

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 24/2015

BETWEEN

TSANG WAI BONG

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr Liu Man-kin (Deputy Chairman)
- Mr Lau Chun-kong (Member)
- Mr Tsang Mo-chau (Member)

Date of Hearing: 8 January 2016 and 1 March 2016

Date of Handing down Written Decision with Reasons: 26 October 2016

DECISION

A. Introduction

1. By a notice of appeal received by the office of the Administrative Appeals Board (“this Board”) on 30 June 2015, the Appellant lodged this appeal (“the Appeal”) against the decision made by the Respondent on 17 June 2015 of

not processing his complaint (“the Complaint”) against The Legislative Council Commission, the Party Bound (“the Decision”).

2. With the approval of the Secretary to the Board given under s.18 of the Administrative Appeals Board Ordinance (Cap. 442) (“AABO”), the Appellant did not appear in the hearing on 8 January 2016 but authorized Ms Kwan Pui Sin to represent him in that hearing. The Appellant attended in person in the hearing on 1 March 2016.

B. The Facts

3. Based upon the uncontroversial evidence before this Board, we find that the facts are as follows.

4. On 20 May 2015, when the Appellant tried to enter the Legislative Council (“LegCo”) Complex, he was requested by a staff member of the LegCo to produce his Hong Kong Identity Card (“HKID Card”) for recording the full HKID Card number. The Appellant produced his HKID Card to the staff and wrote down the first four digits of his HKID Card number on a form provided. The staff refused to let the Appellant enter the LegCo Complex. The Appellant asked the staff for the authority to collect his full HKID Card number. In response, the staff cited section 11 of the Administrative Instructions for Regulating Admittance and Conduct of Persons, Cap. 382A (“the AIs”) which required any person entering or within the precincts of the LegCo Chamber to behave in an orderly manner and comply with any direction given by any staff of the LegCo for the purpose of keeping order. He was finally permitted to enter the LegCo Complex after providing his Mainland Travel Permit for Hong Kong and Macau Residents number to the staff of the LegCo. The Appellant

said that during the whole process, he made it clear to the staff that his purpose of visiting the LegCo Complex was going to the LegCo Library (“the Library”).

5. That day was a Wednesday, on which the Legislative Council had a meeting inside the Chamber of the LegCo Complex.

6. Subsequently, the Appellant lodged a complaint to the Respondent against the collection of his full HKID Card number by the Party Bound.

7. The Respondent requested to see the Appellant’s HKID Card or its copy for the purpose of processing the Complaint, but the Appellant refused to accede to this request. The Respondent told the Appellant that other government-issued documents (e.g. a passport) could also serve as means of identification. The Appellant was not satisfied with this answer and queried why a non-government issued document (e.g. a student card or a staff card) could not be used as means of identification. The Respondent replied and said that a government-issued document was an authoritative document containing data which would be vital and reliable for identification.

8. Having considered the matter, on 17 June 2015, the Respondent wrote to the Appellant to inform him of the Decision. In the letter, the Respondent said:

“Given that there was insufficient information showing that there was a contravention of a requirement under [the Personal Data (Privacy) Ordinance (Cap. 486) (“PDPO”)] on the part of the LegCo Secretariat, and that as of today, we have not received your proof of identity, we cannot proceed this case as a complaint under section 37 of the Ordinance. In the circumstances, no investigation into the manner complained of will be carried out.”

9. Dissatisfied with the Decision, the Appellant lodged the present appeal to this Board.

10. The Respondent has given 2 reasons in support of the Decision:

(a) there is insufficient information showing that there was a contravention of a requirement under the PDPO (“the 1st Reason”);

(b) since the Respondent has not received the Appellant’s proof of identity, the Respondent cannot proceed this case as a complaint under section 37 of the Ordinance (“the 2nd Reason”).

11. We would examine the correctness of these 2 reasons.

C. The 1st Reason

12. The issue here is, based upon the materials before this Board, whether the Party Bound’s arrangement of collecting full HKID Card number of a person going to visit the Library on 20 May 2015 (“the Arrangement”) may contravene a requirement under the PDPO.

