

ADMINISTRATIVE APPEALS BOARD  
ADMINISTRATIVE APPEAL NO. 17/2020

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BETWEEN

黃英豪

Appellant

and

PRIVACY COMMISSIONER FOR  
PERSONAL DATA

Respondent

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Coram: Administrative Appeals Board

- Mr Erik Ignatius SHUM Sze-man (Deputy Chairman)
- Mr LAM Tak-hing (Member)
- Mr Ellis LAU Ying-tung (Member)

Date of Hearing: 14 December 2020

Date of Handing down Written Decision with Reasons: 4 February 2021

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DECISION

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Introduction

1. This is an appeal brought by the Appellant to the Administrative Appeals Board (“**this Board**”) against the Decision of the Respondent dated 28 April 2020 (“**the Decision**”) whereby the Respondent decided not to pursue further the

complaint lodged by the Appellant against the Person Bound (“**the Complaint**”), pursuant to section 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486) (“**the Ordinance**”) and paragraph 8(e) of the Respondent’s Complaint Handling Policy.

2. The Appellant acted in person and made oral submissions at the appeal hearing before this Board. The Respondent was represented by its Government Senior Legal Counsel, Mr Dennis Ng while the Person Bound was represented by Mr Abraham Chan, SC.

#### History of the Complaint

3. The Appellant was a former employee of the Person Bound whose employment ceased in 2017. According to the Appellant, he suffered a work-related injury in about 2015 and submitted his medical reports in respect of the said injury (“**the Medical Reports**”) to the Respondent.

4. In 2019, a few pages of the Medical Reports were sent by an anonymous person (“**the Anonymous Letter**”) to the CLP Staff Union (“**the Union**”), which was then chaired by Mr Chan Lui (“**Mr Chan**”). It is not in dispute that the Medical Reports contain personal data of the Appellant.

5. The Appellant lodged a complaint with the Respondent alleging that the Person Bound had failed to protect his personal data, resulting in leakage of his Medical Reports contrary to Data Protection Principle 4(1) of Schedule 1 of the Ordinance.

6. After conducting preliminary enquiries involving the Complainant and the Person Bound and considering the responses from Mr Chan and the Person Bound, the Respondent considered that there is insufficient evidence to show that the Person Bound had leaked the Medical Reports, and that further investigation on the Complaint would be unnecessary in light of the remedial steps undertaken by the Person Bound in any event. Accordingly, the Respondent made the Decision not to continue the investigation into the Appellant's Complaint.

7. On 3 June 2020, the Appellant appealed to this Board against the Decision.

#### Grounds of Appeal of the Appellant

8. The Appellant lodged the present appeal on two main grounds, namely, (1) the Person Bound did not take appropriate steps and procedures to protect the personal data of its employees, resulting in the leakage of the Appellant's Medical Reports; (2) the Person Bound did not inform the Appellant and/or the Respondent immediately about the leakage of the Medical Reports. Hence the Decision of the Respondent was wrong.

#### Reasons to refuse the Appellant's application to summons Mr Chan Lui as a witness

9. Shortly before the appeal hearing the Appellant applied in writing to this Board to issue a subpoena to summons Mr Chan to give evidence as a witness at the hearing of the appeal. After due consideration of the application and the objection of the Respondent, this Board refused the Appellant's application and so informed the parties. The followings are the reasons for the Board's decision.

10. Mr Chan's evidence is only relevant to the factual dispute as to whether the person who sent the Anonymous Letter was Ms Tse, a former employee of the Person Bound, and whether the Medical Reports so received and given to the Person Bound consisted of two pages (according to the Appellant) or three pages (according to the Person Bound). On the above factual disputes, it is alleged that Mr Chan had given conflicting replies to the Respondent and the Person Bound.

11. However, while it is not in dispute that personal data of the Appellant appeared in the Medical Reports sent to the Union, the question of whether there were two or three pages of Medical Reports so sent to the Union or forwarded by Mr Chan to the Person Bound would not affect the Decision of the Respondent of this Board on appeal as will be seen from the present decision of the Board.

12. Furthermore, it is apparent that while there is a dispute as to whether Mr Chan had given contradictory account on whether he had told anybody that it was Ms Tse who sent the Anonymous Letter to the Union, the real question is whether the source of the subject Medical Reports was from the Person Bound. To enquire into the allegation that Mr Chan had said that it was Ms Tse who sent the Anonymous Letter would not be of assistance to resolve the above question in any event.

13. It will be seen from the Reasons given by the Respondent for its Decision and the issues and findings of the Board in the present decision that the appeal does not turn in any way on the evidence to be given by Mr Chan but on other grounds relating to the exercise of discretion by the Respondent.

14. For the above reasons, this Board considered and decided that Mr Chan's evidence would be irrelevant to the issues before this Board and accordingly refused the Appellant's application to summons Mr Chan as a witness.

