ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 16 of 2008

BETWEEN

WONG MAN LEUNG — Appellant

and

THE PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board

Date of Hearing: 3 December 2008

Date of handing down Decision with Reasons: 21 April 2009

DECISION

Background

1. At all material times the Appellant was an employee of the Immigration Department.

2. Pursuant s.18(1) of the Personal Data (Privacy) Ordinance ("**PDPO**"), on 5th September 2007 the Appellant made a data access request ("**Request 1**") to the Director of Immigration ("**DOI**"). The personal data requested by the Appellant was described as "所有在貴處的紀錄". Under paragraph 5 of Request 1, the Appellant indicated that he would require DOI to:

(a) give him an indication, ***before processing his data access request***, of any fee that may be charged for compliance with his request;

(b) send to him by ordinary mail a copy of the requested personal data at his address given in Request 1.

3. Request 1 was received by DOI on 6th September 2007.

4. Thereafter the Appellant made 3 further data access requests to DOI on 7th September 2007 ("**Request 2**"), 15th September 2007 ("**Request 3**") and 24th September 2007 ("**Request 4**") respectively. Requests 2 and 3 were made in Chinese writing while Request 4 was made in English writing. In the said Requests, the personal data requested was respectively described by the Appellant as follows ("**Requested Data**"):

Request	Requested Data
2	"所有在貴處的資料"

3	"所有在入境事務處處長轄下所管有的資料"
4	"All my information and data kept by Director of Immigration"

5. Requests 2, 3 and 4 were received by DOI on 8th September 2007, 17th September 2007 and 27th September 2007 respectively. In all such Requests, the Appellant indicated (as in Request 1) that he would require DOI, before processing his data access request, to give him an indication of any fee that may be charged for compliance with his request. However, unlike Request 1, in Requests 2, 3 and 4 the Appellant indicated that he wished to be notified when a copy of the Requested Data was ready for collection. This was different from Request 1, where the Appellant indicated that the Requested Data should be sent to him by ordinary mail.

6. DOI decided to deal with Requests 1, 2 and 3 together. Request 4 was dealt with separately. The Appellant did not object to this approach. In the paragraphs below, when we refer to Requests 1, 2, 3 and 4 collectively, we shall for convenience refer to them as "**the relevant Requests**".

7. DOI apparently caused a search of the records of the various divisions of the Immigration Department, and came up with more than 770 pages of documents that contained personal data of the Appellant. These documents were distributed in various divisions of the Immigration Department, including the following:

(a) Immigration Service Institute of Training and Development;

(b) Service Management Division;

(c) Departmental Management Division;

(d) Registration of Persons Division;

(e) Documents Division;

(f) Records and Data Management Division.

8. By a Chinese letter dated 15th October 2007, DOI wrote to the Appellant, referring to Requests 1, 2 and 3, and enclosed 9 Appendices. Each of the Appendices listed a set of documents, which were kept by the various divisions of the Immigration Department as mentioned above, that DOI was prepared to disclose to the Appellant pursuant to his data access requests. The documents as listed in the Appendices totalled some 776 pages. DOI informed the Appellant that photocopies of the documents listed in the Appendices would be provided to him upon payment of the charges as indicated in the Appendices. The Appellant was required to indicate in writing whether he wished to obtain a full set of the documents or any particular information on the Appendices. The Appellant was further informed that payment should be made by crossed cheques made payable to "The Government of Hong Kong Special Administrative Region".

9. An English letter in similar terms as the Chinese letter dated 15th October 2007 was sent by DOI to the Appellant on 5th November 2007, referring to Request 4.

10. By a letter dated 27th October 2007, the Appellant wrote to DOI and identified to DOI the documents (total 59 pages) for which he would require copies to be provided. The documents for which the Appellant required copies were identified from 5 of the Appendices annexed to DOI's letter of 15th October 2007 mentioned above. The Appellant also sent DOI a crossed cheque in payment of the charges that were payable for the photocopies required by him. It is not in dispute that the Appellant's letter was received by DOI on 29th October 2007.

