

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 22 of 2009

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BETWEEN

LEUNG SAU KWAN

Appellant

and

THE PRIVACY COMMISSIONER  
FOR PERSONAL DATA

Respondent

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Coram: Administrative Appeals Board

Date of Hearing: 3 March 2010

Date of handing down Decision with Reasons: 9 July 2010

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**DECISION**

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**Appeal**

1. This is an appeal by the Appellant against the decision (“**Decision**”) by the Privacy Commissioner of Personal Data

(“**Commissioner**”), as stated in a letter dated 14 July 2009, whereby the Commissioner decided that he would not exercise his statutory power to carry out or to continue investigation on a complaint lodged by the Appellant on 7 April 2009 (“**Complaint**”).

2. The Appellant is a woman police officer. In October 2005, Senior Inspector Madam Keung was the Appellant’s superior.
3. In 2005, the Appellant was nominated to participate in a “T”-team special force training, and was required by the police force to attend a medical examination. In September 2005, the Appellant duly attended a medical examination at the clinic (the “**Clinic**”) of Dr. William Chen (“**Dr Chen**”).
4. In the Complaint, the Appellant alleged that Madam Keung had wrongfully requested or procured the Clinic to fax an unsigned medical report (the “**unsigned Medical Report**”) to the report room of the Sau Mau Ping Police Station (the “**Police Station**”). The Medical Report contained personal data of the Appellant. According to the Appellant, the Medical Report had been left lying openly in the report room, and people in the report room was able to read the same.
5. The Appellant further alleged that the Commissioner of Police (“**Police Commissioner**”) had wrongfully retained the Medical Report (which she claimed was wrongfully obtained in the first

place) in the files pertaining to her. She claimed to have seen the unsigned Medical Report again during a disciplinary hearing held in 2007, and subsequently during an interview on 7 September 2008.

6. In short, the complaint of the Appellant is two-fold:
  - (a) against Madam Keung, for allegedly obtaining and disclosing the Medical Report on 19 October 2005, without her prior knowledge or consent (“**Complaint 1**”);
  - (b) against the Police Commissioner, for retaining or continuing to retain the unsigned Medical Report (“**Complaint 2**”) for a time longer than is necessary.

### Complaint 1

7. It may be noted from the above that the alleged faxing of the Medical Report to the report room of the Police Station took place on 19 October 2005. However, the Appellant only made the Complaint to the Commissioner on 7 April 2009, some 3 & 1/2 years after the event.
8. S.39(1)(a) of the Privacy Ordinance provides as follows:

*“(1) Notwithstanding the generality of the powers conferred on the Commissioner by this Ordinance, the Commissioner may refuse to carry out or*

*continue an investigation initiated by a complaint if-*

*(a)the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) has had actual knowledge of the act or practice specified in the complaint for more than 2 years immediately preceding the date on which the Commissioner received the complaint, unless the Commissioner is satisfied that in all the circumstances of the case it is proper to carry out or continue, as the case may be, the investigation;”*

9. There is no doubt that on the Appellant’s own case, she had had knowledge of the alleged faxing of the unsigned Medical Report on 19 October 2005, as she had personally seen the faxed unsigned Medical Report on that day. Accordingly, the Appellant had had knowledge of the act specified in the Complaint for more than 2 years preceding the date on which the Commissioner received the Complaint.
  
10. In Administrative Appeal No. 11 of 2009, this Board held, in reference to the interpretation of s.39(1)(a) of the Privacy Ordinance, as follows:

*“In our view, the intention of s.39(1)(a) is to prevent delay on the part of the complainant who might choose to sit on his complaint by failing to make it until long after the event. It may cause serious injustice to the person against whom the complaint is made (“**the complained person**”) if a complainant delays in making the complaint despite*

*having knowledge of the acts complained of. Such delay may cause difficulty to the complained person in terms of collecting or marshalling evidence in his defence – for example, witnesses who may otherwise be available to give evidence may have disappeared and can no longer be found. Even if witnesses are not lost, memory will lapse as time passes, and it is generally not conducive to the making of an effective or efficient investigation if the Commissioner is required to investigate into complaints that are made long after the event. It is in the nature of privacy complaints that they should be investigated upon timeously. Obviously, in enacting s.39(1)(a), the intention of the legislature is to balance the interests of the complainant and the complained person, and to avoid the practical difficulties that are likely to result from requiring the Commissioner to carry out investigation on “stale” claims. The complainant is given 2 years to make his complaint from the time when he acquires knowledge of the act or practice complained of. If he fails to do so, the Commissioner may refuse to carry out or continue an investigation unless he is satisfied that in all the circumstances, it is proper to carry out or continue the investigation.*

