ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 29 OF 2009

BETWEEN

NG KIN FAI — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

AND BETWEEN

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 30 OF 2009

YEUNG CHUNG WING — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

(Consolidated by the order of the Board on 13 April 2010)

Coram: Administrative Appeals Board

Date of Hearing: 13 April 2010

Date of handing down Written Decision with Reasons: 18 June 2010

DECISION

Before us are the two appeals by Mr. Ng Kin-fai and Yeung Chung-wing ("the Appellants") under section 39(4) of the Personal Data (Privacy) Ordinance (Cap 486) from the respective decisions of Mr. Roderick Woo, the Privacy Commissioner of Personal Data ("the Commissioner") contained in his two letters both dated 3rd April 2009 regarding the complaints made by the Appellants respectively ("the Complaints").

2. The Commissioner's decision is that after some preliminary investigation the Commissioner has decided not to carry out an investigation into the Complaints pursuant to Section 39(2)(d) of the Ordinance.

Consolidation

3. As the facts of the case are similar and the issues are the same, the parties having raised no objection the Board has directed that the two cases be consolidated and heard together.

Facts of the Case

4. Both Appellants were former Senior Investment Managers of Money Concepts (Asia) Limited ("Money Concepts"), an authorized broker dealing in investment and insurance products.

5. We are told that it is a statutory requirement that any person who wishes to market those products has to obtain at least two licences from the Securities and Futures Commission ("SFC") and the Professional Insurance Brokers Association Limited ("PIBA") respectively.

6. To maintain the licences one has to show his competence and standard by being accredited to one of intermediaries, of which Money Concepts is one, and complying with the Continuing Professional Development requirement.

7. The Appellants entered into agreements with Money Concepts respectively that the latter would provide the Appellants the necessary training, practical experience and practice opportunities in giving advice and service to insurance policyholders and investors while the Appellants had to pay certain fees for it.

8. For some reasons, the licences were suspended.

9. The Appellants told us that they terminated the agreements serving notices of termination on 28th May 2005 with effect from 10th June 2005.

10. Upon termination Money Concepts was required to submit Cancellation Forms to PIBA and SFC for termination of their accreditation.

11. The Appellants wanted to obtain copies of certain documents from Money Concepts including Cancellation Forms filed with PIBA, Form 5 filed with SFC, (for the purpose of ease of reference the Cancellation Forms and the Form 5 are collectively referred to as "Cancellation Forms"), the training records kept and the correspondences made by Money Concepts with SFC and PIBA during the relevant period.

12. Pursuant to Section 18 of the Ordinance the Appellants made Data Access Requests in the prescribed form on three separate occasions i.e. 3rd February 2007, 8th November 2007 and 20th June 2008 respectively. On the 1st and 3rd occasion Money Concepts did not respond until well after the statutory period of 40 days or on the 2nd occasion it did not even bother to reply resulting in the matter being reported to the police. On each occasion the Appellants made complaints to the Commissioner.

13. Among the papers supplied to them by Money Concepts are the Cancellation Forms. In some material aspects the Cancellation Forms supplied are different from the versions of two Cancellation Forms they obtained from SFC and PIBA. On 20th February 2009 they lodged the complaints with the Commissioner.

14. After some preliminary investigation on 3rd April 2009 the Commissioner formally informed the Appellants that he had decided not to carry out an investigation of their complaints under section 39(2)(d) of the Ordinance. Hence, the Appellants lodged these appeals.

Subject matter of the Appeal

15. The Appellants claim that on 20th February 2009 they lodged complaints (as appeared in their letters of the same date attached to the Complaint Forms) on the following matters:

(a) Failure to respond by Money Concepts within 40 days to the Complainants' Data Access Requests made on 3rd February 2007;

(b) Failure to respond by Money Concepts to the Complainants' Data Access Requests made on 8th November 2007;

(c) Failure to respond by Money Concepts within 40 days to the Complainants' Data Access Requests made on 20th June 2008 and

(d) The discrepancies found between the versions of Cancellation Forms obtained from SFC and PIBA on one hand and those copies supplied by Money Concepts to the Complainants on the other.

Discussion

16. We have considered the contents of the respective complaint letters from the two Appellants both dated 20th February 2009 that form the basis of these appeals. Despite the able submission by Mr. Leung of counsel for the Appellants we are unable to share his view. We find that the general tenor of the letters is to urge the Commissioner to look into the discrepancies appeared in the different versions of the Cancellation Forms or, to be more exact, "the suspected forged documents". The other three matters i.e. items (a) to (c) contained in paragraph 15 above, if ever mentioned in the two letters, were mentioned as background information and do not form the subject matter of complaints.

17. We must point out that these are the appeals under Section 39(4) of the Ordinance and the statute governs out jurisdiction. We have power to deal with the appeal against the refusal specified in the notice given by the Commissioner under Subsection 39(3) of the Ordinance. It is beyond doubt that the Commissioner's refusal contained in his two letters of 3rd April 2009 to the Appellants respectively is about the alleged alteration of date and not about the late responses or no response to the three Data Access Requests. In fact the Commissioner made no mention of them in his two decision letters dated 3rd April 2009.

18. The Respondent submits that in each of the letters given by the Commissioner on 4th September 2007, 8th November 2007 and 20th June 2008 to the Appellants in respect of the three Data Access Requests respectively the Respondent has decided not to investigate the matters concerning the late responses or no response and have decided to close the files. The Appellants should have appealed within the statutory period for appeal upon receipt of each of those letters. They have not done so. If they now want to appeal against those refusals specified in the letters they should apply for leave to appeal out of time. But, no such application has been made for us to consider. We agree with such submission.

