Administrative Appeal Board

Administrative Appeal No. 34/2007

BETWEEN

AMANDA TANN — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram : Administrative Appeals Board

Hearing Date : 17 December 2007

Date of handing down Decision with Reasons : 25 March 2008

Decision

The Appeal

1. This is an appeal against the decision of the Privacy Commissioner for Personal Data ("**the Commissioner**") exercising the power under Section 39(2)(d) of the Personal Data (Privacy) Ordinance ("**the Ordinance**") to refuse to investigate into a complaint of the Appellant made in a data request form

addressed to Ming Pao Newspapers Limited ("**Ming Pao**") (for the attention of Miss Cecilia Chan).

Background

2. The background leading to this appeal may be briefly stated. On 10 July 2006, Ming Pao published an article ("the **Article**") in its newspaper in relation to the Appellant using a "*Presidential Certificate of Education Award*" ("the **Certificate**") issued under the President's Education Awards Program and Temple Intermediate School in the United States of America, for marketing tuition service in Hong Kong. The Article was published at page A4 of the newspaper and entitled "*Amanda Tann 廣告稱獲頒總統獎 去年發400 萬張補習天后被促停用布殊獎狀宣傳*". It contained a photo of the Appellant holding a President's Award for Educational Excellence which was signed on behalf of Temple Intermediate School. The Article also identified the Appellant as the Chief Lecturer of Ever Learning Centre ("*Amanda Tann 為活學教育中心的首席導師*"). The Article also made express references to representation of information on the Appellant by Mr. C.P. Cheung ("**Mr. Cheung**"), the principal of Temple Intermediate School and the spokesman of the President's Education Awards Program. The Article had thus reported that the Appellant had used the Certificate issued by the President's Education Awards Program to promote her tuition service in Hong Kong. The Article also reported certain comments made by Mr. Cheung, the principal of Temple Intermediate School and the spokesperson of President's Education Awards Program ("Information Providers") to the news reporter (being one Miss Lee Hiu Man ("**Miss Lee**")) concerning the background and nature of the certificate and the appropriateness

of its use for commercial promotion. More particularly, the Article states, *inter alia*, that : -

(a) "*Amanda Tann 的獎狀由美國洛杉磯初中學校 Temple Intermediate 簽發… 張校長解釋，學校每年也會申請200 多張「教育獎」獎狀，頒發給對學校有貢獻的人士…他表示，本人並不認識 Amanda Tann，是在洛杉磯中華會館前主席李超華介紹下向她頒發獎狀。張正平強調，校方只是利用獎狀表揚曾協助學校的人士，認爲 Amanda Tann 不應該繼續利用獎狀，作任何宣傳或市場推廣用途…*"

(b) "負責統籌獎勵計畫的機構發言人回覆查詢時表示，每年會邀請全美學校參加計畫，由校長自行決定哪位學生獲獎… 「我不明白爲何獎狀會發給這位 Dr. Amanda Tann。 很明顯，這個獎不是爲教師而設，對成人根本價值不大。」

(c) In the Article, there is also a photo of Mr. Cheung, the principal of Temple Intermediate School, with the following caption : "美國洛杉磯初中學校 Temple Intermediate School 校長張正平。"

3. On 1st December 2006, the Appellant through her solicitors Messrs. Tai, Tang & Chong made a data access request ("the **Request**") to Ming Pao, by way of a data request form ("**Data Request Form**") which was a prescribed form of the Commissioner. The relevant part is set out below, with the typewritten words in italic character : -

PERSONAL DATA (PRIVACY) ORDINANCE DATA ACCESS REQUEST FORM[1]
(Read this Form and the accompanying Notes carefully before completing

the Form.)

To : *Ming Pao Newspapers Limited*[2] (for the attention of *Miss Cecilia Chan*)

1. ...

