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ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 25/2012

BETWEEN

LAU TUNG LING — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board

Date of Hearing: 17 April 2013

Date of handing down Written Decision with Reasons: 29 May 2013

DECISION

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1. This appeal arises from a complaint under the Personal Data (Privacy) Ordinance, Cap. 486 ("the Ordinance"). The Appeal Bundle is referred to as "AB" below.

The Facts

2. On 30 July 2011, the Appellant sent an email ("the 30/7 Email") to the Constitutional and Mainland Affairs Bureau ("CMAB"), to enquire about certain parts of the Civil Service Code ("the Code") and whether clause 3.2 thereof and the Guide to Judicial Conduct were in contradiction (see AB p.136). The Appellant sent the email by the email name and address < "Judiciary Hongkong" hkjudiciary@ymail.com > and

signed as "Lau TL".

3. The 30/7 Email was forwarded by CMAB to the Civil Service Bureau ("CSB") on 1 August 2011 for reply (see AB p.137).

4. On 10 August 2011 the CSB sent the Appellant an email in reply ("the Reply Email") stating, inter alia, that "*The Code does not govern the conduct matters of Judicial Officers which is a subject under the purview of the Judiciary. You may wish to check with the Judiciary direct concerning the Guide to Judicial Conduct mentioned in your email. This email is copied to the Judiciary for their information.*" (see AB p.137).

5. The 30/7 Email was attached to the Reply Email. They are referred to collectively as "the Email" below. As stated therein, the Email was copied to the Judiciary.

6. There followed further correspondence between the Appellant and the CSB in which the Appellant, inter alia, complained that the Email was copied to the Judiciary without her consent.

7. The CSB replied on 11 May 2012 as follows:- "*In your email of 30.7.2011, one of your enquiries touched on the interpretation of 'The Guide to Judicial Conduct'. Since it is a subject matter under the purview of the Judiciary, we, for the purpose of referring to the appropriate authority to address your enquiry, copied our reply of 10.8.2011 together with your email of 30.7.2011 to the Judiciary for their information.*" (see AB p.142).

8. On 26 May 2012, the Appellant made the complaint to the Office of the Privacy Commissioner for Personal Data ("PCPD").

9. By letter of 27 July 2012 (see AB pp.205-208), the Deputy Privacy Commissioner for Personal Data ("the Deputy Commissioner") informed the Appellant of her decision not to pursue the Appellant's complaint further under section 39(2)(d) of the Ordinance. Dissatisfied with the Deputy Commissioner's decision, the Appellant appeals to this Board.

The "Reasons for decision not to pursue the complaint further"

10. The Deputy Commissioner gave 3 reasons (see AB p.125):-

Reason 1: Unlike a full name, the mere letters T and L could be the abbreviations for numerous words. Even if taken together with the Appellant's email address

<hkjudiciary@ymail.com>, it would not be practicable for the Appellant's identity to be ascertained from the Initials. Hence no "personal data" of the Appellant was involved.

Reason 2: Even assuming the present case involved the disclosure of the Appellant's "name" which amounts to her "personal data", the Appellant's "name" together with her email address were not sensitive information.

Reason 3: According to the CSB, the Appellant's enquiry concerned the purview of the Judiciary in relation to the Guide to Judicial Conduct. As the CSB had suggested in the Reply Email that the Appellant might approach the Judiciary for further information about her enquiry, it was not unreasonable for the CSB to send a copy of the Reply Email for the Judiciary's information. The disclosure of the 30/7 Email in the Reply Email to the Judiciary was directly related to the purpose of collection of the 30/7 Email i.e. to handle the Appellant's enquiry. Hence, it would not amount to a contravention of DPP3 on the part of the CSB.

Relevant Provisions of the Ordinance

11. In section 2(1), "personal data" is defined as any data relating directly or indirectly to a living individual from which it is practicable for the identity of the individual to be directly or indirectly ascertained and in a form in which access to or processing of the data is practicable (see AB p.52).

12. Data Protection Principle 3 ("DPP 3") in Schedule 1 provides that personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than the purpose for which the data were to be used at the time of collection of the data, or for a directly related purpose (see AB p.115); and "use" is defined in section 2 to include disclosure or transfer of the data (see AB p.54).

13. Section 39(2) provides that the Commissioner may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case … (b) the act or practice specified in the complaint is trivial; …. or (d) any investigation or further investigation is for any other reason unnecessary.

This Board's Decision

14. We agree with Reason 1. We agree that the name "Lau TL" was a name shared by

many and the email address < "Judiciary Hongkong" hkjudiciary@ymail.com > in no way reveals the identity of the Appellant. Indeed such an email address is misleading. It could mislead an unsuspecting person to think that the person holding the email had connection with the Judiciary of Hong Kong when the Appellant had none. It is not practicable from "Lau TL" and < "Judiciary Hongkong" hkjudiciary@ymail.com > (even when read together) for the identity of the Appellant to be directly or indirectly ascertained. They do not constitute personal data as defined in s.2 of the Ordinance.

15. We agree with Mr. Lau's submission on behalf of the PCPD that "practicable" does not mean "possible" and "indirectly" does not mean by all possible means. It would otherwise be putting too wide an interpretation on the definition. Even if it might be possible to make an enquiry with Yahoo to identify the account holder of the email address in question, it did not mean it was practicable from the Email to identify the Appellant. Yahoo could refuse to supply such information without the consent of the Appellant.

