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ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 2 OF 2011

BETWEEN

STEPHANIE KIT YING TAO — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board
Date of Hearing: 6 July 2011
Date of Last Submission after the Hearing: 15 August 2011
Date of Handing down Written Decision with Reasons: 3 February 2012

DECISION

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1. This is an appeal relating to a correction request of credit data of the appellant, Miss Stephanie Kit Ying Tao ("the Appellant"). Credit data is important in Hong Kong as it affects the ability of the individual to have access to credit facilities. The ability to have mortgage finance, credit card and other loan facilities is important also to the individual's quality of life. Equally, if not more important, safe keeping of credit data affects Hong Kong's reputation as a financial centre. It may be noted that a party to this appeal is a private company, TransUnion

Limited ("**TU**") who has held credit records for about 4.3 million consumers in Hong Kong. TU is the main source of consumer credit data for credit providers[1] such as banks and credit card companies.

Background

2. On 21 August 2010, the Appellant obtained a copy of her credit report (the "**Report**") from TU. The Appellant found that certain data were wrongly recorded in the Report, namely :

(1) her English name should be "Tao Stephanie Kit Ying" instead of "Tao Kit Ying Stephanie";
(2) her gender was wrongly stated as "male";
(3) two addresses in the address history were duplicated and one other address therein was inaccurate;
(4) the Report wrongly showed that the Appellant was the principal of a credit card account (the "**Account**") held with Standard Chartered Bank (Hong Kong) Limited ("**SCB**") with a past due amount of HK$9,853 as of 30 November 2008, when in fact the Appellant was not the principal (debtor).

3. The Appellant explained that the Account was supplementary to a principal account under her mother's name and hence, she should not be regarded as the principal as she was only 16 when the Account was created.

4. There was no suggestion that those alleged mistakes were not mistakes. All of the aforesaid data are collectively referred to as the "**Incorrect Data**" below.

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[1] The term "credit provider" is defined in the Code of Practice on Consumer Credit Data issued by the Respondent pursuant to Section 12 of the Ordinance.

5. On 25 August 2010, the Appellant wrote to TU requesting the latter to correct the Incorrect Data (the "**Correction Request**").

6. On 31 August 2010, 6 days after making the Correction Request, the Appellant lodged a complaint to the Respondent against TU (the "**Complaint**"). The gist of the Complaint was that TU had failed to ensure that the data and information given to them by financial institutions were accurate.

Investigation by the Respondent

7. After receiving the Complaint, the Respondent made enquiries with TU and SCB respectively.

8. TU is a credit reference agency ("**CRA**") under a Code of Practice on Consumer Credit Data ("**Code**") issued by the Respondent, the relevance of which will be referred below. The credit data held by TU are provided by credit providers (including SCB).

9. Preliminary enquiries by the Respondent revealed that TU had consulted SCB on 26 August 2010, after receiving the Appellant's Request and subsequently supplied the Appellant with an amended report on 8 September 2010, that is, 14 days after receiving the correction Request where all the Incorrect Data were either corrected or deleted (the "**Amended Report**").

10. The Amended Report apparently shows that the Inaccurate Data had been communicated to certain third parties, namely, the Australia and New Zealand Banking Group Limited Bank ("**ANZ Bank**"), Promise (HK) Co. Ltd ("**Promise**"), and the Bank of China Credit Card (International) Ltd ("**Bank of China**")). The disclosure was

during the 12 months immediately preceding the day on which the correction was made. No further steps were taken to supply the Amended Report or the contents of the Inaccurate Data to those third parties. These matters are further detailed below.

11. The Respondent concluded that TU had acted in accordance with clause 3.19 of the Code in complying with the Correction Request.

12. The Respondent was of the view, and this is of importance in the present case, that :

(a) as a CRA, TU mainly gathered credit information about the Appellant including the Incorrect Data from credit providers, rather than collecting the same from the Appellant directly,
(b) hence TU had limited control on the accuracy of such information,
(c) TU's prompt consultation with SCB in ensuring the correctness of the Incorrect Data and the subsequent deletion / correction made did satisfy the requirements under Data Protection Principle 2 (1).

13. The Respondent considered that given that the Correction Request had been fully acceded to by TU, further investigation into the Complaint cannot be reasonably expected to bring about a more satisfactory result. The Respondent therefore decided that a full investigation of the Complaint was unnecessary under section 39(2)(d) of the Personal Data (Privacy) Ordinance ("**Ordinance**").

14. By a letter dated 28 February 2011, the Respondent informed the Appellant of his decision.

15. Dissatisfied with the decision of the Respondent, the Appellant

lodged the present appeal.

The Legal and Regulatory Framework

Section 23

16. The central issue in the present appeal is on Section 23(1) of the Ordinance which provides that :

> *"23. **Compliance with data correction request***
>
> *(1) … a data user who is satisfied that personal data to which a data correction request relates are inaccurate shall, not later than 40 days after receiving the request-*
>
> *(a) make the necessary correction to those data;*
>
> *(b) supply the requestor with a copy of those data as so corrected; and*
>
> *(c) subject to subsection (3), if-*
>
> (i) *those data have been disclosed to a third party during the 12 months immediately preceding the day on which the correction is made; and*
>
> (ii) *the data user has no reason to believe that the third party has ceased using those data for the purpose (including any directly related purpose) for which the data were disclosed to the third party,*
>
> *take all practicable steps to supply the third party with a copy of those data as so corrected accompanied by a notice in writing stating the reasons for the correction.*

17. Therefore, Section 23(1) provides firstly that a data user shall make the necessary correction to data which were inaccurate no later

than 40 days after receiving a request for data correction. Secondly, the data user has a duty to supply the requestor with a copy of the corrected data. Thirdly, if the data has been disclosed to a third party, but the data user has no reason to believe that the third party has ceased using those data for the purpose it was disclosed then he has a further duty to take all practicable steps to supply the third party with a copy of those data as so corrected accompanied by a notice in writing stating the reasons for the correction.

