

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 18/2020

BETWEEN

陳雷

Appellant

and

PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr. Erik Ignatius SHUM Sze-man (Deputy Chairman)
- Ms. Mindy HO Sze-may (Member)
- Miss Julia LAU Pui-g (Member)

Date of Hearing: 14 December 2020

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

DECISION

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 sections 39(2)(ca) and 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486) (“**the Ordinance**”) and paragraphs 8(h) and 8(j) of the Respondent’s Complaint Handling Policy.

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

History of Complaint

3. The Appellant was at the material times an employee of the Person Bound and the Chairman of a CLP Staff Union (“**the Union**”). In 2019, the Union received an anonymous letter which contained medical reports relating to a former employee (“**the Medical Reports**”) of the Person Bound. In his capacity as a representative of the Union, the Appellant met with the Person Bound and passed the Medical Reports to the Person Bound.

4. The Person Bound subsequently sent a letter (“**the Letter**”) to another former employee Ms Tse Fuk Hing (“**Ms Tse**”), whom the Person Bound believed was in possession of copies of the Medical Reports. In the Letter, the Person Bound said to Ms Tse that they knew that Ms Tse had passed the Medical Reports to the Appellant (“本公司得知閣下曾向陳雷先生提供一位中電前僱員（簡稱“A君”）之工傷醫療報告...”).

5. The Appellant having known the contents of the Letter lodged the Complaint with the Respondent as the Appellant was dissatisfied that his name being included in the Letter when as a matter of fact he received the Medical

Reports and gave them to the Person Bound in his capacity as the Chairman of the Union and not in his personal capacity. Further, the Appellant believed that the Person Bound's act caused Ms Tse to have misunderstood that the Appellant had accused Ms Tse as the sender of the anonymous letter enclosing the Medical Reports to the Union.

6. In his Complaint the Appellant alleged that the Person Bound had failed to protect his personal data, and acted in breach of Data Protection Principle of Schedule 1 of the Ordinance.

7. After conducting a preliminary enquiry of the Complaint and considering the Responses from the Person Bound, the Respondent made the Decision not to continue the investigation into the Appellant's Complaint under sections 39(2)(ca) and 39(2)(d) of the Ordinance.

8. On 12 June 2020, the Appellant appealed to this Board against the Decision.

Ground of Appeal of the Appellant

9. The Appellant lodged the present appeal on the ground that the Respondent failed to take into account the fact that the Person Bound disclosed the Appellant's personal data (i.e. his name) to Ms Tse without his consent, in contravention of Data Protection Principle 3 of the Ordinance.

Issues for the Appeal Board

10. 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.

11. 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 in the context of the Appellant's said ground of appeal.

12. In brief, the Respondent made the Decision on the following reasons:

- (1) Further investigation on the Complaint is unnecessary considering the remedial actions taken by the Person Bound (paragraphs 7-8 of the written Decision) ("**the First Reason**");
and
- (2) The nature of the Complaint did not concern protection of personal data privacy (paragraphs 9-10 of the written Decision) ("**the Second Reason**").

Reasons for this Board's decision

13. In arriving at the Decision, the Respondent relied on sections 39(2)(ca) and 39(2)(d) of the Ordinance which provide:

“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-

...

(ca) the primary subject matter of the complaint, as shown by the act or practice specified in it, is not related to privacy of individuals in relation to personal data; or

(d) any investigation or further investigation is for any other reason unnecessary.”

14. At the outset, with respect to 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).

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

Whether the First Reason of the Decision was Lawful and Reasonable

16. 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. Further in Yung Mei-Chun, Jessie v The Privacy Commissioner for Personal Data (Administrative Appeal No. 7/2009, Decision dated 18 September 2009, paragraph 44), the Board held that the respondent was fully justified in concluding that any further investigation would not reasonably be expected to bring about a better result than an undertaking by the person complained against to refrain from further carrying out the conduct complained against and to give clear instructions to its staff for the purpose of complying with the said undertaking.

17. 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.

18. Apart from that, the Person Bound had confirmed that if a similar situation arises in future, it will only disclose the source of the information with reference to the informant's capacity instead of identifying the informant by his name. That means in the situation of the present case the name of the Appellant (which is the only possible personal data concerning the Appellant) will not be disclosed.

19. 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 the Person Bound was indeed in breach of the Data Protection Principles under the Ordinance for disclosing the Appellant's name in the Letter, by reason of the nature of the alleged breach and its scale relating to only one person, what the Respondent would do was to issue an enforcement notice under section 50 of the Ordinance, requiring the Person Bound to take remedial measure in future. Criminal liability on the part of the Person Bound may arise only if the Person Bound fails to comply with the enforcement notice.

20. In the premises, even if the Respondent had continued to investigate and found the Appellant's allegation substantiated, no better result would have been achieved since the Person Bound has already taken remedial measures and there is no reason to doubt that such measures would not be adhered to, which would have been what the enforcement notice required.

21. This Board is thus of the view that it is reasonable and within the Respondent's discretion to conclude that further investigation is unnecessary. There is nothing in the Appellant's case to show that the above exercise of discretion by the Respondent was wrongful or unreasonable.

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

Whether the Second Reason of the Decision was Lawful and Reasonable

23. For the sake of completeness, this Board also considered the substantive matters of the Complaint and would state its decision in relation to it briefly as follows.

24. As held in 李寶輝先生與個人資料私隱專員 (Administrative Appeal No. 49/2005, Decision dated 10 May 2006, paragraph 19) to which this Board agrees, false information and personal reputation are not matters that fall within the regime of protection under the Ordinance. The Ordinance does not aim to cover complaints in relation to defamation or wrong facts which may give rise to civil action and/or recourse. In 葉國成與個人資料私隱專員 (Administrative Appeal No. 21/2016, Decision dated 23 March 2017, paragraphs 33-34), it was held that it is reasonable for the Respondent to come to the view that further investigation is unnecessary if the nature of the complaint is not related to protection of personal data.

25. In the present case, as referred to above, other than complaining that the Person Bound disclosed the Appellant's name to Ms Tse in the Letter, the crux of the Appellant's complaint and grievance is that (1) the Letter failed to state that the Appellant acted in his capacity as chairman of the Union and (2) that it was wrong for the Person Bound to state or imply that it was Ms Tse who sent the anonymous letter enclosing personal medical reports to the Union. Such matters adversely affected the reputation of the Appellant.

26. Even assuming that the Letter did cause misunderstanding on the part of Ms Tse against the Appellant in the way the Appellant described and asserted (as to which the Board has doubts), the Appellant's main complaint relates to the reputation of the Appellant and the wrong description of his capacity; and not the divulging of his name as his personal data. This board agrees with the case and submission of the Respondent, which is relied on by the Person Bound, that the nature of the Complaint is not related to protection of personal data, not falling

within the ambit of data protection under the Ordinance, and hence the Respondent was correct to decide to end the investigation.

27. In the premises, this Board considers and finds that the Decision of the Respondent based on the Second Reason is also lawful and reasonable.

Costs

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

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