

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No.61 of 2005

BETWEEN

WONG PUI WAN

Appellant

and

THE PRIVACY COMMISSIONER FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 21 July 2006

Date of handing down Decision with Reasons: 6 September 2006

DECISION

1. This is an appeal by the Appellant against the decision of the Privacy Commissioner for Personal Data ("PCO") by letter dated 23 September 2005 refusing to carry out an investigation initiated by a complaint lodged by the Appellant on 2 June 2005 on the ground that there was no *prima facie* case of contravention of section 19 of the Personal Data (Privacy) Ordinance, Cap 486 ("**Ordinance**").

Factual background

2. The relevant facts are as follows.

3. The Appellant was formerly employed by the Food and Environmental

Hygiene Department (“FEHD”). She tendered her resignation on 27 August 2001, to take effect immediately.

4. On 27 September 2002, the FEHD responded to a request for information from the Appellant by letters dated 29 July and 26 August 2002. Included in the Appellant’s request for information were request for records concerning the Appellant’s resignation, and the lack of any appraisal interview. In FEHD’s letter, ref (19) in FEHD GMS HI (C) 101/20, the Appellant was invited to attend an appraisal interview on 9 October 2002.

5. By letter dated 31 January 2005, the Appellant sought from the FEHD the following further information:

“

1. 評核報告和評核會見的處理程序；
2. 在本人因工受傷後，食環署處理本人於 1.6.2000-10.12.2000, 11.12.2000-31.5.2001 及 1.6.2001-26.8.2001 期間的評核報告和評核會見的經過程序紀錄；
3. 食環署給本人的信[檔號：(19) in FEHD GMS HI (C) 101/20] (乙)處理你的辭職申請內所提及記錄和(丙)三份評核報告未有進行評核會見內所提及的記錄；
4. 在甚麼情況下，食環署可妨礙他人出庭作證；及
5. 在本人因工受傷後，食環署妨礙了本人出庭作證的經過程序記錄。”

6. By letter dated 17 March 2005, the FEHD agreed to supply to the Appellant the information requested under items 1 and 2, totaling 28 pages. Included among the 28 pages were 23 pages of copies of the Appellant’s appraisal reports for the requested period. The Appellant was informed that upon payment of \$28 she could obtain these documents.

7. In relation to Item 3, FEHD’s letter of 17 March 2005 stated that some of the information under this item were already included in the appraisal reports under item 2. The letter went on to say that for the “other part of the record”, the department had to seek legal advice because the same involved complaints made

by the Appellant and personal data of third parties.

8. The Appellant did not obtain the 28 pages of documents made available to her because (as she claimed) these were only part of the records and she would prefer to get everything in one go. She has not paid for nor obtain these 28 pages up to the date of this hearing.

9. By letter dated 18 April 2005, the FEHD informed the Appellant that after obtaining legal advice, the FEHD was unable to provide the “other part of the record” under Item 3. The letter cited as reasons for not providing the information sections 2.9(c), 2.10(b), 2.11, 2.14(a) and 2.15 of the Government’s “Code of Practice on Access of Information” made pursuant to section 12 of the Ordinance.

10. The Appellant was not satisfied with the FEHD’s reply and made a data access request on 21 April 2005 on the PCO’s standard form (“the Data Request”). The personal data requested were as follows:

- “ (一) 關於本人的辭職申請和三份評核報告未有進行評核會見的記錄-食環署的檔號：FEHD GMS HI(C) 101/20
- (二) 關於本人因工受傷後，食環署妨礙了本人出庭作證的經過程序記錄：
- (i) 食環署以書面向衛生督察胡燕嫦女士提出忠告的記錄；
- (ii) 食環署處理衛生總監（食物監察及標籤）譚春成先生提早退休的記錄；
- (iii) 衛生督察胡燕嫦女士的人事記錄；和
- (iv) 前總監譚春成先生的人事記錄。”

11. For convenience, the personal data requested under (1) above will be called “Category I” and those under (2)(i)-(iv) above will be called “Category II”.

12. The FEHD responded to the Data Request by letter dated 30 May 2005 (ie, within the statutory requirement of 40 days). In its letter, the FEHD stated that:

12.1. in relation to Category I, the FEHD had already agreed to provide the same to the Appellant in its letter dated 17 March 2005; and

12.2. in relation to Category II, they concern personal data of third parties and the FEHD was not able to release such information without their consent.

