

[Note: Office of the Privacy Commissioner for Personal Data has edited this Decision. Please see the remarks for details.]

ADMINISTRATIVE APPEALS BOARD

APPEAL NO. 11/2000

BETWEEN

LAU WAI KAY RICKY

Appellant

and

PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 15 September 2000

Date of Decision : 25 September 2000

DECISION

The appeal

This is an appeal by Mr Lau Wai Kay Ricky ("Mr Lau") against the decision of the Privacy Commissioner for Personal Data ("the Commissioner").

Mr Lau complained to the Commissioner that his former landlords Mr Yeung King Wah and Miss Tong Kit Ching Jenny ("the landlords") had, without his consent, disclosed in a letter dated 13 April 1999 matters relating to his personal data to the Account Officer (Pay Roll), the Director and the Associate Director (Resources & Administrative Services) of his employer, Hong Kong Institute of Education ("HKIEd"). The Commissioner found that there was no breach of the Personal Data (Privacy) Ordinance ("the Ordinance") and further, the Commissioner did not propose to serve an enforcement notice on the landlords.

The background

The background leading up to the complaint is this. Mr Lau entered into a tenancy agreement ("the tenancy agreement") with the landlords to rent their flat from 8 April 1997 to 7 April 1999. The rental was \$22,000 per month. According to the landlords, on 20 November 1998, Mr Lau deposited a sum of \$5,323 into the landlords' bank account and verbally informed them that he would move out of the flat at the end of January 1999. Thereafter Mr Lau had not paid any rental to the landlords. Mr Lau gave back the flat to the landlords on 31 January 1999.

On 3 March 1999, Mr Lau wrote to the landlords requesting them to provide the rental receipts of the flat for November and December 1998 and January 1999 to the HKIED. The purpose was said to comply with the HKIED's rental allowance audit check. Mr Lau in fact set out the content of the receipt in his request :

"I, Yeung King Wah, received from Mr Lau Wai Kay, HKID * rental payments for the months of November and December of 1998 and January of 1999. The rental received was through the deduction of his 2.5 months deposit pre-payments that he had paid to me at the startup of the rental agreement in April 1997. The rental received was \$22,000 per month. The address of the property was # (see remarks below)

Yeung King Wah"

Mr Lau also suggested that the landlords could use the standard receipt form in the market if they prefer.

On 13 April 1999, the landlords wrote to the HKIED for the attention of a staff, namely, Ms Pang, whose name was supplied by Mr Lau. Copies of the letter was also sent to the Director, the Associate Director (Resources and

Administrative Services) of the HKIED and Mr Lau himself. The letter stated that :

“ LAU WAI KAY'S RENTAL ALLOWANCES AUDIT CHECK

In response to the e-mail request (Annex 1) by Mr Lau Wai Kay, HKID * (hereafter called Mr Lau), Assistant Finance Controller of HKIED, concerning the captioned subject, dated 3 March 1999, we are writing to tell you the fact as follow :

- We have NOT received any rental payment from Mr Lau after 20 November 1998.
- On 20 November 1998, Mr Lau deposited a sum of HKD5,323 in our bank account (Hang Seng %) and verbally informed us of his decision to move out at the end of January 1999.
- Mr Lau is supposed to pay us a monthly rental payment of HKD22,000 from 8 April 1997 to 7 April 1999 according to our tenancy agreement (Annex 2).
- When Mr Lau returned us the rental property of # on 31 January 1999, he refused to pay for any of the damages he left in our flat.
- We have to spend a total of HKD20,600 on the repair and maintenance (Annex 3).

We perceive that Mr Lau has violated the tenancy agreement in Annex 2. As a result, we wish to make the following statements:

- We reserve all our legal rights to send the case to the appropriate court(s).
- We perceive that HKIED financed Mr Lau's rental allowance in this case.
- It has never been our attempt to affect Mr Lau's position in HKIED.”