18. In the case of a third party receiving inaccurate data, the question insofar as relevant in the present case, would appear to be :

(a) whether the data user should be assumed that he could make use of incorrect data but that he has no duty to correct any inaccuracy;

(b) secondly, in the case of a third party, what practicable steps should be taken to supply the third party of the corrected data.

19. Then Section 23(2) provides that a data user who is not able to comply with Section 23(1) within the time limit has to notify his inability to the requestor :

> *"(2) A data user who is unable to comply with subsection (1) in relation to a data correction request within the period specified in that subsection shall*
>
> *(a) before the expiration of that period-*
>
> *i. by notice in writing inform the requestor that the data user is so unable and of the reasons why the data user is so unable; and*
> *ii. comply with that subsection to the extent, if any, that the data user is able to comply with that subsection; and*
>
> *(b) as soon as practicable after the expiration of that period, comply*

or fully comply, as the case may be, with that subsection."

20. Section 23(3) of the Ordinance then provides that a data user is not required to comply with subsection (1)(c) if the disclosure to the third party consists of the third party's inspection of a register or other like document which is available for public inspection.

> *"(3) A data user is not required to comply with subsection (1)(c) in any case where the disclosure concerned of the personal data to the third party consists of the third party's inspection of a register or other like document*
>
> *(a) in which the data are entered or otherwise recorded; and*
>
> *(b) which is available for inspection by the public,*
>
> *but this subsection shall not apply if the third party has been supplied with a copy, certified by or under the authority of the data user to be correct, of the data."*

21. In other words, if there is a public register, the data user has no duty to take all practicable steps to supply the third party with a copy of those data as so corrected. Therefore, as a matter of construction, it is reasonably arguable that if the data is not available in the form of a register or like document for inspection of the public, prima facie, the data user would have the duty to take all practicable steps to supply the third party with a copy of those data as so corrected.

22. Once these aspects are understood, it would be fair to conclude that :

(a) normally the data user should not be assumed that he could make use of incorrect data, but at the same time that he has no duty to correct any inaccuracy;

(b) in the case of a third party whom the inaccurate data was disclosed, prima facie, only in the case of a register or like document available for public inspection could it be said that it was not necessary for the data user to take all practicable steps to supply the third party of the corrected data.

23. The next question is what practicable steps should be taken to supply the third party of the corrected data.

24. There are 3 matters that have to be considered to determine whether practicable steps should be taken :

(a) Data Protection principle, in particular, Data Protection principle 2(1).
(b) The Code of Practice on Consumer Credit Data issued by the Respondent.
(c) Supervisory Policy Manual issued by the Hong Kong Monetary Authority.

Data Protection Principle 2(1)

25. Data Protection principle ("**DPP**") 2(1) in Schedule 1 of the Ordinance requires a data user to take all practicable steps to ensure that personal data are accurate having regard to the purpose (including any directly related purpose) for which the personal data are to be used.

The Code of Practice on Consumer Credit Data (the Code)

26. Under Section 12 of the Ordinance, for the purpose of providing practical guidance in respect of any requirements under the Ordinance imposed on data uses, the Commissioner may issue such codes of

practice as in his opinion are suitable for that purpose. The relevant code of practice in the present case is the Code, issued by the Respondent.

27. Pausing here, it is important to note that the Code is for practical guidance of those governed by it. The Code itself is not legislation, cannot override the provisions of the Ordinance, and must be read in the context of the overall scheme of the Ordinance.

28. Two clauses of the Code are of relevance. They impose duties on both the credit provider[2] and the CRA (credit reference agency[3]).

29. Firstly, credit providers are required by Clause 2.5 of the Code to take "*reasonably practicable steps to check*" the accuracy of the data so provided to a CRA, in the present case, TU. If the credit provider discovers any inaccuracy in the data provided to the CRA, it "*shall update*" such data as soon as "*reasonably practicable*".

30. Secondly, Clause 3.19 of the Code provides that upon receiving a request for correction of consumer credit data provided by a credit provider, the CRA "*shall promptly consult*" the credit provider. If the CRA does not receive from the credit provider any written confirmation or correction of the disputed data within 40 days from the correction

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[2] Under Clause 1.13, "Credit provider" means any person described in Schedule 1 of the Code. Under Schedule 1 there are 4 classes of organisations : (1) an authorized institution within the meaning of section 2 of the Banking Ordinance Cap 155, (2) a subsidiary of an authorized institution within the meaning of section 2 of the Banking Ordinance Cap 155 (the term "subsidiary" shall have the same meaning as in section 2 of the Companies Ordinance, Cap. 32, (3) a money lender licensed under the Money Lenders Ordinance Cap 163, (4) a person whose business (whether or not the person carries on any other business) is that of providing finance for the acquisition of goods by way of leasing or hire-purchase.

