

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 57 of 2005

BETWEEN

MS. JACQUALINA FRANCIS Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA Respondent

and

SINO ESTATES MANAGEMENT LIMITED Party Bound by decision
appealed against

Coram : Administrative Appeals Board

Date of Hearing : 23 May, 25 July 2006

Date of handing down Decision with Reasons : 13 October 2006

DECISION

1. This is an appeal from the decision of the Acting Deputy Privacy Commissioner for Personal Data by letter dated 22 July 2005 (“Decision”) informing the Appellant that the Privacy Commissioner for Personal Data (“Commissioner”) did not propose to continue an investigation into the complaint of the Appellant received by the Commissioner’s Office on 14 February 2005 against Sino Estates Management Limited (“Sino”) having passed her mobile telephone number (“the Number”) to one

Miller International Loss Adjusters (H.K.) Ltd. (“Miller”). The decision was in purported exercise of the power under Section 39(2)(d) of the Personal Data (Privacy) Ordinance **CAP 486** (the “Ordinance”). In the present appeal, Sino is a party bound by the decision appealed against and represented by solicitors.

2. Under Section 21(1)(j) of the Administrative Appeals Board Ordinance **Cap 442**, this Board may confirm, vary or reverse the decision that is appealed against or substitute therefore such other decision or make such other order as it may think fit. Under Section 21(2) of the same Ordinance, this Board in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the Commissioner with the Secretary, if it is satisfied that, at the time of the making of the Decision being the subject of the appeal, the Appellant was or could reasonably have been expected to be aware of the policy.

Background

3. The Appellant was an occupant of a flat (“Flat”) of a housing estate, Pacific Palisades, under the management of Sino. She was previously a tenant of another flat in Pacific Palisades from about 1997 before she became an owner of the Flat. She had initiated court proceedings in the Small Claims Tribunal in about the end of November 2004 seeking damages against Sino allegedly caused by water seepage in the Flat. She said that she had found that Sino had, without her consent, disclosed her mobile telephone number (the “Number”) to Miller, the loss adjusters of Sino’s insurance company.

4. During the meeting between the Appellant and the officer of the Office of the Privacy Commissioner for Personal Data (Commissioner’s Office”) on 22 February 2005, she claimed that she provided the Number to Sino for the purpose of contacting her regarding the installation of satellite television in the Flat only, instead of the alleged use. The Appellant also pointed out that Miller had mentioned to her in their

letter of 3 December 2004 that they had tried to use the Number to contact her for dealing with matters of the Flat. She believed that Sino had disclosed the Number to Miller for the purpose of submitting the letter of 3 December 2004 as evidence to the Court with a view to show that they had tried to resolve the matters with her but was unsuccessful. The Appellant also alleged that Sino was trying to show that the Appellant were uncooperative in the coming hearing of the Small Claims Tribunal in January 2005.

The Events

5. Against the backdrop of a dispute on water seepage, the events as revealed by the evidence made available to this board appear as follows.
6. On about 15 August 2004, the Appellant notified the management office of Sino of water seepage at the flat. On the same day, an inspection took place. On 29 August 2004, a second inspection took place and photos were taken.
7. By a letter dated 6 September 2004, Sino replied to a letter dated 5 September 2004 from the Appellant that they had referred the matter to their insurance company.
8. By a letter marked “without prejudice” dated 14 October 2004, Miller informed the Appellant that they were the loss adjusters acting for the insurer. Miller said the Appellant’s previous letter dated 5 September 2004 was passed to them for handling. Therefore the Appellant was aware of the existence of Miller as early as October 2004.
9. By the end of October 2004, there was a third inspection and the Appellant was told of two possible sources of water leakage.

10. By another letter marked “without prejudice” dated 3 November 2004, Miller advised the Appellant that they were assessing her claim which would end on or before 17 November 2004 and would advise her of the outcome of their investigation.

11. By a further letter marked “without prejudice” dated 17 November 2004, Miller informed the Appellant that they were still in the course of investigation.

