

## ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 11/2001

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BETWEEN:

LEUNG WAI MAN

Appellant

and

PRIVACY COMMISSIONER  
FOR PERSONAL DATA

Respondent

Before the Administrative Appeals Board

Date of Hearing: 30 October 2001

Date of Decision: 30 November 2001

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### DECISION

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1. This is an appeal lodged by Mr Leung Wai Man ("the Appellant") from a decision of the Privacy Commissioner for Personal Data ("the Privacy Commissioner"). The appeal arises in the following circumstances, as disclosed in written statements and at an examination under oath before the Deputy Privacy Commissioner on 20 November 2000 ("the examination").

#### *Facts*

2. On the evening of 27 October 1999, at the Tung Tau Correctional Institution, some inmates were returning to their cells after

dinner when there was some friction, during which three inmates assaulted another inmate.

3. At the time of the assault, the inmates were being guarded by the Appellant, an Assistant Officer I of the Correctional Services Department. He called for support from other staff, the assault was broken up and the injured inmate sent to hospital. A report was made to the police and later that night, the Appellant gave a statement to the police at the Tung Tau Correctional Institution.

4. His statement was taken down by a police officer on the standard police statement form. At the top of the sheet is a title which shows it to be a police statement/report. In a section at the top were blanks which were filled in with his name, age, sex, identity card number, address, telephone number, rank, nationality and dialect.

5. The statement commences with a printed paragraph declaring the truth of the statement.

6. The Appellant's statement comprised 3 pages. In the 1<sup>st</sup> paragraph on the first page, he stated his name, place and year of birth, his marital status and his rank and place of work.

7. The rest of the statement described the incident of the assault as he saw it. Insofar as it dealt with the Appellant himself, it recorded the fact that he called for support, and he also said that before the assault, he was not aware of any signs that the assault would take place or of any grudges between those inmates.

8. The Appellant finished giving his statement in the early morning of 28 October 1999. As the General Office of the Tung Tau Correctional Institution was shut, the statement could not be photocopied then and there, so he asked the duty officer for the fax number of the General Office so that the police officer could later fax him a copy there.

9. The statement was duly faxed by the police to the General Office, apparently in the early morning of 28 October 1999. There was no cover sheet, and the statement was faxed in its entirety, i.e. without any parts blanked out.

10. Miss Yip Lai Kuen was an Assistant Clerical Officer who worked at the General Office of the Tung Tau Correctional Institution. One of her duties was to collect and distribute documents faxed to the General Office.

11. According to her sworn answers at the examination, when she arrived at work on the morning of 28 October 1999 she saw the police statement which had been faxed to the General Office. She did not know who it was for, but since the fax had come from a police station (as can be seen from the transmission data on the document), she assumed that it was for the Security Unit as was generally the case.

12. She then put the fax into an envelope and stapled it. She could not be sure whether she wrote anything on the envelope, but if she had, she would just have written "Security" 保安 on it, in accordance with usual practice. She then placed the envelope in the Security Unit's tray in the General Office for despatch. The trays would be cleared by workers who would deliver the documents to the respective units.

13. She saw the Appellant at lunchtime when she passed through the gate that he was manning, and he asked her about the fax. She said she told him that it had been sent to the Security Unit and that he could get it from there if it was for him.

14. According to the Appellant's sworn answers at the examination however, he had telephoned Miss Yip that morning and she had told him that it had been given to Mr Sin Wai Kin, an Assistant Officer II with the Security Unit. This was denied by Miss Yip at the examination.

15. In any event, it is common ground that later that afternoon, the Appellant went to the Security Unit. There he saw Mr Sin who was on duty.

16. According to Mr Sin's sworn answers at the examination, the Appellant asked if he (Sin) had seen the fax, at which time he saw an envelope on a tray with the words "Leung Wai Man's Statement" 梁偉文 口供 written on it. Mr Sin opened it and saw that it was the Appellant's police statement, so he gave it to him. That was the extent of his involvement with the fax.

17. According to the Appellant however, Mr Sin told him that Mr Tse Ka Cheung, his (Sin's) superior, had instructed him (Sin) to take the fax. Mr Sin then gave the fax to the Appellant for him to make a photocopy. The Appellant went to the General Office, where he made a photocopy after asking Miss Yip and making an entry in a logbook. He then returned the fax to Mr Sin. This version was denied by Mr Sin at the examination.



18. Mr Tse Ka Cheung, the officer responsible for security at the Tung Tau Correctional Institution, said under oath at the examination that he had never instructed Mr Sin to take the fax.