[3] The term "CRA" under Clause 1.11 means credit reference agency, which in turn means any data user who carries on a business of providing a consumer credit reference service, whether or not that business is the sole or principal activity of that data user.

request, the relevant data should upon expiry of the 40 days be deleted or otherwise amended as requested.

Supervisory Policy Manual issued by the Monetary Authority

31. After the hearing, the Respondent (and also TU) made further submissions, which do not appear to be controversial, that :

(a) There is a Supervisory Policy Manual which are statutory guidelines issued by HKMA under Section 16(10) of the Banking Ordinance Cap 155.

(b) Paragraph 3.3 of the Supervisory Policy Manual provides that failure to adhere to any guideline may call into question whether the credit provider concerned continues to satisfy the minimum criteria for authorization or licence under the Banking Ordinance. There can be serious consequences which may include suspension or revocation of the authorization or licence granted to the credit provider, under Section 22(1), 24(1) and Schedule 8 of the Banking Ordinance.

(c) Paragraph 4.4.2 of the Supervisory Policy Manual[4] issued by the Hong Kong Monetary Authority states that there would be a breach of the principles if out of date information were to be retained and used and for making subsequent credit decisions.

[4] This paragraph states that "Data Protection Principle 2 ... requires that personal data shall not be kept longer than is necessary for the fulfillment of the purpose for which the data are or are to be used. [Credit providers] may need to retain credit reports from a CRA as documentary support for the relevant credit decisions for which the credit reports were obtained, and as file records in the event of subsequent queries or disputes raised by customers. With the CRA database being updated regularly, there would be a breach of the Principles if "out-of-date" information were to be retained and used for making subsequent credit decisions. [Credit providers] should ensure that they do not use out of date credit reports for making credit decisions".

(d) The term *"permitted purposes"* in paragraph 4.4.3 shall refer to the purpose for which the relevant credit report was to be used at the time of collection of the same, or any other purposes directly related thereto.

(e) Paragraph 4.4.3 of the Supervisory Policy Manual [5] provides for the destruction of the relevant credit reports within a reasonable period.

(f) When Paragraphs 4.4.2 and 4.4.3 of the Supervisory Policy Manual are construed as a whole, the out-of-date credit reports which were obtained for previous credit applications or decisions may be retained only as documentary proof for the previous decisions, otherwise they should be destroyed pursuant to paragraph 4.4.3. When facing new credit applications, credit providers are always required to consider updated credit reports.

The Amended Report

32. We have examined both the Report and the Amended Report. In summary, in the original Report, it was stated that statistically, in the period of the following 12 months, 65.32 % of the population having the credit score of the Appellant would fulfill their commitment to make payment to credit providers. In the Amended Report, the percentage was corrected to 89.94%. This correction appears to be a correction of a significant error. There was no suggestion that the Appellant was borrowing for her mother who appeared to have problems in settling credit card payments as they fell due. There was also no suggestion that the debt problems of her mother were associated with her.

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[5] This paragraph states that "Where a [credit report] is obtained for the purpose of assessing a credit application and the [credit provider] subsequently refused the application, or when a customer ceases to have any borrowing relationship with the [credit provider], [the creditor provider] should destroy the relevant credit reports within a reasonable period unless such reports are to be used for other permitted purposes."

33. In addition, in both the original Report and the Amended Report, it was stated clearly that not only SCB had requested for credit reports, but there were 3 other bodies who had also sought credit reports :

(a) Bank of China, that is, Bank of China Credit Card (International) Ltd, on 16 August 2010, and the application was rejected on 21 August 2010, and a further application was rejected on 21 September 2010;

(b) Promise, that is, Promise (HK) Co Ltd, on 10 August 2010, and the application was rejected on 3 September 2010; and

(c) ANZ Bank, that is, the Australia and New Zealand Banking Group Limited, Hong Kong Branch, on 9 August 2010, and the application was apparently rejected on 9 August 2010.

There was also an application by the Appellant to DBS Bank (Hong Kong) Limited ("**DBS**") for an "Express Loan" and the Appellant's application was rejected on 11 October 2010.

34. In other words, notwithstanding TU had sent the Amended Report to the Appellant on about 8 September 2010, as at 8 September 2010, at least one of the third parties, including Bank of China and Promise both of whom had decided to reject the Appellant's application, had no knowledge of the inaccuracies as complained by the Appellant. But even if they had the Amended Report, we are of the view that it was not apparent that the original Report contained inaccuracies which should have never been there.

Discussion

35. Adopting a common sense approach, the natural chronological event one would expect is TU should inform those third parties of the

inaccuracies. The Inaccurate Data directly came from TU, although the source of the inaccuracy would be from a credit provider. This approach would certainly assist the third parties to correct what could have been a wrong decision. However, we have substantial submissions on a wide range of issues that such a view is not right. These we propose to deal with them below but we have to say the central issues in this appeal are quite limited :

(d) whether TU (as a credit reference agency and data user) has a duty to inform those whom it had apparently sent either or both of the Report (with the Inaccurate Data) and the Amended Report, including the Bank of China, Promise, and possibly also the ANZ Bank and DBS,

(e) if TU has such a duty, whether it still has a good reason not to do so because it was not reasonably practicable to supply the third party with the corrected data and stating clearly that there was an error.

