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## ADMINISTRATIVE APPEALS BOARD

### Administrative Appeal No. 55 of 2006

BETWEEN

SURENDAR M. KIRPALANI

Appellant

and

PRIVACY COMMISSIONER  
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 8 May 2007

Date of handing down Decision with Reasons: 8 June 2007

### DECISION

On 27 June 2005, the appellant Mr. Surendar M. Kirpalani wrote on behalf of the Sunskrit Foundation ("the Foundation") to the Hong Kong Monetary Authority ('HKMA') regarding a complaint the Foundation had earlier made against the LGT Bank in Liechtenstein AG, Representative Office Hong Kong ( "Bank Office "). This letter was copied to the Privacy Commissioner.

2. On 27 July 2005, the appellant again wrote on half of the Foundation to the HKMA regarding the same complaint. This letter was copied to the Privacy Commissioner, the Legislative Committee of the Legco and the ICAC. In this letter, the appellant referred to a letter dated 12 July 2005 from the HKMA, which was not produced as one of the documents in this appeal. Presumably this was a letter from the HKMA in reply to the appellant's letter of 27 June 2005.

3. On 7 September 2005, the Bank Office wrote to the appellant informing him that the HKMA had forwarded the letters dated 27 June 2005 and 27 July 2005 to them for their reply to the appellant directly.

4. On 15 September 2005, the appellant wrote to the Bank Office stating that it was strange that his two letters of 27 June 2005 and 27 July 2005 had been sent by the HKMA to the Bank Office and he asked the Bank Office to let him have copies of these letters together with any covering letter from the HKMA.

5. On 29 September 2005, the Bank Office replied that they were unable to assist the appellant in this matter.

6. On 6 October 2005, the appellant told the Bank Office in a short letter that his letter of 15 September 2005 had not asked the Bank Office to assist. The appellant said in the letter:

“...I take serious issue with your attempts to deceive and misrepresent facts. I deem your letter of September 7, 2005 and its contents as slander on my good name. I reserve absolutely all my rights against the bank and personally against the signatories, unless you are able to provide me proof by way of copies of the alleged documents immediately.”

7. On 12 October 2005, the Bank Office again informed the appellant that they were unable to provide the appellant with copies of the letters requested by him in his letter of 15 September 2005.

8. On 3 November 2005, the appellant wrote to the Bank Office and asked them to explain why they were unable to comply with his request. He also reminded the Bank that under the Personal Data (Privacy) Ordinance (“the Ordinance”), the Bank Office was obliged to provide the requested letters within 40 days of his request. There was no reply to this letter by the Bank Office.

9. On 9 February 2006, the appellant wrote to the Office of the Privacy Commissioner and made a complaint that the Bank Office had failed to comply with his request for copies of the letters of 27 June 2005 and 27 July 2005 within the prescribed time. The appellant complained that this was a serious breach of the Ordinance.

10. The Privacy Commissioner for Personal Data (“Commissioner”) on receipt of the appellant’s complaint, made enquires with the appellant

and the Bank Office for further information. The appellant declined to disclose his relationship with the Bank Office. The Bank Office on the other hand disclosed that they did not carry any client account in Hong Kong and had no relationship with the appellant. They explained to the Commissioner that they were unable to provide copies of the two letters to the appellant because they needed the consent of the HKMA before they could do so.

11. On 3 August 2006, the Commissioner informed the appellant that he did not propose to carry out any investigation of the appellant's complaint. In his reasons for decision, the Commissioner stated that the Bank Office received the letters in question for the purpose of dealing with the complaint to the HKMA by the appellant against the Bank Office; the correspondences between the HKMA and the Bank Office were about the complaint and did not concern the appellant personally. There was no collection of personal data about the appellant by the Bank Office. In such circumstances, the Ordinance did not apply. The Commissioner considered that no investigation or further investigation was necessary.

12. The appellant appealed to this Board. The grounds of appeal may be stated as follows:

(a) The Commissioner's conclusion that there was nothing to suggest that the Bank Office was compiling information about the appellant or collecting his personal data by receiving the letters from the HKMA is wrong. The fact that the Bank Office had written to him personally

and made reference to the letters from the HKMA and the fact that the letter of 7 September 2005 from the Bank Office carried his name and address and made reference to an earlier letter of 10 May 2004 and copies of letters from their Head Office, amounted to compiling of information about him.

