

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 27/2013

BETWEEN

L

Appellant

and

PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA

Coram: Administrative Appeals Board

Mr. Chan Chi-hung, S.C. (Deputy Chairman)

Miss Judy Chan Kar-po (Member)

Miss Hattie Cheng Kin-hei (Member)

Date of Hearing: 13 March 2014

Date of Handing down Written Decision with Reasons: 9 April 2014

D E C I S I O N

BACKGROUND FACTS

1. The Appellant is an ex-employee of Standard Chartered Bank (Hong Kong) Limited (“SCB”).
2. By a data access request dated 17 January 2011 (the “DAR”), the Appellant requested from SCB copies of his personal data kept by SCB pursuant to the Personal Data (Privacy) Ordinance (the “Ordinance”).

3. On 25 February 2011, SCB forwarded to the Appellant a bundle of copies of documents, i.e. the readily accessible documents in response to the DAR. SCB requested as part of its compliance with the DAR, payment of HK\$672 being the administrative costs of locating the readily accessible documents, photocopying, printing and courier charges. SCB also informed the Appellant that, given the DAR related to an extensive period of time, some of the potentially relevant documents were not currently readily accessible. However, SCB would continue to retrieve and review those potentially relevant documents and would provide such documents to the Appellant should they be located.

4. By a letter dated 1 March 2011, the Appellant wrote to SCB:-

- (1) Requesting confirmation of whether SCB would fully comply with the DAR;
- (2) Complaining that HK\$672 was excessive.

5. SCB informed the Appellant on 9 March 2011 that:-

- (1) It would retrieve from some back-up files to further identify documents which might be relevant to the DAR;
- (2) The laptop of one of the individuals identified in the DAR had crashed, resulting in loss of data and SCB was in the process of restoring certain back-up files to see whether some additional data could be identified;
- (3) Extra costs would therefore be involved for this exercise and would be approximately USD 1,740.

6. The Appellant subsequently replied on 15 March 2011, saying that compliance with his DAR was still incomplete. He also requested SCB's clarification as to whether he would be asked to pay for the repairs of the crashed laptop.

7. On 17 March 2011, SCB supplied to the Appellant with a breakdown of the charges amounting to a total of HK\$672 in respect of the readily accessible documents. SCB further replied to the Appellant that:-

- (1) SCB had fully discharged its duty under the Ordinance.
- (2) The offer to retrieve the back-up files was on an entirely voluntary basis.

(3) SCB was fully entitled to recover the fees from the Appellant.

(4) Such fees did not relate to the repair of the laptop.

8. The Appellant lodged a complaint against SCB to the office of the Respondent on 21 March 2011. The Appellant was dissatisfied with the courier and photocopying charges in relation to the readily accessible documents as well as the costs of retrieving the back-up files in relation to the data in the potentially relevant documents.

9. The Appellant further complained that his DAR was not fully complied with as the data in the back-up files which might be relevant to his DAR had not been provided to him.

10. On 30 March 2011, the Respondent made some enquiries with SCB.

11. In reply to the enquiries, SCB indicated that the retrieval process commenced as early as 2 March 2011. The process was described as urgent and that the cost was not a problem. As calculated in accordance with the quotation and on the basis of the relevant back-up files spanning over a period of 29 months from August 2007 to December 2009, the total fees involved were estimated to be approximately USD 1,740.

12. By a letter dated 26 April 2011, SCB stated to the Appellant that it was under no obligation to proceed with the task of the retrieval of the back-up files without any undertaking from the Appellant to reimburse SCB for out-of-pocket expenses associated with this process.

13. On 4 May 2011, SCB reduced its charges in respect of readily accessible documents from the original HK\$672 to a sum of HK\$336. Despite its letter on 26 April 2011, SCB proceeded with the retrieval process and it was completed.

14. On 25 May 2011, SCB wrote to the Respondent that SCB had completed the review process and the quantity of the restored data amounted to some 200 pages. SCB further expressed its view that it was not obliged to provide them to the Appellant unless and until the Appellant complied with its request to reimburse SCB for:-

(1) The out-of-pocket expenses associated with the retrieval process which amounted to USD 1,640;

(2) Photocopying and printing charges and other administrative costs.