Principle No.3 of the Ordinance

The issue in this appeal is whether there is any disclosure of the personal data resulting in an infringement of Data Protection Principle No.3 of the

Ordinance. It is not disputed that the letter of 13 April 1999 consists of the personal data of Mr Lau. Principle No.3 is as follows :

“Principle 3 use of personal data

Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than

- (a) the purpose for which the data were to be used at the time of the collection of the data; or
- (b) a purpose directly related to the purpose referred to in paragraph (a).”

The collection and the use of the data

Mr Lau requested the landlords to provide rental receipts for November and December 1998 and January 1999. They did not do so but instead informed HKIED that they had not received rental from Mr Lau for these three months. Were they entitled to do so? We are of the view that they were so entitled without infringing the Ordinance, if that was indeed the dispute between them. They were responding, no more and no less, to Mr Lau's request and set out their position regarding the rental payment. Their position is that they had not received rental for these three months. They were entitled to set out their case in response to the request. The collection and the use of the data were for the purpose of setting out the dispute between them on the tenancy agreement to a party which Mr Lau had directed the landlords to provide the receipts.

The Tenancy Agreement

Under Clause 5 of the tenancy agreement, Mr Lau had to pay 2½ months rental deposit, namely \$55,000. This sum was to be repaid, by the landlords without interest to Mr Lau when he moved out from the flat. The landlords were further entitled to deduct from the deposit any rental or other fees not paid by him.

In his notice of appeal, Mr Lau referred to the terms of the tenancy agreement which allowed the rental deposit to be set off against the rents. He stated that, "Therefore, a reasonable adult should not have any reasonable ground to believe that I might have wished to claim reimbursement of rental expenses that I had not actually paid for." This is not the place to go into tenancy law, but clearly the general principle (which is also the term of the tenancy agreement itself) is that the right to use the rental deposit to set off arrears of rents is vested with the landlords and not with the tenant. Afterall, when vacant possession of the flat is delivered, there may be expenses which the landlords might have to incur in order to remedy possible damages to the flat by the tenant. Such expenses will have to come out from the deposits as well. In this appeal all we need to decide is this : the landlords had not gone beyond the permissible ambit when they wrote to the HKIEd. In our view they had not written the letter for a purpose totally unconnected with the request for rental receipt.

Oral agreement and other issues

In the course of his submission, Mr Lau stated that there was in fact an oral agreement between him and the landlords regarding the use of the rental deposit for the payment of rent. The reason why he paid \$5,000 odd into the bank account of the landlords was pursuant to this agreement. He further stated that the landlords had never supplied him with rental receipts throughout the duration of the tenancy agreement and he suspected that the real reason for the landlords in writing to the HKIEd was because there was a dispute between him and them regarding the payment of a water supply bill. This bill covered a period after he had moved out from the flat. There was a heated argument between them and one of the landlords had remarked that "you wait to see what we can do". These are matters that had not previously been disclosed to the Commissioner.

The landlords' letter to the HKIEd is clearly on the basis that Mr Lau had not paid rent. If there was an agreement between the parties regarding the use of the deposits, one would expect Mr Lau to raise this at the forefront of his complaint to the Commissioner. Mr Lau's explanation for not telling the Commissioner earlier of these matters was because he was expecting the Commissioner to ask him questions. He was not familiar with the procedure and he did not deal with these matters in his complaint to the Commissioner. He also said that the Commissioner only gave the decision after one year of his complaint and he was not approached by the Commissioner during that year.

We were not told the reasons for this delay in making the decision. It may well be that the Commissioner should review the procedure in his office to see whether the time taken for the investigation of complaints can be shortened in the future. We had considered whether we should remit the case back to the Commissioner because the matters now disclosed by Mr Lau may have a bearing on whether the landlords were using the data properly or for an ulterior motive in order to discredit Mr Lau without any proper basis. In such a case the use of the data was not proper in that it was not connected with the tenancy dispute.