2. The Requested Data

Save as excluded under paragraph 3, this data access request covers the personal data of the data subject as defined below (hereinafter referred to as "the Requested Data"):

Type or other description of the Requested Data (e.g. medical records, personnel records, records relating to particular incident, etc.): *e-mails from Mr. C.P. Cheung, principal of Temple Intermediate School and the spokesperson of President's Education Awards Program.*

Date around which or period within which the Requested Data were collected (if known)[6]:

Around the publication of the 10th July 2006 issue of Ming Pao Daily News.

Branch or staff member by whom the Requested Data were collected (if known):

Miss Lee Hiu Man Justine

3. **Exclusions**

For the avoidance of doubt, the Requested Data access to which is sought **do not include** any personal data[6]:

☒ contained in documents previously provided to your organization by the data subject (e.g. letters to your organization from the data subject)

☒ contained in documents already provided to the data subject by your organization (e.g. letters to the data subject from your organization or documents provided pursuant to a previous request)

☒ in the public domain (e.g. newspaper clippings or entries in public registers concerning the data subject)

☐ (other excluded personal data) : _____

NOTES

...

6. For example, if the Requested Data relate to a particular incident, say, a medical consultation, fill in here the date of that consultation as best

remembered. If the Requested Data relate to a particular period, for example, a period of employment, fill in here the relevant service period.

7. Tick to exclude, as far as possible, any personal data you do not wish to include within the scope of the Requested Data. This may help to avoid any unnecessary delay or charge in complying with the data access request (see Note 8 below).

8. Tick and fill in according to preference. However, compliance with the data access request may not be in the preferred manner where this is not reasonably practicable.

Ming Pao's response

4. Ming Pao had repeatedly refused to comply with the Request, as may be seen letters dated 22 December 2006, 3 January 2007, 2 March 2007 from Ming Pao, and after the Commissioner made a request for the email correspondence, from its solicitors Messrs Johnson, Stokes & Master dated 26 April 2007.

5. The objections in the letters dated 22 December 2006, 3 January 2007 and 2 March 2007 were various and may be summarized as follows : -

(a) Miss Lee had left the company since September 2006.

(b) The email correspondences between Mr. C.P. Cheung and Miss Lee, except those which have been published, were confidential information which a journalist would not disclose unless compelled by a court order.

(c) The email correspondence had been exchanged between Miss Lee and the Information Providers in the course of news reporting.

(d) The requested email correspondence were not personal data, although part of the content of the email correspondence might concern the Appellant.

(e) The usage stated in the process of collecting those remarks from the relevant Information Providers was to report on a piece of news which carried public interest. Prior consent would have to be obtained from the Information Providers. Moreover, it was contrary to well-established professional ethical standard for journalists to disclose correspondence with their sources without first obtaining their consent.

(f) Ming Pao had asked the Information Providers for comments and part of the comments have been published in the Article. Prior consent would have to be obtained from the Information Providers as the purpose of collecting was for news reporting purpose only.

(g) The email correspondence were journalistic materials which deserved special protection under both criminal and civil law, and the Bill of Rights. The case of *Goodwin v UK* (1996) 21 EHRR 123 was cited in support of the proposition that compelling a newspaper to disclose raw journalistic materials concerning confidential sources, unless with overwhelming public interest reasons, would amount to an infringement of the right to freedom of expression. There was no public interest involved in the disclosure.

(h) As a matter of practicality, it would be extremely difficult to trace the background materials such as email correspondence between the reporter and his or her sources.

6. After the Commissioner had made a request for the email correspondence, the solicitors of Ming Pao, Messrs Johnson, Stokes & Master by letter dated 26 April 2007 said that there were email correspondence exchanged between the reporter Miss Lee and both of the Information Providers, Mr CP Cheung and the spokesman, prior to the issue of the Article. Those email correspondence were still in Ming Pao's possession but they were exchanged on the basis that they would not be revealed to any third party. Ming Pao owed a duty of confidentiality to Mr CP Cheung and was not in a position to provide a copy of the email correspondences. There was an implied agreement or understanding with the Information Providers that it would not be disclosed to any third party. Ming Pao also relied upon sections 20(1) of the Ordinance for lack of consent from the Information Providers and section 61(1) of the Ordinance that the requested data was solely for the purpose of news activity. Further, protection of journalistic sources and materials is the cornerstone of press freedom in a democratic society.

