

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 25/2016

BETWEEN

鄧貴新

Appellant

and

PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board
Mr Douglas Lam Tak-yip, SC (Deputy Chairman)
Ms Wendy Gan Kim-see (Member)
Mr Tsang Mo-chau (Member)

Date of Hearing: 6 December 2016

Date of Handing down Written Decision with Reasons: 16 November 2017

DECISION

A. Introduction and Background

1. By a Notice of Appeal dated 16 May 2016, the Appellant, Mr Tang Kwai-sun (“**Mr Tang**”), appeals to this Board pursuant to section 50 of the Personal Data (Privacy) Ordinance (Cap 486) (the “**PDPO**”) against an enforcement notice issued by Privacy Commissioner for Personal Data (the “**Commissioner**”) on 4 December 2015 (the “**Enforcement Notice**”).

2. The Enforcement Notice stems from a complaint lodged with the Commissioner's Office by Mr Wong Shek Hung ("**Mr Wong**"), who was at the relevant time a caretaker employed by the manager of a multi-storey building in Kwai Chung (the "**Building**"). Mr Tang is the owner and occupant of a unit in the Building. In short, Mr Wong's complaint was that on 19 July 2014, Mr Tang used a camera to video record him at the management office without his consent.

3. Mr Tang's response to the complaint is set out by the Commissioner in the Results of Investigation (the "**Commissioner's Decision**") annexed to the Enforcement Notice, and may be summarised as follows:

- (1) Over the years, there had been persistent leakage problems with the sewage pipes on the 8th floor of the Building, and Mr Tang had made repeated complaints to Mr Wong and the manager of the Building but to no avail. Mr Tang complained of Mr Wong's hostile attitude, and that Mr Wong became a persistent annoyance to Mr Tang;
- (2) On 19 July 2014, Mr Tang went to the management office of the Building, which was manned by Mr Wong at the time, to submit a form in Chinese entitled, "有關：樓宇更新大行動(最後一期)津貼發放" and a handwritten note containing the file number of the complaint made by Mr Tang to government departments concerning the leakage problems and the contact numbers of the relevant officers (the "**Handwritten Note**");

(3) As Mr Tang had in the past submitted documents to the management office and not received any replies or follow up, he wished to evidence the documents being submitted and his request to Mr Wong to forward the documents to the Building's incorporated owners or the manager. Hence, Mr Tang decided to video record the process of handing over the documents to Mr Wong;

(4) However, Mr Wong responded in a hostile manner, crumpled the Handwritten Note into a ball and threw it onto the floor and threatened to damage Mr Tang's video camera. Mr Tang thus continued filming to put on record what Mr Tang perceived as Mr Wong's misconduct. Mr Tang took the view that, as the owner of a unit in the Building, he was entitled to observe and film Mr Wong, being a caretaker in the Building, in a common area of the Building.

4. In the course of the Commissioner's investigation, Mr Tang showed the Commissioner's representatives, amongst other things, two video recordings that he made on 19 July 2014: the first recording showed Mr Tang placing the documents on the management office counter manned by Mr Wong (the "**First Recording**"), and the second recording showed Mr Wong's hostile attitude and his treatment of the Handwritten Note (the "**Second Recording**").

5. In response to the Commissioner's queries as to his intentions concerning the recordings, Mr Tang indicated he wished to retain them for "insurance purposes" and to facilitate him in seeking redress against Mr Wong for his behaviour. However, the Commissioner noted that, despite the time that had elapsed, Mr Tang had yet to make use of the recordings for their intended

purpose, such as, for instance, making a complaint and submitting the recording to Mr Wong's employer. On 8 September 2015, Mr Tang confirmed to the Commissioner that he still had not used the recordings for their intended purpose.

B. The Commissioner's Decision and Enforcement Notice

6. As mentioned above, on 4 December 2015, the Commissioner issued the Enforcement Notice annexing the Commissioner's Decision.

7. In his Decision, the Commissioner referred to Data Protection Principles (the "DPP") 1(2) and 2(2) in Schedule 1 of the PDPO, which provide that:

DPP 1(2):

Personal data shall be collected by means which are-

- (a) lawful; and
- (b) fair in the circumstances of the case.

DPP 2(2):

All practicable steps must be taken to ensure that personal data is not kept longer than is necessary for the fulfillment of the purpose (including any directly related purpose) for which the data is or is to be used.

8. Further, section 2(1) of the PDPO defines "personal data" to mean any data:

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- (c) in a form in which access to or processing of the data is practicable;

9. In relation to the First Recording, the Commissioner took the view that:

- (1) Mr Tang was merely filming the handing over of documents to the management office, and even though the recording may have captured Mr Wong's image, this did not constitute the collection of Mr Wong's personal data, and therefore, the DPPs were not engaged;
- (2) That said, Mr Tang could have achieved the same purpose of recording receipt of the documents using less intrusive means such as obtaining a signed receipt from the management office, which would have avoided conflict.

