

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 16/2000

BETWEEN:

KENNETH POON SAI - HO

Appellant

and

PRIVACY COMMISSIONER

FOR PERSONAL DATA

Respondent

Before : the Administrative Appeals Board

Date of Hearing: 22 September 2000

Date of Decision: 22 September 2000

Date of Written Reasons for Decision: 4 October 2000

REASONS FOR DECISION

This is an appeal by Mr Kenneth Poon Sai-Ho from a decision of the Acting Privacy Commissioner for Personal Data dated 18 May 2000 refusing, under s.39(2) of the Personal Data (Privacy) Ordinance cap. 486, to carry out an investigation initiated by a complaint.

At the conclusion of the hearing, after deliberation, the Board unanimously decided that the decision appealed from should be confirmed and this was announced to the parties. We informed the parties that detailed written reasons for the decision would be sent to the parties later. We do so now.

Statutory scheme for Complaint, Decision and Appeal

Under s.37 of the Personal Data (Privacy) Ordinance, an individual may make a complaint to the Privacy Commissioner for Personal Data about an act or practice -

- (a) specified in the complaint; and
- (b) that -
 - (i) has been done or is being done by a data user specified in the complaint;
 - (ii) relates to personal data of which the individual is the data subject; and
 - (iii) may be a contravention of a requirement under the Ordinance.

Under s.39(2)(d) of the Ordinance, the Privacy Commissioner for Personal Data may refuse to carry out an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case, any investigation is for any reason unnecessary.

Under s.3 of the Administrative Appeals Board Ordinance cap. 442, this Board has jurisdiction to hear and determine appeals from, amongst others, a decision of the Privacy Commissioner for Personal Data to refuse under s.39(2) to carry out an investigation initiated by a complaint.

It would thus be seen that the jurisdiction and function of this Board on appeal is restricted to consideration of the Commissioner's decision, which in turn is based upon the terms of the complaint.

The Complaint

Mr Poon's complaint made on 29 March 2000 stated the following:-

"MTR [Mass Transit Railway] apparently violates the caption Ordinance [the Personal Data (Privacy) Ordinance] in that whenever passengers holding a senior citizen concession card and using the MTR toll gates in and out of the MTR station the toll gates yellow indicator lights are on, and at the same time loud electronic bells also sound off; thus disclosing to the rest of the passengers around the toll gates that this passenger is over 65 years of age. ...

At present whenever I use the concession card for senior citizen, my age is disclosed to the world that I am over 65 when passing the MTR toll gates."

According to Mr Poon's complaint, the data user is the MTR Corporation, and the personal data, of which he is the data subject, is his age (65 years or above) which is said to be disclosed at the toll gates by

the activation of a light and an electronic sound when he passes his ticket through. We note that the complaint referred only to the senior citizen concession card.

The Decision to refuse investigation

On 18 May 2000, the Acting Privacy Commissioner for Personal Data gave his decision to refuse an investigation.

The matters considered, as contained in the letter, can be summarised as follows:-

- (1) The information which involves the flashing of the light and the production of an electronic sound is not in a recorded form to which the Ordinance is applicable.
- (2) There has been no disclosure of information regarding the complainant's age.
- (3) The measure taken by the MTR Corporation is reasonable in that it serves the purpose of alerting staff of the Corporation in respect of any suspected misuse of a concessionary ticket.

Accordingly, the reason he gave for his refusal of an investigation was that having regard to all the circumstances, there has been no personal data involved of which the complainant was the data subject, and the matter was outside the jurisdiction of the Ordinance, so that investigation under s.38 was unnecessary.

Hearing of the Appeal

On 22 September 2000, the Board heard the appeal. Mr Poon made oral submissions and did not call evidence.

Mr Poon had, prior to the hearing, asked for production of a Portable Card Analyser used by staff of the MTR Corporation. This is a handheld electronic apparatus which can read signals from a ticket placed onto it. Information from those signals is then displayed on a screen on the Portable Card Analyser.

The Portable Card Analyser was produced and demonstrated with the use of a senior citizen concessionary fare card or ticket, and at Mr Poon's request, his Personalized Octopus Card. However, as stated above, the decision the subject-matter of the present appeal concerned the senior citizen concessionary card only, and not a Personalized Octopus Card.

The demonstration showed that when a senior citizen concessionary card was placed onto the Portable Card Analyser, the code "SENCIT" would be displayed. At Mr Poon's request, when his Personalised Octopus Card was placed onto it, his date of birth was displayed.

Evidence was called by the Privacy Commissioner for Personal Data from Miss May Wong, Deputy Corporate Relations

Manager of the MTR Corporation and Miss Bessie Mok, Assistant Customer Services Officer of the KCR Corporation.

Miss Wong's evidence, which was unchallenged, was that a concessionary ticket (whether a child's concessionary card, a student's concessionary card or a senior citizen's concessionary card) could be purchased by anyone. No identification was required.

Whenever any of these concessionary tickets was used at the toll gates, the indicator light and an electronic sound would be activated. The same light and sound would be emitted *whatever* the type of concessionary ticket, and *whoever* the user of the ticket at that time. In other words, if a 30 year-old person were to pass through the toll gates using a senior citizen concessionary card, the same light and sound would be activated.

Miss Wong's evidence was that this was to remind passengers of the type of ticket they were using, and to alert staff to look out for possible misuse of the concessionary tickets, which permit passengers to travel at half-price. In other words, if the staff on duty, on noticing the activated light and sound and looking at the ticket user, suspects misuse, he would then decide whether to ask the user about his eligibility to use that type of concessionary card.