36. In our view, the central focus in the present case would be section 23(1) of the Ordinance, which requires that a data user, of which TU is one, if the data has been disclosed to a third party during the 12 months immediately before the day on which the correction is made, take all practicable steps to supply the third party with a copy of those data as so corrected accompanied by a notice in writing stating the reasons for the correction. See paragraphs 16 to 22 above. The interpretation of section 23(1) may be considered in the context of the Data Protection Principles, the Code of Practice on Consumer Credit issued by the Respondent under Section 12 of the Ordinance, the Supervisory Policy Manual on the Sharing and Use of Consumer Credit Data through a Credit Reference Agency issued by the Hong Kong Monetary Authority, and all the circumstances of the present case.

37. In this regard, we note that the context in the present case is

that :

(a) The personal data possessed by TU, the data user, in relation to the Appellant was inaccurate;

(b) Those data had been disclosed to third parties (i.e., the Bank of China, the ANZ Bank, Promise (HK) Co. Ltd, and possibly DBS Bank) during the 12 months immediately preceding the day on which the correction was made;

(c) No steps whatsoever were taken to supply the third parties with a copy of those data as so corrected, nor the reasons for the correction.

38. In considering whether it was reasonable for TU to take all (reasonably) practicable steps to supply the third party with a copy of those data as so corrected accompanied by a notice in writing stating the reasons for the correction, we believe the key question is whether TU has no reason to believe that the third parties have ceased using those data for the purpose (including any directly related purpose) for which the data was disclosed to the third parties.

39. TU relies on a number of matters to say that it had no duty nor was it reasonably practicable to inform the third parties of the Inaccurate Data in the present case. In particular TU relies upon Paragraph 4.4.2 of the Supervisory Policy Manual issued by the Hong Kong Monetary Authority and said that (in Paragraph 9 of their submissions dated 22 July 2011), *"to our best understanding, it is the practice of the credit providers to use the credit report only once and only for a specific credit application. If they need to reconsider the application based on new data, their practice is to request a new credit report, rather than using the old one and see what has been updated."*

40. A variant of the submission was that credit providers request

reports for assessment of loan applications. No matter whether the credit reports issued contain the Inaccurate Data, credit providers, according to the Supervisory Policy Manual or DPP 2, shall not reuse the credit reports and shall request for a new credit report for subsequent credit decisions. Therefore, if they have to reconsider the loan application from the same applicant, they shall not reuse the outdated Report. Following this logic, TU has reasonable grounds to believe that the credit providers would not use the outdated credit report. Therefore the requirements of Section 23(1)(c) do not apply to TU. See Paragraph 21 of TU's submission dated 22 July 2011.

41. All these scenarios in that the practice of credit providers was to use the credit report only once, and also that there is the requirement that credit providers shall not reuse the credit reports so in practice they will not reuse the credit reports may well be true, but the circumstances of the present case must be clearly understood :

(a) The first (erroneous) credit report was dated 21 August 2010.

(b) The Appellant's application for personal loan from the ANZ Bank was rejected on 9 August 2010; her application for credit card was rejected by the Bank of China on 21 August 2010; and her application for personal loan was rejected by Promise on 3 September 2010.

(c) The Appellant lodged the Personal Data Correction Form on 25 August 2010.

(d) A new credit report, namely the Amended Report, was issued on 8 September 2010.

(e) The Appellant's application for credit card was again rejected by the Bank of China on 21 September 2010.

(f) Her application for loan was also rejected by DBS on 11 October 2010.

42. Both the original Report and the Amended Report were therefore issued, and the relevant bank applications made, within a short time-span. It would seem to us that it is highly artificial and unrealistic for both TU and the Respondent to have assumed, and to argue that the banks, in considering the Appellant's second batch of applications for credit, would have relied **solely** on the new credit report and **wholly disregarded** what happened in the first batch of applications.

43. Take the case of Bank of China as an example. When the Appellant applied for a credit card for a second time, presumably in September 2010, the Bank of China might have obtained from TU the Amended Report. The Amended Report would contain the correct personal data about the Appellant. At the same time, it is highly likely that the Bank of China would also notice from its own record that, as recent as 21 August 2010, a similar application by the Appellant was rejected. Bank of China's record might also contain the reason for the rejection, assuming that it has refrained itself from looking at the first report. This was apparently permissible under both the Code and the Supervisory Policy Manual. In the absence of information that the first rejection was based on an erroneous report, it would be unrealistic to assume the Bank of China ought to approve the Appellant's second application for credit card. To require the Appellant to send the Amended Report again to the Bank of China and assert that the amendment was due to an error is an unattractive proposition to the Bank of China, as such assertion is likely to be treated to be self-serving.

44. Further, in our view, the word "using" under section 23(1)(c)(ii) should be given a reasonably wide construction. The bank does not have to retrieve the first credit report to look at it and expressly rely on it. It suffices if the effect of the erroneous personal data could still

exist, and this was quite evident in the case of the Bank of China application.

45. We are therefore of the view that, in the circumstances of this case, TU cannot say it had no reason to believe that the banks to which the original Report was issued had ceased using data contained in the Report for the purpose for which the data was disclosed to them, for assessing the Appellant's credit-worthiness.

Party being complained against

46. The Appellant stated as a ground of appeal that the lodging of her complaint was regarding TU and SCB. The Respondent says that in the Complaint Form of the Appellant dated 31 August 2010, the complaint was only concerning the accuracy of the record that TU maintained. It is therefore grossly incorrect for the Appellant to refer to SCB in this appeal as if it were a party being complained against.

