

ADMINISTRATIVE APPEAL NO. 23/2016

BETWEEN

李景文

Appellant

and

PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board
Mr Douglas LAM Tak-yip, SC (Deputy Chairman)
Ms Joan HO Yuk-wai (Member)
Mr SO Yiu-wing (Member)

Date of Hearing: 23 November 2016

Date of Handing down Written Decision with Reasons: 29 June 2018

DECISION

A. Introduction and Background

1. By a Notice of Appeal dated 2 May 2016, the Appellant, Mr Lee King Man (“**Mr Lee**”), appeals to the Administrative Appeals Board (the “**Board**”) pursuant to section 39(4) of the Personal Data (Privacy) Ordinance (Cap 486) (the “**PDPO**”) against a decision of the Privacy Commissioner for Personal Data (the “**Commissioner**”) dated 2 March 2016 (the “**Decision**”), whereby the Commissioner not pursued Mr Lee’s complaint further pursuant to Section 39(2)(d) of the PDPO and paragraph 8(e) and (g) of the Commissioner’s Complaint Handling Policy (the “**CHP**”).

2. First of all, the Deputy Chairman of the Board sincerely apologises to the parties for the delay in issuing this Written Decision, the fault for which lies solely with him due to his other professional commitments.

3. The background of the matter is set out in the preface to the Commissioner's reasons for the Decision (the "**Commissioner's Reasons**"), and may be summarised briefly (with some minor supplementation) as follows:

(1) Mr Lee is and was at all material times an active duty officer of the Hong Kong Police Force (the "**Police**"). On 4 October 2012, the Police obtained a search warrant from a magistrate (the "**1st Warrant**") against the Hong Kong Jockey Club (the "**Club**") for records relating to Mr Lee's betting account with the Club for the period from 27 December 2011 to 10 March 2012. The purpose of the warrant was to assist in the Police's investigation of Mr Lee on the suspicion that he may have been illegally receiving gaming bets (the "**Criminal Investigation**");

(2) According to the Police, there was apparently a clerical mistake in the 1st Warrant, and the period of the records which the Police intended to seek was from 27 December 2011 to 3 October 2012 (being the day before the 1st Warrant) rather than to 10 March 2012. No application was made to the magistrate to amend the 1st Warrant or to obtain a new warrant to cover the omitted 7-month period (the "**Additional Period**"). Rather, the Police informed the Club of the clerical mistake, and on 19 October 2012, the Club provided to the Police Mr Lee's betting records specified in the 1st Warrant as well as the records for the Additional Period, on a voluntary basis;

- (3) Subsequently, the Police obtained from the magistrate a further search warrant on 10 January 2013 for Mr Lee's betting records with the Club covering the period from 4 October 2012 to 31 December 2012 (the "**2nd Warrant**");
- (4) Upon the completion of the Criminal Investigation, the Police concluded that there was insufficient evidence to prosecute Mr Lee for any criminal offence. However, the Police was of the view that Mr Lee's conduct may have contravened Police disciplinary regulations within the meaning of Regulation 3(2)(e) of the Police (Discipline) Regulations (Cap 232A) - in particular, breach of section 6-01(42) of the Police General Orders (made by the Commissioner of Police pursuant to his powers under section 46 of the Police Force Ordinance (Cap 232) (the "**PFO**")) which relates to the use of personal mobile phones by police officers whilst on duty;
- (5) The Police subsequently instituted disciplinary proceedings against Mr Lee (the "**Disciplinary Proceedings**"), and in those proceedings, the Police used and relied upon the betting records obtained from the Club. Mr Lee was eventually found guilty of the disciplinary charges brought against him and disciplined accordingly;
- (6) On 16 December 2015, Mr Lee lodged a complaint with the Commissioner on the grounds that he was dissatisfied that the betting records obtained by the Police in the Criminal Investigation had been used in the Disciplinary Proceedings without his consent;

(7) Upon receipt of Mr Lee's complaint, the Commissioner made inquiries with the Police. The Police informed the Commissioner that the Police had sought legal advice from the Department of Justice concerning the use of the said records. The Police concluded that the said records fell within the exemptions contained in sections 58(1)(d) and 58(2) of the PDPO and it was thus entitled to use the same for the purposes of the Disciplinary Proceedings, without Mr Lee's consent.

