

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 1 of 2008

BETWEEN

LESLIE STUART TUCKFIELD

Appellant

and

PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 14 October 2008

Date of handing down Decision with Reasons: 10 December 2008

D E C I S I O N

1. On 6 October 2007, Mr. Tuckfield (appellant) made a data access request (DAR) to the Hong Kong Police (Police) by e-mail. The DAR was made under section 18 of the Personal Data (Privacy) Ordinance (Ordinance) in the form specified by the Privacy Commissioner for Personal Data (Commissioner) under section 67 of the Ordinance.

2. The data requested by the appellant in the DAR were "Police data regarding offences or convictions" for the period "From 1/11/2004 to

date”.

3. On 8 October 2007, the Police asked the appellant to specify the kind of police report he was requesting. The appellant replied by e-mail on the same day and provided the following information:

“...I wish your department to confirm in writing that the Hong Kong Police do not hold any records of criminal offences or convictions for me and my family (period 2004-2007 inclusive) in accordance with the Personal Data (Privacy) Ordinance, Cap. 286)

Should they hold any such records, please supply the date and nature of the offence. Please note that in accordance with the Ordinance the latest date for you to supply this information is 15 November 2007.”

4. On 9 October 2007, the Police responded to the appellant's request by advising him that they provided two kinds of services, namely

(a) Certificate of No Criminal Conviction (CNCC) – an application for this certification should be made in person to their office. If the applicant is not in Hong Kong, the application may be made by post provided that certain documentary requirements were fulfilled. If no criminal conviction is found, the certificate will be sent to the relevant consulate or immigration authority.

(b) Criminal Conviction Data (CCD) Access – the applicant should make the request in person in their office and provide them with his identification document. If no criminal conviction is found, the application will be notified verbally of the result. If criminal conviction is found, the applicant will be given a summary of the conviction and charged a fee of \$50.

5. On the same day, the appellant wrote back and said he took the Police as denying his request. Referring to the provisions on data access

request in the Ordinance, the appellant said that it was his right under the Ordinance to have access to his personal data. He concluded by repeating his request and stating that the Police should comply with the request by 15 November 2007.

6. On 10 October 2007, the Police replied and, referring to section 18 of the Ordinance, told the appellant that the section only required them to inform the appellant if they did not hold the data requested and it was the policy of the Police to make such notification verbally. The Police then invited the appellant and his family to come to their office to have access to the information they requested and to be informed verbally of the result.

7. On the same day, the appellant told the Police that he disagreed with their interpretation of the Ordinance and that he would make a complaint to the Commissioner.

8. On 15 November 2007, the appellant wrote to the Privacy Commissioner for Personal Data (Commissioner) and made the following complaint against the Hong Kong Police (Police) under section 37 of the Personal Data (Privacy) Ordinance (Ordinance):

“ 1. A request was made to the Hong Kong Police on 8th October 2007 for data regarding possible criminal convictions held against my name. The Hong Kong Police failed to provide such data in the requested form within 40 days...

Furthermore, the request was specifically made for a written report as is my right under Section 19. If this is impracticable the Ordinance requires the data user is to explain why. So far no data has been issued in writing and no adequate explanation has been given as to why this request is impracticable. I am complaining that I have not received such data and therefore I should have been informed as to why my request is not practicable within 40 days of such a request being made.

2. In the absence of any criminal data, the Hong Kong Police policy is to inform the individual concerned by verbal means. I

wish to complain that this policy is totally unsuitable for children.

3. For the service described above a charge of HK \$50 is levied. I challenge this fee is excessive especially since no tangible service has been given.

4. I challenge the necessity to take the fingerprints of children for the issuance of a Certificate of Good Conduct.”

9. On 31 December 2007, the Commissioner informed the appellant that pursuant to section 39(2)(d) of the Ordinance, he decided not to carry out or continue an investigation of the appellant’s complaint. In his reasons for decision, the Commissioner stated that section 18 of the Ordinance did not require the Police to inform the appellant in writing whether they held any personal data of the appellant. A verbal reply would be sufficient. The appellant had failed to attend the office of the Police so that he could be verbally so informed. There was no contravention of section 18(1)(a) and section 19 of the Ordinance. Regarding the second complaint, the Commissioner said that the Police’s “policy of informing the relevant person of the data subject who is a minor about his data access request is not unsuitable in the circumstances” where the appellant made the data access request for his son as the relevant person. The Commissioner also considered the administration fee of \$50 for making a search of the Police records for the purpose of the appellant’s DAR not unreasonable. Finally, regarding fingerprinting of children for the issue of a certificate of good conduct, the Commissioner concluded that since Police records were based on fingerprint identification, the taking of fingerprints was essential for the purpose in question.