19. This Board unanimously agrees that there is only one issue before this Board now i.e. the Commissioner's refusal to investigate the discrepancies contained in the different Cancellation Forms. We consider that the submissions relating to the three Data Access Requests are irrelevant and that part of the appeal should be dismissed.

20. Having said that, we hasten to add that this Board has not made any ruling on the issue whether the Commissioner should continue with the investigation when a subject user has failed to respond or has responded a Data Access Request out of time. This is something that needs to be considered on case-by-case basis.

21. Having dealt with the Data Access Request issue it leaves us with two further issues raised by Mr. Leung in the Appellant's appeal.

22. Mr. Leung puts it as a major ground of appeal --- the unsatisfactory handling of the Appellants' complaints. At the hearing we have indicated to him that this Board conducts the hearing of the appeals by way of re-hearing. Even if there were mishandling it would not necessarily follow that we must allow the appeals. Our stance is that we will consider all the issues anew and examine all the matters afresh. In fact it is a de novo hearing. After hearing we shall come to our own decision whether the Commissioner should continue with the investigation.

23. Notwithstanding such indication Mr. Yum, legal counsel of the Commissioner's office, tried to convince us how the Commissioner was misled by the Appellants' conducts and called Ms. Maggie Lo, Personal Data Officer in charge of the case, to testify at the hearing.

24. Generally she is an honest and truthful witness. Unfortunately we have not heard any submission about the reliability of the contents of the different attendance notes: unless there is any evidence to the contrary we would prefer her version. Rightly or wrongly she stands firm on her own view. We do find that Ms. Lo did honestly

believe that the Complainants' complaints as contained in their letters dated 20th February 2009 was about forged documents.

25. She did not realize that there was such fine distinction between forgery and falsification at all material times during the course of the investigation. It was only after the Complainants had retained their lawyer who highlighted the difference between forgery and falsification. The question we have to answer is: "Should the Commissioner continue with the investigation after realizing the difference?"

26. Before answering the question, let's examine the subject documents and identify the differences. The differences between the Cancellation Forms obtained from SFC and the one from Money Concepts, as we find them, are as those set out in the following tables:

Table 1: SFC Form 5 (Notification by Licensed Corporation)

Copy from SFC	Copy from Money Concepts
Name of Director /responsible provided	Blank and not completed
Signature of the above person	No one signed there
Name of Contact person provided	Blank and not completed
Dated /7/2005	Dated 16/6/2005
Remarks found beneath the space for dismissal	Blank with no such remarks

Table 2: PIBA Cancellation Form

Copy from PIBA	Copy from Money Concepts

Name of Chief Executive provided	Blank and not completed
Signature of Chief Executive	Blank and not completed
Dated 13.12.06	Dated 16.6.05

27. There are many reasons, apart from forgery, that account for the differences. Mr. Leung has listed five in paragraph 29 of his written submission and we would like to add the sixth one as follows, Money Concepts might have prepared the Cancellation Forms and kept them in file. Upon realizing that they had to make submission they took out those Forms, made photocopies and altered and completed them to convert them into other Cancellation Forms for submissions to the relevant authorities. Money Concepts sent them to SFC and PIBA without keeping copies of them for record. For the purpose of complying with the Data Access Requests, they found the earlier version and supplied them to the Complainants.

28. Out of curiosity laypersons would very much like to find out the true reason for the discrepancies. But, the Commissioner is a statutory body whose power of investigation is limited by the Ordinance and his own policy.

29. Section 39(2)(d) of the Ordinance suggests that the Commissioner may refuse to carry out or continue an investigation if he is of the opinion that having regard to all the circumstances of the case an investigation or further investigation is for any other reason unnecessary. The Commissioner has expressly spelt out as one of his policies that after preliminary investigation if the Commissioner finds no prima facie evidence of any contravention of the requirement of the Ordinance, he

may consider further investigation is unnecessary and takes no further action.

30. We find that the policy is a fair and reasonable one. The Commissioner is charged with the duty of investigating into complaints concerning contravention of the provision of the Ordinance. He is not asked to make investigation or enquiry into matters in order to satisfy one's curiosity for any other purpose.

31. In this case we are unable to find anything including the discrepancies or differences in the two versions of Cancellation Forms that make us think Money Concepts or any other person is in contravention of any requirement of the Ordinance. At least Mr. Leung, counsel for the Appellants, has not pointed out to us that Money Concepts or those discrepancies are in contravention of which section.

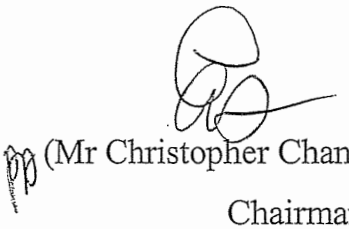
32. We have also considered the Complainants' cases afresh and could not find any special circumstance that renders it necessary for us to deviate from the Commissioner's policy.

Conclusion

33. For the above reasons, we are of the unanimous view that the Commissioner's decisions not to further investigate into the two Complaints should be upheld. Accordingly we dismiss the appeals.

34. For the sake of completeness we make an order nisi that each party pays his own costs. Unless we hear written submission from any of

the parties to the contrary within the next 14 days, the order nisi will be made absolute.



(Mr Christopher Chan Cheuk, BBS)
Chairman
Administrative Appeals Board