13. The Arrangement is a security measure pursuant to the Note on Security Screening Arrangements for Admission to the Legislative Council Complex (“the 2015 Note”) issued by the Party Bound on 1 May 2015. It is provided inside the 2015 Note that:

“2. To enhance the security of the LegCo Complex and to enforce the relevant provisions of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) and the Administrative Instructions for Regulating Admittance and Conduct of Persons (Cap. 382 sub. leg. A) ("AIs"), all persons seeking to enter the LegCo Complex (except persons holding valid access cards issued by the LegCo Secretariat ("the persons concerned")) are required to:

(a) produce their proof of identity (e.g. identity card, travel document) to staff of the LegCo Secretariat for inspection and registration; and

(b) pass through a metal detector archway and have their belongings screened by an X-ray machine at the entrance of the LegCo Complex.

3. For the purposes set out in paragraph 2, staff of the LegCo Secretariat will register:

(a) the names and the numbers of the proof of identity of the persons concerned and their purposes of visit; and

(b) (to protect the interests of the persons concerned who are minors) the information that the persons are under 16.”

Lawfulness of the Arrangement

14. Much time was spent on arguing the lawfulness of the Arrangement. The Appellant submitted that the Arrangement was unlawful. The Respondent and the Party Bound argued otherwise.

15. Having considered all the submissions, we come to the conclusion that the Arrangement is lawful. The legal basis of the Arrangement can be found in the following statutory provisions:

- (a) The Legislative Council Commission Ordinance (Cap. 443) (“LCCO”), s.9(a) and 10(1)(o);
- (b) Common duty of care under the Occupiers Liability Ordinance (“OLO”) (Cap. 314), s.3; and
- (c) AIs, s.3.

LCCO

16. As per LCCO s.9(a), one of the functions of the Party Bound is “*to provide through the Secretariat administrative support and services to the [LegCo].*”

17. It is expressly stated in LCCO s.10(1)(o) that the Party Bound do have the power to “*do such other incidental act or thing or exercise such power as is necessary for the performance of the functions imposed on the Commission under this Ordinance or any other enactment.*”

18. Ensuring the security inside the Legislative Council Complex is an administrative support and service to the LegCo. It is the function of the Party Bound to do so, and it is within the power of the Party Bound to do so.

19. We are of the view that based upon LCCO s.9(a) and s.10(1)(o), it is lawful for the Party Bound to issue the Note and to implement the security measures therein, including the Arrangement.

Common duty of care under OLO s.3

20. Since one of the functions of the Party Bound is to provide through the Secretariat administrative support and services to the LegCo, the Party Bound would have to manage the LegCo Complex. As such, as a matter of law, the Party Bound is an occupier of the LegCo Complex.

21. The Party Bound owes a common duty of care to all the visitors to the LegCo Complex. Such duty is stipulated in OLO s.3(2):-

“The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”

22. The Party Bound therefore has to take reasonable steps to discharge that duty.

23. We are of the view that the Party Bound may issue the Note and implement the security measures mentioned therein, including the Arrangement,

for the purpose of discharging the common duty of care stipulated in OLO s.3(2). The source of power for doing so is LCCO s.10(1)(o).

AIs

24. AIs s.3 provides:-

“Visitors to the precincts of the Chamber, other than those attending public sittings of the Council or a committee, shall apply to an officer of the Council for a pass, and shall display the pass at all times when within the precincts of the Chamber.”

25. AIs s.3 requires all visitors to the precincts of the Chamber (other than those attending public sittings of the Council or a committee) to apply to an officer of the Legislative Council for a pass. Accordingly, pursuant to this section, the Party Bound may stipulate what information a visitor has to provide in applying for such a pass.

26. The Appellant challenged the applicability of AIs s.3 in this case. The Appellant submitted:

(a) As defined in AIs s.1:-

“*plan* (圖則) means:-

(a) a plan of the Building; or

(b) a plan of the precincts of the Chamber,

marked and signed by the Clerk and deposited in the office of the Clerk”

“precincts of the Chamber” (會議廳範圍) means the Chamber and offices of the Council and any adjacent galleries, and places provided for the use or accommodation of members of the public and representatives of the press, radio and television, and subject to any exceptions made by the President includes, during the whole of any day the Council or a committee is sitting, the area marked as such on the plan”

- (b) As neither the Respondent nor the Party Bound has ever produced “the plan”, there was no evidence showing that the Library was within the precincts of the Chamber on 20 May 2015.

