

ADMINISTRATIVE APPEALS BOARD
APPOINTED UNDER SECTION 6 OF THE
ADMINISTRATIVE APPEALS BOARD ORDINANCE
NOTES OF HEARING HELD ON 10 JULY 1997
FOR THE CASE AAB NO. 4/1997

BOARD MEMBER

The Hon Mr Justice LEONG	(Chairman)
Mr Peter LEE Shung-tak, JP	Member
Mr John CHAN Chong-kun	Member

SECRETARY

Mrs Margaret CHAN

IN ATTENDANCE

Mr Phillip G Ross, Counsel for the Privacy Commissioner for Personal Data

Ms Brenda M L KWOK, Assistant Legal Advisor, Office of the
Privacy Commissioner for Personal Data

Mr K H LAI, Senior Personal Data Officer (Operations), Office of the
Privacy Commissioner for Personal Data

Ms Teresa W M YU, Personal Data Officer (Operations), Office of the
Privacy Commissioner for Personal Data

Mr CHAN Kuen-fai, Appellant

Mr LEUNG Man-lung, Appellant's colleague

Mr David HO, Senior Executive Officer (Data Protection),
Home Affairs Bureau

THE APPEAL

Mr CHAN Kuen-fai lodged an appeal to the Administrative Appeals Board (AAB) in compliance with section 39(4) of the Personal Data (Privacy) Ordinance against the decision of the Privacy Commissioner for Personal Data who determined not to investigate further on his complaint.

DECISION SOUGHT

2. The Appeals Board was invited to decide whether the appeal of Mr CHAN should be upheld.

THE LAW

3. Section 39 of the Personal Data (Privacy) Ordinance [PDPO] set out the restrictions on investigations initiated by complaints. It provided that

"(1) Notwithstanding the generality of the powers conferred on the Commissioner by this Ordinance, the Commissioner may refuse to carry out or continue an investigation initiated by a complaint if --

- (a) the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) has had actual knowledge of the act or practice specified in the complaint for more than 2 years immediately preceding the date on which the Commissioner received the complaint, unless the Commissioner is satisfied that in all the circumstances of the case it is proper to carry out or continue, as the case may be, the investigation;
- (b) the complaint is made anonymously;
- (c) the complainant cannot be identified or traced;
- (d) none of the following conditions is fulfilled in respect of the act or practice specified in the complaint--

(i) either--

(A) the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) was resident in Hong Kong; or

(B) the relevant data user was able to control, in or from Hong Kong, the collection, holding, processing or use of the personal data concerned,

at any time the act or practice was done or engaged in, as the case may be;

(ii) the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) was in Hong Kong at any time the act or practice was done or engaged in, as the case may be;

(iii) in the opinion of the Commissioner, the act or practice done or engaged in, as the case may be, may prejudice the enforcement of any right, or the exercise of any privilege, acquired or accrued in Hong Kong by the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person); or

(e) the Commissioner is satisfied that the relevant data user has not been a data user for a period of not less than 2 years immediately preceding the date on which the Commissioner received the complaint.

(2) The Commissioner may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case--

(a) the complaint, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Commissioner was of the opinion that there had been no contravention of a requirement under this Ordinance;

(b) the act or practice specified in the complaint is trivial;

- (c) the complaint is frivolous or vexatious or is not made in good faith; or
 - (d) any investigation or further investigation is for any other reason unnecessary.
- (3) Where the Commissioner refuses under this section to carry out or continue an investigation initiated by a complaint, he shall, as soon as practicable but, in any case, not later than 45 days after receiving the complaint, by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant--
- (a) of the refusal; and
 - (b) of the reasons for the refusal.
- (4) An appeal may be made to the Administrative Appeals Board--
- (a) against any refusal specified in a notice under subsection (3); and
 - (b) by the complainant on whom the notice was served (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person, or either)."

THE POLICY

4. Upon receipt of a written complaint, it is the policy of the Privacy Commissioner to seek to mediate the dispute with a view to resolving the matter informally. The policy has taken into account the following situation:-

- a) the PDPO is relatively new to the community of Hong Kong, it is in the interests of all concerned that the Commissioner attempts to resolve matters informally wherever practicable without recourse to revert to his power to investigate formally;
- b) there is clearly no point to engaging in a formal investigation if a prima facie case of a contravention of the PDPO is lacking, or when a formal investigation could not yield a better outcome than had been

achieved through the informal mediation process. This would not be an efficient and effective use of the Commissioner's resources;

- c) even if the Commissioner decides not to investigate in relation to a complaint, the PDPO under its section 66 provides an avenue for a complainant who suffers damage to claim compensation through civil proceedings.

