privacy Commissioner for Personal Data (“the Commissioner”) informed the Appellant that she has decided not to pursue her complaint further. The “Reasons for decision not to pursue the complaint further” (“Reasons for Decision”) was annexed thereto. Dissatisfied with the Commissioner’s decision, on 17 April 2015, the Appellant lodged her appeal to the Administrative Appeals Board (“this Board”).

Relevant Statutory Provisions

3. Save where otherwise stated, the following statutory provisions are provisions of the Personal Data (Privacy) Ordinance, Cap. 486 (“the Privacy Ordinance”) and Data Protection Principles (“DPP”) are those contained in Schedule 1 of the Privacy Ordinance.

4. Section 18(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.” This is generally called a data access request (“DAR”) and for convenience of use, the PCPD has issued a standard form for making a DAR.

5. Section 37(1): “An individual, or a relevant person on behalf of an individual, may make a complaint to the Commissioner about an act or practice- (a) specified in the complaint; and (b) that- (ii) relates to

personal data of which the individual is the data subject;”

6. Section 39(2): “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- (d) any investigation or further investigation is for any other reason unnecessary.”

7. DPP 1(2): “Personal data shall be collected by means which are- (a) lawful; and (b) fair in the circumstances of the case.”

8. DPP 3(1): “Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose.” Under section 2(1), “use”, in relation to personal data, includes disclose or transfer the data.

9. DPP 4(1): “All practicable steps shall be taken to ensure that personal data held by a data user are protected against unauthorized or accidental access, processing, erasure, loss or use having particular regard to (a) the kind of data and the harm that could result if any of those things should occur; (b) the physical location where the data is stored; (c) any security measures incorporated (whether by automated means or otherwise) into any equipment in which the data is stored; (d) any measures taken for ensuring the integrity, prudence and competence of persons having access to the data; and (e) any measures taken for ensuring the secure transmission of the data.

10. Paragraph 8(e) of the Complaint Handling Policy issued by the Commissioner: “... .. an investigation or further investigation may be considered unnecessary if: after preliminary enquiry by the PCPD, there is no prima facie evidence of any contravention of the requirements under the Ordinance; ...”

11. Section 21(1)(j) of the AAB Ordinance empowers this Board hearing the appeal to confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit.

12. Section 21(3) of the AAB Ordinance: “The Board, on the determination of any appeal, may order that the case being the subject of the appeal as so determined be sent back to the respondent for the consideration by the respondent of such matter as the Board may order.”

The Background Facts

13. On 7 November 2013, the Appellant had a telephone conversation with the mother of a student, Student A, suspected of non-attendance. Mr. Lai was sitting opposite to the Appellant during that conversation.

14. Subsequent to that telephone conversation, on the same day, the father of Student A emailed EDB and complained about, inter alia, the Appellant's attitude in the telephone conversation. The Section Head asked Mr. Lai to handle that complaint.

15. On 22 November 2013, Mr. Lai by letter replied to that complaint.

16. Student A's father was not satisfied with Mr. Lai's reply, and lodged a further complaint on 9 December 2013.

17. The Section Head asked the Deputy Head, Mr. Yan, to investigate the complaint. On 24 December 2013, Mr. Yan conducted separate interviews with

the Appellant and Mr. Lai.

18. On 28 February 2014, EDB issued a written reply to Student A's father answering his complaint ("the Reply").

19. On 21 March 2014, the Section Head together with Mr. Yan and Mr. Lai met with the Appellant ("the 21 March Meeting"). At the meeting, Mr. Yan informed the Appellant of, inter alia, the findings of the investigation and the conclusion that the complaint against her was not substantiated.

20. On 10 April 2014, the Appellant received from Mr. Lai an envelope ("the Envelope", AB/289-290), on which was printed the Appellant's name and rank. Inside the Envelope was a single sheet of paper with one paragraph on it, a paragraph 4, which was a redacted copy of the Reply ("the Redacted Letter", AB/161). On the front of the Envelope and on the Redacted Letter are stamped twice the word "Restricted".

21. The Appellant considered that the circumstances under which the Envelope and the Redacted Letter were given to her constituted a serious infringement of her privacy. However, there are several important disputes of facts between the Appellant and the EDB.

Dispute of Facts

22. According to the EDB, as per their letter to the PCPD dated 4 February 2015 ("EDB's Reply", AB/226-229), at the 21 March Meeting, the Appellant requested for a copy of the Reply. It was pursuant to that request that the Section Head prepared the Redacted Letter.