47. We have examined the Complaint Form, and we found that at continuation sheet 2 (at page 131 of the Appeal Bundle) the Appellant expressly stated that firstly TU acts as a credit reference agency and is the only credit reference agency in Hong Kong, secondly that

> *"The most grave and serious error … is the charge made by Manhattan Card – a division of Standard Chartered Bank (HK) Ltd to which they have stated I was a Principal to this account …"*

and thirdly also that she was

> *"… at a very high risk of losing [her] company, product and potential success and future due to Standard Chartered Bank's serious error and TransUnion's subsequent negligence in the failure to exercise*

their due diligence and ensuring that the data and information given to them from financial institutes to be placed against [her] name as a charge was genuine, accurate and most importantly legal for them to do."

48. The Respondent's objection is not particularly attractive here. The complaint was obviously directed at both TU and SCB. However, SCB is not a party in the present proceedings and we say no more about its culpability, except to say there is a prima facie case that SCB might also be liable for supplying incorrect data to TU.

Enough to provide the Amended Report to the Appellant, and not others?

49. The Respondent submitted that it was enough that the supply of a corrected credit report (ie the Amended Report) to the data correction requestor (ie the Appellant), rather than to anyone who had received the (inaccurate) Report. There are a number of subsidiary arguments advanced by the Respondent and TU.

Sections 17 and 19 of the Ordinance, and previous draft of the Code

50. In support of their argument reliance was first of all placed upon a reading of a number of provisions under the Ordinance, including sections 17(1)(b)(i) and (ii), and Sections 19(3)(b) and (3)(c)(ii) of the Ordinance, that there was no obligations imposed on TU to inform SCB or any credit providers who had been provided with the inaccurate credit report.

51. We do not find these provisions of great assistance in construing Section 23.

52. The Respondent further says that:

(a) The Code has excluded from its original draft, after consultation with the interested parties, a clause (2.3) which imposes duties similar to those under DPP 2(1)(c) and Section 23(1)(c).

(b) The new clause (2.13) that has since 2003 been effective and still effective, reads inter alia : "... *If the credit report is subsequently corrected pursuant to a correction request by the individual, the credit provider should at the request of the individual reconsider the credit application on the basis of the credit report as corrected*".

(c) The Respondent says that Clause 2.13 reflects the practical reality that the data subjects know better which credit providers may be still relying on their "inaccurate" data and it is made explicit that they shall take the initiative to approach the credit providers and request them to reconsider the updated credit report.

(d) The Respondent submitted that that it is not in the interest of the credit applicants if TU indiscriminately discloses to all banks which have obtained credit reports during the past 12 months from the data of correction the amended or new credit reports which may contain information regarding new credit applications made by the applicants or other credit loans granted by different credit providers subsequent to the dates when credit decisions were made.

(e) So the logic goes, that it will be more appropriate for the Appellant to exercise her right under Clause 2.13 of the Code to request any of the banks to reconsider her application by relying on the Corrected Credit Report.

53. This submission baffles us both as to its logic and its practicability :

(a) Firstly, even if the credit provider has a duty to reconsider applications, it does not mean the CRA has no duty to inform the relevant parties of the inaccuracies made in the credit report it had made.

(b) Secondly, if a corrected report cannot be sent to all other banks, the other creditor providers may be misled by the same incorrect information.

(c) Thirdly, if the data subject has to go to each and every bank to exercise his or her right, this is administratively undesirable and inconvenient to both the data subject and the credit providers.

Not subject matter of complaint

54. Secondly, in relation to sections 23(1)(c)(i) and (ii) of the Ordinance, the Appellant said that TU has *"failed to make the necessary commentary on the amended credit report and send the same to previous credit providers informing them of the same"*.

55. In this regard, the Respondent says that the provisions are not the subject matter of the Complaint :

(a) The Appellant made the Correction Request on 25 August 2010 and lodged the Complaint with the Respondent against TU on 31 August 2010, by then the time for complying with the Correction Request by TU had not expired yet.

(b) At the material time, the subject matter of the Complaint was that TU maintained inaccurate and unverified data.

(c) The relevant legal requirements considered by the Respondent when handling the Complaint were DPP2 (1) and the Code. Any steps to be taken by TU under sections 23(1)(c)(i) and (ii) of the Ordinance, if so required, are

subsequent matters and fall outside the scope of the Respondent's preliminary investigation.

56. We are of the view that the provision of corrected data is pursuant to statutory requirement under section 23(1). There can be no violation of Data Protection principles in complying with Section 23(1). Consumers would certainly want any inaccuracies caused to be rectified in the mind of credit providers.

57. We believe that if it were the credit providers who imposed some form of "privity" of information and sought to justify the protection of the confidentiality of such information, in so far as such protection was to the extent that inaccuracies can remain and indeed perpetuate, this is regrettable, and simply cannot be right. The argument of the Respondent on restricting the scope of investigation does not assist the Respondent. As an investigator the Respondent is not strictly bound by an issue between the complainant and the complainee. Otherwise there can be a problem of multiple complaints on a series of incidents within a short period of time that the Respondent has to consider, and the investigations can easily miss the totality of the picture.