11. No separate reply was given by the Appellant to DOI's (English) letter dated 5th November 2007. This would have been unnecessary as the Appellant had already identified in his letter of 27th October 2007 the documents for which he required DOI to provide him with copies.

12. However, until 30th November 2007 the Appellant had not received the documents requested by him. On 30th November 2007, the Appellant made a complaint to the Privacy Commissioner of Personal Data ("**the Commissioner**") against DOI for failing to comply with his data access request. In his complaint made to the Commissioner at that stage, the Appellant had only referred to Request 1. However, as Requests 1, 2 and 3 were in fact dealt with by

DOI together, when considering the Appellant's complaint, the Commissioner's approach was also to deal with all 3 requests together. This will also be our approach in this Appeal. No separate issue arises from Request 4, which was not mentioned in the Appellant's complaint to the Commissioner.

13. On 20th December 2007 DOI sent to the Appellant by ordinary mail copies of the documents requested by him in his letter of 27th October 2007. The same were received by the Appellant on 22nd December 2007. However, despite having received the copy documents, the Appellant maintained his complaint against DOI for failing to comply with his data access requests within the time mandated by PDPO.

14. The Commissioner conducted a preliminary enquiry of the Privacy Complaint. After the preliminary enquiry, the Commissioner considered that it was unnecessary to conduct any investigation or further investigation of the Appellant's complaint. This was because, in the Commissioner's view, investigation or further investigation of the complaint "cannot be reasonably expected to bring about a more satisfactory result" in all the circumstances of the present case. Accordingly, in exercise of its power under s.39(2)(d) of PDPO, the Commissioner decided ("**Commissioner's decision**") that he would not carry out any investigation or further investigation of the Appellant's complaint.

15. Against the Commissioner's decision, the Appellant now appeals to the Board.

The Commissioner's reasons for refusing to investigate

16. The reasons for the Commissioner's decision have been set out in an annex attached to a letter dated 12th March 2008 sent by the Commissioner to the Appellant.

17. It is unnecessary for us to repeat the Commissioner's reasons *in extenso*. Suffice to say that when we give our reasons below for our determination of this Appeal, we would refer to some of the reasons given by the Commissioner where it was necessary or convenient to do so.

The Commissioner's power not to investigate

18. S. 39 (2) of PDPO provides, inter alia, as follows :

> *"The Commissioner may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case-*
> ....
>
> *(d) any investigation or further investigation is for any other reason unnecessary."*

19. The Commissioner's Complaint Handling Policy ("**Policy**"), which was annexed and referred to in paragraph 19 of the

Commissioner's reasons (sent under the Commissioner's letter of 12th March 2008 referred to above), stated the following (under Section B of the Policy):

> *".... an investigation or further investigation may be considered to be unnecessary if:*
>
> .....
> *(g) given the..... remedial action taken by the party complained against or other practical circumstances, the investigation or further investigation of the case cannot be reasonably expected to bring about a more satisfactory result....."*

20. By reason of s.21(2) of the Administrative Appeals Board Ordinance, the Board shall have regard to any statement of the policy lodged by the respondent (in this case the Commissioner) if it is satisfied that at the time of the Board's decision, the appellant was or could reasonably have been expected to be aware of the policy. As the Policy was sent to the Appellant when the Commissioner gave his reasons for not carrying out any or any further investigation of his complaint, we are satisfied that the Appellant did have knowledge of the Policy. We are thus required by law to have regard to the Policy.

21. In considering whether the Commissioner is right in refusing to carry out any or any further investigation, the Board will have to consider whether there is a good reason for the Commissioner to take the view that such investigation or further investigation is unnecessary. In particular, the Board will have to consider if the

Commissioner is correct in taking the view that any investigation or further investigation cannot reasonably be expected to bring about a more satisfactory result. If indeed no investigation or further investigation can be reasonably expected to bring about a more satisfactory result, that in itself is a good reason why further investigation is unnecessary. To carry out an investigation without any reasonable expectation of a more satisfactory result will be a complete waste of time and resources.

22. The Board will need to examine the circumstances of the case, including the facts revealed by the Commissioner's preliminary enquiry, before it can decide whether a more satisfactory result can be *reasonably* expected if further investigation is carried out.

