

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 13 of 2007

BETWEEN

HONG KONG JOCKEY CLUB Appellant

and

PRIVACY COMMISSIONER Respondent
FOR PERSONAL DATA

Coram : Administrative Appeals Board

Date of Hearing : 8 July 2008

Date of handing down Decision with Reasons : 15 August 2008

DECISION

1. On 13.1.2004, Mr. Man fu-wan (文富穩先生) (Mr. Man) applied to the Hong Kong Jockey Club (香港賽馬會) (HKJC) for membership. After consideration, HKJC refused Mr. Man's application.
2. On 4.10.2005, Mr. Man lodged a data access request (DAR) under section 18 of the Personal Data (Privacy) Ordinance (the Ordinance) with HKJC, requesting HKJC to supply him with a copy of all his personal data in connection with his application for membership.
3. On 2.11.2005, HKJC notified Mr. Man to collect copies of documents that contained his personal data and pay the relevant fees.

4. On 10.11.2005, HKJC again wrote to Mr. Man informing him that processing of his DAR had been completed and copies of his personal data were ready for his collection on payment of the relevant fees

5. Mr. Man later collected from HKJC a copy of his application for club membership. This contained Mr. Man's personal details, comments by the proposing members and the supporting members.

6. On 22.12.2005, Mr. Man lodged a second DAR with HKJC. He requested HKJC to supply to him the data relating to the vetting of his application for membership and the reasons for rejecting his application. The period to which such data related was 2004 to 2005.

7. On 26.1.2006, HKJC informed Mr. Man that the personal data he requested had been provided to him but other data connected with his application for membership could not be provided because they were exempt under section 58(1) of the Ordinance from complying with his DAR.

8. On 28.2.2006, Mr. Man complained to the Office of the Privacy Commissioner for Personal Data (the Commissioner). Details of his complaint are as follows (English translation):

“The data provided by the Jockey Club were not comprehensive enough. It lacks the data concerning the vetting process, so I am unable to ascertain the grounds for refusal of my application. The Jockey Club may have concealed some information from me. I only requested the Jockey Club to provide the reasons for the refusal of my membership application, in case I need to clarify or remedy some issues ...

In a letter dated 26 January 2006, the Jockey Club claimed that it was exempt from disclosure of certain data under section 58 of the Ordinance. I am not sure whether it is true. Therefore, I would like to seek clarification from your Office.”

9. The Commissioner commenced an investigation of Mr. Man's complaint and made enquiry thereof with HKJC.

10. On 3 and 27.4.2006, HKJC responded to the Commissioner's enquiry. HKJC's position on the complaint may be summarized as follows:

- (a) The data requested by Mr. Man and withheld by HKJC contained police intelligence information about Mr. Man.
- (b) The data revealed that Mr. Man had involved in criminal as well as unlawful or seriously improper conduct. These included wounding and connection with a triad society. Mr. Man had been arrested and investigated by the police.
- (c) The data were exempt under section 58(1) of the Ordinance, particularly paragraph (a), (d) and (e) thereof, from the requirements of sections 18 and 19 of the Ordinance.
- (d) The data were held by the Police for the purposes referred to in section 58 (1) of the Ordinance. HKJC collected the data from the Police and had undertaken to the Police that the data would be used for these purposes only.
- (e) Because the Police controlled the use of the data and prohibited HKJC from complying with Mr. Man's DAR, under section 20(3)(d) of the Ordinance HKJC could refuse to provide the data to Mr. Man.
- (f) Mr. Man could make a DAR to the Police under section 21(1)(c) of the Ordinance and it would be for the Police to decide whether to rely on section 58(1) of the Ordinance.
- (g) The data were held by HKJC for the purpose of ascertaining whether Mr. Man's character or activities would likely to adversely affect HKJC in the discharge of its statutory duties under the Gambling Ordinance. HKJC could rely on the exemption under section 58(1)(f) of the Ordinance not to comply

with Mr. Man's DAR.

- (h) Mr. Man on signing his application for membership, understood and agreed that the HKJC was not obliged to provide him with the reasons for rejecting his application. The application form contained a term to that effect.