15. The Respondent informed the Appellant on 3 June 2011 of his decision not to pursue the Appellant's complaint any further together with his reasons for the said decision (the "**June Decision**").

16. The Appellant was informed of the June Decision on 7 June 2011. He then emailed the Respondent, contending that:

- (1) SCB restored the files voluntarily and without any request from him or the Respondent.
- (2) SCB might have retrieved the lost data for a purpose other than complying with the DAR and which was of benefit to it.
- (3) Since SCB was now in possession of the retrieved documents, it should hand them over to him forthwith upon payment of a reasonable administration or other reasonable fee. He should not be asked to pay for the voluntarily incurred retrieval fees.

17. On 24 June 2011, the Respondent replied to the Appellant that he reiterated his view that SCB was not obliged to retrieve the lost data but voluntarily did so at an expense of USD 1,640, which was directly related to and necessary for complying with the DAR and which SCB was entitled to pass on to the Appellant.

18. The Appellant contacted the Respondent on 5 July 2011 and 6 July 2011 to express his dissatisfaction.

19. Despite his dissatisfaction, the Appellant paid SCB and settled the sum of USD 1,640 on 1 August 2011.

20. The Appellant was provided with the retrieved data by SCB on 8 August 2011.

21. On 26 August 2011, the Respondent replied to the Appellant and maintained both the June Decision and the reasons given for the said decision (the "**August Decision**").

22. On 1 September 2011, the Appellant lodged a notice of appeal against the Respondent to the Administrative Appeals Board (the "**Board**") (i.e. AAB No. 52/2011).

23. On 26 July 2012, the Board issued its decision:-

- (1) Dismissing the part of the Appellant's appeal relating to the readily

accessible documents provided to him by SCB and agreeing with the Respondent that the fee of HK\$672 imposed by SCB was reasonable and not excessive;

- (2) Allowing the part of the Appellant's appeal relating to the retrieved documents provided to him by SCB.

24. At §44 of the decision in AAB No. 52/2011, the Board remitted the case to the Respondent and directed the Respondent to consider, *inter alia*:-

“(a) *Whether or not SCB was in breach of sections 19(1) and 28 or of any other provision/requirement of the Ordinance; and*

(b) *Without prejudice to the generality of (a) above, exercising his powers of investigation in respect of:*

(1) *Whether it was ‘necessary’ for SCB to have placed its back-up files with its IT provider, Scope International Limited, as well as the related matters mentioned in paragraph 37 above;*

(2) *Whether the crash of the laptop was in any way the fault of SCB and/or its employees or agents; and*

(3) *In the light of his investigations as regards the above, whether the charges incurred by SCB (USD 1,640.00) in respect of the recovery of the back-up files were “necessarily incurred” in complying with the DAR; and/or whether the said charges were, in all the circumstances, “excessive” and, if so, what “non-excessive” fee should SCB have charged.”*

(collectively as the “**Directions**”)

25. As part of the Respondent's re-investigation pursuant to the Directions, the Respondent had some exchanges of communications with SCB regarding the calculation of the fees and the circumstances of the crash of the laptop (the “**Re-investigation**”).

26. On 29 August 2013, SCB wrote to the Respondent (on a without prejudice basis) of its willingness to refund USD 1,640 to the Appellant in full on a no-admission-of-liability basis.

27. On 30 August 2013, the Respondent informed the Appellant and SCB of his decision to terminate the investigation of the Appellant's complaint pursuant to section 39(2)(d) of the Ordinance on the ground that the dispute in question could be amicably resolved and any further investigation of the case was unnecessary (the "Termination Decision").

28. Dissatisfied with the Termination Decision of the Respondent, the Appellant lodged the present appeal to the Board.

29. On 10 October 2013, SCB refunded HK\$12,792 (equivalent to USD 1,640) to the Appellant by way of a cheque drawn by Messrs. Simmons & Simmons, Solicitors for SCB, which has been accepted by the Appellant.