16. The Appellant alleged in ground (5) of her grounds of appeal that "*Besides, based on fact that abundant complaints were lodged against third party, third party could still recognize the Appellant even the Appellant turned to ashes.*" (see AB p.122). By "third party", the Appellant was there referring to the Judiciary. It might be that the Appellant had corresponded with the Judiciary before using the same abbreviated name and the same email address, but there is no evidence that the CSB was aware of this. In any event the fact that the Appellant might have been known to the Judiciary because of some unrelated previous events did not turn the abbreviated name and the email address into "personal data" within the meaning of the Ordinance.

17. In the course of the Appellant's submission, the Appellant mentioned the possibility of a data access request ("DAR") against the Judiciary. But we accept Mr. Lau's submission that even if the Judiciary will be able to supply the Email to the Appellant if the Appellant makes a DAR by providing the name "Lau TL" and the email address < "Judiciary Hongkong" hkjudiciary@ymail.com >, it does not mean that these data are "personal data". These data constitute the parameters for identifying the documents, not the person.

18. In any event, we agree with Reason 3 that even if the abbreviated name and email address constituted "personal data" within the meaning of the Ordinance, there was no contravention of DPP 3.

19. We note that when the Appellant first made her enquiry, she sent it to the CMAB.

The enquiry was forwarded to the CSB for reply. Against this disclosure the Appellant makes no complaint, and in our view, rightly so. Clearly the Code falls within the purview of the CSB and it was proper for the CMAB to refer the enquiry to the CSB as the appropriate department to handle the enquiry. So likewise, as the Guide to Judicial Conduct falls within the purview of the Judiciary, we do not see why it was not proper for the CSB to refer the enquiry to the Judiciary. The Appellant argued that unlike the CMAB, the CSB copied the Email to the Judiciary "for their information", not for their reply and so was improper disclosure. We do not agree. It was up to the Judiciary to decide how best to handle the enquiry. The Judiciary might decide that the CSB's Reply Email was sufficient so that no reply was necessary, or it might decide that an answer by them was warranted. By forwarding the Email to the Judiciary for their information, the CSB was referring the enquiry to the appropriate department for further handling and was directly using the data for the purpose for which they were to be used at the time of collection, namely to deal with the Appellant's enquiry. There was no contravention of DPP 3.

20. As regards Reason 2, the PCPD in the Statement filed in this Appeal elaborated on this reason by referring to paragraph 8(a) under Part B of the PCPD's Complaint Handling Policy, February 2011 (3rd Revision) ("the CHP"). It provides that "*the act or practice specified in a complaint may be considered to be trivial, if the damage (if any) or inconvenience caused to the complainant by such act or practice is seen to be small*". Paragraph 8(a) clearly relates to s.39(2)(b) of the Ordinance. It is submitted to us that whether or not the abbreviated name and email address are sensitive information has a bearing on whether the act or practice specified in the complaint may be considered trivial.

21. Since we have already found that the disclosure of the Email to the Judiciary was not in contravention of DPP 3, we do not find it necessary to rely on Reason 2. Suffice to say that we do not see that any damage or inconvenience was caused to the Appellant by the disclosure.

22. Turning to the Appellant's grounds of appeal (see AB p.122), for the reasons stated above, we reject grounds (1), (2) and (3) which basically refute the three reasons given by the Deputy Commissioner.

23. Regarding ground (4) of the grounds of appeal, there is absolutely no credible evidence to support the allegation. We reject this ground.

24. Ground (7) might have stemmed from a misunderstanding of paragraph 8(g) of the

CHP. There was never any suggestion of mediation in the present case. We do not find it necessary to deal with ground (7).

25. Ground (8) attacks the use of the word "discretion" in the CHP. It is true that s.39(2) of the Ordinance does not contain the word "discretion". Rather, it uses the words "*if he is of the opinion that*" – "he" meaning the Commissioner. Under s.39(2)(b) and (d), if the Commissioner is of the opinion that the act or practice specified in the complaint is trivial or if the Commissioner is of the opinion that any investigation or further investigation is for any other reason unnecessary, he may refuse to carry out or continue an investigation. This in effect gives the Commissioner a discretion to decide when a complaint is trivial or when an investigation is for any other reason unnecessary. Instead of enlarging the Commissioner's discretion, the CHP seeks to lay down a standard set of policy that the Commissioner will apply when making a decision under s.39(2). This makes the Commissioner's decision more certain and consistent. We see no substance in ground (8) of the grounds of appeal.

26. In any event, a copy of the CHP was given to the Appellant on 30 May 2012. By section 21(2) of the Administrative Appeals Board Ordinance, Cap.442, this Board is bound to have regard to the CHP in arriving at our decision.

27. Paragraph 8(d) of the CHP provides that an investigation or further investigation may be considered unnecessary if after preliminary enquiry by the PCPD, there is no *prima facie* evidence of any contravention of the requirements under the Ordinance.

28. For the reasons given above, we accept that there is no *prima facie* evidence of any contravention of the requirements under the Ordinance, further investigation is unnecessary and the Deputy Commissioner was right in her decision to refuse to continue the investigation under s.39(2)(d) of the Ordinance.

Conclusion

29. In conclusion, we find that:-

(1) It is not practicable from "Lau TL" and < "Judiciary Hongkong" hkjudiciary@ymail.com > (even when read together) for the identity of the Appellant to be directly or indirectly ascertained. They do not constitute personal data as defined in s.2 of the Ordinance.

(2) In any event, even if the abbreviated name and email address constituted "personal data" within the meaning of the Ordinance, there was no contravention of DPP 3.

(3) The Deputy Commissioner was right in her decision to refuse to continue the investigation under s.39(2)(d). We hereby confirm her decision and dismiss the appeal.

(signed)

(Ms Cissy Lam King-sze)
Deputy Chairman
Administrative Appeals Board