*There is no doubt that under s.39(1)(a) the Commissioner has a discretion. But it is discretion which the Commissioner is required to exercise having regard to all the circumstances of the case. Unless he is satisfied that despite the delay for more than 2 years, it is nonetheless proper to carry out or continue an investigation, the Commissioner is entitled to refuse to make the investigation.”*

11. We would adopt the interpretation of this Board in Administrative Appeal No. 11 of 2009 as the correct

interpretation of s.39(1)(a). In the present case, no reason at all has been given by the Appellant for not making her complaint against Madam Keung until almost 3&1/2 years after the event. The Commissioner is not satisfied that despite the delay, it is nonetheless proper to carry out an investigation. We agree. It would be most unfair to Madam Keung to require her to meet an investigation after such a long period of delay, and for the reasons given by this Board in Administrative Appeal No. 11 of 2009, the imposition of the time limit of 2 years by the legislature under s.39(1)(a) is clearly directed to preventing the injustice that is likely to be caused to the complained person by a stale claim made long after the event. In the present case we agree with the Commissioner that there is no good reason why he should carry out an investigation into Complaint 1 after such a long delay.

## **Complaint 2**

12. Schedule 1 of the Privacy Ordinance sets out the Data Protection Principles (“DPP”) required to be complied with by a data user (by virtue of s.4 of the Privacy Ordinance). DPP 2(2) provides that “Personal data shall not be kept longer than is necessary for the fulfilment of the purpose (including any directly related purpose) for which the data are or are to be used”.

13. As pointed out above, the Appellant was required by the police force to attend the medical examination after she had been nominated to attend a "T"-team special force training. Obviously the *purpose* of the medical examination was to ascertain the health or medical condition of the Appellant. The health or medical condition of the Appellant is an important piece of information to the police force. Decisions that may be made by the police force on the Appellant's deployment, training, promotion and allocation may have to be made having regard to the Appellant's health condition. The work of a police officer may involve strenuous physical assertion, and whether the Appellant is physically fit to undertake particular duties or training is an important piece of information to the police force. For example, in deciding whether the Appellant is a suitable candidate for the "T"-training mentioned above, regard should obviously be given to her physical fitness for such training. A responsible employer can only make appropriate decisions with regard to its employee by taking into account all the relevant circumstances concerning the employee, including his or her health condition.
  
14. Accordingly, the results and findings of the Appellant's medical examination are clearly information which the Police Commissioner is entitled to retain so long as the Appellant remains as a member of the police force. Retention of such information by the Police Commissioner, for as long as the Appellant remains a police officer, is necessary and reasonable.

Such information constitutes one of the most basic information that an employer is entitled to keep for the purpose of the employment relationship. In our view, the retention of such information by the Police Commissioner does not infringe DPP 2(2). To adopt the statutory language used in DPP 2(2), the keeping of the personal data is necessary for the fulfilment of the purpose for which the data are to be used, namely, for the purpose of making employment decisions with regard to the Appellant while she is employed by the police force.

15. As we understand the submission of Mr Lai, who represents the Appellant during the hearing, the Appellant's case is that the Police Commissioner should not have retained the unsigned Medical Report as the same had been wrongfully faxed to the Police Station in the first place. When the Appellant attended the medical examination, she had signed a health declaration (dated 8 September 2005) in which she declared, inter alia, that:

*“I hereby authorise Quality HealthCare Medical Services Ltd. [which we understand was the operator of the clinic] to give full particulars of the results of the physical examination including prior medical history, to the Personnel Wing of the Hong Kong Police Force which sent me here for this examination. A copy of this authorisation shall be valid as the original.”*

16. Mr Lai submitted that the authority given by the Appellant to the clinic was that it may release the results of the Appellant's medical examination to “the Personnel Wing of the Hong Kong



Police Force” only. The Appellant had not authorised the faxing of the unsigned Medical Report to the Police Station. Mr Lai further pointed out that even according to the document (HQO No. 5/2008) setting out the police’s standard procedure for medical examination of its officers, the medical report should only be faxed (by the “contractor” carrying out the medical examination) to the Chief Inspector (Administration) of the relevant district (in this case, Kowloon East), and not directly to the Police Station. The faxing of the unsigned Medical Report directly to the Police Station accordingly amounted to an unauthorised disclosure of the Appellant’s personal data.

