

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 15/2015

BETWEEN

X

Appellant

and

PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA

Coram: Administrative Appeals Board

- Mr Yung Yiu-wing (Deputy Chairman)
- Miss Carmen Chan Ka-man (Member)
- Professor Horace Ip Ho-shing, MH (Member)

Date of Hearing: 8 October 2015

Date of Handing down Written Decision with Reasons: 17 November 2015

DECISION

The Complaint of the Appellant to the Respondent

1. In February 2009, X applied for an Individual Voluntary Arrangement ("the IVA") and was approved in the creditors' meeting. These facts together with the addresses and telephone numbers, past and present, of X were shown in the credit report of X by the TransUnion Limited ("the Party Bound") dated 20

November 2014. The IVA was completed on 2 February 2015. X then fax a request to the Party Bound to update his credit report. A copy of the certificate of completion of the IVA was also provided to the Party Bound. By letter dated 16 February 2015, X also requested the Party Bound to remove his past addresses and past contact telephone numbers contained in his credit report. Subsequently the Party Bound added to its database the remark “IVA completed on 2/02/2015” but refused to delete the record of IVA and, the addresses and telephone numbers. The Party Bound in his reply to X, informed him that IVA record would be kept for 7 years from its filing date and the past addresses and telephone numbers for as long as there are consumer credit data of X remaining on the database, respectively pursuant to clauses 3.6.1 and 3.6.7 of the Code of Practice on Consumer Credit Data (“the Code”).

2. The Appellant was not satisfied with the reply of the Party Bound and made telephone enquiry about the matter with the Respondent. He was advised by the Respondent that the enquiry must be made in writing. Subsequent to the advice, X put his enquiry into writing on 10 December 2014. In his reply to X’s enquiry the Respondent explained the system of sharing of consumer credit data, the Code and the specific reply to the questions raised in X’s enquiry and drew the attention of X to the procedure for complaint if he thought there was any breach of the Personal Data (Privacy) Ordinance (“**the Ordinance**”).

3. By letter of 16 February 2014 to the Party Bound, X took issue with the reasons given by the Party Bound for not amending the credit report as requested. By copying the said letter to the Respondent, he made a complaint against the Party Bound.

Decision of the Respondent and Grounds of Appeal

4. After enquiry with the Appellant and the Party Bound, the Respondent decided not to pursue further the complaint and notified the Appellant of the decision by letter dated 24 April 2015. In his Reasons for Decision, the Respondent explained briefly the rationale behind the relevant clauses of the Code. He then went on explaining in effect that the Party Bound had cited the correct clauses of the Code in support of retaining the IVA record and the outdated addresses and contact numbers of X. As he was of the view that the relevant clauses of the Code were complied with, he found that there was no prima facie evidence of any contravention of the requirements of **the Ordinance**. Under these circumstances, the Respondent exercised his discretion not to pursue the complaint further and by letter of 24 April 2015 notified X of the decision.

5. X was not satisfied with the decision of the Respondent and is now appealing against the decision of the Respondent. The main points of complaint in the Notice of Appeal about the reasoning of the Respondent can be conveniently and concisely summarised as follows. Firstly the Respondent's claim of public interest is promoted at the expense of his private interest and thus it is unfair to him. Secondly the rationality and/or reasonableness of the relevant clauses of the Code cannot be justified in general. In particular there is no justification for different periods of retention for different types of data.

Determination

6. In the Notice of Appeal, X indicated that he wished to make an application for the Appeal to be heard in private. The ground advanced is that it was the private matter of X. It was expressly stipulated by law that the hearing

must be held in public except for good reasons. X advances no other reasons. X merely thought it was a private matter not concerning any other parties. This is hardly a good reason. He was drawn to the attention that there was not even one member of the public in the audience seats. On further discussion with him about his worry of a public hearing, he agrees to the Board's suggestion that he would apply instead for leave to pursue his appeal anonymously. It was sensible for him to take such course as it would just serve the same purpose if his name is not mentioned in the decision. Even if he persisted in his application for a private hearing, it would have been refused as the Board agrees with the grounds of objection of the Respondent. The Respondent however had no objection to allow X's fall back application. Despite that there must be good reasons for granting the application. X's ground is that he did not wish people reading the written decision of this appeal to learn about his credit history, especially the IVA. There are many purposes of requiring the hearing of appeal to be in public. For one the public is entitled to scrutinise how the Board arrives at its decision. The other purpose is to remind witnesses, or parties making assertions of fact, of the solemnity of the proceedings and that their veracity is also subject to scrutiny by persons not present or not connected with the proceedings. In the particular circumstances of this appeal, relevant facts are not in dispute. There is a possibility, however remote it would be, that some third party might learn inadvertently from the decision, the credit history of X. It is not the purpose of the decision of the Board to let known the credit history of X. In view of the worry of X and there being no objection from the Respondent, the Board permits the Appellant to pursue his appeal in pseudonym X.

7. This Board agrees with the Respondent's submission that the Code is the product of striking a balance between public interest and private interest. In his reasons he does not mean he is sacrificing X's private interest for the public interest. He is merely explaining the rationale behind the Code and the

necessity for striking a balance of conflicting interests. It is not the function or within the jurisdiction of this Board to rewrite the Code or to review it. If one wants the relief of rewriting the Code, or challenging its validity, such relief must be sought elsewhere. To a certain extent the privacy of an individual is eroded but it is besides the point for two reasons. Firstly by the nature of credit report, the privacy of the individual concerned must be inevitably be touched upon. The only issue is to what extent the credit history should be contained in the report. In this regard the Code as issued by the Respondent according to **the Ordinance** just serves the purpose of balancing the conflict of interests between credit agencies and credit providers on the one hand, and the individuals concerned on the other. The Code has its general application and there is no unfairness specifically directed to X. For all these reasons the grounds of appeal relating to the main points of complaint aforementioned in paragraph 5 have no merit.