10. As to the Second Recording, the Commissioner opined that:

- (1) The recording was made for the purpose of capturing Mr Wong's hostile attitude and his treatment of the Handwritten Note. Hence, it was directed towards Mr Wong and a record of his conduct and behaviour. Mr Wong was also clearly identifiable in the recording. In the circumstances, the Second Recording amounted to a collection of Mr Wong's personal data;
- (2) DPP 1(2) provided that the collection of personal data must be conducted lawfully and fairly. However, it is not necessarily the case that the person whose data is being collected must consent to such collection. In the present case, the recording was made openly in a common area of the Building and for the purpose of recording Mr Wong's hostile behaviour and conduct. Notwithstanding Mr Wong's objection to such recording, the collection was, in all the circumstances, neither unlawful nor unfair;

- (3) The fact that Mr Tang had not yet filed a complaint or submitted the recording did not render the recording unlawful or unfair under DPP 1(2);
- (4) On the other hand, DPP 2(2) provides all practicable steps must be taken to ensure that personal data is not kept longer than necessary for the fulfilment of the purpose for which data is or is to be used. Notwithstanding that over a year had elapsed since the recording was made, Mr Tang was unable to demonstrate that he had taken any steps to file a complaint or to use the recording in support of such complaint. As mentioned above, Mr Tang also indicated his intention to retain the recording indefinitely. In the circumstances, the Commissioner found that Mr Tang was in breach of DPP 2(2) by reason of his continued retention of the Second Recording;

11. The Commissioner therefore issued the Enforcement Notice pursuant to section 50 of the PDPO, which provides that inter alia:

- (1) If, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user is contravening or has contravened a requirement under this Ordinance, the Commissioner may serve on the data user a notice in writing, directing the data user to remedy and, if appropriate, prevent any recurrence of the contravention.
 - (1A) An enforcement notice under subsection (1) must –
 - (a) state that the Commissioner is of the opinion referred to in subsection (1) and the reason for that opinion;
 - (b) specify -
 - (i) the requirement which, in the opinion of the Commissioner, is being or has been contravened; and
 - (ii) the act or omission that constitutes the contravention;

- (c) specify the steps that the data user must take (including ceasing any act or practice) to remedy and, if appropriate, prevent any recurrence of the contravention;
- (d) specify the date on or before which steps must be taken; and
- (e) be accompanied by a copy of this section.

C. The Grounds of Appeal

12. Mr Tang's grounds of appeal may be summarised as follows:

- (1) When Mr Tang met with the Commissioner's representative, one Ms Chiu, she refused to download the recordings or to investigate the matters contained in them, which was highly unfair to him (the "**First Ground**");
- (2) Mr Tang had shown Ms Chiu a total of 4 video recordings, but only 2 were referred to in the Commissioner's Decision. Mr Tang also raised a number of questions to Ms Chiu concerning the 4 recordings, which she refused to answer. This was unfair to Mr Tang and showed a breach of duty on the part of Ms Chiu (the "**Second Ground**");
- (3) In addition to the First and Second Recordings, the additional two recordings (the "**Additional Recordings**") showed, respectively, (1) Mr Wong telephoning the police; and (2) Mr Wong further insulting and threatening Mr Tang, which led to the latter's apprehension of being physically assaulted. There was thus no question of privacy involved (the "**Third Ground**");

- (4) As at the date of the Notice of Appeal, the management office had yet to contact Mr Tang concerning the repair of the sewage pipes, being the subject matter of the Handwritten Note. In the circumstances, Mr Tang could not delete the recordings, which demonstrated Mr Wong and the management office's neglect of their duties (the "**Fourth Ground**").

D. Discussion

13. As mentioned above, the appeal was lodged pursuant to section 50 of the PDPO. Section 50(7) of the PDPO provides that:

An appeal may be made to the Administrative Appeals Board against an enforcement notice by the relevant data user not later than 14 days after the notice was served.

14. The Enforcement Notice is concerned solely with the Second Recording, and therefore, it is in relation to that recording that this Board is concerned with in this appeal. Section 21(1)(j) of the Administrative Appeals Board Ordinance (Cap 442) provides that this Board may 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.

15. The hearing of the appeal was attended by the Commissioner's representatives, Mr Tang and Mr Wong and lasted half a day. It is clear that there exists considerable animosity between Mr Tang and Mr Wong, and much time was wasted by the Board intervening and restraining the heated exchanges between the two of them during the hearing.

16. Mr Tang indicated and confirmed to the Board at the hearing, however, that he would consent to deleting the Second Recording in compliance with the Enforcement Notice, which required the deletion of all copies of the recording and written confirmation of the same.