4. After making enquiries and considering Mr Lee's complaint, the Commissioner terminated his investigation and, as mentioned above, issued the Decision on 2 March 2016. The Commissioner's Reasons were as follows:

(1) Data Protection Principle (DPP) 3 (contained in Schedule 1 of the PDPO) provides that, inter alia:

(1) Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose.

...

(4) In this section – new purpose, in relation to the use of personal data, means any purpose other than –

(a) The purpose for which the data was to be used at the time of the collection of the data; or

(b) A purpose directly related to the purpose referred to in paragraph (a).

(2) However, section 58(2) of the PDPO provides that inter alia:

Personal data is exempt from the provisions of data protection principle 3 in any case in which-

- (a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data is held for any of those purposes); and
- (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection,

and in any proceedings against any person for a contravention of any of those provisions it shall be a defence to show that he had reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of those matters.

Section 58(1)(d) of the PDPO refers to:

Personal data held for the purposes of –

...

- (d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;
- (3) The Police had a duty to institute disciplinary proceedings against those officers who are suspected to have violated disciplinary regulations, so as to ensure that a high standard is maintained for police officers, which is in the public interest. It was unrealistic for the Police to have obtained Mr Lee's consent before it could use his personal data for the purposes of investigating whether any disciplinary offence had been committed. The Commissioner therefore accepted that the exemption in section 58(2) of the PDPO was applicable to the present situation;
- (4) As to whether the records should have been admitted as evidence in the Disciplinary Proceedings, that was not a matter which fell within the purview of the Commissioner. If Mr Lee was

dissatisfied with the outcome of the Disciplinary Proceedings, there were proper avenues of appeal. The Commissioner's complaint mechanism should not be used for the purpose of influencing decisions made in those proceedings. In any event, the Commissioner's decision to terminate the investigation would have no effect on Mr Lee's right to appeal the decision in the Disciplinary Proceedings.

5. Mr Lee's grounds of appeal as contained in the Notice of Appeal may be summarised as follows:

- (1) The Police changed the usage of his personal data obtained from the Club for the purposes of the Criminal Investigation to the Disciplinary Proceedings without the consent of the Club or himself, nor did it "apply for any exemption". It was only upon his objection that the Police obtained urgent advice from the Department of Justice (the "**Change of Use Ground**");
- (2) The exemptions contained in sections 58(1)(d) and 58(2) of the PDPO are inapplicable in this case as they relate only to breaches of Hong Kong law, as opposed to merely disciplinary offences (the "**Exemptions Ground**");
- (3) In communications with Mr Lee, the Police disseminated personal data of other individuals to Mr Lee, including names, Hong Kong identity card numbers, and other private information (the "**Dissemination Ground**");

- (4) The Police obtained Mr Lee’s betting records from the Club for the Additional Period, which fell outside the ambit of the 1st and 2nd Warrants (the “**Additional Period Ground**”); and
- (5) The Commissioner merely accepted the views of the Police and did not fairly conduct a thorough investigation of Mr Lee’s complaint (the “**Lack of Thoroughness Ground**”).

6. We consider below each of Mr Lee’s grounds of appeal in turn. Before we do so, we set out for completeness the relevant principles and legislation in this case.

B. Relevant Principles and Legislation

The PDPO

7. The Commissioner’s power to terminate an investigation and the complainant’s right of appeal are set out in Section 39 of the PDPO, which provides that inter alia:

...

- (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-
 - (a) the complaint, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Commissioner was of the opinion that there had been no contravention of a requirement under this Ordinance;
 - (b) the act or practice specified in the complaint is trivial;
 - (c) the complaint is frivolous or vexatious or is not made in good faith;

- (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.

...

(3A) If the Commissioner decides to terminate an investigation initiated by a complaint before its completion, the Commissioner must, as soon as practicable by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant—

- (a) of the decision; and
- (b) of the reasons for the decision.