10. On 3 January 2008, the appellant appealed to this Board against the decision of the Commissioner. The grounds of appeal may be put shortly as follows:

(a) Since the Police did not supply the request data to him, the Police was required under section 19(2)(a)(1) of the Ordinance to provide an explanation. The Police had failed

to provide a satisfactory explanation within the prescribed period of 40 days.

- (b) The Commissioner should not regard as suitable the Police policy of verbally informing a minor that he/she has no criminal record.
- (c) The Commissioner's decision on the administration fee of \$50 was subjective.
- (d) The Commissioner's decision that fingerprinting was necessary for minors for the issue of a CNCC is inconsistent with the Commissioner's guidance in his "Personal Data Privacy: Guidance on Collection of Fingerprint Data - 28 August 2006".
- (e) The Commissioner had failed to offer mediation as an option in the circumstances of the appellant's case.

11. Pausing here, we note that the appellant's request to the Police was, in effect, to supply him with a copy of his personal data and those of his family the Police might be holding at the time and if they held no such data, to confirm that fact to him in writing. This was a simple and legitimate request by the appellant for access to personal data under section 18 of the Ordinance, albeit the personal data related criminal convictions. The Police were required to comply with the appellant's request in accordance with the provisions of section 19 of the Ordinance. Failure to do so amounts to a contravention of the Ordinance.

12. We also need to point out here that the appellant did not apply for a Certificate of No Criminal Convictions or a Certificate of Good Conduct. Such an application is totally different in nature from a request to have access to personal data under the Ordinance. Police policy on issuing these certificates may require an applicant to attend their office for the process of his application. Whether such policy is legitimate and reasonable is not a matter for us in this appeal. But it was wrong for the Police to apply this policy to require a data requestor to attend their office to have access to his personal data.

13: The relevant parts of sections 18 and 19 of the Ordinance provide as follows:

Section 18 - Data access request

- (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.
- (2) ...
- (3) ...
- (4) ...

Section 19 - Compliance with data access request

- (1) Subject to subsection (2) and sections 20 and 28(5), a data user shall comply with a data access request not later than 40 days after receiving the request.
- (2) A data user who is unable to comply with a data access request within the period specified in subsection (1) shall –
 - (a) before the expiration of that period –
 - (i) by notice in writing inform the requestor that the data user is so unable and of the reasons why the data user is so unable; and
 - (ii) comply with the request to the extent, if any, that the data user is able to comply with the request; and

- (b) as soon as practicable after the expiration of that period, comply or fully comply, as the case may be, with the request.

14. Section 37(1) of the Ordinance is also relevant. We think it may be convenient to set it out here as well:

“37. Complaints

- (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-

- (i) has been done or engaged in, or is being done or engaged in, as the case may be, by a data user specified in the complaint;

- (ii) relates to personal data of which the individual is or, in any case in which the data user is relying upon an exemption under Part VIII, may be, the data subject; and

- (iii) may be a contravention of a requirement under this Ordinance (including section 28(4)).

15. The Police and the Commissioner have argued that since section 18(1)(a) does not state the manner of informing the requestor whether the data user hold the requested data, there would be no contravention of the Ordinance if the requestor is only verbally informed that no data are so held.

16. We do not agree with this interpretation of the section. The reason is simple. Section 18 provides for the right of an individual to have access to personal data held by the data user and where the data user

holds no such data, the right of the requestor to be informed of this fact by the data user. Section 18 does not provide for the manner to comply with a data access request. The fact that "inform" in section 18(1)(a) is not qualified, without more, does not enable the data user to comply with the request by verbal means.

