

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 32/2017

BETWEEN

LEUNG CHUNG LAN LORRAINE Appellant

and

PRIVACY COMMISSIONER FOR Respondent
PERSONAL DATA

Coram: Administrative Appeals Board

- Mr Erik Ignatius SHUM Sze-man (Deputy Chairman)
- Ms CHAN Pui-ying (Member)
- Mrs Julie MA LI Mun-wai (Member)

Date of Hearing: 6 June 2018

Date of Handing down Written Decision with Reasons: 14 June 2018

DECISION

Introduction

1. The present matter arose from a complaint made by the Appellant to the Respondent on 14th August 2017 purportedly under section 37(1) of the

Personal Data (Privacy) Ordinance, Cap 486 (“the Ordinance”) in respect of the following two matters,

- (1) The Appellant having terminated her membership account with Asia Miles Limited (“Asia Miles”) found that subsequent to the termination of her account she was still able to access her account details including her personal data through the Asia Miles hotline by entering her account number (with particulars of herself). She complained against Asia Miles that there might be unauthorized access to her membership account information kept by Asia Miles (“Allegation 1”).
- (2) The Appellant alleged that unknown person(s) had impersonated her to attend medical appointments and/or receive treatments at different public hospitals by using her personal data (“Allegation 2”).

2. By a letter dated 8th September 2017 issued by the Respondent to the Appellant (“the Decision”) the Respondent recapped the complaints of the Appellant and referred to a meeting held with the Appellant on 18th August 2017. As to the complaint against Asia Miles the Respondent stated that “as you [the Appellant] agreed that this Office could handle Allegation 1 by relaying your concern to Asia Miles, we have issued a letter reminding Asia Miles of the requirement under the Ordinance in relation to the security of personal data.” In relation to the second complaint, the Respondent stated that, “As for Allegation 2, given that you [the Appellant] are unable to specify the identity of the party complained against, we cannot process this allegation under the Ordinance.”

3. At the end of the Decision the Respondent concluded that “In the circumstances, no investigation into the matter complained of will be carried out”.

4. The Appellant was not satisfied with the Decision issued by the Respondent, hence the present appeal lodged to the Administrative Appeals Board (“the Board”) by the Appellant by way of a Notice of Appeal dated 17th November 2017 against the Decision.

Written Submissions of the Parties

5. The Respondent filed a written Statement dated 12th February 2018 in relation to the Decision appealed against.

6. Other than the Notice of Appeal above referred to, the Appellant filed various written submissions dated 7th March 2018, 19th March 2018 and 18th May 2018 together with attachments.

7. The Board has considered all the written submissions of the parties and the oral submissions presented at the appeal hearing. The Board does not propose to set out the parties’ submissions in detail. It will transpire that it is sufficient to set out in the course of stating the reasons for the present decision the more relevant and important submissions of the parties.

Preliminary Application of the Appellant

8. The Board notes that the Appellant by her letter dated 6th February 2018 applied to this Board for the appeal hearing to be conducted in private. The Appellant supported her application by a short written submission dated

11th May 2018 filed pursuant to the directions of the Board. Having considered the parties' written submissions relating to the application the Board dismissed the Appellant's application and gave its written decision on 31st May 2018. The appeal hearing was therefore conducted as a public hearing as usual which is the norm for appeal hearings as provided in section 17(1) of the Administrative Appeals Board Ordinance, Cap 442.

Reasons for Decision: Allegation 2

9. Allegation 2 can be disposed of swiftly for the following reasons upon the undisputed facts of the case relating to Allegation 2.

10. By section 37(1)(b)(i) of the Ordinance it is expressly provided that an individual may make a complaint to the Commissioner about an act that has been done by **a data user specified in the complaint** (emphasis underlined and added by the Board).

11. In the exercise of his power the Respondent issued a Complaint Handling Policy ("the Policy") which includes paragraph 4(c) as follows,

"In practice, the following information has to be provided to the Respondent in making a complaint under section 37: the complainant must specify the identity of the party complained against by providing his name and contact details..."