12. By letter dated 18 November 2004, the Appellant said to Sino she had repeatedly asked for a written report regarding the leakage from the Flat but the management had failed to do so.

13. A fourth visit was made to the Flat by Sino on 20 November 2004.

14. On or around 22 to 23 November 2004, a staff from Sino called the mobile of the appellant, with his number made “anonymous”.

15. By letter marked “without prejudice” dated 26 November 2004 to the Appellant, Miller asked for inspection of the Flat.

16. On about 25 November 2004, the Appellant notified Sino that she was pursuing the matter through the Courts.

17. By letter dated 29 November 2004, Sino informed the Appellant that they would pass the Appellant’s letter dated 27 November 2004 to the loss adjuster, Miller, for further handling. This letter was copied to Miller.

18. By letter marked “without prejudice” dated 30 November 2004, Miller informed the Appellant that the “incident report” which apparently was the written report the Appellant asked for was an internal document. During their investigation, they were given to understand that the Appellant notified the management office of signs of water seepage from the concrete pipe duct in the Flat on 29 August 2004. Upon inspection by the staff of the management office, remedial measures were taken to rectify the water seepage.

19. By letter marked “without prejudice” dated 1 December 2004, Sino referred to a letter of 23 November 2004 from the Appellant and informed the Appellant that Miller would contact her directly on her claim.

20. By letter marked “without prejudice” dated 3 December 2004, Miller informed the Appellant that they had not received a reply to their letter dated 26 November 2004 asking for inspection. Miller said they had tried to contact the Appellant at the Number but the line was not in service. Miller repeated their request for inspection at the Flat. On the top of that document (which was page 133 of the appeal bundle), there was a reference showing the letter was faxed at about 18:51 on 3 December 2004.

21. By the end of November 2004, the Appellant had commenced proceedings in the Small Claims Tribunal.

22. By letter marked “without Prejudice” dated 3 December 2004, Miller said they had not received a reply from their letter dated 26 November 2004.

23. By letter dated 6 December 2004 to Miller, referring to their letter dated 30 November 2004, the Appellant said she was surprised to receive correspondence from Miller. In particular she responded to Miller's letters dated 26 November and 3 December 2004. This letter was apparently delivered only on 10 December 2004.

24. In that letter of 6 December 2004, the Appellant first said she was confused as to who she should be communicating.

25. Second, although she noted that Miller had tried to contact her on her mobile telephone, the fact was that she had never passed the Number to Miller. She was interested to know how Miller had obtained the Number. She said she would prefer all communication in writing.

26. By letter marked "without prejudice" dated 11 December 2004, Miller referred to their letter dated 3 December and asked for inspection. This letter has apparently crossed with the Appellant's letter dated 6 December 2004.

27. By letter marked "without prejudice" dated 17 December 2004, Miller offered a sum for settlement.

28. On 14 February 2005, the Appellant complained to the Commissioner of the passing of the Number by a staff of Sino to Miller.

29. By letter dated 18 February 2005, the office of the Commissioner informed the Appellant that they were to conduct a preliminary enquiry. A copy of their "Complaint Handling Policy" was enclosed.

30. Upon receiving the Appellant's complaint, the Commissioner's Office made enquires in accordance with their complaint handling policy. In particular, the Commissioner's Office enquired with Sino on the matter.