Compliance with data access request: the law

23. S. 19 of PDPO provides as follows:

> *"(1) Subject to subsection (2) and sections 20 and 28(5), a data user shall comply with a data access request not later than 40 days after receiving the request.*
>
> *(2) A data user who is unable to comply with a data access request within the period specified in subsection (1) shall-*
>
> (a) *before the expiration of that period –*

(i) *by notice in writing inform the requestor that the data user is so unable and of the reasons why the data user is so unable; and*

(ii) *comply with the request to the extent, if any, that the data user is able to comply with the request; and*

(b) *as soon as practicable after the expiration of that period, comply or fully comply, as the case may be, with the request."*

24. In our view, the statutory time limit of 40 days provided under s.19(1) of PDPO is premised upon the data user having received a *valid and effective* data access request. A data access request which is purportedly issued under s.18 but which is in substance invalid or ineffective will not have the legal effect of invoking the statutory time limit. A data user is not obliged *at all* to comply with an invalid or ineffective data access request, and there can be no question of his complying with such a request within any particular time period.

25. Even if the data access request is valid and effective, s.19(1) is subject expressly to the provisions of s.19(2), s.20 and s.28(5). We have already set out s.19(2) above. Insofar as s.20 and s.28(3) are relevant to the present Appeal, we set out the relevant provisions as follows:

S.20(3)

"A data user may refuse to comply with a data access request if-

(a) .....

(b) *the data user is not supplied with such information as the data user may reasonably require to locate the personal data to which the request relates;"*

S.28(5)

"A data user may refuse to comply with a data access request unless and until any fee imposed by the data user for complying with the request has been paid."

26. In the case of s.20(3), a data user may refuse a data access request if he is not supplied with such information as the data user may reasonably require to locate the personal data to which the request relates. Whether a data user may reasonably require information, or further information, before he can locate the personal data, is one that depends on the circumstances of the case. In the case of **Hong Kong Polytechnic University v. Privacy Commissioner for Personal Data** (Administrative Appeal No. 24 of 2001), the data requestor made a data access request "in respect of all data as defined by the Personal Data (Privacy) Ordinance, which is now held by the data user, the Hong Kong Polytechnic University". In a decision handed down on 27 May 2002, the Board held, inter alia, that "it is for the data requestor to identify the data he or she requires and not for the data user to prepare a full or consolidated list for the data requestor to pick and choose". It was held that for that reason, an

enforcement notice issued against a data user to conduct a "thorough search" and to prepare a "consolidated list" was not appropriate. In the present case, we are not concerned with any question of enforcement notice, and the decision of the Board in the **Hong Kong Polytechnic University** case is not directly applicable to our consideration in the present case.

27. In our view, whether or not sufficient information has been supplied by the data requestor to enable a data user to comply with his data access request is always a question of fact. In the ordinary case, if the data user considers that insufficient information has been provided to him to enable him to locate the relevant personal data, one would expect him to inform the data requestor of the position, and to inform him what information is required of him before the data user can locate his personal data. If the data requestor fails to supply the information reasonably requested by the data user, the data user is fully entitled under s.20(3) to refuse to comply with the data access request.

28. It is not always the case that whenever the data access request relates to all personal data held by the data user of which he is the data subject, the request is necessarily too wide or too vague to be valid. In this connection, we note that nothing in the PDPO prevents the data requestor from requesting access to all of his personal data held by the data user. There could be cases where the personal data held by the data user is actually very simple and all of them can be located by the data user easily without any further specification or

information, and it is always a question of fact whether in any given case information is reasonably required of the data requestor before the requested data can be located by the data user. Moreover, in many cases, it may not be known to the data requestor that the data user would require any specific information, or any further information, before he can locate the personal data requested for. Hence, except in those cases where the data access request is obviously deficient on its face (in that it must be known to the data user that without further information supplied by him it would be impossible or impractical for the data user to comply with his request), we consider that, upon proper construction of s.20(3), the data user would have to convey to the data requestor his reasonable request for information before he can rely on the sub-section to excuse compliance with the data access request. Merely because a data access request covers all of the data requestor's personal data does not *per se* render the request invalid or unlawful.