7. By letter dated 10 August 2007, the Commissioner informed the Appellant through her solicitors refusing to carry out or continue investigation. The Appellant therefore lodged the present appeal.

8. At the hearing before us, Ming Pao was absent and the Appellant had not elected to call any oral evidence. The hearing was conducted on the basis of submissions made and the appeal bundle before us.

Appellant's grounds

9. Mr Ng on behalf of the Appellant submitted that the following matters are in his Client's favour.

10. Mr Ng submitted that there was no dispute that the email correspondence did exist, on the admission of Ming Pao. Ming Pao had given different reasons to object disclosure at different times. Even the Commissioner had at one juncture agreed that it was necessary to read the email correspondence. There was no difficulty to supply a copy of the email correspondence. The Commissioner had for unknown reasons chosen not to persist with his request for the email correspondence.

11. Mr Ng also submitted that the Commissioner had failed his statutory duty and in error : -

(a) The personal data requested had been *"published"* as evidenced by a number of admissions in the interpartes correspondence. Reliance was made to *Bennion on Statutory Interpretation* 4th Ed §195 that the legal meaning of an enactment corresponds to that grammatically meaning should be applied, and the *Shorter Oxford English Dictionary* that "publish " means *"make generally known, declare or report openly, announce, disseminate"*.

(b) The Commissioner should not have made a decision if he did not know whether the email correspondence had been published. This was the most proper way of resolving the dispute. The

Commissioner had a power and therefore a duty to exercise his power in reading the email correspondence.

(c) Given his power under the Ordinance, the Commissioner ought to have taken into account relevant materials, namely the email correspondence, before he made his decision.

(d) There is a distinction between protection of the source and the content in the email correspondence. Source might be protected but it was not necessarily right to say that the contents of the email correspondence are also protected. Confidentiality is not a relevant consideration for refusal to read the content. The Commissioner had taken into account irrelevant considerations.

(e) The Commissioner had failed to take into account the Section 61 exemption argument was raised for the first time on 26 April 2007.

(f) The Appellant would suffer prejudice if she was not given an opportunity to correct the information of her personal data.

(g) There was no difficulty whatsoever in making the disclosure. Analogy was made with the observation of the Honourable Mr Justice Rogers VP in the case of *Dynamic Way International Ltd & Anr v Ho Kui Chee & others* [2000] 4 HKC 138. Faced with a situation where the Appellant would have to meet the allegations

in the newspaper, she is exercising a legitimate right under section 18 of the Ordinance.

(h) The Appellant's request was clear. The words in section 2 cannot be subject to those in section 3. Further, the typewritten words in section 2 are more important than those in section 3. There could be no confusion for Ming Pao to understand what was stated in section 2, namely, the Appellant wanted to see all the emails in question, whether they were in the public domain. The tick of the box excluding data in the public domain merely refers to personal data in the public domain before publication of the Article.

Legal Requirements

12. The following provisions of the Ordinance are relevant to this complaint.

13. Section 18(1) of the Ordinance provides that a person may make request to be informed whether a data user holds and if so be supplied with a copy of his personal data : -

> *"An individual, or a relevant person on behalf of an individual, may make 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."*

14. Section 19(1) of the Ordinance provides that the data user would have to comply with such request within 40 days : -

> *"Subject to subsection (2) and sections 20 and 28(5), a data user shall comply with a data access request not later than 40 days after receiving the request."*

15. Section 20(3)(f) of the Ordinance provides that a data user may refuse a data access request if it comes under an exemption under Part VIII of the Ordinance : -

> *"A data user may refuse to comply with a data access request if –*
>
> ...
>
> *(f) in any other case, compliance with the request may for the time being be refused under this Ordinance, whether by virtue of an exemption under Part VIII or otherwise."*