Sino's Response to the Commissioner

31. As a result of the Commissioner's enquiry, Sino's response to the Appellant's allegations appears as follows:

- (a) The Appellant had filed a claim for compensation against them in respect of the alleged water leakage in the Flat in August 2004. In processing the Appellant's claim, Sino had disclosed the Number to the loss adjusters of their insurer for conducting an investigation and contacting the Appellant directly for the collection of relevant information to assess the claim.
- (b) Sino had collected the Number for the purpose of handling matters relating to the Flat. Sino further clarified that on 5 February 2002, the Appellant gave the Number to Sino's on-site Customer Service Centre (property management office) as her contact number for matters in relation to the Flat when Sino arranged to distribute the resident card to the Appellant;
- (c) On 17 November 2004, the Appellant gave the Number to a staff member of Sino, namely Ms. LAU, when the Appellant called Sino to demand follow-up action on her claim for compensation in respect of the alleged water leakage in the Flat.
- (d) Sino claimed that the Appellant was aware that Sino was going to refer her claim to their insurance company and that the insurance company would contact her direct for the purpose of processing her claim

- (e) Sino submitted that over a period of 2 months, Miller had attempted to reach the Appellant on several occasions, including writing to her to request for an appointment to inspect the Flat in order to assess the water damage but the Appellant did not respond to the letters issued by Miller.
- (f) Miller then informed Sino that the Appellant did not respond to its letter. Sino claimed that to enable Miller to contact the Appellant for processing her claim, Sino had given the Number to Miller via email.

Appellant's Response

32. In response to Sino's contention, the Appellant denied that she had provided the Number to Sino on 5 February 2002, nor 17 November 2004 when she called Sino to demand follow-up action on her claim for compensation in respect of the alleged water leakage in the Flat. By this assertion the Appellant seemed to be insisting that she had only provided the Number to Sino for the purpose of TV Satellite installation. She further asserted that she had never given the Number to Sino during the claiming process as she preferred communicating with them in writing. She argued that if she had to provide the Number to Sino for the purpose of dealing with matters in relation to the alleged water leakage in the Flat, she would have provided it to Sino in August 2004 when she first contacted Sino regarding the matter but she had not done so.

Commissioner's Decision

33. The Commissioner conducted a preliminary enquiry of the case upon receiving the complaint, including making enquiries with Sino and the Appellant, and obtained the response in the manner described above. The Acting Deputy Privacy

Commissioner for Personal Data Commissioner by letter dated 22 July 2005 said that by virtue of DPP3 of the Ordinance, Sino may disclose the Number to their insurer or their agents if such disclosure is consistent with or directly related to the original collection purpose of the Number by Sino.

34. Regarding the original purpose for which Sino collected the Number, Sino stated that there were two occasions under which they had collected the Number : first, when they arranged to distribute the resident card to the Appellant and second, when the Appellant called Sino to demand follow-up action on her claim for compensation in respect of the alleged water leakage in the Flat. On the other hand, the Appellant stated that she had only provided the Number to Sino for the purpose of contacting her regarding the installation of satellite television in the Flat. Despite the difference in the version of facts by both parties, the Commissioner was satisfied that the Number was collected by Sino in their capacity as the property manager and in the course of their dealings with Appellant, being the property owner, for property management related matters in respect of the Flat. The Commissioner was therefore of the view that the original purpose for which the Number was collected by Sino was for matters relating to property management of the Flat.

35. The Commissioner also found that Sino had disclosed the Number to Miller for dealing with matters arising from the Appellant's claim against them for water damage to the Flat. The purpose of the use of the Number was apparent from Miller's letter to the Appellant dated 3 December 2004 in which they mentioned that they had tried to contact the Appellant by dialing the Number to arrange for a site inspection at the Flat for the purpose of assessing her claim but was unsuccessful. The Commissioner accepted that it was necessary for Sino to perform its function as a

building manager to pass the Appellant's contact details to their insurer or its agent (Miller) for conducting an investigation and contacting her for collection of the relevant information to assess the claim. As the purpose of disclosing the Number to Miller by Sino was for the purpose of dealing with her claim relating to the Flat, which was a purpose directly related to the original purpose for which the Number was collected by Sino, namely, for property management related matters in respect of the Flat, there was no prima facie case of contravention of DPP3 on the part of Sino. The Appellant's consent for such disclosure is not required.