23. According to the Appellant, she never asked for a copy of the Reply. All she asked for was “to take a look” at the Reply to see if her name had been mentioned. She also indicated that she wished to see the response regarding her team’s handling of Student A’s case in order to see if there was room for improvement.

24. According to the EDB, the Section Head prepared the Redacted Letter by deleting the parts of the Reply that did not concern the Appellant. The Section Head sent the Redacted Letter to Mr. Yan via email and instructed Mr. Yan to print it out, stamp “Restricted” on the header position, put the copy inside an envelope with “Restricted” stamped on the outside, and then ask Mr. Lai to collect it and pass it to the Appellant. Following those instructions, on 9 April 2014, Mr. Yan invited Mr. Lai to his work place. In his presence, Mr. Yan printed out the Redacted Letter and put it in an envelope. An “Acknowledge Receipt” was also prepared. Following the usual practice in handling restricted documents, Mr. Yan sealed the envelope and passed the sealed envelope together with the Acknowledgement Receipt to Mr. Lai for his delivery to the Appellant. Mr. Lai then served the sealed envelope to the Appellant on 10 April 2014 and asked her to sign on the Acknowledgement Receipt.

25. According to the Appellant, however, when Mr. Lai gave her the Envelope, it was unsealed. Furthermore, Mr. Lai “unmindfully told” her that he had opened the Envelope and read the Redacted Letter. This was without her consent and the Appellant immediately voiced her discontent. Mr. Lai instructed her to sign on the Acknowledge Receipt. This she did under protest.

The Complaints

26. Instead of listing her complaints succinctly point by point when she

lodged her complaint to the PCPD on 12 November 2014, the Appellant formulated her complaints in the form of a statement of her version of events and her grievances. Out of that statement, the PCPD managed to identify 4 complaints and by letter of 24 November 2014, the PCPD requested the Appellant to confirm whether the complaints as set out were correct. In addition, the Appellant was asked to provide further information for clarification. In her reply of 8 December 2014, the Appellant wrote that the PCPD's understanding of her complaints were "Basically correct", but then went on to write another 5 pages in supplement and expanded her complaint into 8 complaints. These have been summarized in the Reasons for Decision as follows:-

- (1) Mr. Lai had access to the Redacted Letter without the Appellant's consent.
- (2) The Envelope was unsealed despite that it was stamped "Restricted".
- (3) On 7 August 2014, Mr. Lai informed the Appellant that the father of another student, Student B, wrote a letter to the Chief Executive Officer expressing his dissatisfaction with the Appellant's handling of Student B's case. The Appellant requested to see the letter, but Mr. Lai only allowed her to read the letter once, and forbade her to make a copy.
- (4) Mr. Lai had disclosed the personal data of another student, Student C, to his former school without the consent of Student C.
- (5) As the Redacted Letter was put in an unsealed envelope, the Appellant suspected that who else, apart from Mr. Lai and Mr. Yan, might have access to it.
- (6) The Appellant alleged that she was once advised by Mr. Lai to comply with the "*Administrative Procedures for Data Access*

Request” as stipulated in EDB’s “*Internal Circular No. 7/2000 on Guidelines on Compliance with Personal Data (Privacy) Ordinance, Cap. 486*” to request for the Redacted Letter by making a DAR in writing. The Appellant was dissatisfied that she was finally given the Redacted Letter without her making the DAR and was “shocked at and discontented with the totally unacceptable sloppy and disrespectful handling”.

- (7) The Appellant complained that Mr. Lai had abused Student B’s personal data during a case review meeting.
- (8) The Appellant alleged that she had received an “intimidating” email from Mr. Lai on 19 December 2014 after lodging her complaint with the PCPD. She complained that Mr. Lai had misused his position and abused his power.

Our Decision

27. Of the 8 complaints, we can dismiss Complaints 4 and 7 forthwith. We have not set out the Appellant’s allegations regarding these two complaints because they concern persons who are not bound by this appeal and who are unaware of this appeal or of the fact that the Appellant had sought to make a complaint on their behalves. The Appellant is clearly not the data subject. The Commissioner refused to investigate those complaints by virtue of Section 37 of the Privacy Ordinance. We see no reason to interfere with the Commissioner’s decision.