12. Though the above Policy does not enjoy the status of law, it is to be referenced and taken into account by the Board in the course of administrative appeals (see section 21(2) of the Administrative Appeals Board Ordinance). The Board considers that the above requirement in the Policy makes good sense and accords with the intention, letter and proper construction of the said section

37(1)(b)(i) of the Ordinance. A complainant should provide the identity of a “specified” person who is alleged to have acted in contravention of any requirement under the Ordinance. Otherwise the Commissioner will be tasked to do a private investigator’s job in relation to complaints which task does not fall within the ambit of the duties of the Respondent and the expertise of the Respondent’s office.

13. Obviously, in the present case relating to Allegation 2 the Appellant did not provide a specified data user’s name or identity as required under section 37(1)(b)(i). Even up to the time of the appeal hearing the Appellant could not provide the name(s) or identities of the person(s) said to have acted in contravention of the data protection principles under the Ordinance. In the circumstances the complaint relating to Allegation 2 could not and did not constitute any valid “complaint” under the said section.

14. The consequence is that the Board does not have jurisdiction to entertain the appeal in relation to Allegation 2. By section 3 of the Administrative Appeals Board Ordinance under which the Board operates and derives powers, the jurisdiction of the Board is limited to dealing with appeals against administrative decisions of the description mentioned in column 3 of the Schedule to the Administrative Appeals Board Ordinance. The said column 3 in relation to the Ordinance (item 29) does not include any decisions of the Respondent as to whether there was a valid “complaint” under section 37 of the Ordinance. The net result is that by reason of the fact that the Appellant did not specify the person complained against who was said to have breached the data protection principles under the Ordinance, the Appellant has not lodged a valid “complaint” under section 37(1). The Board does not have jurisdiction to entertain such an appeal.

15. The above interpretation of the relevant sections in the Ordinance and the Administrative Appeals Board Ordinance was supported by at least three decisions of differently constituted Administrative Appeal Boards in the previous cases of AAB No. 32/2004, Lo Lai Wah V Privacy Commissioner of Personal Data (AAB No. 39/2015) and Wong Wai Ping V Privacy Commissioner for Personal Data (AAB No. 13/2016), the last two of which were referred to by the Respondent in their submissions. The Board agrees with the submissions of the Respondent in this respect in the context of Allegation 2.

16. In the Decision of the Respondent as stated in paragraph 2 hereinabove, the Respondent expressly referred to the absence of the identity of the person complained against. The Respondent stated that he could not process the complaint. The above reasons clearly indicated that Allegation 2 did not constitute a valid “complaint” under the Ordinance and hence could not be processed. In the premises, the point taken by the Respondent accords with the Decision issued to the Appellant and is not a fresh point made with afterthought.

17. In the premises, the Board agrees with the submissions presented by the Respondent in the context of jurisdiction of the Board and dismisses the Appellant’s appeal in relation to Allegation 2. It is therefore not necessary to go on to deal with the Respondent’s other alternative grounds of opposition to the appeal in relation to Allegation 2.

Reasons for Decision: Allegation 1

18. In relation to Allegation 1 and from the contents of the Decision as set out in paragraph 2 hereinabove and from the written submissions of the Respondent, the Respondent focused purely on possible contravention of Data Protection Principle 4 (“DPP4”) in Schedule 1 of the Ordinance, which requires

a data user to take all reasonably practicable steps to protect the personal data it holds against unauthorized access.

19. In the Decision itself the procedure/step which the Respondent followed and took was stated to be,

“we [the Respondent] have issued a letter reminding Asia Miles of the requirement under the Ordinance in relation to the security of personal data”.

Again, from the above it could be seen that the Respondent was concerned with DPP4. The above interpretation was agreed with by Ms. Chan, Counsel acting for the Respondent, at the appeal hearing.

20. Coupled with the written and oral submissions advanced by the Respondent in the present appeal on the substantive matter relating to DPP4, obviously the considerations and logic of the Respondent at the time of arriving at the Decision were,

- (1) The only matter complained of was in relation to a possible contravention of DPP4.
- (2) There was no evidence that Asia Miles had contravened DPP4 in that there is no evidence that personal data of the Appellant was divulged by Asia Miles to any third party.
- (3) The Respondent had issued a reminder to Asia Miles for the latter to ensure protection of personal data of the Appellant under DPP4.