8. There are other points of complaint in the Notice of Appeal. All of these except the one to be dealt with later on are irrelevant. X complains about the Respondent not explaining his various aspects of the Code, not answering his request for certain information etc. The Respondent either disputes the allegation or tenders explanations in defence. It is not necessary to go through the Respondent's submission on these points. Suffice to point out that those action or inaction does not form part of his decision, the subject-matter of this appeal. The only issue in this Appeal is whether or not there are grounds to vary the Respondent's decision.

9. Under s39(2) of **the Ordinance**, the Respondent has the discretion of not pursuing further a complaint if he is of the opinion that further investigation is unnecessary for any good reason. The Complaint Handling Policy contains guidelines for the exercise of this discretion. In its para. 8(e) under Part (B), it

is provided that if after preliminary enquiry, there is no evidence of any contravention of the requirements of the **Ordinance**.

10. X made the initial complaint by copying the letter to the Party Bound. This letter together with later communication between the parties contains arguments and criticism of X on the Party Bound's reasons for refusing his request and on the rationality of the relevant clauses of the Code. It appears that to pursue the complaint the Respondent needed to understand properly what specifically the Appellant was complaining about in regard to any possible breaches of **the Ordinance**. Indeed the Respondent shall have regard to s37(4) of **the Ordinance** which requires him to provide assistance to an individual to formulate the complaint. On the other hand, it must be stressed that the Respondent should not be required or expected to look into every possible breach of the party complained against without any specific allegations by the complainant or any suspicious circumstances. Nor the Respondent should be expected to take up the role of counsel for the complainant exploring or fishing without any allegations or suggestion from a complainant for any breach of **the Ordinance**. For instance if there is no allegation of improper safeguard of personal data, the Respondent should not be expected without more to examine closely if the data system was good enough to safeguard the personal data. In the instant case, after initial enquiry of the complaint, the Respondent has formulated the complaint. The Respondent sorted out the issue in respect of which he made his present decision not to pursue further. The first issue is whether or not the Party Bound is justified under the Code and the Ordinance to retain (1) X's IVA record for 7 years from the date of event shown in the official record and (2) the general particulars previously collected, including the past telephone numbers and addresses.

11. The Respondent found that the Party Bound was not in breach of the

Code in so far as the issue is concerned. As has been said, X merely complained about the rationality of the clauses cited by the Party Bound but did not dispute the findings of the Respondent that there was no breach of these clauses. That being the case the Respondent was right in finding that there was no prima facie evidence that there was a breach of **the Ordinance**. The Respondent's decision not to pursue further the complaint in so far as the issue formulated by him cannot be faulted for the above reasons and also for the following reasons.

12. At the hearing, with a view to assisting X to formulate the real ground of appeal the Board ascertained at various stages what exactly it was objectionable in the credit report. He confirmed that he thought any relevance to IVA should be deleted. In this regard the status of the Code is relevant. The Code lays down guidelines for data users. If a data user does not follow the Code, he has to justify his departure from the Code is nonetheless not in breach of the Ordinance. As a corollary, there may be exceptional circumstances under which mere compliance with the Code may not exonerate a data user. However X does not provide any such special circumstances. His argument is that he is now in a financially sound position and not owing a single cent to anyone. Be that as it may, the credit history is an essential element to a credit provider to assess the risk of extending credit to an individual. There are no valid grounds to require the Party Bound to delete the IVA from the credit report. As to the contact addresses and telephone numbers, only one address and one telephone number were not deleted by the Party Bound. When X was asked for reasons for removing his past addresses from the record of the Party Bound, he argues that they might cause annoyance or harassment without being able to elaborate what annoyance, harassment or inconvenience would be caused. Again there were no special circumstances to find the Party Bound was in breach of **the Ordinance** when it followed the Code.

13. In the premises, the decision of the Respondent is correct on the formulation of the complaint. With regard to this it is not within the Board's jurisdiction to see narrowly if the formulation is correct. This Board should determine, whether there is any other issue in the complaint which has not be determined. It is because, if there is an outstanding issue which was not included in the decision, the decision not to pursue further clearly cannot be justified.

14. As aforementioned in paragraph 10, X raised the complaint in relation to the duty of the Party Bound in monitoring or updating the contact information. After the decision of the Respondent, X had discussion with the Respondent about the decision. Presumably such duty of the Party Bound was alluded to during the discussion. It turned out that just one day before the hearing the Respondent made a decision about the remaining telephone number and address that X is seeking to delete from the data record of the Party Bound. Counsel for the Respondent submits that the issue with regard to the address and telephone number should not be determined in this appeal. Especially X, the Respondent and the Party Bound have not had sufficient time to prepare for the argument. X complained that the Respondent make the belated decision because he noticed his omission of the issue from the Notice of Appeal. Be that as it may, it is only right for the Respondent to remedy the situation when he noticed the commission as soon as possible.

15. For the purpose of the present appeal, looking at the process of complaint, the formulation of the Respondent is understandable. The decision on the formulated issue is correct and cannot be faulted with. The question whether there is any outstanding issue which should be pursued has become academic as a decision has been made the day before the hearing.

16. In the premises the decision of the Respondent dated 24 April 2015 is affirmed. Under the special circumstances of the case unless there are facts which have not been made known to the Board, there should be no order as to costs. This Board hereby makes an order nisi that there be no order for costs and the costs order be made absolute in 6 weeks.

(signed)

(Yung Yiu-wing)

Deputy Chairman

Administrative Appeals Board