27. There is no merit in the Appellant’s challenge. The plain and ordinary meaning of “precincts of the Chamber” in AIs s.1 is that “the Chamber and offices of the Council and any adjacent galleries, and *places provided for the use or accommodation of members of the public* and representatives of the press, radio and television” are precincts of the Chamber. *In addition to the aforesaid*, subject to any exceptions made by the President of the Legislative Council, “during the whole of any day the Council or a committee is sitting, the area marked as such on the plan” is also precincts of the Chamber.

28. The construction above is supported by the Chinese version of the definition of “precincts of the Chamber” in AIs s.1, which is as follows:-

“ “會議廳範圍”(precincts of the Chamber) 指會議廳及立法會辦事處及毗鄰的旁聽席，以及供公眾人士與報界、電台及電視台的代表使用或用以容納他們的地方，而除主席作出例外規定者外，在立

法會或任何委員會舉行會議當日全部時間，此詞亦包括在圖則上註明是會議廳範圍的地方” (underline supplied)

29. Accordingly, even without knowing “*the area marked on the plan*”, “*places provided for the use of members of the public*” are clearly “*precincts of the Chamber*”. On 20 May 2015, the Appellant was going to use the Library as a member of the public. On that day, the Library was a place provided for the use of members of the public, and following the definition in AIs s.1, the Library was within the “*precincts of the Chamber*”.

30. We find that AIs s.3 also provides a legal basis in support of the Arrangement.

Data Protection Principle (“DPP”) 1

31. DPP 1 requires:-

“(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.”

32. The purpose of the 2015 Note is to enhance the security of the LegCo Complex by implementing the security measures therein, including the Arrangement. See paragraph 2 of the 2015 Note.

33. We are of the view that enhancing the security of the LegCo is a lawful purpose directly related to the Party Bound's function under LCCO s.9(a) and its common duty of care under OLO s.3.

34. The Appellant argued that the Arrangement would not be necessary, for every visitor was required to pass through a metal detector archway and have their belongings screened by X-ray. These security measures could ensure that every visitor entering the LegCo Complex would not carry any weapon or offensive objects. There would be no need to have the Arrangement in addition to these security measures. The Appellant further argued that even if it would be necessary to collect the HKID Card number of a visitor, just collecting the first 4 digits of the HKID Card number would be sufficient. The Appellant submitted that it would be excessive to collect the full HKID Card number.

35. We disagree. If anyone intends to damage anything or injure anyone inside the LegCo Complex, he or she may do so even without any weapon or offensive object in his or her hands. Thus it would be necessary to record the identities of visitors to the LegCo Complex for security purpose. In order to identify a visitor correctly, it would be necessary to record his or her full HKID Card number and not just the first 4 digits of the number.

36. We hold that the Arrangement does not contravene DPP 1.

Other requirements in PDPO

37. We have considered other Data Protection Principles. We are of the view that the Arrangement does not contravene any other Data Protection Principles. We also do not see any contravention with any other requirements under the PDPO.

1st Reason correct

38. We conclude that the 1st Reason is correct.

D. The 2nd Reason

39. The issue here is, whether by not providing his proof of identity, the Appellant has failed to make a “complaint” (as defined in PDPO s.37) to the Respondent and hence the Respondent cannot process the same.

40. As per PDPO s.2, ““*complaint*” (投訴) means a complaint under section 37.”

41. PDPO s.37(1) provides:-

“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 (including section 28(4)).”

42. One can immediately see that in order to constitute a “complaint”, there is no requirement in PDPO s.37 that the complainant must provide his or her proof of identity. In fact, as shown in s.39(1)(b) and (c), a “complaint” can be made anonymously, or the complainant may be unidentified or untraceable. Notwithstanding all these, there is still a “complaint” as defined in the statute. However, in these circumstances, the Respondent may refuse to carry out an investigation of the complaint pursuant to PDPO s.39(1).