17. In the light of Mr Tang's consent now to delete the Second Recording, it is only necessary for us to deal briefly with his grounds of appeal.

18. In respect of the First and Second Grounds:

- (1) There appears to be some misconception on the part of Mr Tang as to the role of the Commissioner. It is plainly not his function to investigate Mr Tang's complaints as to Mr Wong's conduct or the management of the Building, save where this is relevant to his investigations as to whether there has been a breach of the PDPO;
- (2) Whether the Commissioner's representative should have downloaded the recordings or not is a matter solely for the Commissioner and his office in the exercise of their powers of investigation, and not for this Board to comment. Under section 50 of the PDPO, the Board is solely concerned with the Enforcement Notice and any errors in the Commissioner's Decision which led to the same;
- (3) Whilst the Commissioner could have referred to all 4 recordings as a matter of completeness in his Decision, the Enforcement Notice concerned only the Second Recording, and no decision has been made or enforcement notice issued in relation to the Additional Recordings. Moreover, there is nothing in the Additional

Recordings which would have impacted upon the Commissioner's views as to the Second Recording.

19. As to the Third Ground, we agree with the Commissioner that the Second Recording amounted to the collection of personal data within the meaning of the PDPO, and thus triggered the application of the DPPs. See, for instance, the observations of the Court of Appeal in *Eastweek Publisher Limited and Another v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83 at paragraphs 30-34. As the Commissioner found in his Decision, however, the collection of such data was not unlawful or unfair within the meaning of DPP 1(2).

20. In our view, the only ground which requires some elaboration is the Fourth Ground:

- (1) As the Commissioner noted in his Decision, Mr Tang intended to retain the recording for "insurance purposes" and to facilitate him in seeking redress against Mr Wong for his behaviour. By "insurance purposes", we understand Mr Tang to mean for the purposes of protecting or safeguarding his rights;
- (2) It is not in dispute that Mr Tang, as an owner and occupant of a unit in the Building, has a lawful interest in the proper management of the Building, including the conduct and behaviour of those employed by the manager of the Building. It is also plain that such interest may give rise to legal remedies, although it is unnecessary here to form a concluded view as to whether such remedies are available to Mr Tang personally as an owner or through the Building's incorporated owners;

- (3) It cannot be seriously disputed that the limitation period to bring any legal action against Mr Wong or his employer for any alleged breach of duty would be 6 years from the date of breach under section 4(1) of the Limitation Ordinance (Cap 347) (the “LO”) and that such period has not yet expired;
- (4) It is at least arguable that in any proceedings to be brought in relation to Mr Wong’s conduct, that the Second Recording would be a relevant piece of documentary evidence and subject to the rules of discovery. In the circumstances, in determining whether there has been a breach of DPP 2(2), regard must be had to any genuine and bona fide need for preservation of evidence for the purposes of discovery;
- (5) As observed by Deputy High Court Judge Poon (as he then was) in *Cinepoly Records Company Limited and Others v Hong Kong Broadband Network Limited and Others* [2006] 1 HKLRD 255, the law strikes a balance between the administration of justice and protection of privacy relating to personal data. Whilst that case was concerned with the scope of the exceptions to DPP 3 in section 58(2) of the PDPO in the context of *Norwich Pharmacal* relief, it nonetheless highlights the competing interests of one’s privacy and the protection of another’s legal rights;
- (6) It appears to us that in assessing what is the period of time “necessary for the fulfillment of the purpose for which the data is or is to be used” in DPP 2(2), one must take into account the fact that the law, in particular, the LO, affords a potential claimant 6 years (in a case such as the present) to bring a claim to enforce his

legal rights. It seems to us potentially unfair that a potential litigant should be prejudiced in the exercise of his legal rights by the operation of DPP2(2) by prohibiting him from retaining evidence relevant to his claim;

- (7) We note that, as mentioned above, Mr Tang had at one stage indicated that he intended to retain the Second Recording indefinitely, which may well be unjustified. However, he should have been entitled to retain the Second Recording for at least the duration of the limitation period to decide whether to pursue a claim against Mr Wong or his employer. There is nothing to suggest that Mr Tang's intentions were not genuine or bona fide. The fact that he had not yet made any complaint or otherwise exercised his legal rights prior to the Enforcement Notice does not seem to us a relevant factor.

E. Conclusion

21. For the reasons above, it does not seem to us to have been a breach of DPP 2(2) by reason of Mr Tang's retention of the Second Recording, whether as at the date of the Enforcement Notice, or the date of this Decision.

22. However, in the light of Mr Tang's consent to delete the Second Recording as indicated to this Board at the hearing, we would confirm the Enforcement Notice.

23. We thank all parties for their assistance.

(signed)

(Mr Douglas Lam Tak-yip, SC)

Deputy Chairman

Administrative Appeals Board