29. Where the data user reasonably requires the data requestor to supply information to enable him to locate the relevant personal data, and such information is subsequently supplied, time for the data user to comply with the data access request under s.19(1) will, subject to the other sections or subsections provided therein, start to run from the time when the information is supplied by the data requestor. As the data requestor is expressly excused from complying with the data access request under s.20(3) unless such information has been supplied, it follows that until and unless such information is supplied, there is no valid data access request that the

law requires the data user to comply with within the period allowed by s.19(1). All these are of course premised upon the assumption that as a matter of fact, the data user's requirement for information is reasonable. If the data user acted unreasonably and requested for information that it did not reasonably require, a data access request that was originally valid and sufficient on its own would not be changed into an invalid or insufficient one merely because the data user had chosen to request for information that it did not reasonably require. As always, what is reasonable will depend on the circumstances and the facts of each case.

When did time start to run in the present case?

30. In the present case, DOI did not inform the Appellant that it required any information or further information before it could locate the Requested Data. There is in fact nothing to suggest that DOI was unable to locate the personal data of the Appellant without further information supplied by him. The fact is that DOI did locate all the personal data of the Appellant held by the various divisions of the Immigration Department, and came up with 776 pages of documents as listed in the 9 Appendices referred to above.

31. It should be remembered that when the Appellant made the relevant Requests, he had indicated to DOI that he would require DOI to give him an indication, ***before processing his data access request***, of any fee that may be charged for compliance with his request. It must have been known to the Appellant that the number

of documents held by DOI that contained his personal data could very well be voluminous, and the Appellant was clearly indicating that he would need to know the amount of charges involved before he would decide whether he would wish DOI to process the relevant Requests. In these circumstances, we are of the view that DOI was quite entitled to treat the relevant Requests as having been made by the Appellant *conditionally* in that, depending of the fees involved, the Appellant may or may not wish to have the relevant Requests processed. For DOI to determine how much fees were required, DOI would need to find out how many documents (that contained the Appellant's personal data) were involved. Hence, unless the Appellant had restricted the scope of the relevant Requests by specifying precisely the items of documents or the nature of the documents required, DOI would have no alternative but to search through the entire Immigration Department, including its various divisions, before he could find out how many documents are involved and how much fees are payable. In our view, the approach taken by DOI in the present case (namely, to compile a list of ***all*** documents that contain the personal data of the Appellant and required him to indicate to them whether he wished to obtain a full set of the documents or only some or part of the documents set out in the list) cannot be faulted.

32. In our view, where a data requestor has made a conditional request indicating that he may not wish the data user to comply with his data access request unless and until certain conditions have been fulfilled, the time provided under s. 19(1) of PDPO would not start to run until the conditional request has been

made unconditional. It cannot be the intention of the legislature to require a data user to comply with a data access request that is pregnanted with conditions which may or may not be fulfilled. A data requestor who has chosen to make a conditional request cannot start the clock clicking until and unless he has removed the condition attached to his request.

33. In the present case, the Appellant had stated clearly that he wished to be informed of the fees involved before DOI would process the Requests. This amounted to an indication to DOI that he did not wish the Requests to be processed until after the question of fees had been cleared with him. The amount of fees in turn depended on the amount of documents involved. In the light of the condition imposed by the Appellant, DOI was entitled, before it processed the relevant Requests, to ascertain the amount of documents involved so as to be in a position to properly inform the Appellant what are the charges that he would be required to pay. It would be up to the Appellant then to decide whether he would remove the condition originally attached to the Requests by indicating whether he would like DOI to process the Requests fully (by providing him copies of all the documents), or only partially, or not at all. In the event, the Appellant had chosen to require copies of 59 pages of the documents only. In effect, having originally made requests for all the information and data kept by DOI, the Appellant in the end did not require DOI to process the relevant Requests fully – he only required DOI to process the relevant Requests ***to the extent*** of the 59 pages of documents that he identified in his letter dated 27th October 2007.

