

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 75 of 2011

BETWEEN

WU YIN NEI, WENNY

Appellant

and

PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA

Coram: Administrative Appeals Board

Date of Hearing: 11 July 2012

Date of Handing down Written Decision with Reasons: 26 July 2012

DECISION

Note: references in this Decision to "AB" are references to the Appeal Bundle referred to in paragraph 17 herein and references to "the Ordinance" are references to the Personal Data (Privacy) Ordinance, Cap. 486.

THE FACTS

1. On 8th July 2011, the Appellant lodged a complaint to the Respondent, the Privacy Commissioner for Personal Data (“the Commissioner”), against five named persons. Her allegation was that “The above criminal offenders or intruders illegally obtain & collect my private information including my ex-husband (an Australian citizen). They also intrude my parents (sic) privacy. I never disclose my spouse nor my relationship privacy to them. They abused their authority to do illegal matters” (AB, 186). By a letter of the same date, the Commissioner acknowledged receipt of the complaint and enclosed with it a copy of his Complaint Handling Policy (AB, 187).

2. No particulars were given regarding how and under what circumstances these persons allegedly obtained or collected her private information and/or how they abused their authority to commit illegal acts. No information was given as to what authority these persons supposedly abused and/or what the alleged illegal acts were.

3. By an e-mail dated 19th July 2011, the Appellant added seven other parties as persons complained against (AB, 193). In this e-mail, she stated that she never disclosed (i) that she was divorced; (ii) that “they” [presumably referring to some or all of the persons being complained against] did not know her husband’s name or that he is an Australian citizen; (iii) that she had never disclosed her current mobile phone number, residential address, her parents’ mobile phone number, the fact that her elder brother is a Singaporean passport holder or that she had a niece in Singapore. She further stated that she had received many phone calls from five of the persons complained against. She said: “They kept asking or harass me my non disclose privacy such as:

Your niece is in Singapore? Your elder brother is a Singaporean passport holder working in China?” Furthermore, they also enquired why she had a joint account with HSBC with her ex-husband, why she divorced him and why she did not move back to Australia. Apparently, she found this odd as they were not even supposed to know she had lived in Australia. She reiterated that she had never disclosed this fact to “them”, nor had she disclosed her ex-husband’s name or her marital status. She also told the Commissioner that she was given some gossip and private information about her ex-husband from two of the persons complained against and that they intruded her privacy by asking her “harassing” questions concerning two of her friends. She queried how they could possibly have known the identities of her friends. She said she believed they must have used an “external source” to collect her private information as well as that of her two friends. She requested the Commissioner to investigate and prosecute the culprits.

4. By a letter dated 21st July 2011 (AB, 199), the Commissioner wrote to the Appellant raising enquiries and requesting further particulars about her complaint against the parties complained against. In response the Commissioner was sent (a) a copy of her previous e-mail dated 19 July 2011 (b) copy of a character reference letter written for her by Mr. Philip Ruddock (AB, 204) (c) documents in respect of the Appellant’s marriage to, and divorce from, her ex-husband (AB, 205-211).

5. In several subsequent e-mails and letters sent to the Commissioner between 9th August 2011 and 21st November 2011 (AB, 225-276), the Appellant provided to the Commissioner the names of additional parties complained against. However, no particulars of how and under what circumstances these additional parties allegedly contravened the provisions of the Ordinance were given, apart from an assertion that they were “related to” some of the other parties who were already the subject of her complaint and that “many illegal matters are

done by them to intrude my privacy already”. The Commissioner was requested to “get the international cops, ICAC etc to investigate all of them and to prosecute them as per the Commonwealth Law, Evidence Law, Tort Law, Business Law, Company Law and Company Ordinance, International Human rights, as per appropriate Privacy Laws, Criminal Laws and Commercial Laws in the world”. The Appellant further stated that she had also “informed Parliament House, Australia and the Queen Elizabeth II at the same time”.