11. On 17.4.2007, the Commissioner notified HKJC of his decision which may be summed up as follows:

- (a) HKJC had a statutory duty under section 25(1) of the Gambling Ordinance to prevent crime and the relevant data were held by HKJC for the purposes specified in section 58(1)(a),(d) and (e) of the Ordinance.
- (b) HKJC as an independent data user, "must produce evidence to substantiate its purposes for holding the data and explain why disclosure of the data will prejudice the purposes or will disclose the identity of the party which provides the data". But no such evidence or explanation had been produced.
- (c) Since HKJC had rejected Mr. Man's application, it was no longer necessary for HKJC to ascertain Mr. Man's character or activities and disclosure of the data to him would not prejudice HKJC's consideration of Mr. Man's application.
- (d) HKJC could not rely on section 58(1)(a), (d), (e) and (f) to refuse to comply with Mr. Man's DAR.
- (e) HKJC could not rely on Mr. Man's agreement in his application to refuse his DAR because he did not know the agreement included giving up his right of access to personal data collected by HKJC.
- (f) Notwithstanding the above, it was lawful and reasonable for HKJC to rely on section 20(3)(d) of the Ordinance to refuse Mr. Man's DAR because the data were collected from the Police subject to prohibition from disclosure to third parties without the

consent of the Police and because the Police had expressly objected to disclosure of the data to Mr. Man.

- (g) HKJC had failed to notify Mr. Man in writing within 40 days of the receipt of his DAR of the refusal of the request and the reasons therefor and the name and address of the other data user and thereby contravened section 21(1) of the Ordinance

12. The Commissioner at the same time being of the opinion that HKJC's contravention of section 21(1) would likely continue or be repeated, served an enforcement notice on HKJC with the following directions in paragraph 3 thereof:

- “(i) ... pursuant to section 21(1), inform Mr. Man, in writing, of the refusal of his DAR and the reasons for the refusal, and the name and address of the other data user;
- (ii) amend or formulate the policies, practices and/or procedures of handling DAR to avoid reoccurrence of similar contravention;
- (iii) inform the staff involved in the handling of DAR of the policies, practices and/or procedures mentioned in paragraph (ii), and to take appropriate measures (e.g. training, reminders and effective monitoring system) to ensure that they will comply with the policies, practices and/or procedures; and
- (iv) confirm to me in writing of the steps taken by you to comply with the requirements stated in paragraphs (i) to (iii), and to provide me with the copies of the amended or formulated policies, practices and/or procedures for reference.”

13. The notice also required HKJC to comply with these directions within 28 days of service thereof on HKJC.

14. On 2.5.2007, HKJC appealed to the Administrative Appeals Board ('the Board'). It should be noted at this stage that the appeal is against the Commissioner's enforcement notice only.

15. The grounds of appeal may be summed up as follows:

- (a) The Commissioner was wrong to find that HKJC was in breach of section 21(1) of the Ordinance.
- (b) The Commissioner was wrong to find that HKJC referred to the different sections of the Ordinance to justify its refusal of Mr. Man's DAR.
- (c) The Commissioner was wrong to conclude that HKJC was not entitled to rely on section 58(1)(a), (d), (e) and (f) of the Ordinance to refuse Mr. Man's DAR.
- (d) There was no finding of deficiencies in HKJC's policies and procedures for handling data access requests and there was no basis to instruct HKJC to improve or establish policies and procedures for the handling of information access requests.
- (e) HKJC has no obligation under the Ordinance to establish policies and procedures for handling of information access requests and the Commissioner has no power to seek in an enforcement notice to impose such obligation on HKJC and to require it to prove compliance thereof. To do so, the Commissioner was ultra vires his powers.
- (f) The Commissioner was wrong to conclude without evidence that Mr. Man did not understand his agreement in his application included his agreement to waive his data access rights.

16. On 15.5.2007 HKJC wrote to Mr. Man and reiterated that it had provided the data under request to Mr. Man. HKJC also stated that it refused to comply with Mr. Man's request under section 20(3)(d) of the Ordinance because the Police at Police Headquarters, Arsenal Street,

Wanchai, Hong Kong controlled the use of the data and prohibited HKJC from complying with the request. HKJC further stated that the data were exempt under section 58(1) of the Ordinance from complying with Mr. Man's request.

17. We note that the Commissioner in his decision agreed that it was lawful and reasonable for HKJC to refuse to comply with Mr. Man's DAR because HKJC could rely on section 20(3)(d) of the Ordinance and not that HKJC could claim exemption under section 58(1) in respect of the data, a ground HKJC had primarily relied on to justify its non compliance with the request.

18. Section 20(3)(d) is as follows –

“A data user may refuse to comply with a data access request if –

... (d) subject to subsection (4), any other data user controls the use of the data in such a way as to prohibit the first-mentioned data user from complying (whether in whole or in part) with the request.”

19. Since HKJC could legitimately refuse Mr. Man's DAR, HKJC had not contravened section 19(1) of the Ordinance, which section required a data user to comply with a data access request within 40 days of its receipt by the data user.