ISSUES

30. The issues raised in the present appeal for the Board's decision are:-

- (1) Whether the Re-investigation remitted by the Board pursuant to AAB No. 52/2011 is an investigation that falls within the ambit of section 39(2) of the Ordinance so that the Respondent has the discretion to terminate the Re-investigation on the strength of section 39(2)?
- (2) If yes to (1) above, then, considering the matter and exercising the discretion afresh, whether the Re-investigation should be terminated?

THE RELEVANT LEGISLATION

31. The obligation to comply with a DAR is stipulated under section 19(1) of the Ordinance:-

"(1) 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*
- (b) if the data user does not hold any personal data which is the subject of the request, informing the requestor in writing that the data user does not hold the data.”*

32. Section 28 of the Ordinance allows a data user to impose a reasonable fee for complying with a DAR:-

- “(1) A data user shall not impose a fee for complying or refusing to comply with a data access request or data correction request unless the imposition of the fee is expressly permitted by this section.*
- (2) Subject to subsections (3) and (4), a data user may impose a fee for complying with a data access request.*
- (3) No fee imposed for complying with a data access request shall be excessive.*
- (4) Where pursuant to section 19(3)(c)(iv) or (v) or (4)(ii)(B)(II) a data user may comply with a data access request by supplying a copy of the personal data to which the request relates in one of 2 or more forms, the data user shall not, and irrespective of the form in which the data user complies with the request, impose a fee for complying with the request which is higher than the lowest fee the data user imposes for complying with the request in any of those forms.*
- (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.*
- (6) Where-*
 - (a) a data user has complied with a data access*

request by supplying a copy of the personal data to which the request relates; and

- (b) the data subject, or a relevant person on behalf of the data subject, requests the data user to supply a further copy of that data,*

then the data user may, and notwithstanding the fee, if any, that the data user imposed for complying with that data access request, impose a fee for supplying that further copy which is not more than the administrative and other costs incurred by the data user in supplying that further copy.”

33. With regards to investigation and complaints, section 38 of the Ordinance provides that:-

“Where the Commissioner-

- (a) receives a complaint; or*
- (b) has reasonable grounds to believe that an act or practice-*
 - (i) has been done or engaged in, or is being done or engaged in, as the case may be, by a data user;*
 - (ii) relates to personal data; and*
 - (iii) may be a contravention of a requirement under this Ordinance,*

then-

- (i) where paragraph (a) is applicable, the Commissioner shall, subject to section 39, carry out an investigation in relation to the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a requirement under this Ordinance;*
- (ii) where paragraph (b) is applicable, the Commissioner*

may carry out an investigation in relation to the relevant data user to ascertain whether the act or practice referred to in that paragraph is a contravention of a requirement under this Ordinance.”

34. Section 39(2) of the Ordinance goes on to provide that:-

“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.”*

35. With respect to the discretion to terminate an investigation under section 39(2)(d) of the Ordinance, the Complaint Handling Policy (the “**Policy**”) of the office of the Respondent provides additional guidance (which this Board shall have regard to pursuant to section 21(2) of the Administrative Appeals Board Ordinance (“AABO”), as the Policy has been widely made known to the public and complainants):-

“(B) Discretion under section 39(2) to refuse to carry out or decide to terminate an investigation

8. *Section 39(1) and (2) of the Ordinance contain*

various grounds on which the Commissioner may exercise his discretion to refuse to carry out or decide to terminate an investigation. In applying some of those grounds, the PCPD's policy is as follows:

- a) The act or practice specified in a complaint may be considered to be trivial, if the damage (if any) or inconvenience caused to the complainant by such act or practice is seen to be small;*
- b) The complaint may be considered to be vexatious, if the complainant 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 complaint 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 concern 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.*

In addition, an investigation or further investigation may be considered unnecessary if:

- e) After preliminary enquiry by the PCPD, there is no prima facie evidence of any contravention of the requirements under the Ordinance;*
- f) The data protection principles are seen not to be engaged at all, in that there has been no*

collection of personal data. In this connection it is important to note that, according to case law, there is no collection of personal data by a party unless that party is thereby compiling information about an identified person or about a person whom it seeks or intends to identify;

