ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 4/2015

BETWEEN

TAI KWOK HUNG Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA Respondent

Coram: Administrative Appeals Board
Mr Paul Lam Ting-kwok, SC (Deputy Chairman)
Mr Nelson Cheng Wai-hung (Member)
Miss Ho Yuen-han (Member)

Date of Hearing: 18 September 2015

Date of Handing down Written Decision with Reasons: 29 October 2015

DECISION

A. Introduction

1. By a Notice of Appeal dated 7 January 2015, the Appellant appeals against the Respondent's decision made on 17 December 2014 ("the Decision").

2. By a letter dated 11 September 2015, the Appellant stated that, owing to unexpected family commitments, he elected to have the hearing of this appeal conducted in his absence. He also stated that he had made full written submissions on all issues which should be deemed to be repeated at the hearing. Pursuant to s.20(1)(b) of the Administrative Appeals Board Ordinance (Cap. 442) ("the AABO"), we decided to proceed to hear the appeal in the absence of the Appellant. The Appellant's subsequent suggestion that he could join the hearing by tele-conference was rejected.

3. We have read and considered the detailed written skeleton arguments submitted by all parties concerned, including the Skeleton Submissions of the Parties Bound dated 2 July 2015, the Skeleton Submissions of the Respondent dated 10 July 2015, and the Skeleton Submissions of the Appellant dated 19 August 2015 as well as all documents in the hearing bundle. At the hearing, we also heard oral submissions made by legal representatives of the Respondent and the Parties Bound.

B. The Decision

4. By a letter dated 2 April 2013 [358], the Appellant made a complaint to the Respondent against the Parties Bound regarding two matters ("the 1st Complaint"). For the present purpose, only the second matter is relevant. The Appellant complained about an "unauthorized disclosure of personal information" as follows:

"On 25th November 2011, when I was still under the employment of the SGHL and/or SRL, Francis Hui, the CFO of SGHL and SRL, acting under the direction of Duan Yongji, Chairman of the Board of SGHL and SRL, sent a letter to John Morrison, SRL's Australian financial adviser alleging that my Australian visa was "frozen", which was not only false, untrue and defamatory, but also in breach of the Ordinance, as my visa status constituted my personal data and may not be disclosed to any third party without my prior consent…"

The relevant statement in the said letter reads as follows:

"We were told by Edward that his visa has been frozen by Australian Consulate-General." ("the Statement")

5. By a letter dated 3 June 2013, the Appellant withdrew his 1st Complaint. However, by a letter dated 30 July 2014, the Appellant sought to reactivate the 1st Complaint ("the Present Complaint").

6. By a letter dated 17 December 2014, the Respondent informed the Appellant that he had decided not to pursue the Present Complaint further ("the Decision"). The Decision was based on two broad grounds. First, having regard to all the circumstances of the case, the Respondent did not consider that the delay in lodging the Present Complaint was justified. Second, the Statement which the Appellant considered to be false does not constitute personal data.

7. As to the first ground, according to section 39(1)(a) of the Personal Data (Privacy) Ordinance (Cap. 486) ("the PDPO"), the Respondent may refuse to

carry out or decide to terminate an investigation initiated by a complaint if the complainant 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 circumstances of the case it is proper to carry out or not to terminate such investigation. As the Statement was made on 25 November 2011, the 2 year time limit expired on 25 November 2013.

C. The Appellant's grounds of appeal

8. The Appellant challenges both grounds of the Decision. In respect of the first ground of the Decision, the Appellant's grounds of appeal may be summarized as follows:

(a) First, he did not make a new complaint; he was merely re-activating the First Complaint. Hence, he was not out of time. He relies on section 40 of the PDPO.

(b) Second, assuming that he was out of time, the Respondent should have exercised his discretion to entertain the Present Complaint for the following reasons:

(i) The Respondent has failed to investigate the reasons for withdrawing the 1st Complaint. Had investigations been done, they could have led to discovery of evidence that the Appellant was under actual perception or reasonable apprehension of threats to himself or his family members in

deciding to withdraw the 1st Complaint.

(ii) The Parties Bound will not suffer any prejudice.

9. In respect of the second broad ground of the Decision, the Appellant's ground of appeal is that this is a case of unauthorized disclosure of inaccurate personal data; instead of one of fabrications, lies or false statements.

10. The Appellants also complains of procedural irregularities and improprieties, the details of which we will not repeat.

D. Analysis

D1. The Appellant's appeal against the first ground of the Decision

11. First, it is clear the Present Complaint is a new complaint. In the Appellant's letter dated 3 June 2013, he stated that:

> "…I am writing to withdraw my captioned complaint, but reserve my rights to re-file a fresh one based on same or similar facts."