19. Further, Mr Lok Yu Kuen, the Clerical Officer who was in charge of administration of the General Office, said under oath at the examination that there was in fact no logbook in the General Office for recording photocopying. His desk was in the General Office, and prison officers who wished to enter to make photocopies would ask him if they could make photocopies. According to his recollection, the Appellant had not done so on 28 October 1999, although he accepted that the Appellant might have made a photocopy when he (Mr Lok) was out of the Office or too busy to notice. Miss Yip also said under oath at the examination that she had no recollection of the Appellant making a photocopy that day.

*Appellant's complaint to Privacy Commissioner*

20. That was the factual background to the Appellant's complaint in November 1999 to the Privacy Commissioner against Mr Sin for taking away and retaining the fax which contained his personal data.

21. On 7 March 2000, the Privacy Commissioner found no prima facie evidence of any contravention of the Personal Data (Privacy) Ordinance cap. 486 ("the Ordinance").

22. On 17 April 2000, the Appellant lodged an appeal against that decision.

23. On 2 June 2000, the Privacy Commissioner reversed his former decision and on 23 June 2000, the Appellant withdrew his appeal.

24. In November 2000, the Privacy Commissioner summoned the above individuals to an examination which he was entitled to do under s.44 of the Ordinance. Questions were put by the Deputy Privacy Commissioner to the Appellant, Miss Yip, Mr Sin, Mr Tse and Mr Lok. Questions were also put to them by the Appellant's solicitor. Answers were given under oath.

25. At the examination, the Appellant suggested that Mr Ho Chi Cheong, the duty officer who had given him the fax number of the General Office, should also be summoned but that fact was agreed and Mr Ho was not called. The Appellant did not indicate at any stage that any other persons should be summoned to give information.

26. The Privacy Commissioner decided that after carrying out investigations, including the examination, he was of the opinion that there was insufficient evidence to prove that Mr Sin had indeed taken away the statement, the allegation which was at the foundation of the Appellant's complaints. On 20 January 2001, he informed the Appellant that he did not propose to serve any enforcement notice on Mr Sin.

*Appellant's appeal*

27. The Appellant appealed to the Administrative Appeals Board against that decision. His grounds were that: (i) the Privacy Commissioner "wrongly accepted the evidence given on behalf of the Correctional Services Department, in particular, the evidence of Mr Sin

Wai Kin and Ms Yip Lai Kuen"; (ii) he wished to call two additional persons, viz. Mr Choi Wing Cheong and Mr Shiu Wai Lam, to give evidence.

28. In his Further Particulars of Grounds of Appeal dated 19 March 2001, the Appellant claimed, amongst other things, that the Privacy Commissioner erred in law in finding that on its way to or at the Security Unit, the envelope stapled by Miss Yip had been opened and replaced with an envelope on which someone had written the words "Leung Wai Man's Statement", in the absence of any or any adequate supporting evidence as to the existence of any person who would have done so.

29. The Appellant also claimed that the Privacy Commissioner erred in finding that the discrepancies in the evidence of Miss Yip and Mr Sin as to the wording on the envelope, or its size or colour, could be due to an incorrect recollection.

30. The Appellant stated that he wished to call Mr Choi, the Supplies Officer, to depose to the keeping of an "official and/or unofficial" photocopying record in the General Office, and to call Mr Shiu, the investigating officer of the assault incident, to see if the contents of his police statement had been disclosed or used in the Correctional Services Department's internal investigation. On 17 August 2000, the Appellant had received a warning letter from the Correctional Services Department, which was set aside by consent in judicial review proceedings in HCAL 769/2001.

31. It should be noted that in the Further Particulars of Grounds of Appeal, the Appellant also claimed that the Privacy Commissioner had

failed to consider whether the collection of the statement by the Security Unit was an act or practice that contravened Data Protection Principle 4.

32. Briefly, Data Protection Principle 4 requires that all practical steps be taken to ensure that personal data held by a data user are protected against unauthorized or accidental access. Before the Further Particulars of Grounds of Appeal, the Appellant's complaint had concerned Mr Sin's possible contravention of Data Protection Principles 1 and 2.

33. Briefly, Data Protection Principle 1 requires that personal data should not be collected unless it was necessary, for a lawful purpose and was collected by means which are lawful and fair.

34. Briefly, Data Protection Principle 2 requires that personal data should not be kept longer than was necessary for the purpose.

