

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 11 of 2009

BETWEEN

LEUNG SAU KWAN

Appellant

and

THE PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 18th August 2009

Date of handing down Decision with Reasons: 24th August 2009

DECISION

Background

1. The Appellant is a police officer. On 18th July 2008 the Appellant lodged a complaint (the “**Complaint**”) with the Privacy Commissioner of Personal Data (the “**Commissioner**”) against Dr.

William Chen (“**Dr. Chen**”). In gist, the Appellant complained that Dr. Chen had, allegedly in breach of the provisions of the Personal Data (Privacy) Ordinance (the “**Privacy Ordinance**”) and without her prior consent, faxed a medical report (“**Medical Report**”) containing personal data of the Appellant to the report room of the Sau Mau Ping Police Station (the “**Police Station**”) on 19th October 2005. According to the Appellant, when she returned to the report room on that day, she saw the Medical Report openly lying on the desk in the report room. The Medical Report had apparently been read by some of her colleagues, who had teased her for failing to pass the medical examination. The Medical Report that she saw lying on the desk was, according to the Appellant, an unsigned report.

2. It is important to note that the Complaint made by the Appellant on 18th July 2008 was against Dr. Chen only. In the relevant complaint form completed by the Appellant, Dr. Chen was the only person named as the person complained against. The Commissioner of Police was originally named as the “contact person”, but that had been crossed out specifically by the Appellant and countersigned by her. Hence, although in the Appellant’s statement given to the Commissioner, there were references to certain matters or events that happened *after* the Medical Report had been faxed to the Police Station, it is clear that the Complaint was made against Dr. Chen only, and not against the Commissioner of Police or anyone else.

3. By a letter dated 14th August 2008, the Commissioner informed the Appellant that he had decided not to carry out or

continue investigation on the Complaint (the “**Decision**”) pursuant to s.39(1)(a) of the Privacy Ordinance.

4. On 23rd April 2009, almost 8 months after the Decision was made, the Appellant lodged an appeal against the Decision. The appeal was clearly out of time: see, s.9 of the Privacy Ordinance. However, pursuant to s.27 of the Administrative Appeals Board Ordinance (“**AAB Ordinance**”), time was extended to the Appellant to pursue her Appeal out of time. The Appeal was heard by the Board on 18th August 2009. At the hearing of the Appeal, the Appellant was represented by a Mr. Lai (with the approval of the Secretary of the Board pursuant to s.18 of the AAB Ordinance) who had made submissions on behalf of the Appellant.

Commissioner’s ground for refusing to carry out investigation

5. S.39(1)(a) of the Privacy Ordinance provides as follows:

“(1) Notwithstanding the generality of the powers conferred on the Commissioner by this Ordinance, the Commissioner may refuse to carry out or continue an investigation initiated by a complaint if-

(a) the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) has had actual knowledge of the act or practice specified in the complaint for more than 2 years immediately preceding the date on which the Commissioner received the complaint, unless the Commissioner is satisfied that in all the circumstances of the case it

is proper to carry out or continue, as the case may be, the investigation;”

6. Under s.39(1), if the complainant has had actual knowledge of the act specified in the complaint for more than 2 years immediately preceding the date on which the Commissioner received the complaint, the Commissioner may refuse to carry out or continue an investigation *unless* he is satisfied that in all the circumstances of the case it is proper to carry out or continue such investigation.

7. In our view, the intention of s.39(1)(a) is to prevent delay on the part of the complainant who might choose to sit on his complaint by failing to make it until long after the event. It may cause serious injustice to the person against whom the complaint is made (“**the complained person**”) if a complainant delays in making the complaint despite having knowledge of the acts complained of. Such delay may cause difficulty to the complained person in terms of collecting or marshalling evidence in his defence – for example, witnesses who may otherwise be available to give evidence may have disappeared and can no longer be found. Even if witnesses are not lost, memory will lapse as time passes, and it is generally not conducive to the making of an effective or efficient investigation if the Commissioner is required to investigate into complaints that are made long after the event. It is in the nature of privacy complaints that they should be investigated upon timeously. Obviously, in enacting s.39(1)(a), the intention of the legislature is to balance the interests of the complainant and the complained person, and to avoid

the practical difficulties that are likely to result from requiring the Commissioner to carry out investigation on “stale” claims. The complainant is given 2 years to make his complaint from the time when he acquires knowledge of the act or practice complained of. If he fails to do so, the Commissioner may refuse to carry out or continue an investigation unless he is satisfied that in all the circumstances, it is proper to carry out or continue the investigation.

8. There is no doubt that under s.39(1)(a) the Commissioner has a discretion. But it is discretion which the Commissioner is required to exercise having regard to all the circumstances of the case. Unless he is satisfied that despite the delay for more than 2 years, it is nonetheless proper to carry out or continue an investigation, the Commissioner is entitled to refuse to make the investigation.

The Appellant’s submissions

9. Mr. Lai submits to us that the Commissioner in the present case should have exercised his discretion to carry out an investigation of the Complaint. Essentially Mr. Lai submits that the Commissioner has failed to take into account the following matters in the exercise of his discretion:

(a) the Appellant had been ignorant of the legal requirements under s.39(1)(a) of the Privacy Ordinance. In particular, until she was informed in about July 2008 (by the handling officer of the Office of the

Commissioner) of the provisions under s.39(1)(a), she was not aware that if she failed to make the Complaint within 2 years, the Commissioner might refuse to carry out investigation;

(b) there were police disciplinary proceedings which the Appellant had to endure during the period between 19th October 2005 and the time when she made her Complaint (18th July 2008), and the same have caused mental stress to the Appellant; and

(c) the Medical Report has been allegedly misused and/or retained by the police for an unreasonable or excessive time after it had been faxed to the Police Station on 19th October 2005, and such subsequent misuse or unreasonable retention of the Medical Report should be taken into account by the Commissioner. By failing to take into account of these subsequent events, the Commissioner has wrongfully ignored the “continuity” of the matter.