43. We take the view that although the Appellant has not provided satisfactory proof of his identity to the Respondent, the Appellant has made a “complaint” to the Respondent.

2nd Reason incorrect

44. We conclude that the 2nd Reason is incorrect.

E. Decision stands

45. As the 1st Reason is correct, the Respondent is entitled to make the Decision pursuant to PDPO s.39(2).

46. That the 2nd Reason being incorrect has no impact on the aforesaid.

47. Accordingly, the Decision shall stand.

F. Miscellaneous matters

48. The parties had opportunities to put in written submissions before the hearing on 8 January 2016. On 8 January 2016, all the parties had made their oral submissions. During that hearing, Ms Kwan orally made an application (no prior notice was given to this Board or any other party) for an order disallowing the Respondent and the Party Bound to rely upon the Press Releases issued by the LegCo Secretariat in pp.338-348 of the hearing bundle (“the Press Releases”). This Board heard submissions from the parties on that application. We then took a morning break and intended to hear Ms Kwan’s reply submissions in relation to the appeal and her application. Subsequently, Ms Kwan through our Secretary informed us that she was physically unwell and would need to be sent to hospital by an ambulance. We therefore adjourned the hearing.

49. The hearing was resumed on 1 March 2016 and the Appellant attended the adjourned hearing in person. At the beginning of the adjourned hearing, the Appellant for the first time (no prior notice had ever been given to this Board or any other party) made the following interlocutory applications:

- (a) Discovery application – for an order requiring the Party Bound to produce (a) the “plan” mentioned in AI s.1, (b) documents relating to the circumstances in which the LegCo Secretariat would issue the Amber or Red Alert mentioned in paragraph 4 of the 2015 Note;

- (b) Application for an order disallowing the Respondent and the Party Bound to rely upon the telephone attendance note recording a telephone conversation between the Appellant and Mr. Brad Kwok of the Respondent on 2 June 2015 (“the Attendance Note”); and
- (c) Application for a summons requiring the President of the LegCo to attend the hearing of this Board to give evidence.

50. We disallow all these applications.

51. In respect of the discovery application:-

- (a) As said in paragraph 29 above, even without knowing “*the area marked on the plan*”, the Library was clearly was a place provided for the use of members of the public and was within the “precincts of the Chamber” on 20 May 2015. The “plan” would not have any impact on the outcome of this appeal.
- (b) There was no Amber or Red Alert on 20 May 2015. The documents relating to the Amber or Red Alert are not relevant to this appeal.

52. In respect of the Press Releases and the Attendance Note:-

- (a) The Appellant relied upon Evidence Ordinance (Cap. 8) (“the EO”) s.47A and said that as neither the Respondent nor the Party Bound has given hearsay notice to him pursuant to that section, the objected documents should be excluded from evidence.
- (b) EO s.47A provides:-

“(1) Provision may be made by rules of court-

- (a) specifying hearsay evidence in relation to which subsection (2) shall apply; and
- (b) as to the manner in which (including the time within which) the duties imposed by that subsection shall be complied with in the cases where it does apply.

(2) A party proposing to adduce in civil proceedings hearsay evidence which falls within subsection (1)(a) shall, subject to subsections (3) and (4), give to the other party or parties to the proceedings-

- (a) such notice, if any, of that fact; and
- (b) on request, such particulars of or relating to the evidence, as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.

(3) Subsection (2) may be excluded by agreement of the parties, and compliance with the duty to give notice may in any case be waived by the person to whom notice is required to be given.