*Appeal to Administrative Appeals Board -*

*Declining to call new witnesses*

35. We shall deal first with the application to call Mr Choi and Mr Shiu at the hearing of the appeal. Under s.21(1)(e) Administrative Appeals Board Ordinance cap 442, the Board may examine on oath, affirmation or otherwise any person attending before it and require such person to answer all questions put by or with the consent of the Board. Mr Choi and Mr Shiu were served with notices requiring them to attend the appeals board hearing.



36. The Board heard submissions from counsel for the Appellant and counsel for the Respondent the Privacy Commissioner as to whether it should exercise its discretion to examine Mr Choi and/or Mr Shiu.

37. In the exercise of its discretion, the Board declined to call Mr Choi and Mr Shiu. The Deputy Privacy Commissioner had undertaken a very full examination in November 2000. The transcript, typed in Chinese, ran to more than 80 pages. Oaths were administered to the persons summoned and they were questioned by the Deputy Privacy Commissioner and by the Appellant's legal advisers. The questioning went into minute detail. The Deputy Privacy Commissioner heard submissions and gave a reasoned decision (discussed later in this Decision). At no stage, either at or during the examination did the Appellant suggest to the Deputy Privacy Commissioner that Mr Choi and/or Mr Shiu be summoned.

38. Given the very full extent of the examination, the Board decided unanimously that it saw no reason to exercise its discretion to allow new witnesses to be called at this appeal when the Appellant has proffered no adequate reason to explain why he had not suggested that Mr Choi and Mr Shiu be summoned for questioning at the examination in November 2000.

39. It is not simply a matter of taking evidence from two persons. Some of the persons who had been examined by the Deputy Privacy Commissioner may well have to be re-called and further questions put. Their credibility would have to be assessed again. To allow the Appellant a "second bite of the cherry" at this stage would in the circumstances of this case be wasteful of the time and effort expended by the Deputy Privacy

Commissioner and the examinees. The fuller the investigation by the Privacy Commissioner, the less reason there is for a re-hearing by the Board. We see no reason in this case why a re-hearing (whether in whole or in part) is either necessary or desirable.

40. As for the Appellant's other grounds of appeal, the Board is unanimously of the view that they also fail. The Board saw no defect or deficiency in the scope or mode of investigations undertaken by the Privacy Commissioner.

41. In view of the sworn answers given at the examination, the Deputy Privacy Commissioner was entitled to come to the view that he did - that Mr Sin had not taken or retained the faxed statement.

*No evidence that Mr Sin took the Appellant's statement*

42. First, as to the *taking* of the statement by Mr Sin:- according to the Appellant, it was Miss Yip who had told him that Mr Sin had taken the fax from the General Office. However, this was denied by her on oath. As far as she was concerned, she had put the document in the Security Unit's tray in accordance with usual practice, and thereafter it would not be a matter of concern to her. There would have been no reason for her to specifically notice that it was Mr Sin who had taken it.

43. *If Miss Yip had noticed that Mr Sin had taken it and told the Appellant that (as the Appellant claims), there would have been no reason for Miss Yip to deny that fact at the examination. There was nothing to indicate why Miss Yip would commit perjury to protect Mr Sin.*

44. Further, there was no reason why Mr Sin would want to take the Appellant's statement, or at least, why he would want to take it for the compilation of any personal data about the Appellant. Although Mr Sin was in the Security Unit, Mr Tse's evidence was that the Unit was not required to follow up on the assault incident at that time because it had been taken over by police. There was no evidence to show that the statement had been used by the Correctional Services Department for any internal investigation. And there was no reason why Mr Sin, on a frolic of his own, should undertake his own investigation of that incident or had any ulterior motive to serve.

*Inconsistency regarding the writing on the envelope*

45. As to the inconsistency between Miss Yip's answer that she would have just written "Security" on the envelope and Mr Sin's answer that the envelope he saw had "Leung Wai Man's Statement" written on it, the Deputy Privacy Commissioner considered that there might have been an incorrect recollection by one of them. This was a view that he was entitled to take, having seen and heard them both under oath. In any event, the fact remained that both of them denied the Appellant's contention that Mr Sin had taken the statement from the General Office, a contention for which there was no direct evidence.

46. Having said that, the Deputy Privacy Commissioner also said that he could not discard the possibility that at the Security Unit, the envelope marked "Security" might have been opened by someone who, upon seeing that it contained the Appellant's statement, put it into another envelope, this time accurately describing the contents as "Leung Wai Man's statement".