16. Section 61 in Part VIII of the Ordinance then provides for exemption from complying with data access request for personal data held by data users whose business consists of a news activity, unless the data were published or broadcast, wherever and by whatever means : -

> *"(1) Person data held by a data user –*
>
> *(a) whose business, or part of whose business, consists of a news activity; and*
>
> *(b) solely for the purpose of that activity (or any directly related activity), are exempt from the provisions of –*
>
> *(i) data protection principle 6 and sections 18(1)(b) and 38(i) unless and until the data are published or broadcast (wherever and by whatever means);*
>
> *(ii) sections 36 and 38(b).*
>
> ...
>
> *(3) In this section –*
>
> *"news activity" (新聞活動) means any journalistic activity and includes –*

(a) the –

(i) gathering of news;

(ii) preparation or compiling of articles or programmes concerning news; or

(iii) observations on news or current affairs,

for the purpose of dissemination to the public; or

(b) the dissemination to the public of –

(i) any article or programme of or concerning news; or

(ii) observations on news or current affairs."

17. For the exemption under section 61(1) of the Ordinance to apply, the personal data in question has to satisfy three requirements, namely : -

(i) that the personal data are held by a data user whose business, or part of whose business, consists of a news activity (section 61(1)(a) refers);

(ii) that the personal data are held by the data user under (i) solely for the purpose of that activity (or any directly related activities) (section 61(1)(b) refers); and

(iii) that the personal data has not been published or broadcast, wherever and by whatever means (section 61(1)(b)(i) refers).

18. It is not disputed that the business of Ming Pao consists of a "news activity" as defined under section 61(3) of the Ordinance. In addition, as the email correspondence was sent and/or received by Ming Pao in the course of carrying out journalistic activity leading to the publication of the Article, there

being no evidence to the contrary, we agree that the email correspondence was held by Ming Pao for the sole purpose of news activity. The first two requirements are therefore fulfilled. As regards the third requirement, we shall deal with this below.

Discussion

Different excuses from time to time ?

19. We accept that it was unsatisfactory that Ming Pao seemed to have advanced different reasons at different times to object the request of the Appellant for access to personal data of the Appellant. It is also true that the Commissioner had apparently relied upon more on other different reason(s) to refuse to conduct further investigation. However, this Board having been charged with the duty to hear the appeal and hence has to consider all the grounds, such criticism has to fall apart unless it calls for an investigation into the credibility or genuineness of the responses from Ming Pao or the Commissioner. No application was made for any person to attend before the Board to give evidence or cross examination. Fortunately therefore this problem did not seem to arise in this case.

The Right Approach

20. The central issue here is whether on the true construction of Sections 2 and 3 of the Data Request Form, the Appellant had intended to exclude from her request all her personal data that had been published. In construing its content we should not treat that document as a piece of statute, nor a contractual document. It is true that if there is conflict between two

sections we will have to determine which is more important. However, this does not necessarily mean that we always have to decide which is the leading and which is the subordinate one.

21. We were referred to *Bennion on Statutory Interpretation 4th Edition s195* and *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360 per Lord Watson by the Appellant. These are authorities on statutory interpretation. We were also referred to the House of Lords case of *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12 which concerned with a bill of lading in the context of a contractual relationship. These authorities are no more than an illustration of how words should be interpreted under different contexts. In our view the Data Request Form document was designed to be read and filled in by people without the need for any or any substantial legal training. It should be read and given a meaning that is in accordance with common sense, in all the circumstances and under the context in question.

22. Adopting this approach, we are of the view that the right approach is to consider the words under Section 2 refer broadly to the description of the personal data under request, and the words Section 3 refer to what the request would like to exclude. To give a construction as suggested by the Appellant that (a) there was no confusion that the Appellant wanted to see all the email correspondence in question, whether they were in the public domain, and (b) that the words in Section 2 would control Section 3, would render the existence of Section 3 meaningless. Approaching the matter in this manner, Section 3 clearly contains the information the Appellant wished to be excluded from disclosure. We also note that there was a footnote 7 which expressly provides

for the selection of any personal data which the Appellant did not wish to include.