(4) A failure to comply with subsection (2), or with rules under subsection (1)(b), shall not affect the admissibility of the evidence but may be taken into account by the court-

- (a) in considering the exercise of its powers with respect to the course of proceedings and costs; and

- (b) as a matter adversely affecting the weight to be given to the evidence in accordance with section 49.”
- (c) Obviously, the hearsay notice mentioned in EO s.47A(2) should be a procedure provided in rules of court. There is no section in the AABO providing for a hearsay notice procedure.
- (d) Further, failure to comply with EO s.47A(2) would not affect the admissibility of any hearsay evidence but may affect the weight of such evidence. See EO s.47A(4).
- (e) We have no doubt that this Board may receive and consider any hearsay evidence. See AABO s.21(1)(b). This Board would consider all the circumstances and decide to attach how much weight to any particular hearsay evidence.
- (f) The hearsay evidence objected by the Appellant is admissible evidence, and hence the Respondent and the Party Bound may rely upon the same in support of their respective cases.
- (g) Accordingly, we dismiss the Appellant’s application for an order disallowing the Respondent and the Party Bound to rely upon such hearsay evidence.
- (h) While the Respondent and the Party Bound may rely upon such hearsay evidence, our determination of this appeal is not based upon any of the said hearsay evidence. Our analysis does not depend upon anything in the said hearsay evidence.

53. In respect of the application for an order summoning the President of the LegCo:-

- (a) The Appellant submitted that it would be necessary to give him an opportunity to cross-examine the President of the LegCo to test the correctness of the contents of the Press Releases.
- (b) As said in the above, our determination of this appeal is not based upon the contents of the Press Releases. There is no need to require the President of the LegCo to give evidence in this appeal.

54. In addition to the above, a further reason for disallowing these interlocutory applications is that the applications were made extremely late with no prior notice to this Board or to any other party. Ms Kwan's application was made after the commencement of the appeal hearing, and the Appellant's applications were only made at the very end of the appeal hearing (i.e. after all the parties having made written and oral submissions in the appeal). In respect of all these applications, no prior notice was given to this Board or to any other party. There is no explanation as to why such applications were not made at an earlier time or why prior notice has not been given to this Board and to the other parties. We have to say that this was an ambush by the Appellant. Had these applications been made at an earlier time with prior notice to this Board and to the other parties, the other parties would have had the opportunity to adduce evidence and to prepare legal submissions to answer the Appellant's challenges, and this Board would have had better assistance on all these matters from all the parties. It would not be just and fair to allow these interlocutory applications in the circumstances.

G. Appellant's application for costs

55. The Appellant applied for costs.

56. This Board may only make an award as to costs against the Respondent and/or the Party Bound "*if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.*" See AABO s.22(1)(b).

57. In *Apply Daily Limited v Privacy Commissioner for Personal Data*, AAB No. 5 of 1999, the Administrative Appeals Board stated¹:

"...s.22(1)(b)...clearly does not envisage that a successful appellant is entitled to the costs of the appeal as of right. It is so only entitled if it is unjust and inequitable to refuse it. These are strong words and a high burden is imposed on the Appellant to show that it should be entitled to costs in the circumstances of cases. The fact that it has incurred legal expenses in the appeal will not by itself entitle it to a costs order. Further, the fact that the Respondent had erred in law in making the decision cannot be the decisive factor. There must be something more." (underline supplied)

58. We are far from being satisfied that there is any circumstance justifying an order for costs in favour of the Appellant in this appeal.

- (a) Firstly, we have ruled that the Decision shall stand and we would dismiss this appeal. The Appellant therefore is an unsuccessful appellant.

¹ See Hearing Bundle at 242, para. 30

- (b) Most of the time in this appeal was spent on arguing matters relating to the 1st Reason and the interlocutory applications made by the Appellant. The Appellant failed on all these issues.
- (c) Although we have ruled that the Respondent erred on the 2nd Reason, the time spent on the matters relating to the 2nd Reason is minimal. Further, that the Respondent erred on one issue is not sufficient for justifying a costs order against the Respondent.

59. The Appellant's application for costs must be refused.

H. Conclusion

60. For the reasons above, we dismiss the Appeal and the Decision is affirmed on the 1st Reason given by the Respondent.

61. We dismiss the Appellant's application for costs.

62. Neither the Respondent nor the Party Bound applied for costs. We make no order as to costs.

63. Lastly, we thank the parties for the assistance rendered to this Board.

(signed)

(Mr Liu Man-kin)

Deputy Chairman

Administrative Appeals Board