- g) The complainant and party complained against are able or should be able to resolve the dispute between them without intervention by the PCPD;*
- h) Given the conciliation by the PCPD, remedial action taken by the party complained against or other practical circumstances, the investigation or further investigation of the case cannot reasonably be expected to bring about a more satisfactory result;*
- i) The complaint in question or a directly related dispute is currently or soon to be under investigation by another regulatory or law enforcing body; or*
- j) The ulterior motive of the complaint in question is not concerned with privacy and data protection.*

9. If any of the above grounds a) to j) is satisfied, the Commissioner may, having regard to all the circumstances of the case, exercise his discretion under section 39(2) to refuse to carry out or decide to terminate an investigation. The Commissioner shall notify the complainant in writing of his refusal to carry out an investigation and the reasons for the refusal within 45 days after receiving the complaint. For the avoidance of doubt, in calculating the 45-day period, time will only start to run from the date on which the PCPD has received from the complainant sufficient information to satisfy the criteria of a

complaint under section 37, being the date specified in the PCPD's notification to the complainant of acceptance of his/her complaint. If the Commissioner decides to terminate an investigation before its completion, the Commissioner must, as soon as practicable by notice in writing served on the complainant, inform the complainant of the decision and the reasons therefor."

ANALYSIS AND DECISION

(1) Whether the Re-investigation remitted by the Board in AAB No. 52/2011 is an investigation that falls within the ambit of section 39 of the Ordinance?

36. It is clearly set out in section 38 of the Ordinance that there are only two circumstances under which an investigation can be carried out by the Respondent, namely, (i) where the Respondent "receives a complaint" (in the words of section 38(a)); or (ii) as initiated by the Respondent on his own motion on specified grounds. There is no other provision in the Ordinance allowing the Respondent to carry out an investigation.

37. The Re-investigation was carried out pursuant to the Directions. This plainly cannot fall under (ii) above, as the Respondent did not resume the terminated investigation on his own initiative. Thus, the Re-investigation must still be regarded as an investigation upon receipt of a complaint, and this assists the construction of section 39(2) of the Ordinance to include the Re-investigation, as an investigation "initiated by a complaint" in the words of section 39(2).

38. On the other hand, it would be absurd to limit the scope of '*complaint*' under section 39(2) of the Ordinance in a restrictive manner to exclude an investigation pursuant to a direction of the Board. If that is the case, the Respondent cannot take into account even major post-Directions changes in circumstances which would have called for a termination of investigation had it been a fresh complaint and not remitted by the Board. There is no provision either in the Administrative Appeals Board Ordinance or the Ordinance to enable the Board to amend the Directions for a change of circumstances, and the Board has been *functus officio* in so far as the Directions are concerned. There is no other provision other than section 39 of the Ordinance empowering the Respondent to terminate an investigation. Thus, a purposive construction of section 39(2) is

justified to give the Respondent the discretion under section 39(2) even for an investigation remitted to him by the Board, the exercise of which discretion the Board can review upon another appeal, as in the present case.

39. Therefore, the Re-investigation should be an investigation carried out pursuant to a '*complaint*' under section 38(a) of the Ordinance, and the discretion to terminate the same exists under section 39(2) of the Ordinance.

(2) Whether the Respondent had properly exercised his discretion to terminate the Re-investigation by reason of section 39(2)(d) of the Ordinance that further investigation was unnecessary?

40. There are five circumstances under section 39(2) of the Ordinance by which the Respondent can terminate an investigation. Section 39(2)(d) is the residual ground, which is further expanded by the Policy.

41. Since the Board gave the Directions in July 2012 and the Respondent had commenced the Re-investigation, but SCB has refunded, and the Appellant has accepted the refund, in full. In fact the Appellant specifically requested SCB to refund the sum of USD 1,640 in Hong Kong dollars (HK\$12,792).

42. Although, on the face of it, the Directions given by the Board in AAB No. 52/2011 at §44(ii) are divided into two parts, paragraph (a) dealing with whether there has been a breach of the Ordinance by SCB, and paragraph (b) which is further divided into three questions concerning the facts and costs of retrieval, they are all linked to the last question under paragraph (b)(3), i.e. whether the charges of USD 1,640 were excessive in all the circumstances of the case.

