

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 20/2018

BETWEEN

MICHAEL DAVID REEVE

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Mr Eugene FUNG Ting-sek, SC (Deputy Chairman)

Mr Ronald KWOK Wing-chung

Mr TSANG Mo-chau

Date of Hearing: 17 July 2019

Date of Handing Down Written Decision with Reasons: 21 August 2019

DECISION

A. INTRODUCTION

1. This is an appeal of Mr Michael David Reeve (“**the Appellant**”) against the decision of the Privacy Commissioner for Personal Data (“**the Respondent**”) dated 13 July 2018 deciding not to pursue the Appellant’s

complaint further under sections 39(2)(c), (ca) and (d) of the Personal Data (Privacy) Ordinance (Cap 486) (“**the Ordinance**”).

2. The Appellant was absent at the substantive hearing on 17 July 2019. After the substantive hearing was adjourned, we prepared this Decision on the basis of the materials in the hearing bundles provided by the parties.

B. THE RELEVANT BACKGROUND

3. The Appellant has previously made 3 appeals to the Administrative Appeals Board (“**the Board**”) in AAB No. 12/2011, AAB No. 54/2011 and AAB No. 74/2011 against the Respondent.

4. In the Decision dated 30 March 2012 in AAB No. 12/2011, the Board made the following findings:

*“1. The Spiritual Assembly of the Baha’is of Hong Kong (“**the Assembly**”) is a religious organization and is incorporated in Hong Kong by the Spiritual Assembly of the Baha’is of Hong Kong Incorporation Ordinance, Cap. 1143. It is the administrative body responsible for governing the local affairs of the Baha’i community.*

2. The Appellant was once a member of the Baha’i faith. In June 2008, he visited Hong Kong and met a fellow member of the faith, a young lady whom we shall refer to as “Miss SL”. Two months later, in August 2008, the Appellant moved to Hong Kong, renewed his contact with Miss SL and met her family. He also began to have contact with other members of the Baha’i community in Hong Kong.

3. *Soon afterwards, ... a dispute arose between the Appellant on the one hand and Miss SL and her family on the other, concerning whether the Appellant had behaved inappropriately and contrary to the Baha'i faith towards Miss SL and her family. The Assembly intervened in the matter. Various advice, guidance and warnings were given to the Appellant regarding his conduct towards Miss SL as well as to other members of the Hong Kong Baha'i community. The dispute, however, dragged on and, in April 2009, the Appellant's "administrative rights" were removed by the Assembly. In May 2009, the Appellant appealed to the Universal House of Justice ("the House"), the supreme international administrative body of the Baha'i Faith, against the removal of his rights ...*

4. *In a letter dated 29th January 2010 addressed to the House ..., the Assembly stated its version of the events leading to its decision to remove the Appellant's administrative rights and its reasons for doing so.*

...

7. *... on 29th November 2010, the Assembly notified the Appellant that the House has advised that, on the basis of his established pattern of behaviour and the actions he has taken, he no longer met the requirements of members of the Baha'i faith and that, consequently, his name had been removed from the membership roll ..."*

5. In a letter dated 18 April 2012 to the Secretary of the Board, the Appellant, amongst other things, took issue with some of the Board's findings in paragraphs 2 and 3 of its Decision in AAB No. 12/2011.

6. By a letter dated 13 March 2018 to Miss SL ("**the Appellant's Enquiry Letter**"), the Appellant stated:

“I refer to a letter dated 17th January, 2009 addressed by you to [the Appellant’s lawyers].¹

In this letter, you wrote about having discussed some concerns about [sic] me with a “family friend” who was “a member of the Spiritual Assembly of the Baha’is of Hong Kong”. This discussion took place in mid-September, 2008.

You also referred to another “friend” whose advice on this same matter was sought on [sic] 10th January, 2009, following receipt of my lawyer’s letter. The first “family friend” was away in Taiwan at the time.

For reasons which have not been explained to me, the National Spiritual Assembly of the Baha’s of Lesotho recently brought up this matter in the High Court of Lesotho, along with references to the Office of the Privacy Commissioner of Hong Kong. You are already aware that this office has previously been involved in Baha’i affairs concerning you and the Spiritual Assembly.

Clarification is now needed as to exactly what transpired during these discussions between you and your “family friends”. In particular –

- The “family friends” should be identified by name and full contact details provided.*
- The manner in which this matter was referred to the Spiritual Assembly of Hong Kong in September, 2008 should be explained.*
- Any related notes, observations or comments from the Spiritual Assembly of Hong Kong would be most helpful.*

Please reply at your earliest convenience by e-mail to [the Appellant’s email address].”

7. Miss SL did not reply to the Appellant’s Enquiry Letter, and the

¹ The Board has not been provided with a copy of this letter by the Appellant.

Appellant complained to the Respondent.

8. By a letter dated 13 July 2018, the Respondent informed the Appellant of his decision not to pursue the Appellant's complaint further ("**the Decision**"). In particular, the Respondent (1) recounted the previous complaints made by the Appellant against the Assembly and referred to the previous decisions of the Respondent not to pursue the Appellant's complaints, and (2) expressed his views on why he considered the Appellant's complaint against Miss SL to be unsubstantiated and not made in good faith.