In the reply letter of the Respondent dated 4 June 2013, it was stated that:

> "…In view of your decision as indicated in the Email, your case is now considered closed."

Accordingly, the Appellant clearly knew that, if he made another complaint based on the same facts, it would be, in his own words, a "fresh" complaint.

12. More importantly, under the PDPO, there is no provision that, after a complaint is withdrawn, it may somehow be "reactivated" by the complainant subsequently. If the Appellant's argument is correct, it will imply that, after a complainant withdraws his complaint, he may re-activate the complaint at any time no matter how long time has lapsed since then, and the Respondent will have no discretion not to investigate the complaint. This cannot be right.

13. The Appellant's reliance on section 40 of PDPO is misconceived. That section provides that:

> "Where the Commissioner is of the opinion that it is in the public interest so to do, he may carry out or continue an investigation initiated by a complaint notwithstanding that the complainant has withdrawn the complaint and, in any such case, the provisions of this Ordinance shall apply to the complaint and the complainant as if the complaint had not been withdrawn."

This provision creates an exception to enable the Commissioner to investigate a complaint on his own motion in case where he opines that it is in the public interest to do so even if the complainant withdraws the complaint. The existence of this provision indeed indicates that, unless the Commissioner exercises his discretion conferred by that provision, once the complainant withdraws his complaint, the complaint will come to an end.

14. Hence, the Respondent was correct in considering whether he ought to exercise his discretion under section 39(1)(a) of the PDPO. This provision

provides that the Respondent may refuse to carry out an investigation "unless he is satisfied that in all circumstances of the case it is proper to carry out... the investigation". The intention of the legislature in enacting this provision was explained in *Leung Sau Kwan v The Privacy Commissioner for Personal Data*, Administrative Appeal No. 11 of 2009 (24 August 2009), §7.

15. The provision requires the Respondent to have regard to "all the circumstances of the case". It is impossible and inappropriate to attempt to set out in an exhaustive list of factors that the Respondent should take into consideration. Each case depends on its own facts. Nonetheless, we agree that, in general, one relevant factor is whether the complainant has a reasonable explanation for the delay in making a complaint.

16. As mentioned, the Appellant argues that the Respondent failed to investigate the reasons for withdrawing the First Complaint. This is not factually correct. According to a telephone attendance note recording a telephone conversation between an officer of the Respondent and the Appellant at about 15:40 on 19 November 2014:

> "OIC asked why he lodged the complaint for allegation 2 almost 2 years after the matter complained of had occurred. CPT explained that he was still under the employment with PCA at the time when he actually learnt about the incident. Hence, he did not lodge the complaint at that time as he did not want to affect his employment with PCA. After his resignation, his relationship with PCA got worse and hence he decided to lodge the complaint against PCA."

17. There is no reason for us to doubt the accuracy of the said telephone attendance note. The fact is that the Appellant had been given the opportunity to explain the delay. And the problem is that the Appellant did not say at that time that the delay was caused by his apprehension of threats created by the Parties Bound to him or his family. He only offered such explanation in his grounds of appeal in this appeal. In the circumstances, it lies ill in his mouth to complain that the Respondent did not investigate the reason for the delay. The Appellant resigned by a letter dated 8 January 2013, stating that the resignation shall take effect from 8 March 2013. However, the Appellant made his 1st Complaint after that on 2 April 2013; and there was a lapse of 14 months before he decided to "re-activate" his 1st Complaint. Based on the reasons given by the Appellant to explain the delay at the material time before the Decision was made, we are not surprised at all that the Respondent was not satisfied that the Appellant had provided any satisfactory explanation for the delay.

18. For the present purpose, we have considered the Appellant's explanation that the delay was caused by his apprehension of threats to him and his family. We are not satisfied that it constitutes a sufficient reason for us to overturn the Respondent's exercise of discretion in any event:

(a) First, as just mentioned, for the present purpose, this explanation was only given belatedly in the Appellant's grounds of appeal.

(b) Second, such explanation involves very serious allegations against the Parties Bound. There is, however, no contemporaneous document supporting those allegations, for example, any report to the police.

(c) Third, on the Appellant's own case, the alleged threats began to take place before he made the 1st Complaint. Yet, they had not deterred him from making the 1st Complaint.

19. We appreciate that the Appellant's allegations are disputed by the Parties Bound. We need to make it clear that we are not making any factual finding as to whether the allegations are true or not. Indeed, even if the Appellant provided such explanation to the Respondent at the material time, it would not have been possible or practicable for the Respondent to make any factual finding about the truth of such allegations. When an appellant's explanation for delay involves factual disputes, it must be for the Respondent to adopt a common sense approach based on the information available to consider whether, in all circumstances, the explanation should be accepted or what weight should be given to the explanation.

