

[Note: Office of the Privacy Commissioner for Personal Data has edited this Decision. Please see the remark for details.]

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 20 of 2009

BETWEEN

TSANG SUK WING

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 22 December 2009

Date of handing down Written Decision with Reasons: 13 January 2010

DECISION

This is an appeal by Madam Tsang Suk Wing (“the Appellant”) against the decision of the Privacy Commissioner for Personal Data (“the Respondent”) not to make further investigation into the Appellant’s complaint. The appeal was scheduled to be heard on 22nd December 2009. After waiting for 15 minutes we still could not find the Appellant.

Proof of Service

2. Miss Anna Chan, Secretary to this Administrative Appeals Board, affirmed in punti dialect and confirmed that she had sent the notice of hearing dated 29th October 2009, as the one appears on page 239 of the hearing bundle, in a prepaid, sealed envelope by registered post on 30th October 2009 to the Appellant at the address of * (see remark below)

The Certificate of Posting relating to the letter sent was produced as exhibit "A". There is no return of that Notice or the envelope.

3. We are satisfied that the Notice of Hearing has been sent to the Appellant pursuant to Section 29 of the Administrative Appeals Board Ordinance (Cap 442) and that the Appellant is deemed to have notice of the hearing.

Decision on hearing

4. As the Appellant is absent, the Board proceeds to consider that the three options open under Section 20(1) of the Ordinance. The parties that have appeared before this Board do not make any comment and leave it to the Board to decide.

5. The Board does not have any information that the Appellant is ill or is absent due to any other reasonable cause that she is barred from attending. As the subject matter of complaint first occurred in the year 2006 and it has been with the Appellant for more than three years, it is only proper that the matter should not be dragged on any further. The

Board considers it right to proceed to hear the case under Section 20(1)(b) without further delay.

Facts of the case

6. The Appellant received three letters (“Invitation Letters”) inviting the Appellant to apply for American Express Gold Card or American Express Cathay Pacific Credit Card as the case might be, one after another, in the months of November 2006, June 2008 and November 2008 respectively notwithstanding that she had chosen to opt out from the mailing list of American Express (“AE”).

7. On 9th December 2008 she complained to the Respondent who carried out certain preliminary investigation. On 25th June 2009 the Respondent informed the Appellant that he had decided not to carry out further investigation and gave his reasons for the decision. The Appellant feels aggrieved and hence this appeal.

AE’s Account

8. In November 2006 the Appellant received the 1st Invitation Letter jointly signed by AE and Asia Miles inviting her to apply for the AE Gold Card. AE admitted that on 27th December 2006 they received a telephone call from a certain Mr. Ching who claimed to be the husband of the Appellant and asked AE to stop sending further marketing materials to the Appellant. AE acted accordingly and removed the name of Sherry Tsang from its mailing list.

9. In June 2008, nearly one and half year after the above incident, AE sent a marketing letter jointly signed by American Express and Cathay Pacific Airways promoting the American Express Cathay Pacific Credit Card (the 2nd Invitation Letter”) to the Appellant in the name of Tsang Suk Wing. The Appellant received it and responded to it by making the application for the Card in July 2008. Unfortunately, her application was turned down. On 3rd September 2008 the Appellant in the name of Sherry Tsang gave a complaint letter to AE and the gist of it is best reflected by quoting paragraph 2 thereof:

“Your company was requested and agreed not to send any invitation letters and application forms to me except you have thoroughly checked that I am entitle to apply the new credit cards...”

10. AE took note of it and removed both names of the Appellant i.e. Tsang Suk Wing and Sherry Tsang from its mailing list.

11. In November 2008, about two months after the letter of complaint, the Appellant received the 3rd Invitation Letter again jointly signed by American Express and Cathay Pacific Airways promoting the American Express Cathay Pacific Credit Card.

AE’s explanation

12. The AE’s explanation is as follows:

- (a) The 1st Invitation Letter was sent by Asia Miles, the joint promotion partner, and AE had no knowledge that it had been sent to the Appellant until it was informed by her. It had acted upon her request and removed her name “Sherry Tsang” from the mailing list.

- (b) At the time of sending the 2nd Invitation Letter, AE was not aware that Sherry Tsang was the same person as Tsang Suk Wing. The latter name was not removed from its mailing list. It was due to ignorance of the fact that the 2nd Invitation Letter was sent to the Appellant.
- (c) The 3rd Invitation Letter was sent by Asia Miles; it did not have knowledge that it had been sent to the Appellant.
- (d) There was no willful neglect on the part of AE ignoring the Appellant's opt-out request. AE had promptly carried out and acted upon her request.
- (e) AE was of the view that unless the Appellant also opted out from the mailing list of Asia Miles there was no way that she did not receive any joint promotion material of AE and Asia Miles.