9. By a notice of appeal dated 10 August 2018, the Appellant lodged the present appeal to the Board pursuant to the Administrative Appeals Board Ordinance (Cap 442) ("**the AAB Ordinance**").

C. THE RELEVANT STATUTORY PROVISIONS AND THE RELEVANT PRINCIPLES

10. Section 18(1) of the Ordinance deals with data access request and provides:

"(1) An individual, or a relevant person on behalf of an individual, may make a request—

(a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject;

(b) if the data user holds such data, to be supplied by the data user with a copy of such data."

11. Section 2(1) of the Ordinance contains, amongst others, the following definitions:

“personal data” means “any data –

- (a) relating directly or indirectly to a living individual;*
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained;*
and
- (c) in a form in which access to or processing of the data is practicable”*

“data” means “any representation of information (including an expression of opinion) in any document, and includes a personal identifier”; and

“data subject”, in relation to personal data, means “the individual who is the subject of the data”

12. Section 39(2) of the Ordinance, amongst other things, 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—

- (a) the complaint, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Commissioner was of the opinion that there had been no contravention of a requirement under this Ordinance;*
- (b) the act or practice specified in the complaint is trivial;*
- (c) the complaint is frivolous or vexatious or is not made in good faith;*

- (ca) the primary subject matter of the complaint, as shown by the act or practice specified in it, is not related to privacy of individuals in relation to personal data; or*
- (d) any investigation or further investigation is for any other reason unnecessary. ”*

13. Paragraph 8 of part (B) of the Respondent’s Complaint Handling Policy (Fifth Revision), amongst other things, provides:

“(b) the complainant may be considered to be vexatious, if the complaint has habitually and persistently made to the PCPD other complaints against the same or different parties, unless there is seen to be reasonable grounds for making all or most of those complaints;

(c) the complainant may be considered not to be made in good faith, if the complaint is seen to be motivated by personal feud or other factors not related to concerns for one’s privacy, or the complainant furnishes misleading or false evidence;

(d) the primary subject matter of the complaint is considered not to be related to personal data privacy, e.g. the complaint stems essentially from consumer, employment or contractual disputes.

...

(j) the ulterior motive of the complaint in question is not concerned with privacy and data protection. ”

14. Section 21(1)(j) of the AAB Ordinance provides that “[f]or the purposes of an appeal, the Board may ... subject to subsection (2), confirm, vary or reverse the decision that is appealed against or substitute therefor

such other decision or make such other order as it may think fit".

15. The appeal before the Board is a hearing *de novo*. This means that the nature of the hearing before 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* (unreported, CACV 250/2015, 15 June 2016) S6.1 (Cheung JA).

D. THE GROUNDS OF APPEAL

16. In his notice of appeal dated 10 August 2018, the Appellant did not list out his grounds of appeal. All he did was to attach a letter dated 9 August 2018 signed by him to the notice of appeal. In his letter dated 9 August 2018, the Appellant (1) made certain allegations against Miss SL, (2) recounted the Respondent's decision for not taking further action, and (3) attached a letter dated 19 July 2019 to the Respondent making assertions on certain factual matters.

17. Given that the Appellant has not articulated any grounds of appeal to contend why and how the Respondent has erred in the Decision, and given that this is a hearing *de novo*, the Board will examine whether there are any merits in the Appellant's complaint against Miss SL.

E. APPELLANT'S COMPLAINT AGAINST MISS SL

18. The Appellant has requested Miss SL to provide the following 3

categories of information:

- (1) The name and full contact details of the “family friends”.
- (2) The manner in which this matter was referred to the Assembly in September 2008.
- (3) Any related notes, observations or comments from the Assembly.

E1. First Category

19. Under section 18(1) of the Ordinance, a data access request may be made only if “*the data user holds personal data of which the individual [i.e. the applicant for data access request] is the data subject*”. The term “data subject” is defined in section 2(1) to mean “*the individual who is the subject of the data*”.

20. In other words, section 18(1) only allows a data access request to be made if the applicant individual is the subject of the data being held by the data user.

21. In the present case, the Appellant sought from Miss SL personal data relating to the “family friends”, and not personal data in respect of which the Appellant is the data subject. Therefore, we do not believe the Appellant has made a proper data access request in relation to the name and full contact details of the “family friends” under section 18(1) of the Ordinance.

E2. Second and Third Categories

22. The term “data” is statutorily defined to mean “*any representation of information (including an expression of opinion) in any document, and includes a personal identifier*”.

23. Under these two categories, the Appellant sought from Miss SL information in relation to the referral of the Appellant’s conduct to the Assembly in September 2008 and any related notes, observations or comments from the Assembly.

24. We have not been shown by the Appellant any evidence to suggest that the manner in which the Appellant’s conduct was referred to the Assembly in September 2008 was recorded in any document. Even if it was contained in some documents, the Appellant has not demonstrated in any way that such documents are currently in the possession of Miss SL.