BACKGROUND

5. The Office of Privacy Commissioner for Personal Data (PCO) received a complaint from Mr CHAN Kuen-fai, the Appellant, on 10 January 1997. Mr CHAN was an Occupational Therapist Assistant at Lai Chi Kok Hospital. He stated that he had a dispute with his supervisor, Mr CHAN Kam-on, concerning an alleged indecent assault in September 1996. The dispute had been handled by the Hospital Authority and the Police, but no further action was taken because of insufficient evidence. However, Mr CHAN Kam-on wrote an open letter dated 2 December 1996 to all colleagues of Hospital Authority, in which the Appellant's name, position, working place and the content of the dispute were revealed. Copies of the open letter were posted at the notice boards of Lai Chi Kok Hospital, Castle Peak Hospital and Kwai Chung Hospital respectively.

6. As Mr CHAN Kam-on's open letter was issued on 2 December 1996, prior to the enforcement of the PDPO, the Privacy Commissioner had no authority to act on the complaint. But Ms Teresa YU, the subject officer of PCO, was informed by the Appellant on 21 January 1997 that the open letter was still posted at the staff notice board in the Occupational Therapy Section of Lai Chi Kok Hospital on that date.

7. On 21 January 1997, Ms Teresa YU made a telephone enquiry to Lai Chi Kok Hospital. Ms Gloria YU, the Hospital Administrator, informed that they had received a complaint from Mr CHAN Kuen-fai on Mr CHAN Kam-on who had disclosed the former's information in an open letter. As copies of the open letters were distributed by Mr CHAN Kam-on, the Authority could not deter him to do so. Ms Gloria YU was then advised to remove the letters from the boards.

8. Later on that day, Dr H W TSUI, the Chief Executive of Lai Chi Kok Hospital, confirmed by phone that he had inspected all wards in the

hospital and no open letter was found posting at the notice board, except one at the notice board of the Occupational Therapy Section. The letter had just been removed. Dr TSUI stated that the letter was not written by the hospital and the writer had not sought any permission from the hospital before it was distributed or posted. In the hospital, there were locked notice boards for posting official notices, but there were some unlocked notice boards which could be used by staff to put on any materials. There was no policy restricting the posting of materials on the unlocked boards.

9. On 22 January 1997, Ms Teresa YU made a telephone enquiry to Castle Peak Hospital in relation to the Appellant's complaint. Ms Fion LING, the Hospital Administrator, informed that they were aware of the open letter from Mr CHAN Kam-on and copies of which were removed from the notice boards in mid-December 1996. No such letter was posted at the board since then.

10. On the same day, Ms Teresa YU also made a telephone enquiry to Kwai Chung Hospital in connection with the Appellant's complaint. Ms Maggie LUNG, the Hospital Administrator, on 24 January 1997 phoned to inform that a copy of the open letter was posted at the notice board of the Occupational Therapy Section of the hospital in December 1996, but it had been removed. No open letter was currently found at the other notice boards of the hospital.

11. On 27 January 1997, Ms Teresa YU phoned Mr CHAN Kam-on enquiring his open letter. He replied that he had a dispute with his colleague, Mr CHAN Kuen-fai, in September 1996. Although the dispute had been settled, there was rumour on it. As he thought that there was a need to clarify the matter, he wrote the open letter on 2 December 1996. Since there was no evidence to indicate that the open letter was put up by Mr CHAN Kam-on, Mr CHAN was then advised to take care and not to use personal data of others if he wished to clarify anything about himself.

12. By a letter of 30 January 1997, the Privacy Commissioner informed the Appellant that the PCO had made enquiries to the hospitals concerned and Mr CHAN Kam-on respectively in relation to his complaint. It was noted that copies of the open letter had been removed from the notice boards. Given that, the Privacy Commissioner considered that there was no need for conducting further investigation on the matter in accordance with section 38 of the Ordinance. Therefore, the Commissioner decided not to

conduct further investigation under section 39(3) of the Ordinance, as the matter had been resolved through informal means.

13. The Privacy Commissioner made a decision not to investigate further on the Appellant's complaint, on the ground that there was evidence to show that the three hospitals had taken steps to remove the open letter that was complained of. Furthermore, the Appellant had been informed by phone of the outcome and decision of his complaint before the letter of 30 January 1997 was issued. He did not raise any objection at that time.

14. On 3 February 1997, the Appellant phoned Ms Teresa YU, informing that copies of the open letter were still found at the notice boards of the Psychiatric Ward No A and other wards of Lai Chi Kok Hospital. Ms YU approached Dr TSUI again on 4 February 1997 and he was too busy to make a reply. Mr Ryan CHENG, Assistant Hospital Administrator, phoned to inform that he would ask each Unit Head to remove the open letter should it be found at the board.

15. By a letter of 5 February 1997, the Privacy Commissioner advised Mr CHAN Kam-on to refrain from any act that was inconsistent with the requirement of the principles under the PDP Ordinance. Failing that, an enforcement notice would be issued to him to take remedial actions or else he might commit an offence under section 64(7) of the Ordinance. The Appellant was not given a copy of that letter.