Existence of dispute

The function of the Commissioner is to investigate facts, the powers of investigation does not lie with us. However, after due consideration, we decided not to take this course. To require the Commissioner to proceed further in this matter would require him to assume the role of a presiding judge in a Lands Tribunal, making findings of facts on a tenancy dispute. While the Commissioner has the power of investigation, it is not his proper role to assume such an extensive task on the facts of this case. We think all that he can proceed upon is that there is a real dispute between Mr Lau and his landlords. In the absence of some overwhelming evidence which may suggest that the purpose of writing the letter is

for a purpose totally unconnected with the dispute, the Commissioner is entitled to come to the view that the use of the data is not contrary to Principle No.3. There is no such overwhelming evidence in this case and, in our view, the Commissioner is justified in coming to this conclusion.

Mr Lau complained that there was no indication in his request that he was trying to seek reimbursement from the HKIEd. In our view the reference to rent allowance audit check is an indication that the HKIEd would be responsible for the payment of rentals of Mr Lau. Mr Lau further said that there was no evidence that he had refused to pay rent, or caused damage to the property, or violated the tenancy agreement or the landlords had actually spent \$20,600 to repair the damages. As we have said earlier, the Commissioner is entitled to proceed upon the basis that there was a real dispute between the parties concerning the tenancy agreement which justifies the landlords in writing to the HKIEd and set out their position on the matter. There is a further minor complaint that the landlords get Mr Lau's title wrong in their letter. This is an irrelevant consideration. The inaccuracy does not affect the nature of the use of the data.

Copies to others

Mr Lau complained that there was no need to copy the letters to others. He had not requested the landlords to copy the letter to others in the HKIEd. The landlords' response as stated in their letter to the Commissioner dated 21 May 1999 was that the "HKIEd is financed by the Government of Hong Kong SAR and is supposed to be accountable and transparent to the public for using the taxpayers' money. Our letter dated 13 April 1999 shows that Mr Lau had not paid the rent. But Mr Lau ... has clearly demonstrated his intention to collect the money from the HKIEd. If such, any HK residents, including us, should possess the legal right to understand the HKIEd's arrangement. If HKIEd does not use the money in proper ways as specified by the Government of HKSAR, then it might involve

administration fraud, corruption or theft.” The landlords also suggested that Ms Pang is the subordinate of Mr Lau. Mr Lau himself is the Assistant Financial Controller. The Commissioner found that Ms Pang was once Mr Lau’s subordinate but when the landlords wrote to her, she was no longer Mr Lau’s subordinate.

In our view, disclosing the document to two senior persons in the management of the HKIEd would not be an infringement of Principle No.3. As these two persons are clearly involved in the management of the HKIEd, the landlords were justified to inform them of this matter as well. They had not gone beyond the permitted limit.

The Ordinance

The Commissioner relied on section 58 of the Ordinance which provides that :

“(1) Personal data held for the purposes of –

(a)

....

(d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons; ...

(2) Personal data are exempt from the provisions of data protection principle 3 in any case in which –

(a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data are held for any of those purposes); and

(b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection, ...”

In our view, the Commissioner is entitled to rely on the exemption of section 58(2) because the data were used by the landlords for the purpose of preventing, among other things, what they perceived to be an improper conduct on the part of Mr Lau.

Appeal dismissed

As we had indicated at the outset of the appeal, we are not concerned with a case of defamation, the sole issue in this appeal is on whether the Ordinance had been breached. We agree with the Commissioner that there was no breach of the Ordinance and accordingly the appeal is dismissed.

Mr Lau stated that his employment prospect with the HKIEd has been affected by the landlords' letter because his employer has now become suspicious of him. This caused him mental anguish and anxiety for his employment. We have certain sympathy for Mr Lau, but we are not here to judge the rights or wrongs of Mr Lau or his landlords. This is not an appropriate case for any cost order to be made against Mr Lau.



The Hon Mr Justice Cheung
Chairman,
Administrative Appeals Board

- * The Appellant's Hong Kong Identity Card number was edited out.
- # The address of the property was edited out.
- % The landlords' bank account number was edited out.