Administrative Difficulties

58. Thirdly, the Respondent further sought to justify his argument by suggesting there were administrative difficulties, that :

(a) The credit data sharing system in question involves both TU and the credit providers, in which TU actually takes a rather passive role in collecting and updating the credit data of an individual,
(b) TU operates a central credit database, and compiles and

processes the credit data the bulk of which is contributed by the credit providers.

(c) It is therefore not reasonably practicable for TU to take such steps as required under section 23(1)(c) to notify the relevant third parties the reasons for correction because such information is privy to the credit providers.

(d) This explains why the Code does not contain any specific requirement imposing obligation on TU as a CRA to inform any third party after its compliance with a correction request.

59. TU had also given a more elaborate submission :

(a) It currently manages some 30 million credit account information for 4.5 million data subjects. Because of the vast amount of data, it is fully automated.

(b) There is no mechanism under which the current operation of the TU system tracks when the inaccurate data subsequently corrected were submitted or disclosed.

(c) On the other hand, TU can track which banks accessed the credit reports in the last 12 months. However it does not know the contents of the credit reports issued to them and TU does not keep any record.

(d) In the present case, although section 2 (Credit Application(s) Enquiry Information) of the new credit report issued to the Appellant on 8 September 2010 lists the banks which have made enquiries, TU system does not know whether the inaccurate data have been disclosed to them.

(e) TU system also does not keep record of the content of the credit reports issued because the outdated credit reports will not have any impact on the credit decisions made by the credit providers for subsequent loan applications.

(f) It is therefore unnecessary and unreasonable for TU to maintain records of such enormous amount of outdated data.

60. TU says it recognized that if the data user has no reason to believe that the third party has ceased using those data for the purpose for which the data were disclosed to the third party, he has to take all practicable steps to supply the third party with a copy of those data as so corrected accompanied by a notice in writing stating the reasons for the correction.

61. However, TU then argues that upon the receipt of a data correction request, after satisfying that personal data to which a data correction request relates are inaccurate through clarifying with the credit providers, it will make the correction in its database and supply the individual with a copy of the corrected data. This it has duly done as after receiving the Appellant's data correction request on 25 August 2010, TU made the correction and issued a new credit report on 8 September 2010 in accordance with the requirements under Section 23(1)(a) and (b). TU says that "*Even if the condition under section 23(1)(c)(i) is satisfied, TU has no practicable means of knowing whether the inaccurate data have been disclosed and to whom. This is also relevant to the fact that there is no practicable step TU can take to supply a copy of the corrected data ...*".

62. We are of the view that :

(a) it is unsatisfactory for TU to have a system without any mechanism under which the current operation of the TU system tracks when the inaccurate data subsequently corrected were submitted or disclosed ;

(b) it is also unsatisfactory for TU to say that it does not know the contents of the credit reports issued to third parties and TU does not keep any record ;

(c) it is unreasonable for TU to say that although section 2 (Credit Application(s) Enquiry Information) of the Amended Report issued to the Appellant on 8 September 2010 listed the banks which have made enquiries, TU system does not, and presumably does not have to, know whether the inaccurate data have been disclosed to them;

(d) it is not substantiated that the "outdated" Report will not have any impact on the credit decisions made by the credit providers for subsequent loan applications.

63. In the present case TU has tried to justify its conduct by reference to administrative inconvenience or more accurately, costs considerations, due to the large amount of data involved. However, there is simply no evidence of how much more it would cost, how many more staff will be involved, why the credit providers are not prepared to fund the same, and why TU as the only credit reference agency in Hong Kong enjoying effectively almost a monopoly in the supply of credit data can allow its reputation as the major credit reference agency be eroded through (a) the possibility of retention or perpetuation of inaccurate personal data by either the credit provider or the CRA and (b) inaction.

Data confidentiality

64. Fourthly, TU (in Paragraphs 24 and 25 of TU's submission dated 22 July 2011) argued that it is not for the benefit and better protection of the personal data of the consumer, because there was no on-going relationship between credit providers and the consumer after the rejection, and credit reports contain sensitive personal information which consumers will probably not want their current data to be provided to credit providers that they have not authorized. Secondly, TU may also be making unnecessary disclosure and improper use of

such disclosure, violating the Data Protection Principles 1 and 3.

65. On the question of whether there should be protection of confidential personal data, we believe the test should be this :

(a) Credit providers should not impose any duty of confidentiality of information to the extent that inaccurate information or misinformation may continue to remain or even perpetuate.

(b) Any design be it contractual or otherwise which would result in retention or perpetuation of inaccurate personal data ought to be looked at jealously, as a matter of principle.

(c) Any design that may result in retention or perpetuation of inaccurate personal data, in our view, should only be justified on public interest. Such design should not be justified simply on the ground of administrative difficulties or inconvenience, or on the ground of private contractual arrangements that on examination will show that the design may result in an obvious possibility in the retention or perpetuation of inaccurate personal data by either the credit provider or the CRA through their inaction.

66. The present arguments of the Respondent and TU do not meet this test.

Duty of Credit Providers

67. The Respondent argues that TU's main source of the data is from the credit providers and according to Clause 2.5 of the Code, the credit providers shall update their contributed data held in the database of TU from time to time when they discover any inaccuracy in the data.

It is therefore a duty of the credit providers to rely on the most updated data when a credit application is considered or reviewed, failing which the requirements under DPP2 (1) may be breached. Hence, it is reasonable for TU to adopt a practice on the basis that credit providers have ceased using the Incorrect Data once it has complied with the Correction Request.