13. The Appellant was not satisfied with that response and lodged a complaint to the PCO.

14. The PCO looked at the matter and made enquiries with the FEHD. By letter dated 12 July 2005, the FEHD essentially provided to the PCO the same reasons given in their letter to the Appellant dated 18 April 2005. However, the FEHD provided to the PCO copies of the “other part of the record” which were not provided to the Appellant previously.

15. In view of the answer received from FEHD, the PCO decided that there was no prima facie breach of the Ordinance and informed the Appellant accordingly. The Appellant was not satisfied with that decision, hence the appeal to this Board.

Issue on appeal

16. There was some confusion as to whether there was any issue in relation to Category I.

17. In paragraph 20 of the Appellant’s grounds of appeal, the Appellant appeared to suggest that she was not requesting for “the other part of the records” under Category I, That being the case, Ms Margaret Chiu, who represented the PCO, submitted that no issue arose under this Category. In any case, submitted Ms Chiu, the “other part of the record” had been produced by FEHD and copies of which were already included in the hearing bundle at pages 224-243.

18. Upon clarification with the Appellant, this Board was given to understand that the Appellant’s real complaint was that the reply she received from the FEHD in answer to the Data Request was made on an erroneous basis, in that the FEHD relied on the Code of Practice when (so the Appellant contended) it should

have based on the Ordinance. Further, the Appellant pointed out that the alleged “other part of the record” provided by FEHD contained mainly her personal data such as sick leave records and medical certificates, hence it was difficult to understand why the FEHD had to seek legal advice about their disclosure and why disclosure was originally refused. She did not accept that the “other part of the record” produced by FEHD were those referred to in FEHD’s letters dated 17 March and 18 April 2005.

19. In response, Ms Chiu submitted that it was no part of the PCO’s task to determine whether the decision by the FEHD to seek legal advice on the “other part of the record” was corrected or not, or, for that matter, whether the legal advice received was correct or not. Based on the information available to the PCO, the approach of the FEHD was correct and the Appellant has failed to demonstrate otherwise.

20. In this Board’s view, the PCO’s position is correct. The confusion probably arose because of the view taken by the Appellant that the FEHD had based its disclosure decision pursuant to the Data Request on the Code of Practice rather than the provisions of the Ordinance. However, from the materials before this Board, there is nothing to suggest that the provisions in the Code of Practice relied on by the FEHD are inconsistent with the principles under the Ordinance.

21. Once that confusion is clarified, the dispute becomes a non-issue. In any case, the FEHD has now provided the “other part of the record” which makes this part of the appeal academic.

22. There is one further point in relation to this question which has to be mentioned. As mentioned above, the Appellant submitted to this Board that the information provided by the FEHD should not be believed, because the “other part of the record” now provided mainly contained her personal data and involved no third parties, hence these could not be the “other part of the record” referred to in FEHD’s letters dated 17 March 2005 and 18 April 2005.

23. In relation to this point this Board cannot agree with the Appellant. Although a large part of the “other part of the record” now provided by FEHD concerns the Appellant alone, there are records which are not the Appellant’s personal records or contain third party data. While there is some force in the Appellant’s contention that the FEHD should have provided her with those records which

contained only her personal data and which do not concern any third party (such as her sick leave records), this Board does not accept that there is any evidence of any intention to mislead on the part of FEHD.

24. In relation to Category II, the matter is more straight-forward. The documents requested are not records of the Appellant. The Appellant did not have the consent of these individuals to release the information to her.

25. Moreover, the request was premised under the FEHD having obstructed the Appellant's attendance to testify in court proceedings. There is no evidence to substantiate that premise.

26. In addition, the FEHD has clarified in its letter to the PCO dated 12 July 2005 that it could not locate any record under 2(i), there was no personal data of the Appellant in the records under 2(ii) and 2(iii), and that the records under 2(iv) had been destroyed. This Board sees no basis to suggest that the PCO should not accept that explanation.

Decision

27. Accordingly, this appeal must be dismissed.

(JAT Sew-tong SC)
Deputy Chairman
Administrative Appeals Board