28. We can also dismiss Complaint 8 forthwith. It clearly falls outside the ambit of the Privacy Ordinance. The Commissioner is in no position to investigate any allegation of intimidation or abuse of a superior’s power to prevent someone from making complaints. These are most serious allegations

against a person's integrity, which should not be made lightly. If there is any substance at all in these allegations, the Appellant should take them up with the proper authorities.

29. Complaint 6 is a non-complaint because there is nothing in the Privacy Ordinance to prohibit or inhibit a data user from supplying a data subject with a copy of her data upon the data subject's oral request. We do not understand what is the Appellant's complaint when she got the Redacted Letter without having to go through any formal procedure of a DAR. If the Appellant's complaint is that this was done in breach of the internal circular of the EDB, then again, it is a matter that she should take up with the EDB, not the PCPD.

30. Regarding Complaint 3, the Appellant was not happy that Mr. Lai did not allow her to take a copy of the letter of Student B's father. In that case, the short answer is that she can make a formal DAR under section 18(1) of the Privacy Ordinance. If the DAR is refused, one can then look at the refusal to see if there is any contravention of the ordinance. But until then, we agree with the Commissioner there is no prima facie evidence of a contravention.

31. This leaves us with Complaints 1, 2 and 5. These 3 complaints arise out of the allegation that the Envelope was unsealed. As set out above, there are direct conflicts of facts between the Appellant and the EDB on this. The Commissioner took the view that in the absence of an independent witness, he could not decide whether it was passed to the Appellant in an unsealed envelope in contravention of DPP 4(1) (see paragraph 26 of the Reasons for Decision). We agree that given the limited jurisdiction and resources the Commissioner has, he should not be drawn into unnecessary or complicated dispute of facts. However, at the present hearing, we have looked at the

original Envelope. With bare eyes, we could not see any sign that the Envelope had ever been sealed. There was no staple hole, no glue mark and no traces of sticky tape. If the Envelope was once sealed as alleged, then it calls for an explanation.

32. Mr. Lau representing the Commissioner told us that the PCPD never received the original Envelope from the Appellant. We were quite surprised to hear that. The conflict of facts clearly put the Envelope in the spotlight, and it being a physical document, it is easy to examine it.

33. Mr. Lai has made a “Report of the incident of passing a letter to [the Appellant]” dated 12 February 2015 (AB/233). It was a short report in which Mr. Lai stated, inter alia, the Envelope was sealed. We note that Mr. Lai has declared that “*The above statements are true to the best of my memory and knowledge*” and he has signed at the bottom of the report. Nevertheless, this is not a sworn statement, and does not carry the same weight of a sworn statement. Mr. Lai, as the person bound, appeared in person at the present hearing. We asked him to explain how the Envelope was sealed and how it showed no physical sign of that fact. He told us he could not be sure due to the long lapse of time. We find his answers far from satisfactory. Mr. Yan is not a party to this appeal and did not appear before us.

34. The Appellant told us that when she received the Reasons for Decision and saw the EDB’s claim that the Envelope was sealed when given to her, it was the first time she became aware of that claim. The Appellant was dismayed that the EDB could make a claim like this, which, according to her, was absolutely false. She was further upset that the PCPD never contacted her before their decision to tell her what the EDB said or give her a chance to prove them wrong. We are not unsympathetic to the Appellant’s frustration.

35. Having examined the Envelope, we agree it is unsatisfactory that investigation into the question whether the Envelope was unsealed when delivered to the Appellant, the basis of Complaint 2, should stop on the mere assertion of the EDB or Mr. Lai. We think Complaint 2 requires further investigation.

36. Regarding Complaint 5, the EDB's Reply stated that no other person had access to the Redacted Letter except Mr. Yan and Mr. Lai. But that statement was made on the basis that the Envelope was sealed. Now that this question requires further investigation, we think that Complaint 5 should likewise be further investigated.

37. Turning to Complaint 1, the Commissioner took the view that (1) as Mr. Lai was the Appellant's immediate supervisor and played a key role in the investigation into Student A's father's complaint, he was conversant with the facts contained in the Redacted Letter, hence whether Mr. Lai had opened the Envelope and read the content did not prejudice the Appellant's personal data privacy right; and (2) in any case, as the Appellant's supervisor, Mr. Lai had a duty to monitor and supervise the Appellant's work, it was thus not unreasonable for Mr. Lai to learn about the content of the Redacted Letter. The Commissioner concluded that there was no prima facie evidence that Mr. Lai had unlawfully or unfairly collected the Appellant's data in breach of DPP 1(2).

