ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO.21 OF 2007

BETWEEN

WONG KAI FAT (黃啓發)	Appellant
and	
THE PRIVACY COMMISSIONER FOR PERSONAL DATA	Respondent

Coram: Administrative Appeals Board

Date of Hearing: 23 October 2007

Date of Written Decision with Reasons: 2 November 2007

DECISION

Background facts

1. The Appellant is an occupier of a residential unit in Kwun Tong ("**Property**"). According to the Appellant, he moved into the Property in or about 2004.

2. In or about early 2007, the Appellant received a letter from SmarTone Telecommunications Holdings Limited ("**Smartone**") chasing for payment of outstanding mobile telephone charges owed by a previous occupier ("**Previous Occupier**") of the Property. Upon receipt of this letter, the Appellant called Smartone by phone to inform it that the Previous Occupier had already moved out of the Property and requested Smartone not to send any further demand

letter to the Property. Apparently, he talked to a number of employees of different departments or divisions of Smartone in respect of this matter. However, the stance of Smartone, as expressed by those employees that the Appellant had spoken to, was that the mere words of the Appellant given over the phone were not sufficient for Smartone to decide to take no further action at the Property to recover the outstanding charges, and that its practice was to require the Appellant to bring along his identity card and an address proof to Smartone's shop or office and to sign a declaration, presumably to confirm that the Previous Occupier was no longer residing in the Property. According to the Appellant, he was also told by Smartone that if he did not comply with its request, the possibility of debt collectors attending the Property to seek to recover the outstanding charges could not be ruled out.

3. The Appellant considered Smartone's request to be unacceptable. He took the view that he was under no obligation to help Smartone by attending Smartone's shop or office, or produce his personal data to Smartone. He did, however, provide to Smartone his name and office telephone number as a means of contact. Subsequently, the Appellant received 3 letters issued by Smartone's solicitors seeking to recover the outstanding charges. The 3 letters were addressed to the Previous Occupier and sent to the Property. The Appellant claims that his family members were scared by those letters, and the Appellant considers that Smartone used unfair means to force him to provide his personal data.

4. On 3 April 2007, the Appellant made a written complaint to the Respondent against the conduct of Smartone in seeking to collect his personal data. After the Appellant had informed Smartone of his complaint to the Respondent, apparently Smartone softened its stance somewhat. Eventually, the matter between Smartone and the Appellant was resolved by the Appellant signing a declaration prepared by Smartone, and returning it by post to Smartone, to confirm that the Previous Occupier was no longer residing in the Property and

that he had no means of contact with the Previous Occupier. Smartone has not since sent any further demand letter to the Property, or taken any further action at the Property to seek to recover the outstanding charges.

5. On 29 May 2007, the Respondent decided not to investigate or further investigate the Appellant's complaint on the ground that any investigation or further investigation was "unnecessary", in reliance on s.39(2)(d) of the Personal Data (Privacy) Ordinance ("**Ordinance**"). The Respondent's decision was confirmed in a further letter to the Appellant dated 7 June 2007.

6. The Appellant was not satisfied with the Respondent's decision. He took the view that, although his complaint against Smartone had been resolved, Smartone's practice of seeking personal data from persons who were not its debtors and the manner in which such personal date was sought, were unacceptable. Accordingly, on 11 June 2007, the Appellant lodged an appeal to this Board against the aforesaid decision of the Respondent.

Grounds of Appellant's complaint

7. In the Appellant's Notice of Appeal to this Board, 3 main grounds of complaint were raised against the conduct of Smartone:-

(1) the personal data sought by Smartone was not "necessary" or "directly related" to any function or activity of Smartone, in contravention of Principle 1(1)(b) of the Data Protection Principles;

(2) the personal data sought by Smartone was "excessive" in relation to Smartone's purpose, in contravention of Principle 1(1)(c) of the Data Protection Principles;

(3) Smartone used improper means when attempting to collect personal data from him, in contravention of Principle 1(2)(b) of the Data Protection Principles.

8. These grounds were maintained by the Appellant at the hearing of the appeal. In addition, the Appellant complained of the fact that the Respondent apparently reached its decision not to investigate his complaint against Smartone without having made any inquiry with Smartone or asked Smartone to provide any explanation for its conduct. This, in the Appellant's view, shows that the Respondent has failed to carry out its duties properly or responsibly.

Discussion

(i) First Complaint: personal data sought neither necessary nor directly related to Smartone's function or activity

9. The Appellant argues that the personal data sought by Smartone is not "necessary", because it can easily conduct a land search in respect of the Property to ascertain whether the Previous Occupier has already sold the Property. Further, the Appellant contends that the personal data sought by Smartone is not "directly related" to Smarton's function or activity, because even if the requested information is provided, it cannot prove that the Previous Occupier in fact no longer resides in the Property.

10. Principle 1(1)(a) and (b) of the Data Protection Principles states as follows:-

> "Personal data shall not be collected unless –
>
> (a) the data are collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;
>
> (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose".

11. It can be seen that a data user is permitted, under Principle 1(1)(b), to collect personal data which is either necessary for or directly related to a function

or activity of that data user. Thus, a data user can collect personal data which is directly related to his function or activity, even though it may not strictly be necessary for such function or activity (e.g. because the relevant information could have been obtained from some other source or through some other means).