(4) An appeal may be made to the Administrative Appeals Board-

- (a) against any refusal or termination specified in a notice under subsection (3) or (3A); and
- (b) by the complainant on whom the notice was served (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person, or either).

8. The conduct of proceedings before this Board is set out in section 21 of the Administrative Appeals Board Ordinance (Cap 442) (the “AABO”) which provides that inter alia:

(1) For the purposes of an appeal, the Board may:

...

- (j) subject to subsection (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit;

(2) The Board, in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the respondent with the Secretary under section 11(2)(a)(ii), if it is satisfied that, at the time of the making of the

decision being the subject of the appeal, the appellant was or could reasonably have been expected to be aware of the policy.

- (3) The Board, on the determination of any appeal, may order that the case being the subject of the appeal as so determined be sent back to the respondent for the consideration by the respondent of such matter as the Board may order.

9. Hence, an appeal before this Board is by way of a *de novo* hearing and determination, and the Board may make confirm, vary or reverse the Commissioner's decision as it thinks fit, or alternatively, the Board may remit the case back to the Commissioner for reconsideration. In making its determination, the Board is required, however, to have regard to any statement of policy lodged by the Commissioner with the secretary of the Board, after having been served with the notice of appeal pursuant to section 10 of the AABO.

10. There is no dispute that the statement of policy referred to in section 21(2) of the AABO includes the CHP. Paragraph 8 of the CHP provides that inter alia:

Section 39(1) and (2) of the Ordinance contain various grounds on which the Commissioner may exercise his discretion to refuse to carry out or decide to terminate an investigation. In applying some of those grounds, the PCPD's policy is as follows:

...

In addition, an investigation or further investigation may be considered unnecessary if:

- (e) after preliminary enquiry by the PCPD, there is no prima facie evidence of any contravention of the requirements under the Ordinance;

...

- (g) the complainant and party complained against are able or should be able to resolve the dispute between them without intervention by the PCPD;

11. DPP 3 and sections 58(1)(d) and 58(2) of the PDPO have already been set out above. We have referred also to relevant legislation and regulations concerning the Police, which we set out here for completeness:

Section 46 of the PFO:

- (1) Subject to subsection (2), the Commissioner may from time to time make such orders as he thinks expedient to enable him to administer the police force, render the police force efficient in the discharge of its duties and for carrying out the objects and provisions of this Ordinance, and in addition, such orders may provide for any of the matters specified in section 45 [which concerns police regulations].
- (2) Any orders made under this section shall be called “police general orders” (警察通例) and shall not be inconsistent with this Ordinance or any regulations under section 45.

12. Regulation 3 of the Police (Discipline) Regulations (Cap 232A) provides inter alia:

- (1) Any inspector or junior police officer who commits any disciplinary offence specified in paragraph (2), and –
 - (a) pleads guilty before an appropriate tribunal; or
 - (b) is found guilty by an appropriate tribunal,may be punished by such tribunal in accordance with these regulations.
- (2) The offences against discipline are –
 - ...
 - (e) contravention of police regulations, or any police orders, whether written or verbal;

13. Finally, section 6-01(42) of the Police General Orders provides as follows:

6-01 Conduct

...

42. A police officer on duty is expected to concentrate on his / her duties. An officer may carry and is permitted reasonable use of private communications equipment, such as mobile phones and devices with electronic data storage capability, but shall observe the following:-

- (a) the use of such does not interfere with the discharge of the officer's duties;
- (b) the manner or purpose of such use does not tarnish the Force image; and
- (c) when in uniform such equipment is kept on silent / vibrate mode and concealed to ensure it does not detract from the officer's overall appearance.

C. Discussion

14. In summary, we agree with the Decision and the Commissioner's Reasons, and none of Mr Lee's grounds of appeal is in fact sustainable.

Change of Use and Exemptions Grounds

15. These grounds go hand in hand. The Commissioner does not dispute, whether in the Decision or in this appeal, that the use of the betting records obtained from the Club in the Disciplinary Proceedings amounted to use for a new purpose in DPP 3, subject to the question of whether the records are exempt from DPP 3 by reason of sections 58(1)(d) and 58(2) of the PDPO.