36. In accordance with section 39(2)d) of the Ordinance, the Commissioner informed the Appellant that he did not propose to carry out an investigation into this case. The reason was that there was no prima facie case to show that Sino has contravened DPP3 of the Ordinance, so that an investigation into the matter was unnecessary.

Ground of Appeal

37. The Appellant raised the following grounds of appeal. Very briefly they are as follows.

38. First, she maintained she gave the Number to Sino only in relation to repair of the satellite TV. There was no consent to allow Sino to pass on the Number for any other purpose. In her words, the Number as not a "default" number.

39. Second, she raised a number of matters :-

- i. Sino management staff were able to contact the Appellant by visits to the

Flat and 7 letters.

- ii. There was no resident card as Sino had alleged, but only a Club Card, all that she had to submit was a photo ;
- iii. as of 17 November 2004 Miller was no longer in the “equation” as they had denied the Appellant’s claim, and therefore they had no reason to contact the Appellant ;
- iv. Miller did not write until 14 October 2005 so it was wrong for Sino to say that for 2 months Miller had been contacting the Appellant ;
- v. on 1 December 2004, Sino informed the Appellant that Miller would contact her but failed to tell her that her mobile number would be used ;
- vi. contentious matters should be dealt with in writing not orally ;
- vii. Miller on 3 December 2004 had implied they had called the mobile number of the Appellant and that the Appellant had changed the number, and by doing so it was intended to mislead the court that the Appellant had been uncooperative ;
- viii. Sino did not inform Miller about the Appellant’s proceedings until about a week before the case was heard. ;
- ix. Miller received the Appellant’s letter on 10 December through registered mail but wrote to her on 11 December and made no acknowledgement ;
- x. it was not true that over a period of 2 months Miller had attempted to reach the Appellant but the Appellant did not respond, Sino had no reason to pass on her personal data as her claim had been denied, and Miller had not asked for any visit until 26 November.

Discussion

40. It may be made clear at this stage that this Board should approach the matter in the following manner.

41. First, the only issue before this board is whether the Respondent should investigate whether Sino had wrongly passed the mobile phone number to Miller by action in breach of the data privacy principles.

42. Second, this Board is not dealing with whether the conduct of Sino, Miller and the Appellant or each of them had been reasonable so that their claim relating to water leakage may or may not succeed. The matter was actually settled. Speculation as to what tactics a party had been deploying, for example, delaying two months in responding, failure to return calls, selectively answering letters or giving selective answers to letters and other matters of conduct are generally a matter for costs to be argued before the court. Those matters are of no concern to this Board. Abuses through collateral attack for the purpose of litigation under the disguise of infringement of data privacy rights may be made rampant if this is not the case.

43. An example may further illustrate this. The Appellant said that by letter dated 1 December 2004, Sino had relinquished its duty to manage the Flat. On a plain reading of that letter, it was stated as follows :-

“In the circumstance, we ask of your kind understanding in our inability to deal with your claim directly and your patience in bearing with the said process, which is but necessary.

Yet, we wish to assure you that your case has received our special attention and we shall communicate with all relevant parties to ensure its adequate follow-up.”

44. On the contrary, that letter appears to show that Sino was trying to deal with the claim, by then proceedings had been issued in the Small Claims Tribunal. However, we agree that that letter dated 1 December 2004 is not relevant to the determination of the Commissioner in whether he should investigate. These are matters of other proceedings but not this hearing.

45. Third, for present purposes, this Board should not decide on dispute on facts. These are matters for investigation, unless it may be said that it makes no relevance to a particular conclusion even if the facts alleged was true. That being the case, much of the evidence of the Appellant or the Commissioner can only be regarded as peripheral and at the most merely relevant on the issue of credibility. The Appellant's accusation, for example, that Sino in their letter dated 2 August 2005 mentioned that they did not have the Appellant's contact number, is therefore of no relevance. Sino's answer is of course strange but by then the Decision was already issued (on 22 July 2005). This letter had no bearing on the decision of this Board.

