

ADMINISTRATIVE APPEALS BOARD  
ADMINISTRATIVE APPEAL No. 19/2018

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BETWEEN

SO CHUNG LEUNG Appellant

and

PRIVACY COMMISSIONER Respondent  
FOR PERSONAL DATA

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Coram: Administrative Appeals Board

- Mr Robert PANG Yiu-hung, SC (Deputy Chairman)
- Mr CHEUNG Tat-cheong (Member)
- Miss Rebecca LEE Mo-kit (Member)

Date of Hearing: 15 May 2019

Date of Handing down Written Decision with Reasons: 20 June 2019

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DECISION  
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1. The Appellant, a Senior Station Officer of the Fire Services Department ("FSD") appeals against the Privacy Commissioner for Personal Data's decision dated 7 November 2018 ("the Decision") by which the Respondent decided not to pursue the Appellant's complaint

against the Director of Fire Services (“the Director”), pursuant to s. 39(2)(d) of the Personal Data (Privacy) Ordinance (“the Ordinance”).

## **Background**

2. On 28 May 2018, the Appellant submitted a data access request (“DAR”), requesting the Director to

- (1) inform the Appellant whether the Director held the Requested Data; and
- (2) supply a copy of the Requested Data.

The Requested Data was described as :

*“ALL relevant reports/ documents/ correspondence associated with investigation(s) on me which led to disciplinary charge against me with regard to incident on 12.6.2015, which formed part of my personal data under relevant legislations, which are currently under custody by the Director of Fire Services”*

3. The Director was required to comply with the DAR within 40 days after receiving it.<sup>1</sup> If the Director was unable to comply with the DAR within the period specified, the Director was required to before the expiration of the specified period inform the Appellant that the Director was unable to do so, and of the reasons why he was unable to do so and comply with the request to the extent that the Director was able to comply.<sup>2</sup>

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<sup>1</sup> S. 19(1) of the Ordinance

<sup>2</sup> S. 19(2) of the Ordinance

4. The Director acknowledged receipt of the DAR on 29 May 2018. Accordingly, the Director was required to comply with the DAR on or before 7 July 2018.

5. On 5 July 2018, the Appellant was notified by the Director that *“your application is being processed by this department. Since large amount of relevant materials are required to be examined, our reply is expected to be available before 27.7.2018”*.

6. On 9 July 2018, the Appellant lodged a complaint with the Respondent against the Director, alleging that *“Up to the present moment, not a single page relating to my personal data under request was received. I consider this as a serious violation to Section 19(2)(a)(ii) & Section 64A in Hong Kong Law Chapter 486 Personal Data (Privacy) Ordinance and warrant an investigation by you.”*

7. On 18 July 2018, the 51<sup>st</sup> day after the DAR was received, the Appellant was informed by the Director that the documents in response to his DAR were available and could be released subject to deletion of personal data of other data subjects and third party information. He was requested to pay the photocopying fee for those documents.

8. On 2 August 2018, the Appellant was provided a copy of 161 pages of documents with redactions, in response to his DAR.

9. The Respondent made enquiry with the Director. As to the failure to comply with the DAR within the prescribed time limit, the Director explained that additional time was required to obtain the requested

documents from different units / parties and to ensure the documents released to the Appellant complied with the data protection principles under the Ordinance.

10. The Respondent further noted that the redacted parts of the documents provided were either identifying particulars of other individuals or the reference number of the memo concerned, and accepted that the redactions were justified.

11. The Respondent came to a decision not to investigate the Appellant's complaint further pursuant to section 39(2)(d) of the Ordinance and paragraph 8(e) of the Respondent's Complaint Handling Policy, and so informed the Appellant by letter dated 7 November 2018.

12. On 3 December 2018, the Appellant lodged his appeal with the Administrative Appeals Board ("the Board") against the Decision. The grounds of the appeal are that :

*"I have made clear my complaint is related to a suspected violation of Cap. 486 Section 19(2)(a)(ii). I do not see any slightest mentioning about this in the Privacy Commissioner's notice of decision to me."*

### **Written Representation of the Director**

13. The Director's written representation in response to the Appeal stated that an interim reply had been provided to the Appellant on 5 July 2018 with reasons provided and an expected date of reply before 27 July

2018. Due to the voluminous documents and involvement of different units / parties pertaining to the DAR, FSD was unable to comply with the DAR within the prescribed period. As soon as the documents were available, on 18 July 2018, FSD informed the Appellant of the availability of the documents and the administration charges. All relevant documents were provided to the Appellant as soon as practicable. FSD had used its best endeavours with no significant delay in processing the Appellant's DAR. It would have been too onerous, impractical, unreasonable and cost ineffective to provide 1 (or more) pages within the prescribed period when a reasonable expected date of all the documents being available had been conveyed to the Appellant.