34. It is not disputed that the Appellant's letter of 27th October 2007 was received by DOI on 29th October 2007. We hold that it was on that day that the Appellant had effectively notified DOI the extent to which he would require him to comply with the relevant Requests. It was also on that day that the relevant Requests were made unconditional by the Appellant and transmitted to DOI.

35. S.19(1) is further subject to s.28(5) of PDPO, which provides that a data user may refuse to comply with a data access request unless and until any fee imposed by him for complying with the request *has been paid.* In the present case, the Appellant had by his letter dated 27th October 2007 enclosed a crossed cheque for the fees imposed by DOI in respect of the copy documents that he required.

36. However, it was only on 8th November 2007 that the cheque was cleared by the Immigration Department for payment. We however do not consider this date to be relevant. It is true that in law a cheque is a conditional payment only. However, where there is an express agreement to take a cheque for payment (which is the case here – see, DOI's letter of 15th October 2007 which required the Appellant to make payment of the fees by crossed cheque), the creditor cannot complain the conditional nature of the form of payment and unless the cheque is dishonoured upon presentation, the creditor's remedy is suspended (see, **Sayer v. Wagstaff** (1844) 5 Beav. 415; **Belshaw v. Bush** (1851) 11 C.B. 191, **Ex p. Matthew**

(1884) 12 Q.B.D. 506, **Felix Hadley & Co. Ltd. v. Hadley** [1893] 2 Ch. 680). Where this form of payment is the agreed mode of payment, a cheque payment is as good as cash. There is in this case no question of any dishonour of the Appellant's cheque. Accordingly, it is our view that the Appellant must in law be treated as having paid the fees on 29th October 2007. That the Immigration Department chose to present the cheque only about a week later is neither here nor there.

37. S.19(1) of PDPO provides that the data user shall comply with a data access request not later than 40 days ***after*** receiving the request. As it was on 29th October 2007 that the relevant Requests were rendered unconditional by the Appellant, in our view time began to run under s.19(1) from the day immediately after 29th October 2007, namely, from 30th October 2007.

Contravention of s.19 of PDPO

38. Counting from 30th October 2007, 40 days would expire on 8th December 2007.

39. However, as pointed out above, it was only on 20th December 2007 that DOI sent to the Appellant (by ordinary mail) copies of the documents requested by him in his letter of 27th October

2007. Prima facie, DOI was 12 days late in complying with the relevant Requests.

40. The reasons given by DOI for taking such time to comply with the relevant Requests were two, as follows:

(a) firstly, it was alleged that the 59 pages of documents which the Appellant required were documents of diverse dates and were distributed in various divisions of the Immigration Department, and it took time for them to be retrieved from the different divisions. After the documents had been retrieved, time was taken to have the documents individually reviewed so that any references therein which did not relate to the Appellant could be blackened out or covered up. Re-checking was required to ensure that the personal data of other people would not be inadvertently disclosed to the Appellant.

(b) Secondly, although the copy documents were ready to be provided to the Appellant on 13th December 2007, DOI noted a discrepancy between Request 1 and Requests 2, 3 and 4 in that Request 1 required the relevant documents to be sent to the Appellant by ordinary mail, whereas the other Requests required DOI to notify the Appellant for collection. According to DOI, between 12th December 2007 and 20th December 2007, DOI had tried to contact the Appellant by phone with a view to clarifying with

him how he would like the copy documents to be supplied to him, but such attempts to contact the Appellant had failed. Accordingly, on 20th December 2007, DOI sent the copy documents to the Appellant by ordinary mail, which documents were duly received by the Appellant.

41. The Commissioner was of the view that the time taken by DOI to have the copy documents ready for supply to the Appellant was reasonable, but noted that DOI should have, in accordance with the requirements under s.19(2) of PDPO, informed the Appellant by notice in writing that DOI was unable to comply the data access request within the period specified under s.19(1), and the reasons therefor.

