

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 12 of 2008

BETWEEN

WONG WAI TAK, BELINDA

Appellant

and

PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 9 September 2008

Date of handing down Decision with Reasons: 28 October 2008

D E C I S I O N

1. In 1992, the appellant Wong wai-tak, Belinda, joined the former Education and Manpower Bureau (now Education Bureau) ("the Bureau") as a certificated mistress. Later, she was appointed Assistant Mistress (Student Guidance Officer).
2. In 2000, she applied several times for posting under the Bureau's Staff Interflow Scheme but without success.
3. In March 2004, the appellant complained to the Bureau alleging continuous unfair treatment by her supervisor since 2000.

4. In May 2004, after an investigation, the Bureau found her complaint not substantiated by evidence. The appellant was not satisfied with the Bureau's finding and continued to pursue her complaint with the Bureau.

5. On 17 July 2007, Mrs Fanny Lam and Mr. Tony Chan of the Bureau interviewed the appellant and discussed the case with her ("the interview").

6. On 17 August 2007, Mr. Chan provided the appellant with a record of the interview ("the interview record").

7. On 18 and 30 August 2007, the appellant by e-mail asked Mr. Chan to revise the record as she considered the record totally incorrect and incomplete.

8. On 11 and 17 September 2007, the appellant made similar requests by e-mails to the Bureau. She also attached to her e-mail on 11 September 2007 her own version of the record. However, the Bureau refused to accede to her requests.

9. On 21 September 2007, the appellant made a data access request ("DAR") to the Bureau for a copy of all her personal record since 1992.

10. On 30 October 2007, in compliance with the DAR, the Bureau provided her with 460 pages of documents. While she had no complaint about compliance with her DAR by the Bureau, she considered that some of the data in these documents were not accurate.

11. On 17 November 2007, the appellant filed a complaint to the Privacy Commissioner for Personal Data ("Commissioner") against the Bureau. She said in her complaint:

"I have great concerns on the distorted and biased personnel records which greatly hamper and damage my character and integrity, despite the long years service with the Government. The main concerns are on the incomplete and incorrect investigation of subjective comments by our AP Section which violate the basic principles of objective data collection, data accuracy and

information availability.”

12. In her complaint, the appellant listed 16 items of incorrect facts that she claimed, were extracted from the documents she received from the Bureau (“list of incorrect facts”). She asked the Commissioner to advise her on “whether unfairness, discrimination and/or personal character damage can be established”, “how to correct or remove the wrong facts in her personal record” and how she could “get a fair handling of her case”.

13. On receipt of the complaint, the Commissioner made some initial enquiries. The Commissioner contacted the appellant and clarified from her that her complaint was in fact about the Bureau’s refusal to correct the 16 items in her “list of incorrect facts” and the record of interview. (It should be noted that the record was item 16 on the list.)

14. The Bureau responded to the Commissioner’s enquiry as follows:

(a) The Bureau had received no request from the appellant to correct her personal records. Nevertheless, in the light the appellant’s list, the Bureau agreed to amend and amended item 1 and item 3 thereof.

(b) The Bureau confirmed that between 18 August and 23 October 2007, it had received from the appellant a series of requests by e-mail to amend the record of interview. However, the Bureau did not consider the record of interview incorrect. The Bureau had nevertheless attached the appellant’s version to the record of interview for record purpose.

15. On 11 March 2008, the Commissioner notified the appellant of the result of his investigation and informed her that in exercise of his discretion under section 39 of the Personal Data (Privacy) Ordinance (“the Ordinance”), he had decided not to carry out further investigation of her complaint.

16. In his reasons for decision, the Commissioner stated that he noted the appellant was not satisfied with the result of the investigation by the Bureau on her complaint of unfair treatment which, in the

appellant's view, was based on incomplete and distorted reports and findings. The Commissioner considered that the matter of the appellant's complaint concerned essentially employment disputes on unfair treatment and discrimination and such complaint should be directed to the civil service and not to the Commissioner. The Commissioner citing AAB decision in Administrative Appeal No. 22/2000, considered that it was not for him to resolve disputes on errors of facts in personal record and therefore not for him to deal with the appellant's complaint.

