

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 10 of 2008

BETWEEN

MADAM WONG SUK WA

Appellant

and

THE PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA

Coram: Administrative Appeals Board

Date of Hearing: 30 June 2008

Date of handing down Decision with Reasons: 21 August 2008

DECISION

1. This Appeal was brought by Madam Wong Suk Wa (“**Madam Wong**”) against the Privacy Commissioner for Personal Data (“**the Commissioner**”) who refused to carry out or continue an investigation of a

complaint initiated by Madam Wong against the American Express Bank Ltd. (“the Bank”).

Background

2. Madam Wong was a former customer of the Bank. She terminated her loan account with the Bank in February 2007.

3. On 2 April 2007, Madam Wong wrote to remind the Bank of the termination of her loan account and that any relationship between them had ceased. In the letter Madam Wong further demanded the following:

- “2.1 You are required to request Credit Reference Agent to delete any data relating to the aforementioned account from its database, and;
- 2.2 You are required to COMPLETELY destroy all my personal data that have been continually maintained by all sections of your bank, and;
- 2.3 You are required to ensure that any of my personal data that have been disclosed to any other parties, including any of your business-related agencies, shall be similarly destroyed, and;
- 2.4 You are prohibited to disturb me in any form including but shall not be limited to any mail, phone-call, fax, e-mail or any promotional item that may be addressed to me.”

4. The said letter of 2 April 2007 was addressed and sent to the Bank.
5. On 22 July 2007, Madam Wong received through the post an “American Express Platinum Credit Card Application Form” (“**the Credit Card Application**”). The Credit Card Application bore the logo of “America Express” at the end of the application form. Underneath the logo was printed the name: “American Express International, Inc” (hereinafter referred to as “**AEII**”).
6. On 17 September 2007, Madam Wong wrote to the Bank, complaining that the Bank had failed to comply with her opt-out request and that the Bank had not ceased to use her personal data for direct marketing purposes. She reiterated in a subsequent letter of 9 October 2007 that the Bank was wrong to have sent her the promotional material.
7. In the Bank’s reply of 11 October 2007, the Bank explained as follows:

“ As we are required by law to maintain customers’ data for at least 7 years, we regret that we cannot delete your record from our database at this time.

We note that the direct mailing materials you received was sent by American Express International Inc. which is a separate entity from American Express Bank Ltd. (the “Bank”), and we understand from our enquiries with American Express

International Inc. that they obtained your particulars through an external list vendor, and not from the Bank.”

8. Dissatisfied with the Bank’s explanation, Madam Wong lodged a formal complaint with the Commissioner on 12 November 2007. She alleged that the bank had contravened section 34 of the Personal Data (Privacy) Ordinance by failing to cease using her personal data for direct marketing purposes after her opt-out request, which request having been made to “*all sections*” of the Bank. She asserted that by making the request to “*all sections*” of the Bank, all data users bearing the same prefix of “American Express”, the same logo, the same address or the same parent company would be included.

9. The Bank wrote further to Madam Wong on 15 November 2007. The Bank explained that AEII was not “a section” of the Bank. The Bank further stated that although Madam Wong “had expressly consented to the Bank sharing her personal data with all the Bank’s affiliates and representatives, including AEII, for marketing purposes, the Bank did not in fact pass on her personal data to AEII.”

10. In response to inquiries from the Commissioner, the Bank stated that their internal review showed that the Bank did not in fact share Madam Wong’s personal data with AEII. They further stated that their inquiries with AEII showed that AEII had obtained Madam Wong’s contact particulars from an external vendor. The Bank further explained that while the Bank and AEII were ultimately owned (through other intermediate companies) by a holding company called American Express Company, the

Bank and AEII were separate entities, and AEII was not a subsidiary or “a section” of the Bank.

11. On 28 January 2008, Madam Wong wrote to the Commissioner and complained that on 27 January 2008, direct marketing material from American Express in the form of a postcard (“**the Postcard**”) was again received by her through her mail-box. The Postcard bore the American Express logo and contained the following statement:

“If you do not want to receive any future promotional mailings from American Express, please write to The Data Privacy Officer, American Express International, Inc., 18/F, Cityplaza 4, 12 Taikoo Wan Road, Taikoo Shing, Hong Kong.”

There was no specific addressee on the Postcard. No personal data of Madam Wong appeared on the Postcard at all.

12. In considering the complaint, the Commissioner accepted that the Bank and AEII were two separate legal entities. There was no evidence to show that a relationship of agency existed between them in relation to the marketing activities. The Commissioner concluded that no prima facie case had been shown against the Bank. Madam Wong was notified on 18 February 2008 of the Commissioner’s decision not to carry out or continue an investigation in exercise of his discretion under section 39(2)(d) of the Ordinance.

The Appeal

13. During the hearing of this appeal, Madam Wong made clear that the subject of her complaint related solely to the Credit Card Application. Reference to the Postcard was only evidence of the fact that her personal data was still retained by the Bank and American Express even during the time the Commissioner was undertaking investigation of her complaint.

14. Madam Wong contended that she had no knowledge of the corporate structure of the American Express group. She should not be required to assume the duty to make searches of all the entities within the group for the purpose of serving her opt-out request. It could not have been the spirit of the Ordinance to require an ordinary citizen to assume such a duty.

15. Madam Wong also referred to a document headed "Circular to Customers relating to Personal Data (Privacy) Ordinance" ("**the Circular**"), which was apparently issued by the Bank in March 2001. The Circular contains the following provisions:

"Sharing of customer data

Data held by the Bank relating to a customer will be kept confidential but the Bank may provide such information, for the purposes listed in paragraph 2 above, to:

3.7 American Express Company, its subsidiaries, associates and affiliates, including, in particular, American Express International, Inc. and associated and affiliated companies and parties. ...