43. Therefore, whether the charges were reasonable or excessive was the central and pertinent issue in the Directions and the Re-investigation, and which stands as the crux of the Appellant's complaint to be re-investigated pursuant to the Directions.

44. As stated in the Respondent's website as to the policy in relation to the Ordinance, it is remedial in nature, as opposed to punitive. There is no reason to disagree with this policy. A refund is one of the most obvious examples of remedial actions that can be taken by a data user in a case like this, even though it was done on a without admission of liability basis.

45. The Board should take a broad practical view of the matter, and take into consideration public resources that would have to be continued to be taken up by the Re-investigation to look into disputed factual issues of the SCB's back-up files

and the crash of the laptop, which were only peculiar to the facts of this case and not of any public importance or interest.

46. Bearing in mind the remedial nature of the Ordinance and the overall practicality in this matter, this Board is firmly of the view that the Re-investigation could not be reasonably expected to bring a more satisfactory result, and, taking into account paragraph 8(h) of the Policy, the discretion under section 39(2)(d) of the Ordinance should be exercised in terminating the Re-investigation.

47. For the above reasons, this Appeal is dismissed and the Termination Decision of the Respondent is upheld in full.

ANONYMITY ORDER

48. The Appellant has applied for an anonymity order in the present appeal, which is not opposed by the Respondent.

49. SCB, however, objected to it. In the written submissions of SCB the stated grounds were inter-alia that the Appellant has made certain comments and engaged in certain conduct, which were adverse to the interest of SCB. At the hearing, Mr. Chan of the Counsel for SCB quite rightly rather emphasized the submission that, prima facie, justice ought to be administered in public, unless there are convincing reasons to the contrary.

50. We have already set out our views and reasons in disposal of this Appeal. This is a reasonably arguable appeal in relation to the issues discussed aforesaid, and certainly is not a vexatious appeal. We disagree with the proposition that public interest is only served in disclosing the identity of the Appellant in this decision.

51. On the other hand, we respectfully adopt the reasoning of the Board's decision in AAB No. 52/2011 that:-

- (1) The present case is one which is concerned with the privacy and personal data of the data subject, i.e. the Appellant; and
- (2) There is a real risk that the Appellant's employment prospects might be affected if his name is publicized in this decision.

52. This Board shall exercise the discretion to grant an anonymity order in the same terms as that of **L v Equal Opportunities Commission & Ors** [2002] 3

HKLRD 178 at §19, namely, that:-

'The name of the Appellant should appear as letter "L" in any report of the present appeal and in the titular page of the Board's decision released to the public. The naming or identification of the Appellant in the context of any report of this appeal is prohibited.'

COSTS

53. We now turn to the question of costs. SCB seeks costs against the Appellant.

54. Section 21(1)(k) of the AABO empowers the Board to make an award to any of the parties to the appeal of such sum, if any, in respect of the costs relating to the appeal.

55. Section 22 of the AABO further provides that the Board shall only make an award as to costs under section 21(1)(k):-

- (1) Against an appellant, if it is satisfied that he has conducted his case in a frivolous and vexatious manner; and
- (2) Against any other party to the appeal, if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.

56. In deciding the question of costs, we have carefully considered the following factors:-

- (1) This appeal is dismissed.
- (2) The Respondent does not seek costs from the Appellant.
- (3) The Appellant cannot be regarded as acting in a frivolous or vexatious manner in conducting this appeal. His appeal is reasonably arguable, although he has also made some irrelevant and unfounded allegations against SCB.

57. Thus, the Board is firmly of the view that no costs should be ordered against the Appellant.

58. It also is not the case that it would be unjust and inequitable not to order costs in favour of the Appellant against any party.

59. Thus, there should be no order as to costs.

CONCLUSION AND ORDERS

60. This appeal is dismissed with no order as to costs.

61. An anonymity order is granted in favour of the Appellant in terms as stated in paragraph 52 above.

(signed)

(Mr. Chan Chi-hung, S.C.)
Deputy Chairman
Administrative Appeals Board