20. The Appellant argues that the Parties Bound will not suffer any prejudice if the Present Complaint is entertained. The Parties Bound disagree. They point out correctly that the Present Complaint is concerned with an isolated incident that took place 4 years ago. They also stated that, except Mr Duan, the other officers involved including Mr Francis Hui and Ms Josephine Leung had all left the employment with the Parties Bound. The Respondent observed that there may be a miscommunication between the Appellant and Mr Duan. Again, we are not deciding whether there was indeed any miscommunication. The point is that the passage of time clearly makes it more difficult to ascertain what happened in fact. In the circumstances, we take the view that, as a result of the Appellant's delay, there is a real and substantial risk that the Parties Bound will

suffer prejudice and that it will be difficult for the Respondent to carry out any meaningful investigation now.

D2. The Appellant's appeal against the second ground of the Decision

21. In short, the Respondent's position is that, on the Appellant's own case, the Statement was false; and "a lie or a fabrication always remains a lie or a fabrication and can never convert into personal data" (see *Kam Sea Hang Osmaan v Privacy Commissioner for Personal Data*, Administrative Appeal No. 29 of 2001 (28 February 2002), §6. In contrast, the Appellant argues that the Statement constitutes an inaccurate personal data.

22. Section 2(1) of the PDPO defines "personal data" as any data (a) relating directly or indirectly to a living individual; (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and (c) in a form in which access to or processing of the data is practicable. It further defines "practicable" as "reasonably practicable". In addition, an "inaccurate" data means that the data is incorrect, misleading, incomplete or obsolete.

23. It is clear that an inaccurate personal data may be made intentionally, negligently or innocently. In our view, an inaccurate personal data may be, at the same time, a lie or fabrication. They are not mutually exclusive. We agree that there is force in the Appellant's argument that the distinction drawn by the Respondent is incorrect.

24. Having said that, we take the view that the Respondent reached the right

conclusion though for the wrong reason. We appreciate that the Respondent has accepted and maintained at the hearing that the Appellant's visa status constitutes personal data. We are inclined to the view that this is wrong. In the present context, visa status refers to the statement that the Appellant's Australian visa had been frozen. We find it difficult to understand how and why it is practicable for the identity of the Appellant to be directly or indirectly ascertained from such statement. The Respondent submitted at the hearing that the Statement should be read together with other parts of the letter which contained it. We agree that anyone who reads the whole letter will see that it was referring to the Appellant. However, this is quite beside the point. The point is whether the Statement concerning the visa status, by itself, would enable the Appellant's identity to be ascertained; and the test is "reasonably practicable".

25. At the hearing, the Respondent stressed that this was not the only, let alone the main, reason why he decided not to carry out an investigation. Although we are inclined to the view that the Respondent's reasoning was erroneous, it did not impact on the correctness of the Decision. This is because, as mentioned, the Respondent reached the right conclusion that the Statement does not constitute "personal data"; and more importantly, even if this point is ignored, there were and are other sufficient reasons to support the Decision as explained above.

D3. The Appellant's complaint about miscellaneous procedural irregularities

26. The Appellant also complains of various procedural irregularities. First, he complains that, contrary to section 39(3) of the PDPO, the Respondent failed

to reply within 45 days after receiving the Present Complaint. However, non-compliance with this provision will not render the decision void; and remedies for breach thereof are not within our jurisdiction (*Yuen Man Tak v Privacy Commissioner for Personal Data*, Administrative Appeal No. 35 of 2003 (7 September 2004), §32; *Doris Yiu v Privacy Commissioner for Personal Data*, Administrative Appeal No. 22 of 2007 (25 January 2008), §48). Having said that, we must make it clear that we are not condoning any failure on the part of the Respondent to comply with the statutory requirement. All that we are saying is that such failure is not a ground to set aside the Decision.

27. Second, the Appellant complains that there was a breach of the rule of natural justice as he was not provided with a full copy of the letter of response from the Parties Bound whereas his complaint letters and correspondence were disclosed to the Parties Bound. It is unnecessary to debate whether and to what extent the rule of natural justice applies in the present context. We believe that, quite simply, the Respondent should act fairly. However, we fail to see how and why the Appellant's complaint in this respect can constitute a sufficient reason to set aside the Decision. We have considered the explanations given by the Respondent; we are not satisfied that the Appellant had been treated unfairly. In any event, even assuming that there was any breach of the rule of natural justice or any unfairness, such deficiency has been cured by this appeal process in which the Appellant had been provided with all relevant information and given full opportunities to make representations.

E. Conclusion

28. For these reasons, we are unable to accept the Appellant's argument that the Respondent has exercised his discretion wrongly in deciding not to carry out any further investigation of the Present Complaint. His appeal is dismissed.

(signed)

(Mr Paul Lam Ting-kwok, SC)
Deputy Chairman
Administrative Appeals Board