68. The Respondent also referred to Clause 2.13 of the Code which provides the following:-

> *"...if a correction request made by the individual is subsequently complied with by the CRA, the credit provider shall, **at the request of the individual**, use a new credit report obtained from the CRA as a basis for its reconsideration of the credit application."* (emphasis added)

69. We are of the view that whether the credit providers have the duty to rely on the most updated data when a credit application is considered or reviewed is not relevant. If indeed the credit provider was not aware of the inaccuracies, but the CRA was aware of the inaccuracies, why the CRA was not under a duty to inform the credit providers and those who had received the inaccurate information? Imposing a positive duty on credit providers to seek out for themselves inaccuracies and correct them is to assume that the credit providers must be or should be aware of those inaccuracies. This is not a reasonable assumption in practice.

70. The Respondent says that the Appellant may, at any time and if she so wishes, produce the Amended Report to any of the credit providers, who had previously reviewed the Report and declined her credit application, for reconsideration. Such credit providers shall then act in accordance with clause 2.13 of the Code.

71. It may be the case that the Appellant may be able to make use of an amended report. However, there is no duty on the Appellant to make correction of an error made by the CRA in the first place.

72. The Respondent did obtain relevant information and documents from SCB (see the Respondent's letter to SCB dated 11 October 2010 and SCB's reply dated 12 November 2010 under items 8 and 11 of the Respondent's List respectively). The documents so obtained from SCB concern the dispute between the Appellant and SCB over whether the Appellant should be liable for the default of the Account. Such dispute is a contractual matter between the Appellant and SCB. SCB is not a party to this appeal and we say no more than to repeat that prima facie SCB had supplied incorrect data to TU.

Further investigation has no practical effect ?

73. The Respondent relied on the case of 王開萬及王梅芬 與 個人資料私隱專員 (Administrative Appeals Board Case No. 12 and 13 of 2009). The Board in that case upheld the decision of the Respondent not to carry out an investigation and agreed that further investigation would not bring about a more satisfactory result. The Board states the following in paragraph 19 of the relevant judgment:-

> *"專員採取了一個實際方式來處理本案。專員認為繼續調查不會產生任何實際效果：(a)既然告示及會議記錄已除下，再發執行通舍(知) 已無實際效果；(b) 根據私隱條例第45(2)條及第46條，他們的調查內容不得用於民事法律程序上。因為條例並沒有註明調查結果可成為民事訴訟表面的證據，上訴人亦不可用調查的結果作為民事起訴的基礎。*

74. The Respondent considered that further investigation cannot be reasonably expected to bring about a more satisfactory result. The

reason is that even if TU is found to be in contravention, the Respondent can at most direct TU to amend its record which TU had done so already.

75. We agree that if there is no practical effect on further investigation, the Respondent has a discretion not to proceed with investigation.

76. However we respectfully disagree that there is no practical effect to investigate further in the present case.

77. Firstly, under Section 29 of the Ordinance, where pursuant to a data correction request a data user is required to inform a requestor of any matter by notice in writing, then the requestor shall be deemed not to be so informed unless and until the requestor is served with the notice.

78. The so-called notice in the present case, as we have examined, was in the form of an amended credit report dated 8 September 2010. See pages 143 to 145 of the Appeal Bundle.

79. In both the original Report and the Amended Report, TU had categorically stated that it acted as an "*objective and trusted bridge for [the Appellant's] credit providers*" and TU also uses personal data. A credit provider set out in Schedule 1 of the Code is no doubt a data user. Again the Code also defines a CRA as a data user. TU was thus a data user and under a duty under Section 29 to serve a notice, and that notice has to be a proper notice.

80. The Amended Report could not be a proper notice if it did not state clearly whether the three TU's members being credit providers, namely, Bank of China Credit Card (International) Ltd, Promise (HK) Co Ltd, and Australia and New Zealand Banking Group Limited had or

had not been duly informed of the amendment, and the reasons for such amendment.

81. Secondly, if the three TU's members were not duly informed of the amendment and the reason for the amendment was due to errors, this was not in compliance with DDP 3. DPP 3 states that "... *unless the data subject gives consent otherwise personal data should be used for the purposes for which they were collected or a directly related purpose*".

82. The purpose for collection in the present case was to provide accurate personal data to all those who made a request in accordance with the arrangement between TU and the credit providers.

83. Further, no consent may be assumed or implied from the data subject to allow the provision of inaccurate personal data to third parties.

84. Thus the third parties receiving inaccurate data ought to be informed of the inaccuracy.

85. Accordingly, it could not be said that any further investigation would have no practical effect.

Reliefs sought by the Appellant

86. The Respondent argues that the reliefs sought by the Appellant are either of no merit or outside the jurisdiction of this Board :

(a) a written confirmation from the Respondent acknowledging his negligence in failing to identify the beaches of the Ordinance, etc. and compensatory damages therefor;

(b) legal proceedings for defamation would be issued against

the Respondent should the aforesaid confirmation and damages be not given;

(c) that the Respondent to issue an enforcement notice against TU and to "*make an offering of a monetary settlement*";

(d) the Respondent to "*make a goodwill gesture in aiding my company, Sweet Potato Ltd. in its youth publication, Sky Magazine Hong Kong…*".