6. Having considered the information available and all the circumstances of the case, the Commissioner decided not to pursue the complaint further. He duly informed the Appellant of his decision and the reasons for the said decision by a letter dated 22nd November 2011 (AB, 277).

7. Between 23rd November 2011 and 6th December 2011, and despite the Commissioner having already decided not to pursue her complaint any further, the Appellant continued to send e-mails to the Commissioner adding parties to her complaint (AB, 282-294). In total, the number of parties complained against amounted to no less than 95.

8. Finally, by a letter dated 8th December 2011, the Commissioner wrote to the Appellant to remind her that he had decided not to pursue her complaint (AB, 295).

THE APPEAL

9. On 9th December 2011, the Appellant lodged the present appeal against the Commissioner’s decision.

10. At the hearing of this appeal, the Commissioner was represented by his legal counsel, Ms. Unique Leung. The Appellant was absent.

11. Section 20(1) of the Administrative Appeals Board Ordinance provides as follows:

(1) If on the day and time fixed for the hearing of the appeal the appellant fails to attend the hearing or fails to make representations either in person or by counsel or a solicitor or by some other person, the Board may-

- (a) if satisfied that the appellant's failure to attend was due to sickness or any other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;
- (b) proceed to hear the appeal; or
- (c) by order dismiss the appeal.

12. From information given to us by the Secretary of the Board, we were satisfied that ample notice of the hearing had already been given to the Appellant. It was quite apparent that she had chosen not to attend the hearing without giving any reason. There was no prior notice from her of informing us of her non-attendance, nor any application for an adjournment. In the circumstances, the Commissioner applied for the hearing of the appeal to proceed in her absence. We acceded to this application.

13. Before commencing to hear the appeal, however, we noted that none of the parties whom the Appellant complained against made an appearance because none of them had been notified of the proceedings. The Commissioner, relying upon remarks made by the Chairman of this Board, Mr. Horace Wong SC, in his ruling in AAB No. 10/2011, submitted that none of the parties complained are "parties bound by the decision appealed against" within the meaning of the Administrative Appeals Board Ordinance, Cap. 442. It follows from this that they need neither be notified of these proceedings nor be present at the hearing.

14. Mr. Horace Wong SC's ruling was in respect of an application by the Commissioner to effect "substituted service" of documents on 17 parties complained against by the Appellant under circumstances where it was impractical to do so under section 29 of the Administrative Appeals Board Ordinance, Cap. 442. The issue before the Chairman was whether the Board had jurisdiction to make orders of substituted service, and if so, whether he, as Chairman of the Board, may exercise such power in an interlocutory application.

15. In that application, the learned Chairman proceeded upon the assumption that the 17 persons upon whom service was sought to be effected were indeed "parties bound by the decision appealed against" within the meaning of the Administrative Appeals Board Ordinance. Towards the end of his ruling, however, he expressed doubt as to whether they could fairly be so described. At paragraph 85 & 87 of the said ruling, the learned Chairman said: "...in cases where the Respondent [i.e. the Commissioner] has decided that, based merely on the nature or contents of the complaint, there is not even a prima facie case to carry out any investigation at all, the position may be different. The decision is made entirely based on the view taken by the Respondent on the complaint itself. The decision is not based on any evidence provided by the persons complained of. No investigation has been made. The persons against whom [the complaint had been lodged] have not even been contacted, let alone given any evidence. In some cases, conceivably, the very existence of the persons complained of may not even be sure. The decision is made solely on what the Respondent considers to be a total lack of merits of the complaint. The decision is made by the Respondent without any reference at all to the persons against whom the complaint(s) are made.....In these circumstances, I have some doubts as to whether the Parties Bound can fairly be described as persons "bound by" the Decision. It is

difficult to see, if the Decision was made without any reference to the Parties Bound, in what regard are the Parties Bound bound by the Decision.”

16. Miss Leung submitted that the persons complained against in this appeal fall fairly and squarely within the category of persons described by Mr. Horace Wong, SC in his ruling in AAB No. 10/2011. We accepted this submission. We also agreed with and adopted the remarks of the Chairman in his ruling in AAB No. 10/2011. Accordingly, we held that none of the parties complained against in this case were parties bound by the decision in this appeal.