#### **Written Statement of the Respondent**

14. The Respondent's Statement relating to the Decision set out 4 arguments in opposition to the Appeal:

- (1) In the course of dealing with the complaint, the Respondent was under the impression that the Appellant had shifted his focus from suspected violation of s.19(2)(a)(ii) to the redactions.
- (2) There was a lack of evidence substantiating the Appellant's belief that the Director was able to at least partially comply with the Appellant's DAR within the prescribed period.
- (3) Given the Appellant had already received the requested documents on 2 August 2018, further investigation of the

case cannot reasonably be expected to bring about a more satisfactory result.

- (4) Even if the Appellant's case is sent back to the Respondent for reconsideration, the Board lacks jurisdiction to hear the appropriateness of the Respondent's subsequent determination whether to refer the suspected violation of s.19(2)(a)(ii) of the Ordinance to the Police for further criminal investigation.

### **The Appellant's Response**

15. By written submissions dated 29 April 2019, the Appellant responded to the arguments raised by the Respondent. He stressed that he had all along made clear the grounds of his complaint, that no investigation had been conducted into such complaint, and reiterated that it was the obligation of the Respondent to investigate and punish contravention of the law.

### **Law**

16. Section 19(1) of the Ordinance provides :

*Subject to subsection (2) and sections 20 and 28(5), a data user must comply with a data access request within 40 days after receiving the request by—*

(a) *if the data user holds any personal data which is the subject of the request—*

(i) *informing the requestor in writing that the data user holds the data; and*

(ii) *supplying a copy of the data; or...*

17. Section (19)(2) of the Ordinance provides :

*A data user who is unable to comply with a data access request within the period specified in subsection (1) or (1A) 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.*

18. Section 39(2)(d) of the Ordinance provides :

*The Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case any*

*investigation or further investigation is for any other reason unnecessary.*

### **The Hearing**

19. The Appellant was asked to clarify the particulars regarding the FSD's alleged breach of s.19(2)(a)(ii) of the Ordinance at the commencement of the hearing. He was not complaining about the redactions, but the failure to provide what documents that could be provided within the prescribed period, even to the extent that they should be supplied to him on a page by page basis.

20. The Appellant further argued that as the Respondent failed to consider such violation in the Decision, the Decision itself is unjust and the Appellant is prejudiced. He further submitted that even if the Respondent, at present, takes into account such breach and makes the same decision not to pursue his complaint, there was still no due process regarding his complaint as he does not have the chance to appeal against such decision. He is now seeking a relief for the matter to be returned to the Respondent for reconsideration so as to facilitate due process.

### **The Respondent's Case**

21. Ms Chan for the Respondent submitted that its attention was diverted by the Appellant's complaints in the course of investigation (in particular in an email dated 14 August 2018) regarding the redaction in the internal memos. Ms Chan suggested that it was of the Respondent's view that the top priority of a regulator's view is that the documents are to be



sent to the data subject as soon as possible. As the Appellant had been notified within the prescribed period that a substantive reply would be provided on 27 July 2018 (*i.e.* within 60 days of the DAR) and that the documents were ready within 11 days after the prescribed period, the Respondent did consider that there was delay and decided not to pursue the Appellant's complaint further.

22. Ms Chan further submitted that the legislative intent of the Ordinance is to ensure that there is no delay and invited the Board to consider the whole merits of the case as this is a *de novo* hearing. She stated that the delay and thus breach, if any, was a minimal and technical one while the Appellant was never prejudiced.

23. Ms Chan also referred to paragraphs 11 and 12 of the Director's written representation dated 13 February 2019, which stated that the Director had used his best endeavors with no significant delay in processing the DAR. In addition, the Respondent agreed with the Director's position that the demand of the Appellant that pages are to be singled out so as to comply with s.19(2)(a)(ii) of the Ordinance would be too onerous, impractical, unreasonable and cost ineffective.

24. The Respondent's case is that there would be no point of remitting this matter to the Respondent for investigation. Ms Chan further submitted that as this case concerns a technical breach, it does not warrant a referral to the Police for prosecution as deterrent effect is not to be pursued here.

### **The Director's Submissions**

25. Miss Cheung, on behalf of FSD, submitted that two days prior to the Appellant's complaint, and within the statutory period, the Appellant had already received information that the documents requested would not be ready as a large amount of materials is to be examined. FSD expected such DAR would be complied with before 27 July 2018. The documents were available on 18 July 2018, 10 days prior to the date set by FSD.