17. The Appellant might well have a case for unauthorised disclosure of her personal data if she had made a complaint against the clinic or Dr Chen within the time limit allowed by s.39(1)(a) of the Privacy Ordinance. Indeed the Appellant had made such a complaint (the “**Former Complaint**”) against Dr. Chen before, and had lodged an appeal in respect of the Former Complaint. The Board had heard and determined the appeal in relation to the Former Complaint separately (in Administrative Appeal no. 11 of 2009 mentioned above). The Board had dismissed the Appellant’s appeal in that case on the ground that the Commissioner was correct in refusing to carry out or continue an investigation by reason of the delay of the Appellant in lodging the Former Complaint. If the Appellant had not delayed in lodging the Former Complaint, the question

of unauthorised disclosure could well have been investigated promptly and expeditiously. The Commissioner did not refuse to carry out investigation of the Former Complaint because he took the view that the Former Complaint was otherwise totally devoid of merits. He refused to carry out investigation only because of the substantial delay of the Appellant in lodging the same.

18. In the present appeal, however, we are concerned with a very different issue. In considering Complaint 2, we are not concerned with what happened on 19 October 2005. Rather, we are concerned with the question whether the *subsequent* retention by the Police Commissioner of the unsigned Medical Report contravenes the provisions of the Privacy Ordinance (in particular DPP 2(2)). For that reason, Complaint 2 is not susceptible to the objection of delay (as in Complaint 1). The issue relevant to Complaint 2 is entirely different.
  
19. Presently the Police Commissioner is keeping 2 reports relating to the Appellant's medical examination – the unsigned Medical Report mentioned above as well as a signed Medical Report subsequently provided by the clinic and signed by Dr Chen (the “**signed Report**”). As far as the signed Medical Report is concerned, for reasons already set out above (see, paragraphs 13 & 14 above) we are of the clear view that the Police Commissioner is entitled to retain the same so long as the Appellant remains a member of the police force.

20. We have compared the unsigned Medical Report and the signed Report. We note that, apart from the page which contains Dr Chen's signature, which is found in the signed Report but not the unsigned Medical Report, the contents of the 2 reports are effectively the same. In other words, all the personal data relating to the Appellant contained in the unsigned Medical Report are already contained in the signed Report.
  
21. In these circumstances, if there could be no valid objection to the Police Commissioner keeping the signed Report – and all the personal data of the Appellant contained therein – we see no reason at all why the keeping of the unsigned Medical Report by the Police Commissioner can be objectionable on any ground. The same personal data is retained by the Police Commissioner, whether under the signed or the unsigned report.
  
22. Accordingly, whether or not the faxing of the unsigned Medical Report to the Police Station constituted an unauthorised disclosure of the personal data of the Appellant, the Police Commissioner is entitled to retain the said personal data for the purpose mentioned above, namely, for the purpose of keeping record of the Appellant's medical condition so that appropriate decisions could be made in the course of the Appellant's employment in regard to her deployment, allocation, training and promotion etc. Keeping record for such legitimate purpose

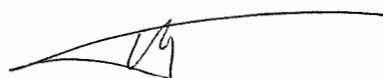
(for so long as the Appellant remains in the employment of the police force) involves no contravention of the Privacy Ordinance.

23. As the unsigned Medical Report and the signed Report are effectively the same in contents, the Police Commissioner has indicated to the Commissioner that he would not object to the removal or deletion of the unsigned Medical Report from the files that he keeps pertaining to the Appellant. However, the Appellant has indicated to the Commissioner that she does not agree to the removal or deletion of the unsigned Medical Report by the Police Commissioner. At the hearing, Mr Lai informed us that the reason why the Appellant objected to the removal or deletion was that the Appellant wanted to preserve the evidence of the Police Commissioner's alleged wrongful act.
  
24. Whatever might be the reason of the Appellant's objection to the Police Commissioner's proposal to remove or delete the unsigned Medical Report from his files, we are of the view that the Police Commissioner is entitled to keep the personal data of the Appellant relating to her health and medical condition for so long as the Appellant stays as a member of the police force. We are of the view that there are no reasonable grounds to believe that the Police Commissioner has done any act or engaged in any practice that may constitute a contravention of the requirements of the Privacy Ordinance. The Commissioner

is accordingly entitled not to carry out any investigation into Complaint 2 under s.38 of the Privacy Ordinance. Alternatively, as there is no reason to think that any further investigation would lead to any result or finding which would cause the Commissioner to take any action in this case, the Commissioner is entitled to exercise his discretion under s.39(2)(d) of the Privacy Ordinance to refuse to carry out or continue investigation into Complaint 2.

**Decision**

25. For reasons set out above, we are of the view that the Commissioner was correct in refusing to carry out or continue investigation into Complaints 1 and 2. We will accordingly dismiss the Appellant's appeal.



(Mr Horace Wong Yuk-lun, SC)

Chairman

Administrative Appeals Board