- (4) The above were sufficient to deal with the matter complained against.

21. Nothing was mentioned in the Decision directly or impliedly about any consideration that the complaint under Allegation 1 was not a “valid complaint” under section 37(1) or that it was a factor taken into account by the Respondent in coming to his Decision. The Respondent dealt with Allegation 1 substantively and on its merits. The above was conceded by the Respondent in paragraph 15 of the Respondent’s written Statement. In fact the Appellant also submitted, in the Board’s view correctly, in paragraph 5 of her written submissions dated 7th March 2018 that she never received the reasons about sections 37 and 38 of the Ordinance before she received the Respondent’s statement relating to the Decision in the course of this appeal.

22. It is upon the above background that the Respondent in the course of the present appeal took a fresh point that the Appellant has failed to satisfy one of the legal requirements under section 37(1)(b)(iii) in that “the act specified in the complaint may be a contravention of a requirement under the Ordinance”. The Respondent went on to submit that “taking the Appellant’s case to the highest, the access to data was in fact made only by the data subject (i.e. the Appellant herself) and there was no evidence whatsoever to support that there was any access, be it authorized or not, made by any other third party” (see paragraph 15 of the Respondent’s written Statement). Hence, the Respondent submitted that Allegation 1 was again not a “valid complaint” under section 37(1) and similar to Allegation 2 the Board has no jurisdiction to deal with the appeal relating to Allegation 1.

23. It is fair to note that other than the above submission the Respondent submits in the alternative that if Allegation 1 was a “valid complaint” under

section 37(1) and hence the Board has jurisdiction to hear the appeal relating thereof, the Appellant in any event has failed to adduce prima facie evidence of contravention pursuant to section 39(2)(d) of the Ordinance and the Respondent was entitled to terminate the investigation since the entering into the Appellant's account with Asia Miles need to go through verification process and only the Appellant had done that (see paragraph 16 of the Respondent's written Statement).

24. The Board has grave reservation on whether the Respondent could be permitted to rely on a different and new ground to refuse to investigate the complaint, i.e. that there was no valid complaint under section 37(1) for the first time when the matter goes on appeal. The Board will come back to this question later in paragraph 33 hereinbelow.

25. In any event, even if the new point is entertained the Board has reservation of the correctness of the Respondent's submission as summarized in paragraph 22 above.

26. When it comes to the question of whether a complaint in respect of Allegation 1 falls within the class of "valid complaints" under section 37(1)(b)(iii), the issue is whether the act specified in the complaint **may be a contravention** of a requirement under the Ordinance (emphasis underlined and added by the Board). It would necessarily involve an assessment of the merits of the complaint. The Respondent may decide that the complaint is completely devoid of merits and hence does not pass the test of "the act complained of may be a contravention of a data protection principle". In that case, as suggested by the Respondent, putting the complainant's case at its highest there is no valid complaint under section 37(1) and the Respondent's decision cannot be entertained by the Administrative Appeals Board. However, if the Respondent

comes to the view that the act complained of “may be an act of contravention of data protection principle” and hence passes the test under section 37(1) and the Respondent goes on to consider the merits and finds that there is no contravention at the end of the day or he terminates the investigation for other reasons, such decision will be amenable to appeal to the Administrative Appeals Board. In the former case, the only recourse of the complainant seems to be resorting to a judicial review application to Court of First Instance since the legal channel of appeal is not available. In the latter case the complainant has the right to appeal to the Administrative Appeals Board.

27. The above situation was faced by the Administrative Appeals Board in the case of Wong Wai Ping V Privacy Commissioner For Personal Data (AAB No. 13/2016). As to one of the aspects of the complaint in relation to residential address and name of the appellant the Board found at paragraph 35 of the decision that,

“we differ from the Respondent and hold that a complaint as defined in section 37(1) of the Ordinance has been made. However, the Appellant has not adduced any evidence to show a prima facie case. Accordingly, the Respondent’s decision of not carrying out an investigation in relation to these is correct, but the basis of the decision should be section 39(2)(d) and not section 37(1) of the Ordinance.”