10. We are unable to accept these submissions made on behalf of the Appellant.

11. Generally speaking, a person is not entitled to rely on his ignorance of the law as a ground for exemption from, or for preferential treatment under, the requirements imposed by the law.

Our law is open, published and publicly accessible, and as is well-known, ignorance of the law is no defence. Where a person claims that his legal right has been infringed, it is his duty to advance his legal right properly in accordance with the legal requirements, including any requirement that may impose a time limit on him for raising his complaint.

12. There may be cases where by reason of infirmity, sickness, old age, or other special circumstances, a person is not able to apprise himself of the legal requirements or to advance his legal right in accordance with such requirements. In such cases, if the law allows a discretion to be exercised, these personal or special circumstances may well be relevant to the exercise of the discretion. Suffice to say that the present case is not such a case. We do not think that the Appellant's professed ignorance of the relevant legal requirement is relevant to the Commissioner's exercise of his discretion in this case.

13. Nor do we think that the alleged mental stress arising from the police disciplinary proceedings is of any relevance insofar as the exercise of the discretion is concerned. Although one can understand that a person facing disciplinary proceedings may be under some stress, there is no evidence, let alone medical evidence, before us to show that the Appellant was suffering mental stress in such a way as to *prevent* her from making the Complaint within the time required under s.39(1)(a). The Complaint was to be a complaint *by*, and not against, the Appellant. There is no suggestion of any

psychiatric illness on the part of the Appellant. We can see nothing from the evidence before us to suggest that the Appellant was in any way inhibited by her mental condition to make the Complaint in good time. A bare allegation of stress, which we all suffer in some form or another, is quite irrelevant.

14. The submission of “continuity” is in our view wholly misconceived. As pointed out above, the Complaint was made against Dr. Chen only. None of the alleged acts of misuse or wrongful retention of the Medical Report by the Police has anything to do with Dr. Chen. Indeed, on 7th April 2009, the Appellant made another complaint to the Commissioner against a Senior Inspector, who is her superior (the “**New Complaint**”), in respect of such alleged misuse or wrongful retention of the Medical Report. The Commissioner has dealt with the New Complaint and has made a separate decision thereon. There is no suggestion that Dr Chen was in any way involved in any of the events subsequent to the faxing of the Medical Report on 19th October 2005. In our view, there is no question of any “continuity”, and the Commissioner is clearly right not to take into account of these subsequent events. To do otherwise would be grossly unfair to Dr. Chen.

15. At the hearing of the Appeal, Mr. Lai referred us to a letter dated 11th July 2009 submitted by Dr. Chen to the Board (Dr. Chen did not attend the Appeal hearing), in which Dr. Chen stated that “since the examination was performed more than 3 years ago, I have no recollection of [the Appellant] and the examination”. Mr. Lai

submitted to us that there were various matters in the letter which were not clear, and required further investigation. In our view, these allegedly unclear matters precisely highlight the vice of delay in pursuing a privacy complaint. According to the letter, due to the long lapse of time, Dr. Chen is unable to recollect the Appellant or her examination. He is only able to tell the Board the "routine practice" followed by the Secretary of his clinic (one Ms. Cheung), but he has no information as to how the Medical Report in this particular case was handled by Ms. Cheung. He stated that the Appellant had never complained to him about the examination and the handling of her examination report. We are not surprised by these statements of Dr. Chen. It would indeed be surprising that the doctor could recall the Appellant's examination (and the handling of her examination report) that took place almost 3 years ago for which he had previously received no complaint and had not been alerted of any problem.

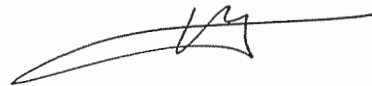
16. In these circumstances, we are of the view the Appellant has provided no satisfactory explanation for her delay in making the Complaint. None of the matters submitted by Mr. Lai on her behalf are relevant. We are not persuaded that the Commissioner has exercised his discretion wrongly. In our view, in all the circumstances of this case, the Commissioner was entitled to, and had rightly decided, not to carry out or continue investigation of the Complaint.

17. We would mention, for completeness sake, that Mr. Lai has referred us to certain telephone attendance notes prepared by the

officer (of the Office of the Commissioner) handling the Complaint, which recorded the contents of certain telephone conversations between the Appellant and the officer concerned. It is submitted by Mr. Lai that the contents of these attendance notes were not complete and parts of the conversation had been taken out of context. When asked what might have been omitted which would be relevant to the present appeal, Mr. Lai was unable to give us any particulars at all. Mr. Lai also submitted that the telephone attendance notes show that the Commissioner was biased against the Appellant. Having studied the telephone attendance notes, we can detect nothing that remotely suggests bias on the part of the Commissioner. The allegation is totally unfounded.

Decision

18. For reasons mentioned above, the appeal is dismissed.



(Mr. Horace WONG Yuk-lun, SC)
Deputy Chairman
Administrative Appeals Board