17. The appellant appealed to the Administrative Appeals Board against the Commissioner's decision. Her grounds of appeal may be restated as follows:

1. The Commissioner failed to make an assessment of his findings and pass a fair judgment on the accuracy of the appellant's personal data in her official personal record. In addition, during his investigation, the Commissioner gave the Bureau an opportunity to provide inaccurate facts and lied to the Commissioner.
2. The Bureau lied in saying that the appellant had not made a request to correct her personal record. The Commissioner allowed the Bureau to correct selectively the appellant's personal data in her personal record and ignored the true facts raised by her in her complaint.
3. The core issue of her complaint to the Commissioner was data accuracy in her personal record and not about fairness of the investigation of her complaint to the Bureau. The Commissioner was wrong to ignore the issue and regard her complaint as an employment issue. The Commissioner should investigate whether the Bureau as a data user had taken all practicable steps to ensure her personal data are accurate and to update and correct any inaccuracy.
4. There are many errors and misunderstandings in the Walk-in Attendance Notes on her final discussion with PCO officers on 13 March 2008. It is doubtful whether the Commissioner could make a fair and objective judgment of her case.

18. The Commissioner in his statement relating to the decision stated he found that the appellant had not lodged a data correction request with the Bureau. Neither had she given to the Bureau the list of incorrect facts. The appellant only attached to her letter of 21 September 2007, her "emails about the mentioned distorted interview record". Referring to Section 22(1) of the Ordinance, the Commissioner said that that a data correction request only applies to personal data which had been provided to a requestor pursuant to an earlier data access request made by the requestor and thus, a data correction request should be preceded by a data access request. The Commissioner said that the appellant's letter of 21 September 2007 was sent to the Bureau before the Bureau supplied to the appellant on 30 October 2007 her personal data pursuant to her DAR dated 24 September 2007. Therefore, the letter of 21 September 2007 could not be regarded as a data correction request. After the appellant received her personal data, there was no request for correction thereof. The Bureau's failure to accede to the appellant's request was not a contravention of the Ordinance.

19. The Commissioner reiterated that the complaint was essentially an employment dispute and to deal with such dispute was neither the role of the Commissioner nor the purpose of the Ordinance.

20. The appellant submits that she had made verbal requests to the Bureau to correct her personal record. The Bureau had corrected the error regarding "points of increment" which was mentioned in her telephone calls to the Bureau. The Commissioner had allowed the Bureau to make corrections without a proper correction request. It appears that a verbal request would be sufficient. The appellant also submits that Data Protection Principle 2(1)(a) is applicable in this case and the Bureau should take all practicable steps to ensure that the personal data it held are accurate for the purpose for which they are used. The fact that there were errors in her personal record indicate, prima facie that the Bureau had failed to comply with this requirement of the Ordinance and the Commissioner should not have refused to carry out an investigation of her complaint.

21. Mr. Lee, counsel for the Commissioner adopting the arguments in the Commissioner's statement relating to decision, submits in addition that verbal requests for correction of personal data are not sufficient to

require a data user to make correction of data. The reason is, he submits, that it would be difficult to pin point the discrepancies between the data held by the data user and the corrections sought by the requestor. He further submits that the Ordinance requires a data correction request to be made after the requestor has received a copy of the relevant personal data provided by the data user to him pursuant to his earlier data access request. This procedure is important because failure to comply with a data correction request may lead to criminal consequences. In any case, it is not clear what personal data the appellant says were wrong since the list of incorrect facts are mostly arguments relating to the investigation by the Bureau and not personal data and it is not for the Commissioner to reopen the Bureau's investigation.

22. Having gone through the documents and heard submissions from the appellant and Mr. Lee, we think that before we proceed further, we need to go back to the details of the appellant's complaint to ascertain what in fact she was complaining to the Commissioner and what was really her grievance.

23. We note that she began her complaint with "great concerns on the distorted and biased personal record" of her service with the Government. She then said "the main concerns are on the incomplete and incorrect investigation of subjective comments by our AP section which violate the basic principles of objective data collection, data accuracy and information availability". Then in the rest of her complaint, she sought advice from the Commission and she ended by listing out the facts that she alleged to be incorrect.

24. It would be clear from the above analysis of her complaint, there were two matters that the appellant said had aggrieved her: 1. Inaccuracy in her personal record with the Government service and refusal by the Bureau to correct them; and 2. Improper investigation conducted by the AP section of the Bureau on her complaint on unfair treatment and discrimination during her employment with the Bureau.

25. On the first complaint, the Commissioner had clarified with the appellant that her allegation of data inaccuracy was in respect of items 1 to 15 of the list of incorrect facts and in respect of the record of interview. Of the 15 items on the list, the Bureau had amended items 1 and 3. As to

the remaining items, the Bureau was of the opinion that they were not inaccurate. The Bureau had refused to correct them not only because they were not incorrect but also because the appellant had made no data correction request to the Bureau.