87. On these four aspects, we agree that no such reliefs ought to be granted. Those reliefs if granted would amount to a collateral attack on matters that should be the subject of litigation. In addition, we believe the Respondent do not have power to grant the reliefs as sought.

88. However the refusal of those reliefs is not an excuse not to investigate further. If indeed TU is found to be in breach of Section 23, or DPP 2(1), the Respondent is quite entitled to issue an enforcement notice to, for example, compel TU not to accept any arrangement with data providers to bind itself in order to allow the perpetuation of mistakes and also misleading other data users.

Supervisory Policy Manual issued by HKMA

89. TU further argued that, given the clear wordings of Paragraphs 4.4.2 and 4.4.3 of the Supervisory Policy Manual, even for making credit decisions in relation to a fresh application of the same customer, it does not fall within a "permitted purpose" for which the out of date credit report may be used. Hence it is justifiable for TU to conclude that there is reason to believe that the credit providers should have ceased using a credit report after making a decision on a particular credit application. TU added that :

(a) There is no evidence to show that the credit providers after the date of the Amended Report[6] had considered her old Report as at 21 August 2010[7].

(b) Out of the various credit applications made by the Appellant, as far as they are known to the Respondent, Bank of China, ANZ Bank, and DBS Limited have processed her credit applications after the date of the Amended Report, and there is no evidence whatsoever that these banks have considered the old Report in making decisions regarding the subsequent credit applications.

(c) In particular for DBS, there is simply no evidence that it possessed or otherwise had any chance to access the old Report at all.

(d) There can be many reasons leading to the rejection of the Appellant's credit applications. The Appellant has not approached any of the credit providers for explanation at all. It would be speculative to suggest these banks may have considered the old Report.

(e) Therefore it will be unsafe to assume or suggest that the credit providers may not have ceased using any out of date credit report when making credit decisions which is expressly prohibited under the Supervisory Policy Manual.

90. In our view, given our analysis, investigation of the Respondent ought to have included the dates whether and if so when either the Report or Amended Report or both of them together were provided to the credit providers. This piece of information was within the peculiar knowledge of TU. It lies ill in the mouth of TU to say there was no evidence without stating whether there was access by any of the credit providers to any of the Report or the Amended Report or both of them.

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[6] see pages 327 to 329 of the Appeal Bundle.

[7] See pages 316 to 319 of the Appeal Bundle.

TU ought to state its case clearly.

91. Further, the destruction of the credit data reports do not mean no record of refusal could not be retained by the credit providers. The Supervisory Policy Manual had not said credit providers have to consider afresh each application. The Supervisory Policy Manual does not prohibit the credit providers from asking whether an applicant for credit facilities had previously been rejected, and if so for what reasons.

Scope of Investigation : Status of Credit Reference Agency

92. In our view, the scope for investigation by the Respondent should also include an investigation of the capacity in which TU has been acting. It is important to appreciate that as a credit reference agency (ie TU), if it is to function properly, that is, if it is to provide any requester with accurate information on credit, TU may have to act in a number of different roles. Thus subject to further investigation by the Respondent, TU may have acted in the following roles :

(a) Firstly, TU acts for the credit providers in receiving the credit data.

(b) Secondly, TU acts for the credit providers in compiling the credit data from other credit providers.

(c) Thirdly, TU acts for the credit providers in supplying relevant credit reports containing the updated credit data to credit providers, upon request.

93. On the assumption that there is to be such finding of different roles, it seems clear that if there was any error in the Report, it is only reasonable that TU should be under a duty to make the correction and supply that correction with reasons of the correction to those who had previously requested and received the inaccurate credit report.

94. Such duty exists notwithstanding TU has no duty to provide accurate data. Such duty arises from the moment inaccurate data was provided. The reason is that it is only right in the interest of the recipient of the inaccurate data that they should be notified of the inaccuracy, that it is commercial common sense that this should be done, that it is in the public interest to ensure the integrity of a credit reference agency, and that it is in our view a duty that should be readily implied, as a matter of law into the contractual relationship between TU and the credit providers receiving the credit report. Any restriction or limitation of such duty on the part of TU creates the possibility of lack of any sufficient safeguards for TU to provide accurate data.

Conclusion

95. In conclusion we are of the view that the appeal must be allowed, but the reliefs claimed by the Appellant ought to be refused.

96. Given the submissions made by both TU and the Respondent, we are also concerned that there may be a possibility that one or more of the credit providers in the present case may have also acted in breach of data protection principle 2 by providing inaccurate data to TU. However the credit providers in the present case are not parties to the appeal and we say no more.

97. We believe that the Respondent should consider investigating further into the conduct of the relevant credit providers to see if TU or some other parties should be liable. If indeed the conclusion of the Respondent is that TU should be liable, upon investigation, this decision does not prevent the Respondent from conducting further investigation of TU to see if it had acted in breach of other data protection principles.

98. We draw comfort from *Nammo v TransUnion of Canada Inc* 2010 FC 1284, 20 December 2010, a case of a different data protection regime, that the Federal Court found TransUnion of Canada Inc had breached the provisions of the Personal Information Protection and Electronic Documents Act SC 2000, c.5 by among others, failing to transmit the amended personal financial information concerning the applicant to third parties, including to the Royal Bank of Canada.

99. We thank parties for their submissions.

(signed)
(Mr Andrew Mak)
Deputy Chairman
Administrative Appeals Board