

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO.25 OF 2008

BETWEEN

LEUNG HO YIN Appellant

and

THE PRIVACY COMMISSIONER Respondent

FOR PERSONAL DATA

Coram: Administrative Appeals Board

Date of Hearing: 22 October 2008

Date of handing down Decision with Reasons: 16 April 2009

DECISION

Introduction

1. AASTocks.com Limited (“AAS”) is a company offering an electronic financial information service through its website, www.aastocks.com (“the Website”).

2. In 2007 the Appellant, Mr. Leung Ho-yin, subscribed for the service and opened a membership account with AAS through the Website. In applying for membership, Mr. Leung provided AAS with an e-mail address lhy-aastock@per.com.hk.

3. According to Mr. Leung, the e-mail address provided by him was tailor-made specifically for this membership application, and used solely for this purpose and no other. He was in fact the owner of the domain name “*per.com.hk*” and all e-mails addressed to the domain would be forwarded to him. According to Mr. Leung, he used the aforesaid designated e-mail address to enable him to monitor whether adequate security measure had been undertaken by AAS to prevent misuse of the information provided to them.

4. From 6 January 2008, numerous SPAM e-mails from unknown source were received at Mr. Leung’s designated e-mail address.

5. On 7 January 2008, he complained to AAS informing them that the security of their system had been compromised by hackers, urging them to take immediate remedial measures to prevent further breach of their security system. AAS replied to Mr. Leung within 15 minutes saying that their investigation had shown that their system was “well-protected from any hacker activities”.

6. On 8 April 2008, Mr. Leung learned from a report in one of the Chinese newspapers that AAS had acknowledged that their system had

indeed been infiltrated by hackers and that AAS had since enhanced the security of their Website.

7. On 13 April 2008, Mr. Leung lodged a complaint with the Respondent alleging that AAS had failed to protect his personal information, and that even after AAS had been alerted to the incident, they had still failed to take any steps to investigate his complaint.

8. Mr. Leung's complaint, in essence, is that AAS, being a data user, has breached Principle 4 of the Data Protection Principle ("DPP 4") prescribed in the Personal Data (Privacy) Ordinance ("the Ordinance"), which provides:

"Principle 4 – security of personal data

All practicable steps shall be taken to ensure that personal data (including data in a form in which access to or processing of the data is not practicable) held by a data user are protected against unauthorized or accidental access, processing, erasure or other use" (emphasis added)

9. It is Mr. Leung's complaint that the fact that unauthorized e-mails were sent by spammers to his designated e-mail address is *prima facie* evidence that AAS had not taken *all practical steps to ensure* that personal data were protected against unauthorized or accidental access as required under DPP 4.

10. It is worth noting at this stage, and there is no dispute, that the SPAM e-mails received through Mr. Leung's e-mail address contained no

information concerning the identity of Mr. Leung. There is no evidence that other than the use of the designated e-mail address, there had been any unauthorized use of personal information of Mr. Leung or information which would have revealed Mr. Leung's identity.

Respondent's Decision under Appeal

11. By his letter dated 7 July 2008, the Respondent informed Mr. Leung of his decision not to carry out an investigation of Mr. Leung's complaint ("**the Decision**").

12. The Decision was made primarily on two grounds: first, that Mr. Leung's e-mail address did not constitute "*personal data*" within the meaning of the Ordinance as Mr. Leung's identity could not be ascertained from the e-mail address alone; and secondly, that there was no evidence showing that his personal data had been leaked to the spammers by the Website. The Respondent was of the view that there was no *prima facie* case of a contravention of the Ordinance and accordingly exercised the discretion conferred on him under s.39(2)(d) of the Ordinance, refusing to carry out an investigation of the complaint.

13. Dissatisfied with the Decision, Mr. Leung lodged the present Appeal.

"Personal Data"

14. As is clear from the heading of DPP 4 and the wording of the provision, the subject matter which data users are required to protect is

“personal data”. DPP 4 does not apply to offer protection of information falling outside the statutory definition of *“personal data”*.

15. Accordingly, the first question arising on this Appeal is whether the e-mail address lhy-aastock@per.com.hk amounts to Mr. Leung’s *“personal data”* within the meaning of the Ordinance. As noted earlier, the only information alleged to have been accessed by unauthorized users was the said e-mail address. There is no evidence of other personal information having been disclosed to or accessed by spammers or other unauthorized users.

16. The term *“personal data”* is defined in the Ordinance as follows:

“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”.*

Paragraph (b) is of particular relevance to our present case.