12. In the present case, the relevant function or activity of Smartone would be the collection of outstanding charges from a customer (viz. the Previous Occupier). Smartone was told by someone (viz. the Appellant) over the phone that the customer had already moved out of the address which, it would appear, was the correspondence or contract address given by that customer to Smartone, and that the customer had not been residing at that address for a long time. In such circumstances, one can see why Smartone would seek to verify the identity of the person who provided such information. Since the Appellant also claimed that he was the new owner or occupier of the Property, it was not unreasonable for Smartone to ask the Appellant to produce his identity card and address proof for verification purposes. Of course, the personal data sought by Smartone could not prove, conclusively, that the Previous Occupier was no longer living in the Property. However, if there was proof that the person providing the information was living the Property, Smartone would have a reasonable basis to accept the information (viz. that the Previous Occupier is no longer living in the Property) given by that person.

13. In these circumstances, the Board considers that the personal data sought by Smartone is directly related to an activity or function of Smartone, and thus there is no contravention of Principle 1(1)(b) of the Data Protection Principle. The fact that Smartone could have checked, by some other means, whether the Previous Occupier is still living in the Property does not, in our view, mean that the personal data sought by it is not directly related to its function or activity.

(ii) <u>Second Complaint: personal data sought by Smartone is "excessive"</u>

14. The Appellant argues that the personal data sought by Smartone is "excessive". The Appellant also complains of Smartone's request for him to attend its shop or office to provide the personal data.

15. Principle 1(1)(c) of the Data Protection Principles states as follows:-

> "Personal date shall not be collected unless –
>
> (c) the data are adequate but not excessive in relation to that purpose."

16. The personal data sought by Smartone relates to (i) the identity card and (ii) an address proof of the Appellant. As earlier mentioned, such personal data would be reasonable proof that the information provider (viz. the Appellant) was living in the Property and thus was able to verify that the Previous Occupier was no longer residing in the Property. This Board considers that the personal data sought by Smartone is not excessive in relation to Smartone's purpose.

17. As regards Smartone's request that the Appellant should attend its shop or office to produce the personal data, this does not go to the issue of whether the personal data sought by Smartone is excessive. In any event, Smartone could not insist on the Appellant attending, and had no power to compel the Appellant to attend, its shop or office to provide the personal data sought, and the Appellant did not, as a matter of fact, do so. In all the circumstances, this Board is unable to see that there is any contravention of Principle 1(1)(c) of the Data Protection Principle in the present case.

(iii) <u>Third Complaint: use of improper means to attempt to collect personal data from Appellant</u>

18. The Appellant's complaint relates to two matters: (i) Smartone's "threat" of the possibility of debt collectors visiting the Property to collect the outstanding charges should the Appellant refuse to provide the personal data sought, and (ii) Smartone instructing its solicitors to send 3 letters, addressed to the Previous Occupier, to the Property seeking recovery of the outstanding charges.

19. Principle 1(2) of the Data Protection Principles states as follows:-

> "Personal data shall be collected by means which are –
> (a) lawful; and
> (b) fair in the circumstances of the case."

20. In respect of the first matter, this Board considers that, in the face of the Appellant's refusal to provide the personal data sought, Smartone would have to decide whether to accept the Appellant's words at face value, and what further action it considered to be appropriate or necessary to pursue the outstanding charges. Generally speaking, it is not illegal for a creditor to engage the services of a debt collector to recover outstanding debts, provided that no unlawful means is employed when seeking to recover the debts.

21. As a matter of fact, the Appellant did not provide the personal data sought by Smartone, and Smartone did not send any debt collector to the Property to demand for payment. Instead, Smartone apparently instructed its solicitors to send 3 demand letters to the Property. The Appellant has not produced the 3 letters as evidence, and this Board does not know the contents of those letters. The mere sending of demand letters issued by solicitors is neither unlawful or unfair. Further, as earlier mentioned, after the Appellant had provided a written declaration to Smartone, no further action was taken by Smartone at the Property to seek to recover the outstanding charges.

22. In all the circumstances, Smartone's conduct is within the permissible boundaries of the law, and this Board agrees with the Respondent's view that there is insufficient basis to find that Smartone has contravened Principle 1(2) of the Data Protection Principles.

23. S.39(2)(d) of Ordinance provides 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."

24. In view of the matters aforesaid, this Board considers that the Respondent is entitled, in reliance on this section, to decide not to investigate or further investigate the Appellant's complaint against Smartone.

(iv) Failure to make any inquiry of Smartone

25. At the hearing of the appeal, Mr. Cheng appearing on behalf of the Respondent confirmed that, in respect of the Appellant's complaint, the Respondent reached its decision without having made any inquiry of Smartone or asked Smartone to give any explanation for its conduct. Nevertheless, Mr. Cheng pointed out that the Respondent had in fact taken action to investigate Smartone's practice under s.38 of the Ordinance. That this is the position is also stated in paragraph 6 of the Respondent's written response to the Appellant's letter to the Secretary to this Board dated 15 August 2007. However, Mr. Cheng maintained that the Respondent was under no obligation to inform the Appellant of the details of the investigation, and in any event would be precluded from disclosing such details by virtue of the Respondent's duty to maintain secrecy under s.46 of the Ordinance.

26. This Board has no power or jurisdiction to direct the Respondent to carry out any investigation under s.38 of the Ordinance. Nevertheless, it does appear to this Board that Smartone's general practice of seeking personal data from persons who are not its debtors in circumstances of this case is a matter which merits further consideration by the Respondent or other appropriate Government or public bodies.

Conclusion

27. This Board has considered all the oral and written materials submitted by the Appellant in support of his appeal, but does not find that there is any sufficient basis to disturb the Respondent's decision. Accordingly, the appeal is dismissed, with no order as to costs.

(Anderson Chow Ka-ming, SC)
Deputy Chairman
Administrative Appeals Board