20. The only contravention of the Ordinance by HKJC found by the Commissioner was section 21(1) which required HKJC when relying on section 20(3)(d) to refuse Mr. Man's DAR to inform Mr. Man by notice in writing the reasons for refusal and the name of the other data user who prohibited it from complying his DAR.

21. Section 21(1) is as follows:

“Subject to subsection (2), a data user who pursuant to section 20 refuses to comply with a data access request shall, as soon as practicable but, in any case, not later than 40 days after receiving the request, by notice in writing inform the requestor-

- (a) of the refusal;
- (b) subject to subsection (2), of the reasons for the refusal; and
- (c) where section 20(3)(d) is applicable, of the name and address of the other data user concerned.”

22. Section 21(1) is a procedure required of a data user to comply with in handling data access request. It was for HKJC's non compliance with this section that the Commissioner served the enforcement force and directed HKJC to take steps to rectify such failure and to prevent such contravention to continue or recur. The enforcement notice was not concerned with non compliance with data access request and what justification HKJC had for it.

23. As we see it, HKJC's appeal is against the issue of the enforcement notice and the directions given therein by the Commissioner. These directions are concerned with compliance with section 21(1) and proper policies and procedure on future handling of data access requests by HKJC. This is purely a matter of procedural requirements. That being the case, whether HKJC could legitimately rely on section 58(1) to claim that the data under request were exempt from requirements relating to data access requests in the Ordinance and HKJC could thereby lawfully refuse Mr. Man's DAR, is not relevant for the disposal of this appeal.

24. We appreciate that counsel for HKJC, Mr. Fok SC had devoted a large portion of his skeleton arguments on this issue and we thank him for his legal revelations on the subject. While, if we may say so, these arguments are of great interest, we think a resolution by us here of the issue in the light of them would only be academic. Notwithstanding it might prove to be of assistance for reference in similar cases, we consider a decision on it by the court would be of greater authority and provide more comprehensive guidance in future. We do not think we should go into this academic exercise here.

25. The real issue we need to dispose of in this appeal is whether the Commissioner was justified to serve on HKJC the enforcement notice and specify the directions in paragraph 3 thereof for HKJC to comply with.

26. Mr. Fok submits that HKJC only failed to comply with section 21(1) to inform Mr. Man that the other data user for the purpose of section 20(3)(d) was the Police and to inform him of the address of the Police. But on 26.1.2006, HKJC had already informed Mr. Man that the data he requested were supplied by law enforcement agencies and that HKJC was claiming exemption under section 58(1) of the Ordinance. Later, on 27.4.2006, HKJC informed the Commissioner that it was aware of the link between section 20(3)(d) and section 21(1)(c) and its obligation to inform Mr. Man of the identity and address of the other data user. Mr. Man was also aware through the Commissioner's results of investigation that the data he requested were supplied to HKJC by law enforcement agencies that prohibited disclosure of the data to him. In any case, Mr. Fok submits, the failure to comply with section 21(1) had been remedied by HKJC's letter dated 15.5.2007 to Mr. Man which informed him that HKJC refused his DAR because the Police controlled the use of the data and prohibited HKJC from complying with his DAR. HKJC also stated in the letter the address of the Police Headquarters. These facts show that HKJC was patently aware of the requirement under section 21(1).

27. Mr. Fok also submits that there was no finding or basis for finding that there were deficiencies in HKJC's policies of handling personal data in membership applications. The Commissioner had not asked for information on such policies from HKJC. There was no evidence that the Commissioner had considered as required under section 50(2) of the Ordinance, the question of damage or distress caused or likely to cause to the data subject of the relevant personal data, before he issued the enforcement notice.

28. In these circumstances, Mr. Fok so submits, there was no proper basis for the Commissioner to conclude that HKJC's contravention of section 21(1) would likely continue or be repeated.

29. As to the directions in paragraph 3 of the enforcement notice, Mr. Fok argues that subparagraphs (ii), (iii) and (iv) thereof are ultra vires the Commissioner's powers. (These directions required HKJC to formulate policies, practices and/or procedures of handling data access request to avoid recurrence of similar contravention and to inform its staff thereof and at the same time, to take steps to ensure compliance thereof by its

staff) Mr. Fok contends that these directions carried possible penal consequences for non compliance and before the Commissioner could make such directions, there must be express statutory powers for him to do so. But there is no such power in the Ordinance and neither can such power be implied from Data Protection Principle 5 (“DPP 5”). DPP5 only requires all reasonable steps be taken to ensure a person can ascertain a data user’s policies and practices in relation to personal data.