26. She went on to submit that the Appellant lodged a complaint in two days without asking FSD to partially supply any documents. She also emphasized that it would be impracticable to provide the documents page by page as such demand is unreasonable. She was unable to say that the Director could not supply at least some of the documents before the expiry of the prescribed period, but submitted that the obligation on the Director was to comply with the DAR as soon as practicable after the expiration of the prescribed period.

### **Analysis**

27. We consider that there had been a possible breach of s.19(2)(a)(ii) of the Ordinance by the Director. This possible breach had not been investigated by the Respondent.

28. It was the duty of the Director to comply with the DAR within the prescribed period. If the Director could not comply with the DAR within the prescribed period, he had to do 2 things : Firstly, he had to inform the Appellant by notice in writing that he was unable to comply with the DAR

and the reasons why he was unable to comply. Secondly, he was required to comply with the DAR to the extent that he was able to comply.

29. On the first requirement, although the language used in the letter dated 5 July 2018 could have more clearly stated that the Director was **unable** to comply with the DAR within the prescribed period **because of** the large amount of materials required to be examined, we are satisfied that the meaning of the letter was reasonably clear and the duty under s.19(2)(a)(i) had been complied with.

30. It is the second requirement that caused us concern. Given that the data had been gathered and processed over a period of 51 days, it is reasonable to infer that **at least some** of the documents were available and could have been provided to the Appellant by the end of the prescribed period, given that **all** the documents were provided only 11 days thereafter.

31. The obligation on the Director was to comply with the DAR within the prescribed period to the extent that he was able to, not to the extent that it was reasonably practicable to do so.

32. This can be contrasted with s.19(2)(b) of the Ordinance, which provides that full compliance should be done as soon as practicable.

33. The regime which is set out in the Ordinance is that insofar as a data user is able to, it should comply with a DAR within the prescribed period. This is a strict requirement and will only be excused if the data user is unable to comply. It does not mean that a data user must move heaven and earth, nor does it mean that it should provide copies of the data

as each and every page is considered and processed. What it does mean is that before the end of the prescribed period, the data user has to provide such documents as he is able at that time to do so. Thereafter, the data user is obliged to complete his obligations as soon as practicable (which means reasonably practicable).

34. From the documents and submissions, the Respondent's position was that the Appellant had been promised a reply within 60 days of the DAR, and had been provided with the documents in compliance with the DAR 11 days after expiry of the prescribed period. There was no undue delay and no prejudice to the Appellant.

35. However, we consider that the Respondent had failed to address and investigate the actual complaint, which was that the Director had failed to provide even a single page of the requested data before expiry of the prescribed period.

36. We cannot be certain on the evidence before us that there definitely was a breach of s.19(2)(a)(ii), since the Respondent did not in fact investigate to see whether any single page of documents could have been identified and provided within the prescribed period. However, we can be certain that there was a potential breach which was not investigated.

37. That leaves us with the question as to whether and how we should exercise our powers under s.21(1)(j) of the Administrative Appeals Board Ordinance.

38. The nature of the hearing of the Board is by way of rehearing on the merits and not simply by way of review. (see *Li Wai Hung Cesario v. Administrative Appeals Board & anor.*, CACV 250/2015) The Board can simply decide the matter *de novo*, and in fulfillment of the due process entitlement of the Appellant.

39. Having considered the matter, we decline to remit the matter back to the Respondent for further investigation (as suggested by the Appellant) or make any further order.

40. In coming to our decision, we have considered that

- (1) While the compliance with the DAR was late, there is no suggestion that the DAR was not complied with save as to a 11-day delay in respect of possibly part of the data requested;
- (2) The Appellant had been informed by the Director before the expiry of the prescribed period that the documents would not be available within the prescribed period, and the reason why;
- (3) The delay was a relatively short delay;
- (4) The Appellant is unable to point to any substantial prejudice that he has suffered as a result of the delay;
- (5) If the matter were to be remitted back to the Respondent for investigation, no further information useful or relevant to the data protection principles in the Ordinance could be obtained.

In this regard, it is relevant that the provisions in s.19 of the Ordinance is for furtherance of the data protection principles, especially in the case of s.19, Principle 6 (access to personal data).

41. We stress that this is not to be taken as endorsing or excusing in any way the failure of the Director to comply with his obligations under the Ordinance. All data users must be aware of and comply with their duties under the Ordinance. Nevertheless, each case must be considered on its own facts and we do not consider that in the facts of this case, there would be merit in any further order.

### **Costs**

42. We direct that any submissions on costs be lodged in writing and exchanged within 14 days after the handing down of this Decision. Any replies to be lodged and exchanged within 14 days thereafter.

(signed)

(Robert Pang Yiu-hung, SC)  
Deputy Chairman  
Administrative Appeals Board