26. At this juncture, we think it convenient to refer to the provisions in the Ordinance that are relevant in this appeal:

(a) Section 37 the Ordinance provides for complaints to be made to the Commissioner about an act or practice by a data user which relates to the personal data in which the complainant is the data subject and which may be a contravention of a requirement under the Ordinance.

(b) Section 38 of the Ordinance requires the Commissioner when he receives a complaint to carry out an investigation to ascertain whether the act or practice complained of is a contravention of a requirement of the Ordinance.

27. Thus, where the act or practice alleged in the complaint does not prima facie amount to a contravention of a requirement under the Ordinance, or is not related in anyway to a requirement under the Ordinance, the complaint is not one which may be made to the Commissioner pursuant to section 37 and the Commissioner is under no obligation to carry out an investigation.

28. Even if the complaint is one to which section 37 of the Ordinance applies, the Commissioner notwithstanding his duty under section 38, may nevertheless refuse to carry out an investigation of the complaint where section 39 applies.

29. The only requirement under the Ordinance with regard to accuracy of personal data is provided under Data Protection Principle 2(1)(a) and this is as follows:

“ All practicable steps shall be taken to ensure that –

(a) Personal data are accurate having regard to the purpose (including any directly related purpose) for which the

personal data are or are to be used.”

30. This does not mean that data held by the data user must be correct in all respects. The requirement is this: provided that the data user has taken all practicable steps to ensure the personal data kept by him are accurate, it is no breach of this requirement if the data are subsequently found to be incorrect by the data subject. If that happens, the data subject may pursuant to section 22 of the Ordinance ask the data user to correct the inaccuracies. Thus, there is no contravention of a requirement of the Ordinance where the personal data kept by the data user are inaccurate but it would be a contravention if the data user refused to correct the inaccuracies when the data subject lodged a data correction request with him.

31. Where a dispute arises between the data user and the data subject as to the accuracy of the data held by the data user, but no data correction request is made to the data user, the dispute as to accuracy of data is one of fact and it is not for the Commissioner to resolve such dispute and neither has the Commissioner the power to do so. But where a data user refuses to make correction upon receipt of a data correction request because the data user considers his version of the data to be correct, then the Commissioner is under a duty to investigate the basis of the data user's refusal and that may involve the determination of whether the personal data held by him are incorrect.

32. It follows that a complaint about a data user holding inaccurate personal data without more does not fall within section 37 because prima facie the allegation does not reveal a contravention of a requirement of the Ordinance. The Commissioner may refuse to investigate such a complaint.

33. Coming back to the appellant's case, in our view, she had not made any data correction request to the Bureau. We disagree that a data correction request can be made verbally for the simple reason that it would be difficult to verify not only whether a request has been made but also the requested correction. We do not think the appellant's letter dated 21 September 2007 addressed to the Secretary of the Bureau can be regarded as a data correction request in relation to the 15 items of the list of incorrect facts. The letter related solely to the complaint of the

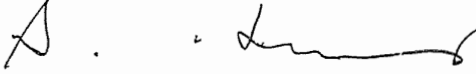
appellant on unfair treatment and discrimination by the Bureau and the interview of 17 July 2007. Even if it were a request of some kind, it still cannot be regarded as a request under section 22 as it does not state what data and in what way the data needed correction. In any case, this letter was sent before the appellant received a copy of the personal data provided to her by the Bureau on 30 October 2007 pursuant to her earlier DAR.

34. Further, the 15 items in the list of incorrect facts are not personal data albeit they relate to the appellant's personal record in the Bureau. They are not data from which the appellant's identity can be ascertained. The Ordinance does not apply to data that are not personal data. For the reasons stated above, this part of the appellant's complaint to the Commissioner is not within section 37.

35. On the second part of her complaint, the appellant had linked the improper investigation by the Bureau to violation of principles of data collection, data accuracy and access information. But her primary object of complaint was to resolve matters relating to her employment with the Bureau. The Commissioner was not empowered under the Ordinance to investigate such matters. In any case, apart from the issue of data accuracy, which is already included in her first complaint, the appellant had not specified in what way Bureau had violated the principle regarding data collection. The appellant may have been aggrieved by the investigation of the Bureau into her complaint of unfair treatment and discrimination in her work. While she has our full sympathy if that is true, it is not the Commissioner's function to reopen what the Bureau had concluded in its investigation and neither is it our function.

36. In these circumstances, the Commissioner may refuse to investigate the appellant's complaint pursuant to his powers under section 39 of the Ordinance.

37. For the reasons given above, we dismiss the appeal.


(Mr Arthur LEONG Shiu-chung, GBS)
Chairman
Administrative Appeals Board