25. Further, the Appellant has not produced anything to show that (1) the Assembly’s observations or comments were contained in any document and (2) even if they were, Miss SL currently holds such documents.

26. Accordingly, we consider that the Appellant has not made out a prima facie case for a data access request under section 18(1) of the Ordinance in relation to the information under the Second and Third Categories.

E3. Conclusion on the Appellant's Complaint against Miss SL

27. For all the above reasons, we are of the view that the Appellant complaint against Miss SL is groundless and we reject it as being completely without foundation.

F. RESPONDENT'S DECISION NOT TO PURSUE COMPLAINT FURTHER

28. Under section 39(2) of the Ordinance, the Respondent may refuse to carry out or decide to terminate an investigation initiated by a complaint if he forms certain opinion about the complaint or investigation.

29. In the Decision, the Respondent decided not to pursue the Appellant's complaint against Miss SL further under sections 39(2)(c), 39(2)(ca) and 39(2)(d) of the Ordinance.

30. Section 39(2)(c) provides that the Respondent may refuse to carry out or decide to terminate an investigation initiated by a complaint if the complaint is frivolous or vexatious or is not made in good faith. We consider that the Appellant's complaint against Miss SL is frivolous and was not made in good faith.

- (1) A complaint is frivolous when it is not capable of reasoned argument, without foundation or where it cannot possibly succeed.

- (2) In the context of the Ordinance, a complaint is made in good faith if it was predominantly motivated by matter(s) not related to concern for one's privacy.
- (3) In the light of our conclusion regarding the Appellant's complaint against Miss SL, we consider that the complaint in question is not capable of reasoned argument and without foundation, and is therefore frivolous.
- (4) Further, the Respondent has pointed out the following:
 - (a) Prior to the present complaint, the Appellant had lodged a total of 44 complaints with the Respondent since 2010 as a result of the matter leading to the removal of the Appellant's administrative rights by the Assembly. 32 of the 44 complaint cases were made against the Assembly and the other 12 were made against other parties relating to the matter (including 3 against Miss SL, one of them being the present complaint).
 - (b) Amongst these complaints, the Respondent had completed 43 cases resulting in the termination of the complaints under section 39(2) of the Ordinance. The Appellant had appealed against 3 of the 43 completed cases (excluding the present appeal) and the Board had dismissed all 3 of such appeals (in AAB No. 12/2011,

AAB No. 74/2011 and AAB No. 54/2011).

- (5) We are satisfied that the present complaint made by the Appellant against Miss SL is predominantly motivated by the Appellant's concern in relation to the matter leading to the removal of the Appellant's administrative rights by the Assembly, and not any infringement of his personal data privacy rights. We agree with the Respondent's contention that the Appellant's present complaint against Miss SL is not made in good faith.

31. Sections 39(2)(ca) and 39(2)(d) of the Ordinance provide that the Respondent may refuse to carry out or decide to terminate an investigation initiated by a complaint if the primary subject matter of the complaint is not related to privacy of individuals in relation to personal data, and if further investigation is unnecessary. In the light of our conclusions in the previous paragraph, we agree that the Respondent was correct not to pursue with the Appellant's complaint under sections 39(2)(ca) and 39(2)(d).

32. For all the above reasons, we consider the Respondent's decision not to pursue the Appellant's present complaint further under sections 39(2)(c), 39(2)(ca) and 39(2)(d) of the Ordinance to be correct.

G. CONCLUSION

33. For all the above reasons, we dismiss the Appellant's appeal and

confirm the Decision.

34. The Respondent has submitted that the Board should make a costs order against the Appellant.

- (1) Under section 21(1)(k) of the AAB Ordinance, the Board may *“subject to section 22, make an award to any of the parties to the appeal of such sum, if any, in respect of the costs of and relating to the appeal”*.
- (2) Section 22(1)(a) of the AAB Ordinance provides that the Board shall only make an award as to costs under section 21(1)(k) *“against an appellant, if it is satisfied that he has conducted his case in a frivolous or vexatious manner”*.
- (3) We have already concluded that the Appellant’s complaint against Miss SL is a frivolous one. In pursuing his complaint in the present appeal, we consider that the Appellant has conducted his case in a frivolous manner. We are therefore satisfied that an award as to costs should be made against the Appellant.
- (4) After the hearing was concluded on 17 July 2019, the Respondent filed a statement of costs on 19 July 2019 setting out his costs incurred in this appeal.

- (5) In response, by a letter dated 24 July 2019, the Appellant asserted that the greater part of the Respondent's costs appears to be made up of expenses resulting from research and preparation connected with his earlier cases against the Assembly, and contended that the Respondent's costs should be revised.
- (6) We do not see any proper basis for the Appellant's assertion that the costs set out in the Respondent's statement of costs were not incurred in the context of the present appeal. Having considered the Respondent's statement of costs, we make an order that the Appellant do pay to the Respondent HK\$40,000, being the costs incurred by the Respondent in this appeal.

(signed)

(Mr Eugene FUNG Ting-sek, SC)

Deputy Chairman

Administrative Appeals Board