16. It should be mentioned here that if the new purpose for which the betting records are used falls within sections 58(1)(d) and 58(2) of the PDPO, then the data is automatically exempt from DPP 3, and there is no need on the part of the

data user, in this case, the Police, to make any “application for exemption”, as contended by Mr Lee.

17. We would mention here that section 60B of the PDPO provides that:

Personal data is exempt from the provisions of data protection principle 3 if the use of the data is—

- (a) required or authorized by or under any enactment, by any rule of law or by an order of a court in Hong Kong;
- (b) required in connection with any legal proceedings in Hong Kong; or
- (c) required for establishing, exercising or defending legal rights in Hong Kong.

It is at least arguable that police disciplinary proceedings may fall within the meaning of “establishing, exercising or defending legal rights in Hong Kong”, in which case, the use of data in those proceedings would be exempt from DPP3. In *Lam Siu Po v Commissioner of Police* (2010) 12 HKCFAR 237, Bokhary PJ observed at paragraph 24 that,

“In my view, disciplinary proceedings – whether in respect of professions, disciplined services or occupations – are determinations of rights and obligations in suits at law within the meaning of art.10 [of the Bill of Rights]”;

However, as the issues were not raised by the Commissioner in the Decision or this appeal, we shall say not more about them here.

18. Hence, the main issue in this appeal is whether:

- (1) The use in the Disciplinary Proceedings of betting records obtained from the Club in the Criminal Investigation was for the purpose of the prevention, preclusion or remedying (including punishment) of

unlawful or seriously improper conduct, or dishonesty or malpractice; and

- (2) The application of the provisions in DPP 3 would be likely to prejudice any of the matters referred to above, i.e. the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice;
- (3) Alternatively, the Police had reasonable grounds to believe that failure to use the betting records for the Disciplinary Proceedings would have been likely to prejudice any matters referred to above.

19. In respect of (1) above, as mentioned, Mr Lee contends that the exemptions are inapplicable in this case as they only relate to breaches of Hong Kong law, as opposed to merely disciplinary offences. This contention is plainly unsustainable given that section 58(1)(d) of the PDPO expressly refers not only to “unlawful” conduct, but also to “seriously improper conduct, or dishonesty or malpractice, by persons...”.

20. In the Decision, the Commissioner did not specify precisely which part of section 58(1)(d) was relied upon. In the appeal, however, the Commissioner submitted that the disciplinary offence in question amounted to at least “seriously improper conduct”. Hence, if the (then suspected) disciplinary offence falls within this category, then it would be unnecessary to consider whether the conduct was “unlawful” or “dishonest” (no dishonesty has in any event been alleged).

21. Whether conduct would amount to seriously improper conduct depends on the facts of each case, although guidance can be found in judicial decisions and decisions of this Board as to the types of conduct that would fall within the

definition. For instance, the following conduct has been held to constitute “seriously improper conduct”:

- (1) Failure to pay a judgment debt pursuant to a judgment of the court (AAB No. 20 of 2010);
- (2) Breach of a tortious duty for failure to maintain a canopy in a safe condition (*Lily Tse Lai Yin & Others v The Incorporated Owners of Albert House & Others* [1999] 1 HKC 386);
- (3) Tort of copyright infringement of musical works (*Cinepoly Records Co Ltd and Ors v Hong Kong Broadband Network Ltd and Ors* [2006] 1 HKC 433);
- (4) Serious indebtedness of an officer of a law enforcement agency contrary to disciplinary guidelines (AAB No. 5 of 2006).

22. However, lesser forms of misconduct have been held not to amount to “seriously improper conduct”, for instance, failure to honour a cheque, without evidence of fraud or dishonesty (AAB No. 14 of 2004).

23. In the present case, Mr Lee’s betting records obtained from the Club have been placed before the Board. A cursory glance at the records shows that Mr Lee was involved in very prolific betting at the Club. For instance, in the 1-year period between December 2011 and December 2012, the individual bets made by Mr Lee numbered in the thousands, and often numerous bets would be placed on a daily basis.