17. Having decided that the presence of the parties against whom the Appellant complained was unnecessary, we proceeded to hear the appeal. We received the Appeal Bundle as evidence in this appeal pursuant to section 21(1)(b) of the Administrative Appeal Boards Ordinance, Cap. 442. No further evidence was called by the Commissioner. Submissions were then made to us by the Commissioner in answer to the Appellant’s grounds of appeal.

THE RELEVANT STATUTORY PROVISIONS AND LEGAL PRINCIPLES

18. The following statutory provisions are relevant to this appeal:

Data Protection Principle (DPP) 1 in Schedule 1 of the Ordinance provides:

- (1) Personal data shall not be collected unless-
 - (a) the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;
 - (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and
 - (c) the data are adequate but not excessive in relation to that purpose.

(2) Personal data shall be collected by means which are-

- (a) lawful; and
- (b) fair in the circumstances of the case.

“Personal data” is defined in section 2(1) of the Ordinance as:

any data-

- (a) 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.

Section 39(2)(d) of the Ordinance provides, inter alia that 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- (d) any investigation or further investigation is for any other reason unnecessary.

Section 21(1)(j) of the Administrative Appeals Board Ordinance provides that, for the purposes of an appeal, the Board may subject to subsection (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit. Section 21(2) provides that the Board, in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the respondent with the Secretary under section 11(2)(a)(ii), 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.

19. Paragraph 8(d) under Part B of the Commissioner’s Complaint Handling Policy (February 2011, 3rd Revision) states that “an investigation or further investigation may be considered unnecessary if: (d) after preliminary enquiry by the PCPD [i.e. the Commissioner],

there is no prima facie evidence of any contravention of the Ordinance”. This principle accords with a number of previous decisions of this Board.

20. In AAB No. 32 of 2004, this Board held that “If there is no prima facie evidence of contravention of the Ordinance by the complained practice or act, the Privacy Commissioner can exercise his discretion to refuse to investigation under section 39. The Appellant should bear in mind that complaining of contravention of the Ordinance by others is equivalent to accusation of committing an offence, which is a serious accusation. Therefore, the complaint should have basis, including evidence and justifications. The Privacy Commissioner has to consider if there is any basis for the complaint, i.e. prima facie evidence and justifications, before deciding to investigate...”.

21. In AAB No. 8 of 2007, the Board held that “[the Commissioner] does not have an absolute duty to inquire with the party complained against on every detail of a complaint. According to section 37(1)(b)(iii) of the Ordinance, a complaint must be of an act which might possibly contravene the requirements under the Ordinance. Generally speaking, it is the complainant, rather than the party complained against, who should provide the necessary information. If the complainant is unable to prove the alleged contravention, the complaint is not established.”

22. In AAB No. 50 of 2011 (which, apparently, was another appeal which the Appellant had brought before this Board), this Board (at paragraph 13) referred to the passages in the two decisions mentioned above and continued as follows: “This Board has no reason to disagree with the principles stated in these cases. The rationales behind these cases are obvious. Besides the duty to utilize limited resources efficiently, the Commissioner has to consider the rights of

those complained against. It is their right to freedom from being subject to unnecessary and baseless investigation that the Commissioner has to balance against the legitimate right under the Ordinance of the complainant to the assistance of the Commissioner to investigate the infringement of his or her right to privacy of personal data. When the complainant does not make out a case of prima facie evidence, it is reasonable for the Commissioner not to initiate a formal investigation. There is no absolute duty for him to make an enquiry of the parties complained against. To do so is tantamount to putting the cart before the horse.”

THE ISSUE IN THIS APPEAL AND OUR DECISION THEREON

23. In the present case, it is the Appellant’s allegation that the parties complained against obtained and/or collected her personal information unlawfully and in breach of DPP 1 in Schedule 1 of the Ordinance. The issue in this appeal is whether she has provided sufficient evidence to the Commissioner to establish a prima facie case that this has occurred.