42. As we held above, the time for DOI to comply with the time limit provided under s.19(1) expired on 8th December 2007. We do not think that s.19(2) was engaged in this case, for even if DOI had had good reasons why he could not comply with the time limit under s.19(1), by failing to issue the notice required under s.19(2), DOI could not take advantage of s.19(2). Such a notice would have to be sent out before the 40 days period under s.19(1) had expired. DOI had never given any such notice to the Appellant, let alone doing so before the 40 days period expired. Accordingly, it is not open to DOI to rely on s.19(2) to excuse his non-compliance with s.19(1).

43. As regards the second reason given by DOI, we note and agree that there is in fact a discrepancy between Request 1 and Requests 2, 3 and 4. We understand why, in the light of such discrepancy, DOI had made the attempts to contact the Appellant for the purpose of clarifying the discrepancy, and might have spent some time in doing so. However, we do not consider that this fact alone would excuse DOI from his non-compliance with s.19(1). The fact is that by the time DOI was ready to dispatch the requested copy documents to the Appellant (13th December 2007), the time period allowed by s.19(1) had already expired, and as pointed out above, DOI could not take advantage of s.19(2) as he had not issued any notice to the Appellant in accordance with that sub-section.

44. In these circumstances, we hold that *prima facie*, DOI had failed to comply with the Appellant's data access request within the time limit specified under s.19(1).

Decision not to investigate or further investigate

45. Although we are of the view that *prima facie*, DOI had failed to comply with s.19(1), we are of the clear view that the Commissioner's decision not to carry out investigation or further investigation, pursuant to his power under s.39(2) of PDPO, was plainly correct. The decision also accorded with the Policy referred to in paragraph 19 above.

46. Even if there had been a *prima facie* breach of s.19(1), the delay in our view was clearly slight. The time limit expired on 8th December 2007, and the documents were ready 5 days later on 13th December 2007. Thereafter, because of the confusion caused by the discrepancy in the Requests, some time had been wasted before the copy documents were sent to the Appellant by ordinary mail. In our view, the delay between 13th December 2007 and 20th December 2007 was at least partly contributed to by the Appellant.

47. In the light of the fact that the delay had only been slight, if DOI had issued a notice (which he did not) following the requirements under s.19(2) before 8th December 2007, we have no doubt that DOI would have been able to rely on s.19(2). The failure on the part of DOI to issue the relevant notice under s.19(2) is, in our view, in the nature of a technical breach only.

48. As pointed out above, the Commissioner took the view that DOI should have issued a notice to the Appellant under s.19(2) if he was unable to comply with the 40 days time limit under s.19(1). The Commissioner had inquired with DOI what improvements it proposed to make on its procedures in handling data access requests such as those made by the Appellant in this case. We note that in response to such inquiry, DOI has, by a letter dated 12th March 2008, undertaken ("**the Undertaking**") to the Commissioner, inter alia, that in more complicated cases where DOI is unable to comply with a data access request within the 40 days time limit, it will issue notice in writing to the data requestor informing him that DOI would not be

able to comply with his request within the 40 days period and the reasons therefor, but make it clear that DOI would as soon as practicable comply with the request. By a letter dated 12th March 2008 sent by the Commissioner to DOI, the Commissioner confirmed with DOI the Undertaking given by him and reminded DOI that the statutory requirements have to be followed in complying with data access requests.

49. In these circumstances, we agree with the Commissioner in all the circumstances of the present case, any investigation or further investigation is unnecessary as it cannot be reasonably expected that carrying out such investigation would bring about a more satisfactory result. The fact is that the Appellant has already received the copy documents requested by him, albeit after some delay. The Appellant has not suffered any loss or damage as a result. The delay in the present case was slight, and DOI could have relied upon s.19(2) if he had not failed in issuing a notice in writing under that section. That failure was merely a technical breach, and for that, DOI had already given the Undertaking to the Commissioner. The present case is not one which would call for the issuance of an enforcement notice under s.50 of PDPO. In these circumstances, it is clear that even if investigation or further investigation is carried out by the Commissioner, it cannot be reasonably expected that the same would bring about a more satisfactory result.

50. For these reasons, we agree that the Commissioner has rightly exercised his power under s.39(2)(d) to refuse to carry out any

investigation or further investigation of the case. The Appeal is accordingly dismissed.

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