- (b) The Commissioner was wrong to state in his decision that the Bank Office did not carry any client account in Hong Kong and had no relationship with the appellant because if there was no such relationship, the Bank Office would not have sent him the letter of 10 May 2004. The Commissioner was also wrong to say that the Bank Office had stated in their letter of 29 September 2005 that they were unable to provide the appellant with the letters. In fact, it was in the letter of 12.10 2005 that the Bank Office said so.
- (c) It was wrong for the Commissioner to refer to the two letters of 27 June 2005 and 27 July 2005 as “your letters” i.e. the appellant’s letters, when they were not written by him in his personal capacity. His relationship with the Bank Office has no relevance.
- (d) The Commissioner was wrong to say that the purpose of the Bank Office receiving the letters from the HKMA was to deal with the appellant’s complaint against the Bank Office.

13. Section 18 of the Ordinance provides that an individual may make a data access request to a data user who holds personal data of

which the individual is the data subject and if the data user holds such data, he is required under section 19 of the Ordinance to comply with the request within 40 days of the request being made.

14. Section 2 of the Ordinance defines "personal data" and "data user" as follows:

"Personal data" means (a) any data 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.

"Data user" in relation to personal data means a person who controls the collection, holding, processing or use of the data.

15. In our opinion, the law as provided under the above sections is this:

(a) a person holding data which are not "personal data" within the meaning under section 2, is not obliged to comply with a data access request.

(b) a person who does not collect, hold, process or use the personal data is not a data user in relation to that data. He is not obliged to comply with a data access request in relation to that data.

(c) a person who holds personal data of which the individual making

a data access request is not the data subject, is not obliged to comply with that request.

16. As we understand it, the appellant's main complaint to the Commissioner against the Bank Office is that the Bank Office had failed to provide to him the two letters of 27 June 2005 and 27 July 2005 within 40 days of his request and therefore committed a breach of section 19 of the Ordinance. The Commissioner says that the Bank Office committed no breach because there was no collection of the appellant's personal data by the Bank Office and the case does not engage the Ordinance. No investigation need to be carried out in respect of the complaint.

17. The primary question then is: was the Bank Office required under the Ordinance to provide these letters to the appellant? This depends on firstly, whether the two letters dated 27 June 2005 and 27 July 2005 received by the Bank Office from the HKMA are themselves personal data or contain personal data i.e. data relating to a living individual from which it is practicable to ascertain the identity of the individual. Secondly, even if they could be regarded as personal data, whether they are personal data of which the appellant was the data subject. Thirdly, whether the Bank Office was a data user in relation to the two letters or the data contained therein, in the sense the Bank Office had control on the collection, holding, processing or use of the data.

18. In our opinion, the two letters though signed by the appellant, were not personal letters of the appellant. They were letters from the

Foundation. The care-of address and the phone and fax numbers on the letterhead of both letters are the address and contact numbers of the Foundation. The contents of both letters relate to the complaint against the Bank Office made by the Foundation to the HKMA. The fact that the care of address and phone and fax numbers may be those of the appellant himself, does not make them the personal data of the appellant in so far as the two letters are concerned. They relate to the Foundation for the purpose of the complaints made to the HKMA. As the Foundation is not a living individual, the two letters or their contents do not relate to a living individual. Whatever those data may be, they are certainly not personal data within the meaning of the Ordinance.

19. Secondly, for the same reason, these letters and their contents are not personal data of which the appellant was the data subject.

20. Thirdly, the two letters were sent to the Bank Office by the HKMA to require the Bank Office to deal with them and reply directly to the complainant as they related to a complaint against the Bank Office. These letters were received by the Bank Office for no other purpose than to answer to the complaint made by the appellant on behalf of the Foundation. Receiving and answering complaint letters is a far cry from collecting, holding, processing or using personal data. In Eastweek Publisher Ltd & Another and Privacy Commissioner for Personal Data [2000] HKLRD 83 (at 102) Godfrey VP had this to say on what amounts to collection of personal data:

“I prefer the view, expressed by Ribeiro JA, that it is of the essence of an act of personal data collection that the data user must thereby be compiling information about a person already identified or about a person whom the data user intends or seeks to identify.”

Ribeiro JA in that case said the same (at p.90):

“...It is, in my view, of the essence of the required act of personal data collection that the data user must thereby be compiling information about an identified person or about a person whom the data user intends or seeks to identity. The data collected must be an item of personal information attaching to the identified subject, as the above-mentioned definitions of “personal data” and “data subject” suggest.”

21. It may be seen that the Bank Office came nowhere near this concept of collection of personal data when they received the two letters from the HKMA. The Bank Office was not obliged to comply with the appellant’s data access request in relation to the two letters.

22. The complaint by the appellant is simply not a matter within the Ordinance. We find the appellant’s grounds of appeal without substance and constitute no valid reason to challenge the decision of the Commissioner. For the reasons stated above, we agree with the Commissioner that it was unnecessary for him to carry out any

investigation. The decision of the Commissioner is correct. The appeal is dismissed.



(Arthur LEONG Shiu-chung, GBS)  
Chairman  
Administrative Appeals Board