30. Mr. Fok’s submission in this regard concerns what power the Commissioner has in relation to serving an enforcement notice under section 50 on a data user. It may be convenient for discussing this issue to set out the relevant part of the section first -

“Where, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user-

(a) is contravening a requirement under this Ordinance; or

(b) has contravened such a requirement in circumstances that make it likely that the contravention will continue or be repeated,

then the Commissioner may serve on the relevant data user a notice in writing-

(i) stating that is of that opinion;

(ii) specifying the requirement as to which he is of that opinion and the reasons why he is of that opinion;

(iii) directing the data user to take such steps as are specified in the notice to remedy the contravention or, as the case may be, the matters occasioning it within such period ...as is specified in the notice...”

(2) In deciding whether to serve an enforcement notice the Commissioner shall consider whether the contravention or matter to which the notice relates has caused or is likely to cause damage or distress to any individual who is the data subject of any personal

data to which the contravention or matter, as the case may be, relates.

(3) The steps specified in an enforcement notice to remedy any contravention or matter to which the notice relates may be framed –

- (a) to any extent by reference to any approved code of practice;
- (b) so as to afford the relevant data user a choice between different ways of remedying the contravention or matter, as the case may be.”

31. Accordingly, before the Commissioner serves an enforcement notice on a data user, there must be a contravention of the requirements of the Ordinance which is continuing or which has been committed in circumstances that make it likely it will continue or be repeated. The Commissioner should also consider whether the contravention has caused or is likely to cause damage or distress to the data subject of the relevant personal data. If the Commissioner is satisfied on these requirements for serving an enforcement notice, he may then specify in the notice directions requiring the data user to take steps to remedy the contravention.

32. In the present case, it cannot be disputed that the HKJC had not informed Mr. Man of the matters required under section 21(1) although it relied on section 20(3)(d) to refuse his DAR. HKJC's letter of 26.1.2006 was not such a notice under section 21(1) notwithstanding Mr. Man was informed thereby of HKJC's reliance on section 58(1) to refuse his DAR and the requested data were supplied to HKJC by law enforcement agencies. Neither HKJC's letter of 27.4.2006 to the Commissioner nor its letter to Mr. Man on 15.5.2007 could be regarded as compliance with section 21(1) for the simple reason that the former was there to provide supplementary information to the Commissioner while the latter, taken at its highest, was no more than an attempt by HKJC to remedy the contravention. In our opinion, the fact that HKJC might be aware of the requirement under the section or the fact that Mr. Man knew HKJC relied on section 20(3)(d) to refuse his DAR does not relieve HKJC of its duty to comply with section 21(1). We are in no doubt that HKJC at the time of the Commissioner's decision to serve on it an enforcement notice had contravened a requirement of the Ordinance.

33. We note that HKJC took no steps to comply with section 21(1) after it claimed to rely on section 20(3)(d) despite its claim that it was patently aware of the need to give such notice to Mr. Man. The non compliance with the section continued until 15.5.2007 when it purported to give such notice to Mr. Man, probably prompted by the Commissioner's enforcement notice. This was more than a year after its refusal of Mr. Man's DAR and well beyond the period of 40 days as set out in section 21(1) and HKJC gave no explanation for such inaction during this period. In our opinion, the contravention had continued throughout this period and had the enforcement notice not been served, it was unlikely the HKJC would comply with the requirement under section 21(1).

34. Mr. Man appearing as 'person bound by the decision of the Board' submits that because of the action taken by HKJC in refusing his DAR, he was not in a position to defend the Police's allegations that he had involved in criminal activities. He also submits that because of the failure by HKJC in informing him who was the law enforcement agency that prohibited the compliance of his DAR by HKJC, he was unable to go to this data user to demand access to his personal data. He said, in the end, when he knew it was the Police who made such allegations, he managed to clear his name after it came to light that these allegations were unfounded. He said he had suffered damage as a result of HKJC's non compliance with the requirements of the Ordinance.

35. The Police have not made any representation to the contrary and neither the Commissioner nor HKJC was in a position to challenge Mr. Man's contention. On balance, we are not able to say Mr. Man's contention is unfounded and without substance and we find that the circumstances show the contravention was likely to cause damage or distress to Mr Man. In these circumstances, the Commissioner was justify to serve the enforcement notice to require HKJC under section 50 (1) to remedy the non compliance.