Personal Data (Privacy) Ordinance

46. Fourth, the following provisions relevant to this case set out the circumstances over which the Commissioner was obliged to investigate a

complaint :-

“Complaints

(1) An individual, or a relevant person on behalf of an individual, may make a complaint to the Commissioner about an act or practice-

(a) specified in the complaint; and

(b) that-

(i) has been done or engaged in, or is being done or engaged in, as the case may be, by a data user specified in the complaint;

(ii) relates to personal data of which the individual is or, in any case in which the data user is relying upon an exemption under Part VIII, may be, the data subject; and

(iii) may be a contravention of a requirement under this Ordinance (including section 28(4)).

Investigations by Commissioner

38. *Where the Commissioner;*

(a) receives a complaint....

...

then-

(i) ...the Commissioner shall, subject to section 39, carry out an investigation in relation to the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a requirement under this Ordinance;

Restriction on investigations initiated by complaints

39.

...

(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-

(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.

47. Of relevance to the Appellant's case is Data Protection Principle 3 ("DDP3") in Schedule 1 of the Personal Data (Privacy) Ordinance. This principle must not be viewed as granting an absolute right of privacy, for otherwise it may necessarily restrict other rights such as right to freedom of expression and speech. The balance is struck by the terms of the principle interpreted in the context of the Personal Data (Privacy) Ordinance, other relevant statutes such as the Hong Kong Bill of Rights Ordinance Cap 383, and the constitution, the Basic Law.

48. DPP3 states that :

"Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than –

(a) the purpose for which the data were to be used at the time of the collection of the data; or

(b) a purpose directly related to the purpose referred to in paragraph (a)."

Purpose of collecting the Number

49. The main issue in this appeal must be the purpose of collecting the Number.

50. The appellant denied having given the Number to Sino except once for the installation of satellite television. She said that the Number should therefore not be kept or used once the installation was completed. Further, she said specifically that she did not give Sino the Number on 5 February 2002 or 17 November 2004. At the hearing, the Appellant explained the circumstances in giving the Number was that she went to the management office and left the Number with the Receptionist. That was because the contractor would only come in to maintain the satellite TV at certain times of the week.

51. By a letter dated 17 May 2004, Sino through their solicitors added that the number of the Appellant was contained in a document entitled “Emergency Contact List” dated 14 June 2004. The Appellant initially objected to admit this evidence and sought an adjournment. When Sino withdrew their reliance, she referred to this document in her final submission. She explained that the strength of her case was that the number of occasions in which it was alleged she had to give her mobile telephone number supports her case that in each of the occasions mentioned, the giving of the Number must be for the purpose of the occasion only. It was therefore agreed and not in issue that the Emergency Contact List forms part of the evidence.

52. Unfortunately, this new piece of evidence was late and the Appellant after the hearing on 23 May 2006 sought to put in further evidence and arguments. This necessitated a further hearing which was held on 25 July 2006, to give an opportunity

to the Appellant to address the Board. At this further hearing, the Appellant went so far as to suggest the “Emergency Contact List” dated 14 June 2004 might not be genuine. We examined the original of the copy document which was page 333 in the hearing bundle. We found nothing unusual notwithstanding the information therein was type written. The allegation that such a document was fabricated is serious and should have never been made without proper foundation. We do not see any material that might suggest otherwise. In addition, the Appellant if she wanted to had ample opportunity between the two hearings asked for inspection. We found such cynical suggestion unhelpful, and indeed frivolous and vexatious. There were further matters raised at the second hearing on 25 July 2006, including further accusations of misconduct on the part of Sino. Suffice it to say those matters were most peripheral if not irrelevant, the Board did not really reel why the Appellant should be entitled to adduce those evidence and making further accusations. Those accusations might be relevant to other complaints which are not before this Board. We do not accept the Appellant was entitled to come back. We note that at one juncture that she was worried that the Board did not have a full picture. We do not believe the Appellant was making a serious effort to identify the irrelevance from the full picture.