GROUND OF APPEAL

16. On 8 March 1997, Mr CHAN Kuen-fai lodged an appeal to the Administrative Appeals Board against the decision made by the Privacy Commissioner for Personal Data in his letter of 30 January 1997. The appeal was accepted by the Board on 12 March 1997. In his appeal form, Mr CHAN stated that-

- i) the open letter dated 2 December 1996 had far-reaching consequences and damages on him and somebody should be responsible for the act;
- ii) removal of the open letters from the pertinent notice boards was not sufficient to solve the issue. Further investigation on the matter was required in order to clear his name and reputation; and

- iii) the enquiries made by PCO in relation to his complaint should be made known, and remedial measures should be recommended to the relevant hospitals/authorities which had allowed the posting of the open letter.

DECISION

57. The Chairman announced the decision of the Appeals Board as in paragraphs 58-65.

58. It was a hearing for the appeal by Mr CHAN Kuen-fai, the Appellant, against the decision of the Privacy Commissioner for Personal Data (the 'Commissioner'). The Appellant made a complaint to the Office of the Privacy Commissioner for the Personal Data (the 'PCO') in January 1997 about the posting of an open letter signed by Mr CHAN Kam-on at the notice board of the hospital, mainly in Lai Chi Kok Hospital, Kwai Chung Hospital and Castle Peak Hospital. The letter contained personal data of the Appellant. The Commissioner conducted an investigation on the complaint and was informed by the hospitals concerned that copies of the open letter had been removed from the notice boards. The Commissioner on 30 January 1997 made a decision not to carry further investigation on the complaint under section 39(2) of the Personal Data (Privacy) Ordinance [the 'PDP Ordinance'], as the matter had been resolved through informal means. The Appellant was not satisfied with the decision of the Commissioner and lodged an appeal to the Administrative Appeals Board. The Appeals Board was to consider whether the Commissioner's investigation on the Appellant's complaint was sufficient or not and whether it was proper for the Commissioner to make such decision in accordance with the PDP Ordinance.

59. The Appellant appealed because he considered that the investigation on his complaint was not sufficient and the Commissioner should make a ruling as to whether there was an infringement of the Ordinance, and if so, who should be responsible for the act. The Commissioner should also ask that person to make an apology or pay compensation to him as he had suffered damage as a result of that act.

60. It was noted that the open letter of Mr CHAN Kam-on was issued on 2 December 1996, prior to the enforcement of the PDP Ordinance on 20 December 1996. The Commissioner had not made a ruling on whether Mr CHAN Kam-on was a data user at the time when he wrote his letter, since the Commissioner had no power to make a ruling before the Ordinance came into operation. If there was evidence to show that Mr CHAN Kam-on had posted his open letter on a notice board on or after 20 December 1996, then Mr CHAN could be taken as a data user. However, there was no such evidence. It was therefore proper for the Commissioner not to make a ruling on whether Mr CHAN Kam-on was data user in respect of the Appellant's complaint.

61. In the course of the investigation, the Hospital Administrators of the three hospitals informed the PCO that copies of the open letter were found on the notice boards of the hospitals sometime in December 1996 but they had all been removed. For posting of these letters, there was no evidence on who had posted them up or the hospitals had instructed or joined with or given consent to anyone to post them up. Given that, whether the hospitals were data users in accordance with the definition of the PDP Ordinance was doubtful. Even if the hospitals had allowed or given consent for such posting, the hospitals could not be taken as data users, since they only permitted the posting of the letters but they had no control on the content or data mentioned in the open letter.

62. Nevertheless, the Commissioner had carried out an investigation on the Appellant's complaint in January 1997 and found that copies of the open letter were removed from the notice boards of the hospitals concerned. The removal was the result of the Commissioner's investigation. Given the outcome, the Commissioner made a decision on 30 January 1997 not to investigate further on the Appellant's complaint, as the matter had been resolved by informal means.

63. Besides the removal of open letters from the notice boards, on 5 February 1997 the Chief Executive of Lai Chi Kok Hospital issued to all staff a circular on 'General Guidelines for Document Posting on Notice Boards', announcing that all notice boards supplied by the hospital to individual units were work related and they should only be used for the display of notices, memos and other documents which were related to work. The hospital had also set up a Task Force on 8 July 1997 to conduct surprise and enforcement checks to ensure that the guidelines were compiled with. These were effective measures to prevent future infringement of the PDP Ordinance. The Appeals Board was of the view that the outcome would be the same, even if the Commissioner continued his investigation after 30 January 1997. Given the limited manpower and resources in PCO, it was not unreasonable and not unjustified for the Commissioner to make a decision not to investigate further on the Appellant's complaint.

64. Concerning the issue of an order by the Commissioner for an apology or a compensation, the Appeals Board found that the Commissioner was not empowered by the PDP Ordinance to demand an apology or compensation from a person who had disclosed the personal data of others. An individual who suffered damage by reason of a contravention of the requirement of the Ordinance by a data user, could seek compensation by civil proceedings under section 66(1) of the PDP Ordinance.

65. Having regard to the above circumstances, the Appeals Board unanimously agreed that the investigation carried out by the Commissioner on the Appellant's complaint was not insufficient and it was proper for the Commissioner not to make further investigation on the case. The appeal was dismissed.

66. The hearing ended at 11:45 a.m.



(Arthur LEONG)
Chairman

Administrative Appeals Board

12 August 1997