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ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 67 of 2003

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BETWEEN

YUEN MAN TAK

Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 28 September 2004

Date of Decision : 28 September 2004

Date of handing down Reasons for Decision : 12 October 2004

DECISION

Shortly before the hearing on 28 September 2004 commenced, the appellant Yuen Man Tak through the Board Secretary, informed this Board that he was indisposed and would not attend the hearing. He asked this Board to deal with his appeal in his absence. Counsel for the Respondent had no objection to this. Accordingly, this Board proceeded under s. 20 of the Administrative Appeals Board Ordinance to hear the appeal in the absence of the appellant. Having heard and considered all the arguments and circumstances in the case, this Board concluded that the appeal should be dismissed. The appeal was then dismissed with the reasons for decision to be handed down in writing in due course.

2. This Board now hand down the following reasons for decision.
3. In October 2001, the appellant Yuen Man Tak went to Sotheby's Hong Kong Ltd (the Company) to apply for the post of Temporary Exhibition Assistant. He was told to fill in an application form and that thereafter he would be interviewed. The particulars required in the application form included his parents' personal particulars such as name and occupation. The appellant considered his parents' personal particulars were irrelevant to his application and the requirement by the Company was an infringement of his and his parents' privacy. He refused to provide those particulars. As a result, he was not given an interview.
4. The following day, the appellant sought an explanation from the Deputy Director of the Company. He was told that the requirement was for security check since Temporary Exhibition Assistants would handle valuable articles. The appellant was not satisfied with the explanation. On 4 April 2002, he wrote to the Privacy Commissioner (the Commissioner) complaining about the Company's infringement of privacy.
5. On 24 April 2002, the Commissioner, referring to the appellant's letter as an enquiry, replied that all data users including the Company, when collecting personal data should comply with Data Protection Principle 1 and Principle 2 in Schedule 1 of the Personal Data (Privacy) Ordinance (the Ordinance) and the Code of Practice on Human Resource Management (the Code) and if the appellant should find any breach of the Ordinance by the Company, he should provide supporting evidence.
6. It would appear from the Commissioner's reply that he did not regard the appellant's letter as a proper complaint in respect of which he should investigate. Nevertheless, the Commissioner went on to follow up the case. Obviously, the Commissioner was concerned about the appellant's case, otherwise, he would not have done so
7. On 2 July 2002, Mr. Samuel Wong, Personal Data Officer (Operations) wrote to the Company. He referred the Company to Data Protection Principle 1 and the Code and reminded them that collection of names and occupations of the parents of applicants for the post of Temporary Exhibition Assistant was excessive and not necessary for the

purpose of recruiting for that post. Mr. Wong also advised the Company to cease requiring job applicants to provide personal data of their parents.

8. After more than a year, on 7 July 2003, the appellant wrote to the Commissioner and asked for the result of the investigation of his complaint and alternatively, whether the Commissioner intended to carry out an investigation.

9. On 10 July 2003 the Commissioner informed the appellant that no investigation would be carried out in respect of his case because it was not a complaint within the meaning of s.37 of the Ordinance. In the letter, the Commissioner also explained the meaning of 'complaint' as provided under s. 37.

10. The appellant was not satisfied with the result. He wrote to the Commissioner again on 17 July 2003 insisting that he had made a complaint. He wanted the Commissioner to investigate the matter and to ascertain if the Company had ceased the practice of requiring job applicants to provide their parents' personal data.

11. On 19 July 2003, the Commissioner informed the appellant that he maintained his earlier decision.

12. On 6 August 2003, the appellant appealed to this Board against the Commissioner's decision not to investigate his case. He gave two grounds of appeal:

(1) The Commissioner's interpretation of 'complaint' for the purpose of s. 37 of the Ordinance is wrong.

(2) The Commissioner's failure to comply with s. 39(3) of the Ordinance is wrong.

13. The appellant has not elaborated these two grounds. We do not know on what arguments he relies to support his case.

14. The Commissioner contends that under s. 37(1)(b)(i) of the Ordinance, the act or practice complained of must be one which has been done or engaged or being done or engaged. The appellant has not shown that a collection of his parent's personal data has been or is being carried out by the Company. Secondly, under s.37(1)(b)(ii), the act or practice must relate to personal data of which the individual is the data subject. S. 37 therefore does not cover personal data belonging to third parties. The appellant's complaint does not satisfy s. 37(1)(b)(i) and (ii) and the Commissioner has no power to investigate the case.

15. The question before us is simple and that is : whether the appellant's letter dated 4 April 2002 is a complaint within s. 37 of the Ordinance so that the Commissioner is required under s. 38 of the Ordinance to carry out an investigation.

16. Under s.37 a person may make a complaint to the Commissioner about an act or practice which (a) has been completed or being done or engaged by a data user, (b) relates to the complainant's personal data and (c) may amount to a contravention of the Ordinance. An act or practice which does not fulfil any of these conditions is not within the scope of complaints contemplated by the section.

17. Under s. 38 of the Ordinance, the Commissioner is required to carry out an investigation if he receives a complaint. This does not mean any complaint. It must be one that will invoke the Commissioner's power of investigation and that means that it must be one covered by s.37.

18. Further, under Data Protection Principle 1, personal data shall not be collected by a data user unless the requirements set out there under are complied with by the data user. Failure to comply with the requirements is a contravention of the Ordinance. But there can be no contravention if there is no collection of personal data.

19. Thus, if the act or practice complained of is not yet done or does not relate to the personal data of the complainant or may not amount to a contravention of the Ordinance, the Commissioner will not carry out an investigate the complaint.

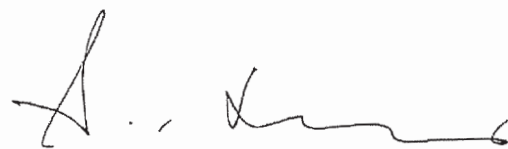
20. On the appellant's own case, the Company required him to supply the personal data of his parents but he refused to do so. On those facts, the Company had sought to collect personal data of third parties but because of the appellant's refusal, no such data were collected. Since no such data had been collected, there was no non-compliance with the requirements of Data Protection Principles 1 and no contravention of the Ordinance. The Company had not done any act or engaged in any practice that could be the subject of complaint under s. 37..

21. However, it may be argued that by requiring the appellant to provide his parents' personal data, the Company was collecting personal data and this is an act within the scope of the s. 37(1)(b)(i). In our opinion, even in that case, the appellant's complaint is still outside the section because what was being collected were the personal data of third parties and this was outside s.37(1)(b)(ii). The act complained of by the appellant is not within the scope of complaints under s. 37 in respect of which the Commissioner is empowered to investigate.

22. The Commissioner is correct not to carry out an investigation in respect of the appellant's case. The appeal is dismissed.

23. The appellant might have felt aggrieved that the Company's act had deprived him of an interview. This is understandable. Nevertheless, the appellant may find some consolation in that although his complaint could not be investigated under the Ordinance, it has prompted the Commissioner to write to the Company on 2 July 2002 to advise them of the need to comply with the provisions of the Ordinance to prevent recurrence of similar cases. This may have achieved the purpose of the appellant's complaint.

24. We make no order as to costs.



(Arthur Leong)

Chairman

Administrative Appeals Board