The Respondent's Decision

13. After investigation the Respondent came to the following conclusions:

- (a) Sending the 2nd Invitation Letter was an isolated incident and thereafter AE has included the two names of the Appellant in its opt-out list. The Respondent did not intend to take any further action in respect of this.
- (b) As to the 3rd Invitation Letter, the Respondent found that "American Express should be liable for the sending of the marketing mail to you (i.e. the Appellant) contrary to your (i.e. the Appellant's) opt-out request" (paragraph 15 of Reasons for decision at page 110 of the hearing bundle). On 25th June 2009

The Respondent issued a letter to AE containing a warning that any contravention might lead to serious consequence.

- (c) The Respondent has taken all remedial measures by requesting Asia Miles not to send further marketing material to the Appellant.
- (d) The Respondent is of the view that “no better result could be achieved by a full investigation of the case”.

Discussion and Analysis

14. This Board agreed with the Respondent that AE had done what it should have done, though rather belatedly on 29th April 2009 informing Asia Miles of the Appellant’s intention to opt out from the AE list. Whether it is effective to remove the Appellant’s name from the Asia Miles list is not a subject we should consider as the Appellant has no intention to opt out from Asia Miles.

15. We accept that the 2nd Invitation Letter was sent to the Appellant because AE was not informed that Sherry Tsang had another name. The Appellant’s husband told AE that the Appellant’s name was “Sherry Tsang” and the name of Tsang Suk Wing was not disclosed. Under such circumstances would a cross check with Asia Miles using the name “Sherry Tsang” and her Asia Miles number assist and reveal the other name of the Appellant “Tsang Suk Wing”? We have no evidence that such check had been carried out before the 2nd Invitation Letter was sent.

16. The question is whether the Appellant has the legal obligation to make such cross-checking and to inform the joint promotion partner of the Appellant’s opt-out.

17. According to the “Personal Data Privacy: Guidance on Cross-Marketing Activities” (the “Guidance Note”) issued by the Office of the Respondent, “cross-marketing” is defined as “the practice whereby:

- The personal data of customers (including ex-customers) held by one company “A” are transferred or disclosed to another company “B” for the purpose of conducting activities in the nature of a “joint marketing scheme”;...”

18. We have no evidence that the Asia Miles data have been transferred or disclosed to AE or vice versa. We do not know whether the joint promotional exercise carried out by AE and Asia Miles falls within the meaning of cross-marketing as defined above and is governed by the Guidance Note.

19. For this reason we are not as positive as the Respondent who has found in paragraph 15 of his Reasons for decision that “as the marketing letter was jointly signed by American Express and Asia Miles, American Express **should** be liable for the sending of the marketing mail to you (i.e. the Appellant) contrary to your (the Appellant’s) opt-out request.” (emphasis and brackets provided).

20. However, in paragraph 15 of the Respondent’s Statement relating to the decision dated 12th August 2009, the stance has been slightly changed: “American Express **could** be liable for the sending of the Third Invitation contrary to the Opt-out Request, even though it was sent by Asia Miles” (emphasis provided).

21. Mr. Wilson Lee, Legal Counsel for the Respondent, at the hearing admitted that he was not sure whether the joint promotion scheme carried

out by AE and Asia Miles was included as cross-marketing for the purpose of the Guidance Note.

22. In principle, the Respondent should at least make further investigation into this aspect. But, we accept the Respondent's view that "no better merit could be achieved by a full investigation of this case" as AE has informed Asia Miles that the Appellant has chosen to opt out from the mailing list.

23. We accept that AE has no deliberate intention of ignoring the Appellant's request for opting out. The 3rd Invitation Letter was sent to the Appellant by Asia Miles without knowing that the Appellant had chosen to opt out from the AE mailing list. Even if Asia Miles had known that, under the existing circumstances it is doubtful that it would be effective because the Appellant had not chosen to opt out from the Asia Miles mailing list.

Conclusion

24. For the above reasons, we have no dispute with the Respondent's decision not to carry out further investigation into the complaint and unanimously decide to dismiss this appeal. However, we have the following observations for the Respondent to consider.

Observations

25. As indicated above we have some reservation whether the Guidance Note is applicable to joint promotion scheme as the present one

assuming that there is no transfer or disclosure of personal data of one company to another.

26. Where a joint promotion partner has been informed of the data subject's intention to opt-out, should that promotion partner check more carefully with its other promotion partners the particulars of the data subject e.g. his full name and other names etc? Should it also have the duty of informing all other promotion partners?

27. Is it possible to have partial opt-out in case of joint promotional scheme? For example, if there are 2 promotion partners to the scheme as in this case, could the data subject simply opt out from A company without opting out from the other with the result that she will not receive any promotion material concerning A company? In other words, she will remain in B company mailing list but any promotion material concerning A company will not be sent to her by B company.



(Mr Christopher Chan Cheuk, BBS)
Chairman
Administrative Appeals Board

* The Appellant's address was edited out.