

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 10/2021

BETWEEN

Dr BRIAN KING

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Ms Elaine Liu Yuk-ling, J.P. (Deputy Chairman)
- Ir Lau Wing-yan (Member)
- Mr Jeremy Tse Wing-ho (Member)

Date of Hearing: 23 July 2021

Date of Handing down Decision with Reasons: 3 August 2021

DECISION

1. This is an appeal against the Respondent's decision made on 10 March 2021 ("**Decision**") not to carry out an investigation into the Appellant's complaint against the Housing Department ("**HD**").

Background facts

2. The Appellant lodged three access to information applications to HD pursuant to the Government's Code on Access to Information ("**the Code**"), requesting for documents and information pertaining to a former tenant of a flat in Kin Ming Estate ("**Former Tenant**").

3. The first application was lodged by the Appellant on 21 April 2020 ("**Application 1**") requesting for information including (a) tenancy agreement; (b) letter to Director of Housing dated 13 August 2014; (c) current public housing status, that is on waiting list, interim housing, public housing resident, etc; and (d) current address and contact details of the Former Tenant.

4. On 6 May 2020, HD replied to the Appellant that the requested information in Application 1 was personal data and/or an individual's privacy data, which was collected by HD for "*handling tenancy matters, tenancy enforcement and public rental housing applications*" in relation to the Former Tenant. HD considered that the requested information is personal data and/or individual privacy data of a third party, paragraphs 2.14(a) and 2.15 of the Code applied. As there was no consent by the Former Tenant to the disclosure and the exceptions under paragraph 2.15 of the Code were not satisfied, Application 1 was rejected.

5. On 9 May 2020, the Appellant lodged a second access to information application requested only the current address of the Former Tenant ("**Application 2**"). He stated that the information requested "*is for handling the public rental housing application or related matters of the above individual*".

6. On 26 May 2020, HD rejected Application 2 basically on the same grounds of rejection of Application 1.

7. On 18 June 2020, the Appellant repeated that the information requested under Application 2 was for “*handling the public housing application or related matters*”. He considered that no “new purpose” was engaged, and the disclosure to him is consistent with the purposes for which the information was collected, therefore, in his view, disclosure is permitted under paragraph 2.15(a) of the Code.

8. On 8 July 2020, HD pointed out in reply to the Appellant that the entity who is in the position to handle the public rental housing application or related matters from the Former Tenant is the Hong Kong Housing Authority/Housing Department.

9. The Appellant then lodged a third application for access to information on 20 October 2020 (“**Application 3**”). In this application, the Appellant enclosed a blank prescribed form issued by the Immigration Department titled “Information required for registration of marriage” and stated his request as follows:

“All personal particulars under ‘Bride’ on attached forms with respect to Former Tenant of [the address]. Kindly note that I am invoking exemption 60B(a) of the PDPO and Cap 181 Hong Kong Marriage has an obligatory requirement to provide the above information.”

10. On 5 November 2020, HD refused Application 3 on the ground that the requested information is an individual’s privacy data and is not to be disclosed

under paragraph 2.15 of the Code. HD further stated that section 60B(a) of Personal Data (Privacy) Ordinance (“PDPO”) does not apply.

11. The Appellant then lodged a complaint with the Respondent against HD for its refusal to disclose the requested information in all three applications.

The Respondent’s Decision

12. On 10 March 2021, the Respondent made the Decision on the following grounds:

- (1) While the applications were made pursuant to the Code, the Respondent’s decision rests entirely and only on the basis of PDPO. Compliance with the Code is outside the purview of the Respondent.
- (2) PDPO confers an individual (i.e. data subject) the right to access a copy of his or her own personal data and this right does not extend to cover access to personal data of other data subject(s).
- (3) The requested data does not belong to the Appellant. The Appellant is not entitled to the information sought under the PDPO. In such circumstances, HD’s refusal is not in contravention of the relevant requirements under the PDPO.

The Appeal

13. On 9 April 2021, the Appellant lodged with this Board an appeal against the Decision by a Notice of Appeal in which he set out the following grounds for the appeal, and were repeated below in verbatim:

- “1. that the Privacy Commissioner’s decision violates 18 a) and d) of its Complaint Handling Policy.
2. that Data Protection Principle 3 does not apply to Application 3.
3. that Exemption 60B(a) applies to Application 3.
4. that the Hong Kong Marriage Ordinance provides the required authority in Application 3.
5. that Data Protection Principle 3 does not restrict disclosure in Applications 1 and 2.
6. that the Housing Department’s decision in Application 3 violates Articles 16 and 19 of BORO and Articles 19 and 23 of the ICCPR.”

14. On 13 April 2021, the Respondent was directed to lodge and serve by 11 May 2021 a statement setting out the finding of facts, with the evidence in support thereof and the reasons for the decision and identifying all persons who had made representations relevant to the appeal (“**the Statement**”). The Appellant was directed to lodge and serve a response to the Statement by 8 June 2021.

15. The Respondent has lodged the Statement and served the same on the Appellant on 11 May 2021.

16. No response was made by the Appellant.

17. The Respondent has lodged and served on the Appellant a written submission dated 15 July 2021 (“**R’s Written Submission**”).