24. We have examined the facts (in particular those set out at paragraphs 1-5 above) and the evidence submitted to the Commissioner by the Appellant. We fail to see a prima facie case being established which indicates that the persons complained against might possibly have contravened DPP1 (or indeed of any other DPP or requirement of the Ordinance). The Appellant’s contention seems to be this: that (i) Some of the persons complained against seemed to be aware of her private information and that of her ex-husband, friends and relatives; (ii) she did *not* provide such information to them; (iii) hence these persons complained against must have collected the said private information unlawfully or unfairly. The rest of parties complained against were all “related” to these persons and thus they *must* equally have been guilty of the same unlawful/unfair activity. With respect, we think these are *non sequiturs*. Moreover, there is

no evidence which shows how some of the persons complained against came to be aware of the Appellant's private information nor even of the fact that they "collected" such information. Even assuming that they *did* collect the said information, there is no evidence that such information was collected "in a form in which access to or processing of the data is practicable" so as to fit the statutory definition of "personal data". Nor is there any evidence which shows that the information was collected for an improper purpose or by unlawful means or under circumstances which were unfair. In our view, the Commissioner was perfectly entitled to conclude, on the available information, that the complaint was insufficient to establish a prima facie case of contravention of any DPP or requirement of the Ordinance by the persons complained against.

THE GROUNDS OF APPEAL

25. In her grounds of appeal, the Appellant claimed that the Commissioner has done nothing to resolve the case, nor to investigate and "prosecute" the parties complained. As we have pointed out above, the Commissioner is under no obligation to initiate a formal investigation unless, on preliminary enquiry, there is a prima facie case of contravention of the Ordinance by the parties complained against. Besides, it is not true that the Commissioner did "nothing". The Commissioner did consider the Appellant's allegations and, by a letter dated 21st July 2011 (AB, 199), raised enquiries and requested further particulars about her complaint against the parties complained against. In response the Commissioner was sent (a) a copy of her previous e-mail dated 19 July 2011 (b) copy of a character reference letter of Mr. Philip Ruddock (AB, 204) (c) documents in respect of the Appellant's marriage to, and divorce from, her ex-husband (AB, 205-211). Such documents, however, did nothing to assist the Commissioner's preliminary enquiry into the complaint.

26. The Appellant also stated in her grounds of appeal that the persons complained against obtained/collected her private information without her consent. However, even assuming that this occurred, this does not per se show a prima facie case of an infringement of DPP 1. As pointed out earlier, there still has to be some evidence that the Appellant's personal data (as defined in the Ordinance) was collected for an improper purpose contrary to DPP 1(1) or under circumstances which were unlawful or unfair contrary to DPP 1(2). We find that there is no such evidence. All we can see are bare allegations with no supportive evidence.

27. The Appellant also contended that the Commissioner erred in not making any enquiries with the Australian Consulate General and Parliament House concerning the confidential information which they have collected from her and referred to a reference letter written her behalf by Mr. Philip Ruddock, the Federal Attorney General of Australia. In reply, the Commissioner submitted that he was not obliged to make such enquiries as no prima facie case of contravention of the Ordinance and that, as regards the reference letter, it is not relevant to the merits of the Appellant's complaint. We agree with and accept this submission.

28. Another ground of appeal is that the list of parties complained against as set out in the Commissioner's Decision failed to include every name the Appellant has documented in her complaint. She did not, however, provide particulars of the alleged "missing names". In reply, the Commissioner denies having missed out some names, but says that even assuming some names *were* omitted, this would not have made any difference to his Decision. We accept the Commissioner's submission and see nothing in this ground of appeal.