28. In coming to the above decision that the Respondent was wrong to have based his decision on section 37(1), that Board ran the risk in that case of contradicting its earlier holding in the same case that the Respondent’s decision made under section 37(1) is not appealable to the Board since it is outside of the jurisdiction of the Board.

29. However, if the Board could not make the kind of decision in Wong Wai Ping's case stated in paragraph 27 hereinabove the complainant will be forced to take the matter relating to decision of the Respondent stated to be made under section 37(1) of the Ordinance to the Court of First Instance by way of judicial review application which is costly, time consuming and less efficient than the administrative appeals under the Administrative Appeals Board Ordinance.

30. This Board considers the above situation undesirable. It is undesirable because the jurisdiction of the Board would depend on how the Respondent classifies and frames his decision. This is particularly obvious when the decision is based, not on clear cut matter such as absence of a specified complaine, but on an assessment of the merits and evidence of the complaint under section 37(1)(b)(iii).

31. This Board suggests that when a case is not concerned with the absence of "specified complaine" under section 37(1)(b)(i), but involves a consideration of merits and evidence of the complaint under section 37(1)(b)(iii), the Respondent should either rest his decision solely on section 39 or make alternative decisions on the following issues,

- (a) "whether there is a valid complainant under section 37(1)(b)(iii)",
and
- (b) "assuming that there is a valid complainant on merits whether the Respondent has any ground not to investigate or pursue the complaint on its merits under other sections of the Ordinance".

32. In case the said two alternative decisions are made by the Respondent and stated in the Respondent's decision, at least the second decision is appealable to the Administrative Appeals Board and the Board's decision on that issue will assist the Respondent in reviewing or reopening the case. The integrity of the whole process of administrative appeal will be enhanced and justice will be done and seen to be done in a much quicker and efficient way.

33. In the premises and by reason of the fact that during the course of making the Decision the Respondent did not rely on the reason that the "complaint" of the Appellant in Allegation 1 was not a valid complaint, the Board does not agree that the Respondent should now be allowed to rely on the reason under section 37(1)(b)(iii). In the course of the appeal hearing Ms. Chan, Counsel for the Respondent, fairly agreed that to be fair to the Appellant the Board could proceed with the appeal without regard to the fresh point relating to section 37(1)(b)(iii). That is what the Board will do.

34. As it turns out, in the present case the decision of this Board does not turn on the above question of jurisdiction of the Board in the context of Allegation 1. In any event, for the reasons given hereinbelow the Decision of the Respondent is defective and deficient.

35. It is important to note that from all the submissions advanced by the Respondent, his case is based on a decision made in the context of enquiry as to whether there was a possible contravention of DPP4. In the context of DPP4 the Board agrees with the Respondent's submissions that there is no sufficient evidence to make out a prima facie case of any act of contravention of DPP4 such that the Respondent was correct in exercising his power under section 39(2)(d) to cease investigation after issuing a written reminder to Asia Miles.

For the above reasons, the Appellant's appeal relating to Allegation 1 in the context of any contravention of DPP4 must fail.

36. However, that is not the end of the matter.

37. The Appellant's complaint to the Respondent, viewed objectively, was wider than a possible contravention of DPP4.

38. In the written pro forma of complaint lodged by the Appellant to the Respondent dated 14th August 2017 in relation to Allegation 1 the Appellant stated in English in substance the following (insofar as the Board can read and discern),

(1) "For the Asia Miles Complaint, the company confirm they cancelled my a/c, however, I still can access to my account by phone";

(2) "I already contact Asia Miles, they confirm they cannot thoroughly cancelled my account is because they need to keep my name for their internal use".

39. Though the English language used by the Appellant is not completely comprehensible, allowance should have been given to a lay person's complaint especially when she is not legally represented. It is the duty of the Respondent to ascertain from the Appellant the crux of her complaint and possible facets relating thereto. It is to be borne in mind that the law relating to privacy of personal data is complicated and the Respondent has the best resources and expertise in relation to the nature, contents and operation of the Ordinance and should be able to discern what a complaint may possibly entail.