17. The data user's duty to comply with an access request and the manner of compliance are provided under section 19. The data user is required to supply a copy of the data within 40 days of receiving the request if he holds the data and if he does not hold such data, he is required to let the requestor know about it within the same period of time. If the data user is unable to do both, he has to inform the requestor in writing about it and the reason why. Sections 19(3) and (4) also provides that notice to the requestor on correction of data supplied and notice that the data user is unable to supply the data in the form requested, have to be in writing.

18. In our opinion, bearing in mind that a data access request is required to be made in writing and a data correction request is also required to be made in writing, and further section 19 requires notices to the requestor to be in writing, it would be unreasonable, if not absurd, to suggest that a requestor need only be verbally informed by a data user that no personal data of his are held without being inconsistent with the requirements of section 19.

19. In any case, it not disputed that the Police did not inform the appellant within the prescribed time limit, verbally or otherwise, whether they held any personal data relating to criminal conviction of which the appellant and his family are the data subjects. Neither had they informed the appellant verbally or otherwise, that they were unable to comply with his DAR within the prescribed time and the reason why. As we have pointed out, it was wrong for the Police to require a requestor to attend their office in order to have access to his personal data. We do not see how the appellant's failure to attend the office of the Police despite being invited there to receive the verbal information can legally or otherwise be regarded as a reason for the Police not to comply with his DAR.

20. Prima facie, these acts of non-compliance with section 19 are

contraventions of the Ordinance, in respect of which the appellant may validly complain to the Commissioner under section 37 of the Ordinance and which the Commissioner is expected to investigate.

21. For the record, we wish to express our dismay at the representations made by the Police in this appeal. Mr. Lau Fu Wah on behalf of the Police said the following:

“5. When Mr. Tuckfield first wrote to the Police on 2007-10-8, he specifically asked for a copy of his no conviction record under PDPO instead of quoting his intended purpose for such record. In response to the request, the Police has provided him a very comprehensive reply explaining that there were two different services namely, the CNCC and CCD access as well as their respective application requirements. Subsequently on 2007-10-31, Mrs. Tuckfield sent in her application by letter, but again she also made a request for a criminal record check (i.e.CCD) under PDPO as with her husband.”

22. We do not think what Mr. Lau said above is correct. The appellant in his e-mail on 8 October 2007 (to which we have referred at the beginning of this judgment) specified that his request was for access to his personal data under the Ordinance. He also specified the last date for the Police to comply with his request. It is crystal clear that the appellant was making the request pursuant to his right under section 18 of the Ordinance and he expected the Police to comply with it within the statutory time limit set down in section 19 of the Ordinance. The statutory duty of the Police on receipt of such a request was to comply with it in accordance with section 19. We fail to see how the appellant's request could be taken by the Police as an application for one of the two services regarding criminal convictions provided by them and their comprehensive explanation on the application requirements as sufficient to meet the request unless they were totally unaware of their statutory duty under the Ordinance in respect of a data access request.

23. Mr. Lau referred to Mrs. Tuckfield's application on 31 October 2007 and the appellant's application on 14 December 2007 for a Certificate of No Criminal Conviction. We need to point out that Mrs

Tuckfield's application is irrelevant to the appellant's complaint of non-compliance by the Police with his data access request. The appellant's application on 14 December 2007 is also irrelevant because it was made after his complaint to the Commissioner. Their references to these applications once again demonstrate their failure to understand the requirements of the Ordinance. It would be for the Commissioner to take such steps as may be appropriate to familiarise the Police with these requirements.

24. The practice of how to inform a person, be he an adult or a minor, that he has a criminal record or no criminal record in a case other than a request under section 18(1) of the Ordinance is for the Police to decide. Whether such practice when applied to a minor contravenes the Ordinance is a matter for the Commissioner to investigate into. The Commissioner cannot dispose of the issue by a simple assertion that the practice was not unsuitable in the circumstances of the appellant's case. On the Commissioner's mere assertion without more, we are not in a position to say if the Commissioner is correct or not. Further investigation into this matter is necessary.

25. On the issue of collecting fingerprints from a minor by the Police for the purpose of an application for a Certificate of No Criminal Conviction, the Commissioner in his statement of reasons for decision contended that his Guidance Note on Collection of Fingerprint Data were for general application and each case had to be examined on its own facts. He repeated that it was necessary to collect fingerprints to determine if a person, whether an adult or minor, has a criminal conviction since such records were primarily based on fingerprint identification.