17. We do not preclude the possibility that an e-mail address, in some circumstances, *could be* information from which the identity of an individual may be directly or indirectly ascertained. There may well be cases where it would be reasonably practicable, whether because of the information revealed in the e-mail address itself or in conjunction with other information, for the identity of an individual to be ascertained from such an address.

18. In our view, however, we are not dealing with such a case in the present Appeal. In the present case, we do not accept that Mr. Leung's identity could reasonably be ascertained from the said e-mail address, without more. The prefix of the address "*lhy*" no doubt corresponds to the initials of Mr. Leung. But that alone can hardly be sufficient to lead to the conclusion that Mr. Leung's identity would become reasonably ascertainable from such an address.

19. Mr. Leung contended that, being owner of the domain name "*per.com.hk*", his full name and contact telephone number could easily be obtained by a search on the Internet of that domain name. This is not disputed by the Respondent. However, the fact that a search would have revealed his identity as the *owner* of the domain name "*per.com.hk*" does not necessarily mean that he would be identified as a *user* of the email addresses with that domain name.

20. We have allowed the parties to file further written submissions after the hearing on the meaning of "*personal data*", in particular, in relation to e-mail addresses. Mr. Leung has taken the opportunity to draw our attention to literature and materials from other jurisdictions, including the United Kingdom, Australia, Canada as well as textbook commentary on the Ordinance in Hong Kong. The Respondent has also filed further submissions in reply. We have considered these further materials but do not think that they assist in advancing Mr. Leung's case. We propose only to deal with them briefly here.

21. Mr. Leung referred to the “Good Practice Note – Collecting personal information using websites” and the “Data Protection Technical Guidance Determining what is personal data” issued by the UK Information Commissioner’s Office. Neither of these documents has the force of law. They are not intended to be legal authorities on the interpretation of the term “personal data” in the context of the Data Protection Act 1998 in the UK. But more importantly, nothing in the passages from these Notes to which our attention has been drawn detracts from our views expressed above.

22. Mr. Leung next referred to a case note entitled “2004 - Complaint Case Note 2” which was published by the Privacy Commissioner of Australia. The only point one can deduce from the case note is that the commissioner apparently came to the view that a disclosure by a retail organization of customers’ e-mail addresses to other customers was a breach of National Privacy Principle 2 under the Privacy Act, 1988 in Australia. What exactly was the information disclosed is not clear from the case note and in any event, the case note contains no discussion or analysis of the reasons for the Commissioner’s view. The case note is of limited assistance to our consideration of the issue arising in the present case.

23. Mr. Leung referred to “PIPEDA Case Summary #277” published by the Privacy Commissioner of Canada. The case concerned an organizer of a loyalty programme who had sent a mass e-mail to 618 participants of a photography contest. The e-mail addresses of the recipients of the e-mail were all viewable by every other recipient of that e-mail. It was found by the commissioner that the organizer had failed to protect personal information against unauthorized use or access, as required under Principle

4.7.1 of the relevant legislation in Canada. However, the case summary similarly does not contain any discussion or analysis of the basis of the commissioner's view. Accordingly, other than noting the result of that case, little assistance can be derived from the case summary on the interpretation and application of the relevant statute.

24. None of the materials and literature submitted by Mr. Leung has persuaded us that the e-mail address lhy-aastock@per.com.hk should be regarded as "*personal data*" of Mr. Leung within the meaning of the Ordinance.

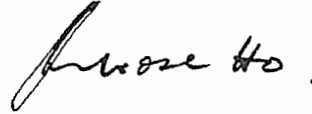
25. Therefore, in the absence of any other evidence suggesting that there might have been unauthorized access to or misuse of other personal data or information, there is nothing to indicate that a contravention by AAS of DPP 4 has occurred.

26. We are therefore unable to find any ground for disturbing the Respondent's Decision. Contrary to Mr. Leung's submissions, we see no justification to require the Respondent to engage an IT security specialist to review AAS's system with a view to finding whether AAS has complied with its duty under DPP 4.

27. In any event, s.39(2)(d) of the Ordinance confers upon the Respondent a wide discretion to refuse to carry out or continue an investigation of a complaint. In light of all the circumstances of the present case, there is no question of the Decision being either unlawful or so unreasonable as to warrant the intervention of the Administrative Appeals Board.

Conclusion

28. We are unanimously of the view that this Appeal must be dismissed.

A handwritten signature in cursive script, appearing to read "Ambrose HO".

(Ambrose HO, SC)

Deputy Chairman

Administrative Appeals Board