40. It is not difficult and is reasonable to discern from the above complaint of the Appellant that there are two limbs in substance in Allegation 1:

- (1) a complaint relating to DPP4 as the Respondent perceived and processed the complaint; and/or
- (2) a complaint relating to DPP2(2) regarding the fact that Asia Miles kept the personal data of the Appellant for an undue period after termination of the Appellant's account. It is implicit in her complaint that she was dissatisfied that after the termination of her account her data could still be accessed by the Appellant herself, which means that such data was still kept by the company.

41. DPP2(2) under the Ordinance is set out as follows,

“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”.

42. It is clear from the above analysis of the history of the matter that the Respondent has not addressed the alternative complaint of the Appellant in the context of DPP2(2) before the Decision appealed against was made. The subsequent letter from Asia Miles dated 3rd October 2017 was received by the Respondent after the Decision was made and communicated to the Appellant and thus could not be a factor taken into account by the Respondent in coming to the Decision.

43. The Board notes that in the letter dated 3rd October 2017 from Asia Miles it was stated, inter alia, that,

“a few types of personal information will still be kept in the Asia Miles system, including membership number, member’s full name, date of birth and activity history. Such personal information is stored for the purposes of record-keeping related to the Asia Miles program, identification and verification and responding to, handling and processing any enquiries as specified in the Asia Miles Customer Privacy Policy”.

44. As a matter of observation the said letter from Asia Miles raised problems more than settling the issue under DPP2(2). In the letter nothing was said about the duration of the retention of the Appellant’s personal data. Furthermore, the reason given was for record-keeping, identification and verification and responding to, handling and processing any enquiries as specified in the Asia Miles Customer Privacy Policy. It is doubtful, putting it at the least as to whether the above complies with DPP2(2) and the Respondent understandably could not assist the Board off-hand at the appeal hearing since the matter relating to DPP2(2) was not any part of the Respondent’s consideration at the time when the Decision was made and when his statement was presented to the Board. It remains to be investigated by the Respondent whether the “policy” of Asia Miles comply with DPP2(2) and section 26 of the Ordinance on “erasure of personal data no longer required”.

45. The Board should not speculate on the answers to the above questions in relation to DPP2(2) without hearing full arguments. The Board should not usurp the function of the Respondent who is tasked with the duties and powers under the Ordinance to deal with such complaint relating to DPP2(2). In the

absence of any proper process of investigation by the Respondent in such matter the only proper way is for the Respondent to focus on and deal with the complaint in relation to any possible contravention of DPP2(2) lodged by the Appellant and properly make a finding relating thereto.

46. In the premises, though the aspect of DPP4 is clearly a non-starter and the Respondent's reasons not to investigate further in relation to DPP4 were clearly correct in the Boards' view, the Respondent failed to make any enquiry, analysis or findings as to the aspect of the complaint of the Appellant in relation to DPP2(2).

47. Under section 21(1) of the Administrative Appeals Board Ordinance, the 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 (section 21(1)(j)). The Board may also order that the case being the subject of the appeal as so determined be sent back to the respondent for the consideration by the respondent of such matter as the Board may order (section 21(3)).

48. In the premises, the Board shall send the matter relating to Allegation 1 concerning the complaint of any contravention of DPP2(2) against Asia Miles back to the Respondent for consideration and processing. To that limited extent the appeal in respect of Allegation 1 is allowed.

Conclusion

49. The Board unanimously makes the following orders,

- (1) The appeal in relation to Allegation 2 is dismissed.

- (2) The appeal in relation to Allegation 1 concerning contravention of DPP4 is dismissed.
- (3) The appeal in relation to Allegation 1 concerning contravention of DPP2(2) is allowed and the matter relating thereto be sent back to the Respondent to be considered and processed.

Costs

50. It was confirmed by both parties at the appeal hearing that neither party will apply for costs.

51. In light of the decision made by the Board where the Appellant's appeal is allowed to a limited extent and the above positions of the parties, the Board finds it appropriate to make no order as to costs relating to the present appeal.

(signed)

(Mr Erik Ignatius SHUM Sze-man)

Deputy Chairman

Administrative Appeals Board