Customer rights regarding collection and use of data; op-out

Under and in accordance with the terms of the Ordinance and guidelines issued pursuant thereto, any individual:

4.5 may choose that his/her personal data are not used for marketing purposes: this includes receiving marketing material from the Bank (whether or not originated by the Bank) and disclosing information about you to another company in the American Express group and/or selected business partners for marketing purposes. ...”

16. Madam Wong contended that paragraph 3.7 was a confirmation that her personal data would be passed to and shared with ABII.

17. Furthermore, Madam Wong argued that by paragraph 4.5, the Bank had undertaken to comply with any opt-out request whether or not the marketing materials originated from them. The Commissioner should have found that the Bank had acted in breach of its own policy as stated in the Circular.

Discussion

18. Section 34 of the Ordinance provides that a data user who has obtained personal data and uses the data for direct marketing purposes shall, if requested by the data subject, cease to so use those data.

19. In this appeal, it is necessary first to consider by whom was the Credit Card Application issued.

20. On all the materials available, it is clear to this Appeal Board that the Credit Card Application was issued by AEII. Only the name of AEII (and not the Bank) appears on the Credit Card Application. Indeed, the application form is headed with an invitation in the following terms:

“Please complete this application form with required documents and *return to us* ... on or before August 31, 2007 to apply.”
(emphasis added)

The reference to “us” can only mean AEII in the context.

21. There is nothing on the Credit Card Application to suggest that it was issued by the Bank.

22. This Appeal Board has been taken through searches of companies and business registration records. This Appeal Board is satisfied that the Bank and AEII are, and have always been, two separate entities.

23. Madam Wong’s opt-out request dated 2 April 2007 was sent only to the Bank, not AEII. Although the request had demanded that “all sections” of the Bank should cease to make use of her personal data, given that they are separate entities, the opt-out request can only be regarded as having been served on the Bank, not AEII.

24. This Appeal Board takes note of the Bank's explanation that AEII and the Bank are two separate entities and that AEII had obtained Madam Wong's particulars from an external vendor and not through the Bank. From the information available, there is nothing to suggest that the two entities were in a principal-and-agent relationship; or that the Bank had in any way disclosed personal data of Madam Wong to AEII; or that the Bank was in a position to control the use of information procured by or in possession of AEII.

25. While it is true that paragraph 3.7 of the Circular gives notice to the Bank's customers that personal information might be provided to AEII, the existence of such a provision does not make it any more (or less) likely that such information was actually passed.

26. It is clearly insufficient, by simply pointing to the fact that the two entities share the same prefix, the same logo and the same address, to suggest somehow that the Bank's explanation should be open to doubt, and require the Commissioner to commence or continue an investigation on that basis. Having considered all the circumstances, this Appeal Board is of the view that the Commissioner was entitled to conclude that there was not a prima facie case of any contravention of the Ordinance that would merit his further investigation.

27. On the other hand, Madam Wong argued that she should not be required to undertake detailed searches to ensure that all the companies within the group were served with an opt-out request. That may be so. But as the opt-out request was sent to the Bank, and to the Bank alone, it is

effective only to prevent the Bank from making use of her personal data for direct marketing purposes. It would be quite wrong to strain the law by making the Bank responsible for an act which was not theirs but that of another entity, albeit an entity within the same group. In any event, this Appeal Board is unimpressed by the argument of Madam Wong in this regard. The name and address of ABII clearly appears on the Credit Card Application. It is not as though Madam Wong would be put to huge inconvenience by being required to give ABII an opt-out request if she desires not to receive their marketing materials. Any perceived hardship on her part is, perhaps, exaggerated.

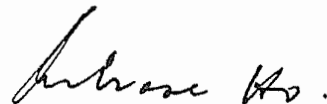
28. As to paragraph 4.5 of the Circular, this Appeal Board reads the provision as the Bank giving the customers the option not to receive *the marketing materials sent from the Bank* – whether or not such materials originate from the Bank. This is obviously the only reasonable and sensible interpretation of that provision. The option can only sensibly be given by the Bank in relation to materials the sending of which it has control. It makes no sense to interpret the policy as the Bank's promise to its customers in respect materials which could have been sent by anybody whomsoever. Accordingly, it cannot be said that the Bank was in breach of its policy when Madam Wong was sent materials by an entity that was distinct and separate from the Bank. In any event, whether or not the Bank acted in breach of its own policy does not advance Madam Wong's case in this appeal.

Conclusion

29. For the foregoing reasons, this Appeal Board does not consider the Commissioner's refusal to carry out or continue the investigation of Madam Wong's complaint to be unreasonable, illegitimate or improper. The present appeal is devoid of merits and must be dismissed.

30. The Bank, as "a person bound by the decision" under section 11(1)(a) of the Administrative Appeals Board Ordinance, has made submissions and was represented at this hearing. The Bank's representative indicated that the Bank would ask for costs in the event of a dismissal of the appeal.

31. The Appeal Board therefore directs that any party wishing to make submissions on costs should do so in writing, and file and serve the same within 10 days after receipt of this Decision. Each party will be given one opportunity to file a further reply submission on costs within 7 days thereafter. Unless otherwise directed, the question on costs will be decided by this Appeal Board on the basis of the written submissions without a hearing.



(Ambrose HO, SC)
Deputy Chairman
Administrative Appeals Board