ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 62 of 2005

BETWEEN

KHROUSTALEV IGOR — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram : Administrative Appeals Board

Date of Hearing : 6 February 2007

Date of handing down Decision with Reasons : 6 March 2007

DECISION

On 16.10 2004, the Appellant Khroustalev Igor was charged in the magistrates court with dealing with property known or believed to represent proceeds of an indictable offence. He was remanded in custody at the Lai Chi Kok Remand Centre ("LCKRC").

2. On 1.11.2004, the Appellant was granted bail in the High Court. On 24.12.2004, a magistrate imposed a further bail condition that he should not interfere with prosecution witnesses.

3. On 22.1. 2005, the Appellant's bail was revoked for breach of bail condition by a magistrate on the ground that there was evidence that the Appellant had interfered with one of the prosecution witnesses. The

Appellant was remanded in custody in LCKRC.

4. On 2.2.2005, the Appellant applied to the High Court for bail. His application was refused on the ground that he might interfere with prosecution witnesses if he was granted bail.

5. Police investigation of the case against the Appellant disclosed that the Appellant had, while he was in remand in LCKRC, made a telephone call from Hong Kong to a prosecution witness who was then in Russia. The Police suspected that the Appellant had threatened the prosecution witness not to come back to Hong Kong to testify against him and if the prosecution witness did come back, the Appellant would kill him.

6. In mid May 2005, the Police verbally approached the Correctional Services Department ("CSD") for confirmation that the Appellant had made such a call from LCKRC to Russia. The CSD verbally confirmed that such a call had been made by the Appellant in April 2005. The CSD also verbally told the Police that written confirmation would be provided upon receipt of a written request from them. According to the Police, subsequent to the verbal request, they had sent a written request in the form of a memo to the CSD.

7. On 26.5.2005, the Appellant applied again to the High Court for bail. The prosecution opposed the application on the ground that the Appellant would interfere with prosecution witnesses if bail was granted to him. Counsel for the prosecution informed the court of the call made by the Appellant in April 2005 from LCKRC to a prosecution witness in Russia and the threats he made in the call to the witness. Prosecution counsel also informed the court that the CSD had confirmed that the Appellant had made the call in April 2005. The Appellant's application was refused.

8. On 31.5.2005, the court liaison officer of Eastern Magistracy wrote the CSD to enquire if there was any record of enquiry about the Appellant's telephone call from LCKRC to outsiders.

9. On 7.6.2005, the CSD confirmed to the court liaison officer of

Eastern Magistracy that they had no record of receipt of any written enquiries about the Appellant's telephone calls to outsiders.

10. In the meantime, the Police did not receive any reply to their memo from the CSD and suspected their memo had somehow gone astray.

11. On 17.6.2005, the Police send a second memo to the CSD requesting record information of the Appellant's telephone calls while he was in remand. On 28.6.2005, the CSD confirmed that the Appellant had made the call to Russia on 20.4.2005.

12. On 24.8.2005, the Appellant complained to the Office of the Privacy Commissioner for Personal Data ("Commissioner") that the police officer in charge of the court case against him had committed a breach of the provisions of the Personal Data (Privacy) Ordinance in making 'the illegal verbal only' access to his private call from LCKRC to Russia. He complained that "the person in charge of the case called in illegal, verbal only, way or talked in person to somebody from LCKRC who had the access to the log-book which indicates prisoner's calls" He also complained that the prosecution had made use of the illegally obtained verbal information, before the CSD confirmed it in writing, as the ground for opposing his application for bail in the High Court. As a result of the illegal access to his private data, he was unlawfully detained in custody.

13. On 26.8.2005, the Commissioner informed the Appellant that having considered his complaint, the Commissioner did not propose to carry out an investigation of his complaint. In his reasons for decision, the Commissioner said that the use of the Appellant's call records by the police was for prosecution and detention of the Appellant in criminal proceedings and such use is exempt from the provisions of Data Protection Principle 3 ("DPP3") under s. 58(2) of the Personal Data (Privacy) Ordinance ("PDPO") and the disclose of the record by the CSD was not unlawful. The Commissioner also said that there was no requirement in law that request for information by the Police must be in writing and the verbal request made by the Police to the CSD for the telephone call records was not unlawful nor unfair. There was no prima

facie evidence of non-compliance with Data Protection Principle 1(2)(DPP1(2)). In these circumstances, the Commissioner considered that no investigation or further investigation was necessary.

14. The Appellant was not satisfied with the Commissioner's decision and appealed to this Board. His grounds of appeal may be summarized as follows:

(1) "Verbal" access to personal data by any user of the information including the Police is questionable and unlawful.

(2) The Commissioner instead of carrying out an investigation, tried to cover up the abuse and even to justify it.

(3) After his complaint about the approach by the Police to collect information by verbal request, the Police then followed the proper procedure and requested the same information in writing. This confirmed his view that the Police was wrong in the first place.