18. The Appellant has not lodged or served any written submission in this appeal.

The Hearing

19. The Appellant did not appear at the time scheduled for the hearing. The Board has waited for over 30 minutes. The Appellant still did not attend the hearing. Having satisfied that the notice of the hearing and the documents bundle had been served on the Appellant, and there is no evidence that the Appellant's failure to attend was due to sickness or other reasonable cause, the Board decided to proceed to hear the Appeal pursuant to section 20(1)(b) of the Administrative Appeals Board Ordinance.

Determination

20. This Board hears and determines administrative appeals before it by way of rehearing on the merits and not simply by way of review (*Li Wai Hung Cesario v Administrative Appeals Board & anor*, unreported, CACV 250/2015, 15.6.2016).

21. The Board has reviewed the documents lodged by the Appellant and the Respondent respectively, and has considered the oral submission of the Respondent which was substantially the same as those set out in the Statement and R's Written Submission.

22. Section 18(1) of the PDPO provides that:

“An individual, or a relevant person on behalf of an individual, may make a request –

- (a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject;

- (b) if the data user holds such data, to be supplied by the data user with a copy of such data.”

23. “Relevant person” is defined in section 17A of PDPO as follows:

“relevant person (有關人士), in relation to an individual, also includes a person authorised in writing by the individual to make, on behalf of the individual –

- (a) a data access request; or
- (b) a data correction request.”

24. In all three applications, the Appellant requested for data of the Former Tenant but not those of his own. The Appellant had not produced any proof that he was authorised by the Former Tenant to make the data access requests on the Former Tenant’s behalf. The Appellant has no right to make the data requests in all three applications under section 18(1) of PDPO.

25. The grounds of appeal set out by the Appellant were brief. There was no explanation or elaboration on these grounds despite the Appellant was given several opportunities to do so.

Alleged violation of Complaint Handling Policy

26. By paragraph 1 of the Notice of Appeal, the Appellant alleged that the Decision violated paragraphs 18(a) and (d) of the Complaint Handling Policy (“**Policy**”).

27. Under paragraphs 18(a) and (d) of the Policy, the Respondent has an obligation to ensure equity and fairness in the allocation of resources across all

complaints and legal assistance applications, and to act independently and impartially without fear or favour.

28. The Appellant did not state how and in what circumstances the aforesaid policy was violated. There is no evidence to support any violation of the aforesaid policy in the present case.

Data Protection Principle 3

29. Data Protection Principle 3 in Schedule 1 of PDPO relates to the use of personal data for a new purpose, which is defined as a purpose other than the purpose (or directly related purpose) for which the data was intended to be used at the time of the collection of the data.

30. As the Appellant has no right to make the data request under the PDPO, there is no need to consider the purpose for the use of the data request. In any event, the Appellant admitted that no “new purpose” was engaged in Application 2. The Appellant’s stated purpose for Application 1 is substantially the same as Application 2. Paragraphs 2 and 5 of the Notice of Appeal are without merits.

Section 60B(a)

31. The Appellant contended in paragraph 3 of the Notice of Appeal that exemption under section 60B(a) applies to Application 3.

32. Section 60B(a) of the PDPO provides that:

“Personal data is exempt from the provisions of data protection principle 3 if the use of the data is –

- (a) required or authorized by or under any enactment, by any rule of law or by an order of a court in Hong Kong;”

33. The Appellant failed to state why section 60B(a) is relevant to Application 3. Even if there is an exemption under section 60B(a), the effect of the exemption is simply that Data Protection Principle 3 does not prevent or restrict the disclosure of information in question. It does not imply that HD is required to make disclosure and does not confer an entitlement on the Appellant to gain access to the data requested. (*Ng Shek Wai v Medical Council of Hong Kong* [2015] 2 HKLRD121)

Alleged application or violation of Ordinances other than the PDPO

34. In paragraph 4 of the Notice of Appeal, the Appellant referred to the application of the Marriage Ordinance to Application 3. In paragraph 6 of the Notice of Appeal, the Appellant alleged a violation of the Bill of Rights Ordinance and International Covenant on Civil and Political Rights in HD’s decision in Application 3.

35. The Appellant failed to show how the Marriage Ordinance applies to Application 3, nor did he show how the decision of HD in Application 3 violated the provisions in Bill of Rights Ordinance and International Covenant on Civil and Political Rights.

36. The issue of whether there was a violation of rights under the Bill of Rights Ordinance and International Covenant on Civil and Political Rights does not form part of the basis of the Decision. The powers and functions of the Respondent are set out in section 8 of PDPO, the alleged violation of the Bill of Rights Ordinance and ICCPR by HD is outside the purview of the Respondent.

The Code

37. The application of the Code is not an issue in this appeal against the Decision of the Respondent. Insofar as the Code is concerned, it is expressly stated in paragraph 1.26 of the Code that if any person believes that a department has failed to properly apply any provision of the Code, he may complain to the Ombudsman. The Appellant was informed by HD by various letters that any complaint on the improper application of the Code shall be made to the Ombudsman.

Conclusion

38. By reasons of the above, we consider that there is no merits in this appeal. This appeal is unanimously dismissed.

(signed)

(Ms Elaine Liu Yuk-ling, J.P.)

Deputy Chairman

Administrative Appeals Board