24. It is unclear from the papers before us whether, and if so, how many of the bets were made during the times when Mr Lee was on duty. However, from

the frequency of the bets made, one can only assume that a substantial number of bets would have been placed whilst Mr Lee was on duty, and such bets would presumably have been made using his mobile phone.

25. While there is nothing unlawful or improper about betting at the Club, even if done on a frequent basis, placing bets as a police officer whilst on duty raises altogether different considerations. In our view, Mr Lee's frequent betting whilst on duty using his mobile phone can plainly amount to "seriously improper conduct". Further, it seems to us that if the Police were unable to use the betting records for the purpose of investigating and/or prosecuting disciplinary proceedings against Mr Lee without first obtaining his consent (which is unlikely to have been forthcoming), it would likely prejudice the prevention, preclusion or remedying (including punishment) of such conduct.

26. In any event, it is unnecessary for the Board to come to any concluded view as to whether the failure to use the betting records for the disciplinary proceedings would have been likely to prejudice the prevention, preclusion or remedying (including punishment) of Mr Lee's conduct, given that section 58(2) of the PDPO provides that it shall be a defence for the Police to show that it had reasonable grounds for so believing. In our view, the Police plainly had reasonable grounds for such a belief.

27. In the circumstances, we do not find these grounds of appeal as being sustainable.

Dissemination Ground

28. Mr Lee does not complain in this ground that any of his personal data had been disseminated to others, but rather the data of other individuals had been disseminated to him. There is nothing to suggest that Mr Lee is making the

complaint on behalf of those individuals or that he is authorised to do so. In the circumstances, Mr Lee, not being the data subject, is not entitled to make a complaint under the PDPO. Section 37(1) of the PDPO provides that inter alia:

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 8, may be, the data subject; and
 - (iii) may be a contravention of a requirement under this Ordinance...

29. In the circumstances, and without any comment as to the substantive merit of the complaint (if any), this ground of appeal is unsustainable.

Additional Period Ground

30. As mentioned above, the complaint here concerns the provision by the Club of Mr Lee's betting records for the Additional Period which was not specified in the 1st Warrant (or the subsequent warrants). As a preliminary observation, the Board would note that it would have been preferable, if there had been a clerical error with the 1st Warrant, for the Police to have returned before the magistrate and applied to the warrant. This is especially so given that the Police did apply for a further warrant, but no attempt was made to either amend the 1st Warrant or to include the Additional Period in the subsequent warrant.

31. Mr Lee's complaint is, presumably, that the manner in which the betting records for the Additional Period had been collected by the Police was improper as those records were not covered by the 1st Warrant or the subsequent warrant.

32. The purpose and manner of collection of personal data are addressed in DPP 1, which provides that inter alia:

- (1) Personal data shall not be collected unless-
 - (a) the data is collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;
 - (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and
 - (c) the data is adequate but not excessive in relation to that purpose.

- (2) Personal data shall be collected by means which are-
 - (a) lawful; and
 - (b) fair in the circumstances of the case.

33. There is nothing to suggest that the Police, in obtaining Mr Lee's betting records for the Additional Period, did so other than for a lawful purpose related to the Criminal Investigation. It is also clear that the collection of the records was necessary for or directly related to that purpose and not excessive, having regard in particular to the fact that the Court issued warrants for the preceding and subsequent periods. Had an application been made to amend the 1st Warrant or to obtain a new warrant to include the records for the Additional Period, it is clear (and not suggested otherwise by Mr Lee) that the Court would have granted the same. In the circumstances, there is no unfairness.

34. As to the disclosure of the records for the Additional Period by the Club without being compelled to do so by a warrant, it is also clear to us that the disclosure of those records to the Police, having regard to the 1st Warrant, would

have been exempt from DPP 3 pursuant to sections 58(1)(d) and 58(2) of the PDPO, in that the use of those records (namely, providing the same to the Police), was for the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons.

Lack of Thoroughness Ground

35. In the light of our conclusions above, it is also clear that there is no merit to the Lack of Thoroughness Ground.

D. Conclusion

36. For the reasons above, the appeal is dismissed. We thank all parties for their assistance.

(signed)
(Mr Douglas LAM Tak-yip, SC)
Deputy Chairman
Administrative Appeals Board