47. This postulation has been criticized by the Appellant on the ground that there was no evidence whether such an opportunity or individual existed. This also formed the basis of the Appellant's further ground of appeal, that if there had been such an opportunity, then the Correctional Services Department would have contravened Data Protection Principle 4, i.e. protection against unauthorized or accidental access, and the Privacy Commissioner should have investigated this aspect as well.

48. In our view, it was not necessary for the Deputy Privacy Commissioner to have considered this postulation when his view, having seen and heard Miss Yip and Mr Sin, was that one's memory might have been at fault. The Deputy Privacy Commissioner was obviously, simply attempting to reconcile Miss Yip's version and Mr Sin's version as to what was written on the envelope because he accepted the answers of both persons.

*No contravention of Data Protection Principle 4*

49. In any event, even if someone at the Security Unit had opened the envelope marked "Security" and found the Appellant's statement inside, and then transferred it to another envelope, this time marking it "Leung Wai Man's statement", that did not show that the Correctional Services Department had contravened Data Protection Principle 4.

50. It was the Appellant himself who had asked the police to fax the statement to the General Office. Even if the Appellant could be regarded as having obtained the duty officer's consent to use the fax machine to receive the document, he (the Appellant) had *not* informed



anyone at the General Office that a fax containing his personal data would be received.

51. As such, the fax had been received unsolicited at the General Office, without a cover sheet indicating its intended recipient. It had been transmitted from a police station and dealt with an incident involving inmates that had occurred within the Tung Tau Correctional Institution. As such it would have been reasonable for Miss Yip to have assumed that it was related to the work of the Correctional Institution. No criticism can be made of the way Miss Yip dealt with the fax, i.e. by putting it inside an envelope marked for the Security Unit and stapling it.

52. Anyone at the Security Unit who received the package, without a recipient being specified, would have been acting reasonably in opening it to see what it was for. It is not relevant to this appeal whether any junior officer doing that might have been in breach of any internal procedural guidelines of the Correctional Institution. What is relevant to this appeal is whether the Correctional Services Department could be said to have contravened Data Protection Principle 4. Clearly it could not, because until the package was opened, no-one would have known that there was personal data in it.

53. The transfer of the statement into an envelope specifically marked "Leung Wai Man's statement" could not be said to be in contravention of Data Protection Principle 4 either. On the contrary, that was the taking of a practicable step to ensure that the personal data in the statement was protected against unauthorized or accidental access, in accordance with Data Protection Principle 4.

54. In light of the above, we see no ground which might cause the Privacy Commissioner to believe that the Correctional Services Department had done or engaged in any act or practice contravening Data Protection Principle 4.

*No retention of fax by Mr Sin*

55. As for the Appellant's allegation that Mr Sin had retained the fax after giving it to him for photocopying, there was a direct conflict of evidence between Mr Sin and the Appellant. Having examined both persons in detail and seen and heard them, the Deputy Privacy Commissioner was entitled to find that there was insufficient evidence to support the Appellant's complaint. This was particularly when the Appellant's allegation in support of that episode, i.e. that consequently he had made a logged photocopy that day in the General Office, was unsupported, if not contradicted, by Mr Lok and Miss Yip.

*Findings and decision*

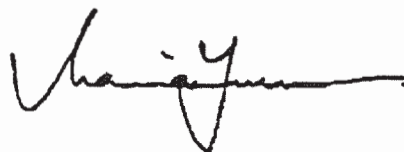
56. Given the extensive examination undertaken by the Deputy Privacy Commissioner who saw and heard the witnesses, we consider it neither necessary nor desirable in this case, where the issue is essentially one of credibility in a dispute of fact, to re-hear the witnesses for the purpose of making separate findings of fact.

57. In light of the matters discussed above, the Board's unanimous decision is to dismiss this appeal and to confirm the decision that is appealed against.

*Directions for submissions on costs*

58. The Board has not heard the parties on the issue of costs. To save on time and costs, I direct that should the Respondent wish to apply for costs, he is to send written submissions within 14 days of the date of this Decision to the Secretary of the Appeals Board and to the Appellant through his solicitors. Should the Appellant wish to resist any application for costs (if made), he is to send written submissions within 7 days thereafter to the Secretary of the Appeals Board and to the Respondent. The Respondent would then have 7 days thereafter to serve his reply.

59. The Board's decision on this issue will then be notified to the parties in writing.



Hon Madam Justice Yuen  
Deputy Chairman  
Administrative Appeals Board