53. Coming back to the main issue of the present case, we believe that the purpose of collecting the Number, in each of the occasions, must be for building management purpose, no matter whether it was on the occasions on 5 February 2002, 17 November 2004, or on the Plaintiff’s version in relation to the satellite TV occasion, or for emergency contact. Our conclusion would therefore be the same even if the Emergency Contact List does not form part of the evidence.

54. The true nature of such collection in the context of this case must be clearly understood. We believe that in the circumstance of the present case (but not necessarily generally), if a distinction has to be drawn to exclude other purposes though relating to building or property management, then the Appellant should make that clear to Sino. We also agree that a property manager can reasonably be expected to retain contacting particulars collected from property owners so as not to have to re-collect them in every subsequent incident of property management matters. To require a property manager to contact an occupant only in writing, is unreasonable, unless there are circumstances justifying such peculiar mode of communication.

55. We note that the Appellant in her giving the Number on the “satellite TV occasion” did not impose any restrictions on Sino as to how the Number could be used. In addition, Sino received the Number in its capacity as property manager in the course of dealing with property management matter, including maintenance of satellite TV. In such circumstances, it is reasonable to infer that the purpose of collection was not merely for maintaining or installing the satellite TV. In fact, a property manager can reasonably be expected to retain contacting particulars collected from property owners or occupants so as not to have to re-collect them in every subsequent incident of property management matters. In general, it is not uncommon for property management to occasionally use a resident’s e-mail address and, in certain situations mailing address or phone number, to contact a resident regarding administrative matters or notices. It is also not uncommon that property management may use information in the file they maintain about a resident to resolve disputes and “troubleshoot” problems.

56. Although the Appellant expressed that Sino was *“trying to show that she was*

uncooperative”, there is not evidence before us showing or implying any ulterior motive when Sino disclosed the Number to Miller.

Purpose of Use of the Number

57. Having decided on the purpose of collecting the Number, we have to decide whether Miller’s manner in contacting the Appellant through the Number was not for property management purpose.

58. We note that in general, subject to the evidence to the contrary, a claim against a property management company like Sino for water leakage in common water or drainage pipes may be treated as a claim relating to property management. Neither party had adduced evidence that this was not the case. Although this Board does not have the details of the claims by the Appellant against Sino, again it is reasonable to suggest that in general a loss adjuster like Miller in the circumstances such as this case could be treated as an agent for Sino in settling a claim relating to the management of the building. The allegation that Miller had contacted the Appellant for a purpose other than relating to her claim, ie to demonstrate her conduct was not reasonable may be the effect of such contact if the Appellant did not respond appropriately. However, it does not mean that such contact must be said to have been made for a purpose other than building management. On the contrary, there was a flurry of activities after proceedings were issued, including making of the contact to the Appellant. To view such conduct in such manner requires a skeptical mind and much more evidence is required.

59. Viewing the materials before us as a whole, it may be said that Sino and Miller's approach to the Appellant could have been better co-ordinated. Their selective answering or giving selective answers are not entirely a satisfactory way of communication, or even good property management practice. On the other hand, the documentary evidence made available to us also shows that the Appellant had not answered many if not all of Miller's letters in writing. However, it is not necessary for us to decide whether she should have done so. It is not necessary for us to decide whether she had or had not been approached by Miller unsuccessfully. In any case, in litigation each party was free to take positions to achieve their own goals. The danger of viewing the materials and deciding on who was right or wrong is to tread into a territory which the decision of this Board is not called for.

60. For the reasons stated above, the appeal is dismissed.

61. On the question of costs, we believe the Appellant has conducted her case at the second hearing on 25 July 2006 in a frivolous or vexatious manner. We therefore exercise our discretion to order costs against the Appellant, in the sum of HK\$2,500 to be paid to the Respondent, and in the sum of HK\$2,500 to be paid to Sino Estates Management Limited.

(Andrew MAK Yip-shing)

Deputy Chairman

Administrative Appeals Board