In relation to the Personalised Octopus Card, Miss Wong's evidence was that this system is operated by a company called Creative

Star Ltd. Applications for this card were made to this company, not to the MTR Corporation and the latter did not hold any records of the particulars of the applicants. This type of Card is personal to the owner, in that fares could be deducted by autopay from his bank account, and in case of loss, the owner could ask for the card to be deactivated so that fares would not be incurred at his expense.

Miss Mok's evidence was similar to that of Miss Wong's, save that the KCR Corporation did not offer concessionary tickets to students as such.

Legal Analysis

In our view, the decision of the Privacy Commissioner for Personal Data on the complaint before him was correct and should be confirmed.

In relation to the first ground of his decision, it is true as Mr Poon said that the words "recorded form" used in the decision may be open to question because those words are not to be found anywhere in the Personal Data (Privacy) Ordinance itself. This may have been an attempt to use everyday language to express the Privacy Commissioner for Personal Data's opinion that the activation of the light and sound do not involve "the representation of information in any document", which is the definition of "data" in s.2 of the Personal Data (Privacy) Ordinance.

In our view, this may have been too narrow an approach to Mr Poon's complaint. Mr Poon was not saying in his complaint that the activation of the light and sound was the data. Construed more liberally, Mr Poon's complaint was that data was contained in the senior citizen concessionary card, and that the data was disclosed by the activation of the light and sound when the card was passed through the toll gates. The first ground in the Privacy Commissioner for Personal Data's decision therefore did not fully address this complaint.

However the Privacy Commissioner for Personal Data was clearly correct, in our view, in his second ground when he considered that there had been no disclosure of information regarding the complainant's age.

"Personal data" is defined in s. 2 of the Ordinance to mean:-

"any data -

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- (c) in a form in which access to or processing of the data is practicable."

Neither the card, nor its activation of the light and sound signals at the toll gates, discloses any personal data of the user. The card itself may be purchased and possessed by anyone. No identification is required or has to be disclosed.

As for the signals, they identify only the type of *card* being used, *not the user* using it. As noted above, the same signals would be activated whether the user was 30 or 65 years of age. It would be up to the visual judgment of the staff on duty whether to ask the user about his eligibility to use the concessionary ticket.

Since the same light and sound are activated whatever the concessionary card used, and more importantly, *whoever* is using one, no aspects of "the identity of the individual" user can be "directly or indirectly ascertained" from the card or its activation of the light and sound signals. Therefore, no personal data (as defined in s.2 of the Ordinance) is involved or disclosed by the card or its activation of the signals at the toll gates.

Since a complaint under s.37 of the Personal Data (Privacy) Ordinance must relate to personal data of which the individual is the data subject, and there is none here, the complaint did not come within the terms of the Ordinance.

We noted that the Personalised Octopus Card, when placed onto a Portable Card Analyser, did display the date of birth of the card owner. However, neither the Personalised Octopus Card nor the display on the Portable Card Analyser was the subject of the complaint. The subject of complaint was the senior citizen concessionary card and the activation of the light and sound at the toll gates, and that was the subject of the Privacy Commissioner for Personal Data's decision. This Board

therefore cannot and should not deal with this extraneous topic which is not the subject-matter of this appeal.

The third ground considered by the Privacy Commissioner for Personal Data involves the invoking of Data Protection Principle 3 (set out in the Schedule to the Ordinance) and s.58 of the Ordinance.

However, as this Board took the view that the Privacy Commissioner for Personal Data's decision is clearly correct in his second ground, in that the complaint involves no personal data, the Ordinance does not apply.

It was therefore not necessary or appropriate for us to consider this third ground, which would only be applicable if the Ordinance did apply and the MTR Corporation was a data user and Mr Poon, a data subject.

Decision

By reason of the matters set out above, the Board unanimously confirmed the decision of the Privacy Commissioner for Personal Data appealed from.

Costs

Counsel for the Privacy Commissioner for Personal Data

sought an order for costs against the appellant as a matter of principle. In an attempt to save costs, the Privacy Commissioner for Personal Data had sought the appellant's consent under s.21(1)(g) of the Administrative Appeals Board Ordinance to ask the Board to determine the appeal without an oral hearing on the basis of written submissions only. This invitation had been declined by Mr Poon.

Under s.21(1)(k) and s.22 of the Ordinance, the Board may award costs against an appellant only if it is satisfied that he has conducted his case in a frivolous and vexatious manner. This is a high threshold, and the Board took the view that Mr Poon has not so conducted his case, notwithstanding his refusal to consent to dispensing with an oral hearing.

Witness expenses

Finally we should note that an application was made on behalf of the witnesses for expenses.

Under s.21(1)(l) of the Administrative Appeals Board Ordinance, the Board may pay an allowance for the expenses of any witness summoned under the Ordinance.

However, s.30 of the Ordinance provides that it is for the Chairman of the Board, with the prior approval of the Chief Justice, to make rules relating to the payment of allowances for expenses of

witnesses under s.21(1)(1). This Board understands that no such rules have yet been made.

Accordingly, whilst this Board would in principle agree to pay an allowance to the witnesses, the payment and relevant procedure relating to it would have to be deferred until rules are made under s.30 of the Ordinance.

A handwritten signature in black ink, appearing to read 'Madam Justice Yuen', with a long horizontal flourish extending to the right.

Madam Justice YUEN

Deputy Chairman, Administrative Appeals Board