29. The Appellant also complained against 3 staff members of the Commissioner's Office for collecting personal data from her, thus intruding her privacy without providing with a solution to her problems. With respect, it appears to us that this contention is groundless, since it was quite obvious that the Commissioner's subordinates were merely discharging their duties when, for the purpose and in the course of conducting a preliminary enquiry into her complaint, they requested and obtained the Appellant's personal data. In any event, this complaint against the Commissioner's staff has nothing whatsoever to do with the matter with which this Board is concerned in this appeal, namely that relating to the unlawful/unfair collection of her private information by the 95 plus individuals named in her original complaint. We shall therefore refrain from saying anything more about it.

30. Finally, the Appellant also claims in her grounds of appeal that the privacy of her relatives and friends have also been intruded upon by the parties complained against. The Commissioner points out (quite correctly) that the Appellant does not have the capacity to bring a complaint in this regard on behalf of these relatives and friends as she has not shown that she is the "relevant person" (as defined in section 2 of the Ordinance) of the data subjects in question. In section 2(1), "relevant person" is defined as follows:

...in relation to an individual (howsoever the individual is described), means-

- (a) where the individual is a minor, a person who has parental responsibility for the minor;
- (b) where the individual is incapable of managing his own affairs, a person who has been appointed by a court to manage those affairs;
- (c) in any other case, a person authorized in writing by the individual to make a data access request, a data correction request, or both such requests, on behalf of the individual.

CONCLUSION

31. By reason of the foregoing, we conclude as follows:

(i) On the available evidence, the Commissioner was justified in concluding that there was no prima facie case of a contravention of any of the provisions of the Ordinance;

(ii) The Commissioner had correctly exercised his discretion not to pursue the Appellant's complaint any further in accordance with section 39(2)(d) of the Ordinance and in accordance with paragraph 8(d) under Part B of his Complaint Handling Policy, a copy of which was sent to the Appellant under cover of the Commissioner's letters dated 8th July and 22nd November 2011 and which has been duly lodged with the Secretary under section 11(2)(a)(ii) of the Administrative Appeals Board Ordinance. We are 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 said policy.

32. We accordingly dismiss this appeal and exercise our power under section 21(1)(j) of the Administrative Appeals Board Ordinance to affirm the decision of the Commissioner.

COSTS

33. It remains for us to deal with the question of costs. Section 21(1)(k) of the Administrative Appeals Board Ordinance, Cap. 442 gives the Board power, subject to section 22, to make an award to any of the parties to the appeal of such sum, if any, in respect of the costs of and relating to the appeal. Normally, in civil litigation, the general rule is for costs to follow the

event. However, as far as this Board is concerned, the rule is modified to some extent by section 22(1), which provides that:

The Board shall only make an award as to costs under section 21(1)(k)-

- (a) against an appellant, if it is satisfied that he has conducted his case in a frivolous or vexatious manner; and
- (b) against any other party to the appeal, if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.

34. The Commissioner applied for costs against the Appellant on the ground that she had conducted her case in a frivolous or vexatious manner, in that she failed to reply properly to his request for information and/or further and better particulars of her complaint. The Commissioner, however, did not elaborate on the basis upon which he considered such failure on the Appellant's part as constituting a frivolous or vexatious manner of conducting her case. In addition, the Commissioner did not provide any *other* specific reasons why he considered the Appellant's case to have been frivolously or vexatiously conducted. We have to agree that her response to the Commissioner's letter dated 21st July 2011 (AB, 199) was inadequate and, as we have said, did nothing to assist him. However, we hesitate to hold that this per se is tantamount to conducting her case in a "frivolous or vexatious manner". We bear in mind that the Appellant is neither legally trained nor represented. We also have no reason to believe that she brought this complaint to the Office of the Commissioner out of improper motives or malice. All indications are that she really harboured in her mind a grievance against the parties complained against, which she presented to the Commissioner's Office as best she could (albeit inadequately) without any legal knowledge or representation.

35. We also take into account the fact that she is absent and hence unable to explain why she had conducted the case in such a manner.

36. In all the circumstances, we are prepared to give her the benefit of the doubt and make no order as to costs.

(Signed)

(Mr Thong Keng Yee)

Deputy Chairman

Administrative Appeals Board