

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 4/2013

BETWEEN

FAN YIN KEI

Appellant

and

PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA

Coram: Administrative Appeals Board

Date of Handing down Written Decision with Reasons: 17 July 2013

DECISION

Background

1. By a Notice of Appeal dated 26 March 2013 lodged by the Appellant with the Administrative Appeals Board, the Appellant appeals against a decision (“**the Decision**”) dated 8 March 2013 made by the Respondent (“**the Appeal**”). By the Decision, the Respondent decided that he would, in exercise of his discretion under section 39(2)(d) of the Personal Data

(Privacy) Ordinance, refuse to carry out an investigation initiated by a complaint made by the Appellant on 14 November 2012 (“**the Complaint**”).

2. By a letter dated 23 May 2013, the Respondent informed the Board that he had decided to withdraw the Decision, and that accordingly he would not file and serve the Statement, Description of Documents and the documents relating to the Appeal. The Respondent further stated that he would contact the Appellant to arrange for the disposal of the Appeal.
3. By a letter dated 6 June 2013 sent by the Appellant to the Secretary of the Board and the Respondent, the Appellant stated that he had received a request by the Respondent to withdraw the Appeal. However, he would only “settle” the Appeal on certain conditions. For present purposes, it is not necessary for me to set out the conditions mentioned in the said letter of the Appellant. Suffice to say that in his letter, the Appellant stated that he would only agree to withdraw the Appeal if the Respondent would comply with the said conditions.
4. By a letter dated 7 June 2013 sent by the Respondent to the Appellant, copied to the Board, the Respondent stated he had not agreed to any conditions for the withdrawal of the Appeal. The Respondent made it clear that whether the Appellant would withdraw the Appeal was a matter solely for him but that the Respondent would continue to investigate the Complaint in any event.

5. The Board is not concerned with how the parties to an appeal may negotiate to settle the appeal. Until and unless an appeal is unconditionally abandoned by an appellant in accordance with the provisions of the Administrative Appeals Board Ordinance (“**the AAB Ordinance**”: see, section 19 thereof), the appeal is not considered by the Board as withdrawn and the Board will adjudicate on the same. The parties in this case have been informed by the Board of this.
6. In the present case, the Appellant has not abandoned the Appeal in accordance with section 19 of the AAB Ordinance. Accordingly, the Appeal continues to be an appeal before the Board.
7. However, the fact is that the Respondent has withdrawn the Decision. Accordingly a situation has arisen whereby the subject-matter of the Appeal has in effect disappeared in that the Respondent will not be seeking to defend the Decision in the Appeal. Indeed, by a letter dated 21 June 2013, the Respondent wrote to the Secretary of the Board and stated, *inter alia*, as follows:

“As stated earlier in our letter to you dated 23 May 2013, given that we have decided to withdraw the decision appealed against, we do not intend to file the Statement, Description of Documents and the Documents referred to therein in relation to the Appeal.

We are prepared to submit to the Board’s determination of the Appeal”.

Summary Determination

8. In a situation such as the present, where the decision under appeal has been reversed by a respondent, the Board has power to make a determination of the appeal summarily in favour of the appellant without a hearing. Section 21(1)(h) of the AAB Ordinance provides as follows:

“For the purposes of an appeal, the Board may-

...

(h) if it appears to the Board that the respondent has reversed the decision appealed against, determine the appeal summarily in favour of the appellant without a hearing and without calling on anyone to attend or to appear before it.”

9. It has been held in AAB No. 64 of 2011, in which I cited my own previous Chairman’s Ruling given in AAB No. 10 of 2011, that the Board’s powers under section 21(1) of the AAB Ordinance is exercisable by the Chairman, without the constitution of a 3-members Board. This includes the power exercisable under section 21(1)(h). The reasons for that Ruling, insofar as they are relevant to section 21(1)(h), have been set out in the decision given in AAB No. 64 of 2011, which I will not repeat.

Order

10. I would accordingly exercise the power under section 21(1)(h) to make a determination of the Appeal summarily in favour of the Appellant without a hearing. As the exercise of this power is made consequential upon the

Respondent having reversed or withdrawn the Decision, it is exercised without consideration of the merits of the Appeal, and without hearing the parties.

11. This Appeal is allowed and the Decision is formally set aside. The practical effect of allowing the Appeal is that the Respondent is required to carry out an investigation into the Complaint.
12. As the present decision is made without consideration of the merits, it is inappropriate for me to make any comments on the merits of the Complaint, nor to speculate of the result of the Respondent's investigation – and I will not do so.

(Signed)

(Mr Horace Wong Yuk-lun, S.C.)

Chairman

Administrative Appeals Board