#### Issues for the Appeal Board

15. As the Court of Appeal affirmed in *Li Wai Hung Cesario v Administrative Appeals Board & Anor* (CACV 250/2015, unreported, 15 June 2016), in an appeal on merits to this Board, the appellant has to say why the decision below is wrong. The tribunal will address the appellant's grounds of appeal, but it does not follow that the tribunal is required to perform the task of a first instance decision maker afresh and set out its own findings and reasons for the decision.

16. In the premises, the issue for this Board is whether the Respondent's exercise of its discretion in making the Decision was lawful and reasonable.

#### Reasons for this Board's decision

17. In brief, the Respondent made the Decision for the following reasons:

- (1) There is insufficient evidence to establish that the Person Bound had leaked the Medical Reports (paragraphs 12-14 of the Decision) ("**the First Reason**"); and
- (2) Further investigation on the Complaint is unnecessary considering the remedial actions taken by the Person Bound (paragraphs 17-18 of the Decision) ("**the Second Reason**").

18. In arriving at the Decision, the Respondent relied on inter alia section 39(2)(d) of the Ordinance which provides:

*“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.”*

19. With respect to the exercise of the Respondent’s discretion under section 39(2)(d) of the Ordinance, the Respondent may decide not to investigate a complaint for any reason. The Board would not interfere with the Respondent’s decision so long as it is reasonable, legal and made in accordance with the relevant procedures (see 梁惠貞女士與個人資料私隱專員, Administrative Appeal No. 47/2004, Decision dated 6 December 2005, paragraphs 18-19).

20. Therefore, this Board’s function is not to substitute the Respondent’s statutory role and function to investigate any complaint or to make any findings as to the facts. This Board only has to consider whether there is sufficient evidence and reason to disturb the Respondent’s exercise of discretionary power under the Ordinance, and whether the reasons of the Decision are wrongful and unreasonable.

#### Whether the Second Reason of the Decision is Lawful and Reasonable

21. In Ho Mei Ying v The Privacy Commissioner for Personal Data (Administrative Appeal No. 52/2004, Decision dated 18 April 2006, paragraphs

17-18), the Board held that the Respondent's discretion under section 39(1) is wide, and it was reasonably open to the Respondent to come to the view that further investigation of the relevant complaint was unnecessary in view of the voluntary remedial action taken by the person complained against.

22. In the present case, it is not disputed by the Appellant that the Person Bound had engaged an independent consulting company as its data security consultants to review and strengthen the Person Bound's data management system. By the end of the second quarter of 2020, the Person Bound had implemented all five measures recommended by the said consulting company and provided further training to its employees since late 2019 in order to enhance their awareness of personal data privacy so as to prevent data security incidents from happening in the future.

23. It should be noted that a breach of the Data Protection Principles under the Ordinance does not *per se* attract any liability, whether civil or criminal. Therefore, even assuming that the leakage of the Medical Reports was due to flaws in the Person Bound's internal policy/practice for handling personal data as the Appellant alleged, given the scale of the incident and its nature, what the Respondent would have done was to issue an enforcement notice under section 50 of the Ordinance, requiring the Person Bound to remedy the said flaws. Criminal liability on the part of the Person Bound may arise only if the Person Bound fails to comply with the enforcement notice.

24. In the premises, had the Respondent continued to investigate into the Complaint and found that the Appellant's complaint against the Person Bound was substantiated, no better result would have been achieved than what the Person

Bound had already undertaken in terms of remedial measures, which would have been what the enforcement notice intended.

25. This Board is thus of the view that it is totally reasonable and within the Respondent's discretion to decide that further investigation is unnecessary under the relevant sections of the Ordinance.

26. The above ground alone is sufficient to dispose of and dismiss the appeal.

#### Whether the First Reason of the Decision was Lawful and Reasonable

27. For the sake of completeness, this Board will consider the First Reason which relates to a substantive matter/evidence of the Complaint.

28. The Appellant alleged that the Person Bound was the source of the leakage of the Medical Reports. However, there were several gaps in terms of evidence in such allegation. First of all, even if it is assumed that the Medical Reports had on some other previous occasions been left by the Person Bound's employees near a copier, it does not follow that the two or three pages of Medical Reports sent by the Anonymous Letter were leaked from the Person Bound's source. Secondly, as put by the Respondent the Medical Reports of the Appellant must have been in the possession of various entities including the relevant doctors of the Appellant, insurance related entities and etc.. To infer from the limited information and evidence made available to the Respondent, especially when there is simply no evidence on the identity of the person who sent the Anonymous Letter, that the Medical Reports of the Appellant were leaked by the Person Bound is a quantum leap and would be unreasonable.



29. As a result, this Board accepts and agrees with the Respondent's First Reason for the Decision that there was insufficient evidence to establish that it was the Person Bound from whose source that leaked the Medical Reports. There is nothing in the Appellant's case and submission to challenge the reasonableness of the Decision against this First Reason.

**Costs**

30. The Respondent and the Person Bound indicated at the end of the hearing that in the event that the appeal is dismissed they would not seek costs against the Appellant. In the circumstances, for the above reasons the Board makes an order dismissing the appeal with no order as to costs.

(signed)  
(Erik Ignatius SHUM Sze-man)  
Deputy Chairman  
Administrative Appeals Board