38. At the hearing, we asked the Appellant explicitly to look at the Redacted Letter (AB/161) and point out to us whether there is any, and if so, which, sentence or data therein which she thinks Mr. Lai could not possibly have known unless and until he had read the Redacted Letter. She pointed to one and half sentence, but the information contained therein did not concern

her at all. They read as follows: “As part of the investigation process, it had been the original intention of the Investigation Team to seek clarification from you whether your wife had asked for the full name of Ms LO during her telephone conversation on 7.11.2013, and accordingly, *I had sent you an email on 14.2.2014 with the view to contacting you for clarification. No response has been received from you so far.*” The part in italic is the part pointed out by the Appellant. This one and half sentence tells us that the investigation team had sent an email to Student A’s father and received no response. It is apparent that this is not the Appellant’s personal data. Further, whether or not Mr. Lai knew of this is not for the Appellant to say. It is not for her to know how far Mr. Lai was involved in the investigation process or how much Mr. Yan had told Mr. Lai of the investigation process. According to the EDB’s Reply, Mr. Lai played a key role in the investigation of Student A’s father’s complaints and had been involved in the investigation by serving as a witness to the telephone conversation concerned. When the Appellant was told of the investigation result at the 21 March Meeting, what was related to the Appellant was taken from the paragraph contained in the Redacted Letter and it had already been made known to Mr. Lai. We think EDB’s Reply has made it clear, and we accept, that Mr. Lai was conversant with the content of the Redacted Letter.

39. Nonetheless, even if Mr. Lai was conversant with the content of the Redacted Letter, it did not mean he was at liberty to read the letter. The EDB’s Reply made it clear that no explicit authorization was given to Mr. Lai to have access to the Redacted Letter. Once the Redacted Letter was put inside the Envelope, marked “Restricted” to the Appellant, it is a prima facie breach of DPP 4(1) if Mr. Lai, the person charged with secure delivery of the Redacted Letter to the Appellant, had opened the Envelope and read the Redacted Letter, thus gaining unauthorized access to it. We think Complaint 1 should be further investigated.

40. We must make it clear that we have made no decision on the question whether the Envelope was sealed or unsealed. Nor have we made any decision whether there are any contraventions of the Privacy Ordinance. But we do accept that the full circumstances concerning how the Redacted Letter was prepared and delivered to the Appellant and the question whether the Envelope was sealed do require further investigation.

41. Lastly, we refer to the Appellant's application to introduce some tape recordings into evidence. No transcript was provided to us. In view of our decision, we do not think it necessary to listen to those recordings. If the PCPD in their further investigation think they are relevant and properly obtained, the PCPD would no doubt make good use of them. But according to Mr. Lai, the tape recordings were made without his knowledge or consent. If that is the case, it prima facie puts the Appellant in breach of DPP 1. The Appellant seemed to believe that she was at liberty to do so because she was collecting, what she called, evidence of Mr. Lai's dishonesty. This is a complete fallacy. We cannot find any exemption in the Privacy Ordinance which would entitle the Appellant to, in secrecy, tape record random conversations she has with Mr. Lai just in case Mr. Lai might say something to his detriment or something that is less than honest. This is neither fair nor just, and we take a dim view of such behavior. Further, although by section 21(1)(b) of the AAB Ordinance, the rule of evidence in hearings before the Administrative Appeals Board are more relaxed, this Board is not prepared to admit evidence that is not relevant. Evidence that a person might have been dishonest in matters totally unrelated to the complaints under investigation is not relevant and will not be admitted.

Conclusion

42. In conclusion, pursuant to sections 21(1)(j) and 21(3) of the AAB Ordinance, we make the following orders:

- (1) We confirm the Commissioner's decision not to pursue further Complaints 3, 4, 6, 7 and 8 stated above, and dismiss the appeals insofar as they relate to these complaints.

- (2) We reverse the Commissioner's decision not to pursue further Complaints 1, 2 and 5 and allow the appeal insofar as they relate to these 3 complaints. We remit Complaints 1, 2 and 5 to the Commissioner for further investigation, including, but not limited to, investigation into how the Envelope was sealed, if at all, and whether Mr. Lai had gained unauthorized access to the Redacted Letter, and whether there has been any contravention of the Privacy Ordinance.

(signed)

(Ms Cissy Lam King-sze)

Deputy Chairman

Administrative Appeals Board