(4) Access to his personal data has to be made by written application and there was no reason why the Police could obtain the information verbally.

(5) The CSD disclosed the information verbally and the Police collected the verbal information and investigation would reveal the abuser who was responsible for it but the Commissioner collaborated with the two departments and protected them.

15. Before us, the Appellant agreed that the Police may lawfully collect his personal data from the CSD for the purposes in the present case if the proper procedure had been followed but the Police did not do so. The Police should have submitted to the CSD a written request first and not to gain access to his personal data by verbal request to the CSD. This was unlawful collection of his personal data and the prosecution should not have used such information in the High Court to oppose his bail application. The two departments should be held accountable for

such abuse of procedure. They had breached DPP1(2) and DPP3.

16. The Appellant however, indicated to us that he would not take his complaint against the CSD further and his main complaint was the Police had acted unlawfully in the collection of his personal data from the CSD.

17. The Commissioner in his statement relating to his decision maintained that there was no prima facie evidence of unlawful and unfair means of collection of the Appellant's personal data. The relevant data were collected for the purpose of prosecution and detention of offenders and there was no evidence that it was used for other purposes. Collection of personal data by verbal means does not by itself make the collection unlawful and unfair. Therefore there was no contravention of DPP1(2) by the police.

18. As regards the disclosure by the CSD of the telephone call record of the Appellant, the Commissioner stated that the collection of such personal data was for the purpose of detention of the Appellant and allied administrative matters. There was no evidence to show that there was a change of such use by reason of the disclosure of the relevant data. Since the disclosure to the Police of the relevant data was for the prosecution and detention of the Appellant for a criminal offence, s. 58 (1)(a) of the PDPO applied. The relevant data were exempt from the application of DPP3.

19. Representative of the Police informed us that there was no set procedure for obtaining information from persons detained in the custody of the CSD for the purpose of criminal investigation, albeit in requesting clinical information of suspects from the Hospital Authority, the Police had to follow procedures set down in their internal orders. In circumstances as in the present case, usually a verbal request would be made first followed by a written request for record. The Appellant's telephone call record was obtained in this manner but the memo making the request somehow had failed to reach the CSD before the relevant data were used in court.

20. The relevant provisions of the PDPO in the present case are:

(1) Section 58(2) of PDPO provides that "personal data are exempt from DPP3 in any case in which the use of the data is for any of the purposes referred to in subsection (1) and the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in subsection (1)." Among the matters referred to in subsection (1) are "the apprehension, prosecution and detention of offenders.

(2) DPP1(2) requires collection of personal data by lawful and fair means in the circumstances of the case.

(3) DPP3 requires that personal data shall not be used for a purpose other than that for which the data were to be used at the time of collection or for a purpose directly related thereto, unless there is prescribed written consent from the data subject.

21. Since the Appellant had indicated he would no longer pursue his complaint against the CSD, we do not think we need to consider whether there had been a breach of DPP3 by the CSD. Nevertheless, as the matter had been raised by the Appellant and considered by the Commissioner, we wish to say that if the Appellant had pursued the matter further, we would still find the Commissioner right in not investigating the complaint against CSD for the reasons he stated in his statement of decision.

22. On the question of whether the Policy had failed to comply with DPP1(2), first of all, we do not find any evidence that the Police had used means to gain access to the Appellant's telephone call record held by the LCKRC where the Appellant was then detained, which are unlawful in the sense that the access had been obtained by force, threats, fraud or misrepresentation or by collusion or conspiring with CSD officers.

23. In our opinion, collection of personal data may be made in writing or verbally. There is no express provision in the PDPO that collection cannot be made verbally nor is there necessary implication that collection may only be made in writing. The provision requiring access

to personal data should be made by written requests under section 18 of the PDPO relates to access to personal data by an individual who is the data subject of the personal data. It does not apply to collection by an individual of the personal data of another person. There is no law prohibiting the Police in the course of criminal investigation to verbally request a suspect or a potential witness to provide information. The mere fact that, in the present case, the collection was verbal, without more, does not make the collection unlawful.

24. We find that there was no set procedure that the Police had to follow in their collection of the relevant data and the means they had adopted , i.e. by verbal request first, then followed by a written request, and upon discovering the written request failed to reach the CSD, by a second request, was not unreasonable in the circumstances of the case. The Appellant has submitted that the prosecution using the verbal information before it was confirmed in writing to successfully oppose his application for bail in the High Court was unfair to him. But it should be noted that the Appellant did not seemed to have objected to the information being accepted by the presiding judge hearing his application nor it would appear that the issue of unfairness was raised in the application for bail. Nevertheless, the issue of unfairness in DPP1(2) relates to the collection of the relevant data and not the subsequent use of the data in court proceedings. We find there was no evidence that the Police had contravened DPP1(2).

25. The Commissioner was right in not investigating the complaint.

(Mr Arthur LEONG Shiu-chung)
Chairman
Administrative Appeals Board