26. In response, the appellant submitted that although such collection did not contravene the Ordinance, it remained unsuitable for children. The Commissioner in the Guidance Note had himself acknowledged this unsuitability and in using the appellant's circumstances that his son had not been exposed to the practice as an excuse not to challenge the Police policy in this regard, the Commissioner had acted against his own guidance.

27. It is interesting to note that the Commissioner does acknowledge

in the Guidance Note the adverse impact of intrusion into personal data privacy in attaining the purpose of fingerprint collection by a data user. In particular, the Commissioner considers that the data user should consider other less privacy intrusive alternatives before embarking on fingerprint data collection and the data user "should adopt all practicable steps to lessen the adverse privacy impact and protect the data subjects' personal data privacy."

28. The Commissioner also acknowledges that although a data subject's decision to voluntarily supply his fingerprint data for particular purposes is to be respected, consent for such collection must be voluntarily and expressly given. It is critical that the data subject should possess the requisite mental capacity to understand the adverse impact on his personal privacy and consent is not given under undue influence.

29. The Commissioner's serious concern regarding taking of fingerprints from minors is obvious from the following strongly worded paragraph in his Guidance Note:

"For data subjects who are of tender age, it is objectionable from the perspective of personal data protection that they be exposed to acts or practices that devalue privacy which may make them less aware of the data privacy risks that may impact upon them in later life. In other situations where a special relationship exists, the data subject should be sufficiently informed of the adverse impact on personal data privacy brought about by the collection of fingerprint data and be given a fair option to choose between giving or withholding the data. The decision of the data subject should be respected. The data user would do well to put itself in a position to dispel any reasonable suspicion of undue influence due to the disparity in bargaining powers."

30. In our opinion, the considerations set out by the Commissioner in the Guidance Note although expressed to be of general guidance, are there to be observed by data users who intend to collect fingerprint data, particularly when collecting from a person of tender age. Failure to observe these guidance notes may result in a contravention of a

requirement of the Ordinance e.g. collection of personal data by fair means. A data user who fails to do so may be unfavourably considered by the Commissioner in the event of a complaint against him by the data subject. Obviously the Commissioner in refusing to investigate the appellant's complaint, had not gone into considerations such as what safe guards were there to ensure a minor is not subject to undue influence when his fingerprint data were collected by the Police, bearing in mind the disparity of bargaining powers between them. It may well be that there were other options for dealing with an application for the certificate by a minor without the need of fingerprint data. But these matters were never explored. We do not think that simply because fingerprint data are necessary by the Police for the purpose of identification, the Commission is justified to refuse to investigate into the matter. The Commissioner should have considered the question he had set for himself in the Guidance Note in the light of the circumstances of the appellant's case:

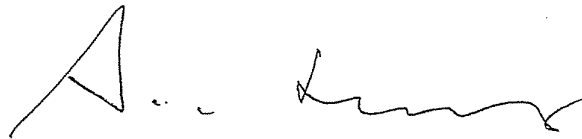
“ Is the collection of fingerprint data disproportionate to the degree of intrusion into personal data privacy in attaining the purpose of collection?”

31. On the question of charging a \$50 fee by the Police, section 28 of the Ordinance provides that a data user may impose a fee for complying with a data access request provided that the fee is not excessive. In the present case, the Police had not complied with the appellant's request and no fee had been or should be charged. Whether the fee stated by the Police is excessive has become purely academic and is not a matter we need to go into in this appeal.

32. As to mediation, it is not mandatory for the Commissioner to mediate between a complainant and the person complained of. It may well be in the present case that mediation by the Commissioner between the appellant and the Police on his requests might have come to a conclusion to the advantage of all concerned. Such a conclusion might have given the Police better insight of the requirements of the Ordinance and persuaded them to review their policies on the issues in this appeal. Nevertheless, it is for the Commissioner to decide whether mediation should be carried out.

33. It remains for us to say that notwithstanding the discretion of the Commissioner under section 39 of the Ordinance to refuse to investigate or continue to investigate a complaint for any reason, for the reasons stated above, the Commissioner was unreasonable in refusing to continue his investigation into the appellant's complaint.

34. Accordingly, we allow the appeal and remit the case to the Commissioner to continue his investigation.



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