36. On the question whether the Commissioner was justified to issue the directions in paragraph 3(i), (ii), (iii) and (iv) of the enforcement notice, Mr. Lee for the Commissioner submits that not only the Commissioner had power under section 50 but also it was reasonable and legitimate for him to direct HKJC to establish a policy, practice and/ or

procedure in order to avoid similar contravention by HKJC. Mr. Lee contends that throughout the Commissioner's investigation into the complaint, HKJC had never let the Commissioner know there was in existence any such policy, practice or procedure on proper compliance with section 21(1) and there was no evidence that might show HKJC had such policy, practice or procedure.

37. Mr. Lee argues that DPP5 implies the requirement that a data user is required to establish such policy, practice or procedure. The Commissioner in carrying out under section 8(1)(a) of his functions to monitor and supervise compliance with the requirement of the Ordinance was entitled to require HKJC to establish such policy, practice or procedure.

38. As we see it, at this stage of the appeal, we are not discussing the Commissioner's general powers in the Ordinance set out in section 8. The question we are grappling with is whether the Commissioner could make the directions in the enforcement notice served on HKJC under section 50. Section 8(1)(a) gives the Commissioner general powers to monitor and supervise compliance with the requirements of the Ordinance. The Commissioner has specific powers to carry out these functions and these are defined else where in the Ordinance. But we have not been shown that these include an express power to direct a data user in particular circumstances to formulate such policy, practice or procedure. The Commissioner apparently conceded that probably no such express power exists in the Ordinance.

39. Mr. Lee argues that such power may be implied from the provisions in DPP5. We do not agree. DPP5 requires a data user to take all practical steps to ensure a person can ascertain the data user's policies and practices in relation to personal data. This is to ensure that such policies and practices are accessible by any person. We fail to see anything in this principle that may give rise to an inference that it imposes on the data user a duty to formulate such matters. Nor has it been argued throughout this appeal that there were circumstances from which such inference could be drawn. In any case we do not think this is relevant to our discussion here.

40. In our view, the power for the Commissioner to serve an enforcement notice on a data user derives from section 50 and not elsewhere in the Ordinance. Where the Commissioner after considering the matters set out in subsection (1) finds it necessary to serve an enforcement notice, he may make directions for the data user to comply with. The scope of the directions is limited by section 50(1)(iii) and 50(3). These sections confine the directions to “take such steps to remedy the contravention... or matters occasioning it...” and if necessary, they may be framed by reference to any code of practice. It should be noted that any step that a data user directed by the Commissioner to take must be to remedy the contravention that has given rise to the enforcement notice. This must be to remedy what a data user did or did not do in relation to a requirement or requirements of the Ordinance.

41. In the present case, what HKJC did not do was to comply with the requirement of section 21(1) to give the requisite notice to Mr. Man. This was all the contravention the enforcement notice was about. The step that HKJC should take to remedy this contravention was to serve the required notice and no more. Paragraph 3(i) of the enforcement notice being directed at this remedy, was within section 50(1)(iii). The Commissioner was entitled to give such a direction.

42. As we said before, non compliance with section 21(1) was the only contravention the Commissioner found against HKJC. Paragraph 3(ii) and (iii) of the enforcement notice directed HKJC to formulate policies, practices and procedures of handling DAR to avoid recurrence of similar contravention, to take steps to inform its staff thereof and ensure their compliance therewith. These are steps to prevent future contravention of section 21(1) from occurring and are not steps to remedy a contravention which has occurred or is continuing. The Commissioner did not find that HKJC had no such policies, practices or procedure or if it had, they were deficient or if they were not deficient, the HKJC in handling Mr. Man’s DAR had failed to adhere to them. Neither did the Commissioner find the lack of such policies, practices and procedure or deficiencies thereof or the non adherence thereto amount to a contravention of the requirement of the Ordinance. In any case, we have not been shown that express provision exists in the Ordinance to make these deficiencies and failures contravention of the Ordinance.

43. We do not think paragraph 3(ii) and (iii) are within the scope of section 50(1) of the Ordinance and we conclude the Commissioner should not have made these directions in the enforcement notice. These directions should be set aside.

44. Since HKJC by its letter of 17.5.2007 had informed Mr. Man of the name of the other data user for the purpose of section 20(3)(d) was the Police and the address of Police Headquarters, Mr. Man was thereafter in a position to go to the Police if he wished to, to demand access to the personal data in question. The direction in paragraph 3(i) no longer serves any useful purpose. It may be said that HKJC had carried out that direction in effect. As a result, paragraph (3)(iv) should also be set aside.

45. For the reasons stated above, the appeal is allowed to the extent that paragraphs 3(ii), (iii) and (iv) of the enforcement notice are set aside with no order as to costs.



(Mr Arthur LEONG Shiu-chung, GBS)
Chairman
Administrative Appeals Board