23. There was no suggestion that the Appellant did not know what she was doing when ticking the relevant box under Section 3. Her grounds of appeal said she knew what she was doing. The question is the effect of what she had done, namely, ticking (actually that was a mark with a cross) a box that concerned and resulted in the exclusion of personal data.

24. Accordingly, with legal assistance and having expressly excluded any data in the public domain, on a plain reading of the Data Request Form the Appellant was clearly intending to exclude personal data which had already been published, including those that had been published in the Article. The submission that the exclusion was limited to personal data before the existence of the publication in question cannot be supported by a plain reading of the Data Request Form as a whole and in particular what had been ticked and typed in Section 3. This submission simply cannot be substantiated.

Difficulty in distinguishing published and unpublished data?

25. Mr Ng then submitted that there could be a problem with distinguishing published and unpublished data. If part of the email correspondence which had been published refers to any part of the other email correspondence which had not been published then the unpublished part should be disclosed. Therefore the Commissioner should have seen email

correspondence to decide whether they should be considered to be in the public domain.

26. We believe this argument may have force if the Appellant may be able to demonstrate which part of the Article would have the effect as submitted. There is always a minimum threshold which the Appellant must show, at the least, that there is a prima facie case that there could be a reference in the published part to unpublished data, or somehow published and unpublished data are intertwined. To argue that there was a possibility of cross-reference or intertwining that would give rise to possible confusion is to argue in a vacuum. The logical extension of such argument would be that, as Mr Ng had also suggested, all the contents of the email correspondence, whether or not their contents had not been published (and in the latter case should not be disclosed under the Section 61 exemption), must be disclosed otherwise the Commissioner nor the Appellant would not know if there had been any reference to an overlapping situation. This amounts to a submission that there can be no exemption under Section 61(1). We cannot accept such submission.

27. Secondly, it is true that there might be a distinction between protection of the source and the content in the email correspondence for the purpose of identifying the extent of data protection. On the other hand, the mere existence of an identifier to the Appellant does not mean all the contents in the email correspondence would be personal data. Section 61 draws the distinction between data that have been published and those that have not. Prima facie there should not be difficult to distinguish a certain data that has or has not been published. Whether a certain data has been published is a matter

of fact. Without advancing evidence of any real possibility to show reference in the published part to unpublished data, or somehow published and unpublished data are intertwined, this Board is unable to accede to the Appellant's complaint.

28. Thirdly, as a matter of exercise of discretion on whether the request of the Appellant should be acceded, we also do not see the alleged difficulty in the context of the present case. The main purpose of the present request is clearly that the Appellant was not happy with what was published. For unpublished data Ming Pao certainly did not mention them and apparently did not rely upon them. The Appellant suggested that there was no real difficulty in disclosing the email correspondence. The absence of practical difficulty is not the test whether the email correspondence should be disclosed. Equally it may be said that the Appellant could as well issue a new form without the exclusion of published data without any difficulty. Parties are entitled to adhere to their legal rights, subject to perhaps the question of costs.

Competing rights

29. Our view was reached on the basis that no argument was advanced before us on the Bill of Rights provisions nor the case of *Goodwin v UK* and hence we do not have the benefit of such submissions. However, even giving Section 61 a literal as opposed to a liberal and purposive construction, we cannot agree that Sections 18 and 61 would give the Appellant an unrestrictive right to see all the email correspondence, even if she had not excluded any personal data from her request under Section 3.

30. This is because Section 61 strikes the balance between two competing interests and fundamental rights : that there should be protection of data privacy on the one hand, and that there should not be interference with free speech on the other. It must be borne in mind that breach of Section 18 of the Ordinance would attract criminal sanction and it is only right that Section 61 would have to be given a construction that it would not restrict a data user who is a newspaper exercising its freedom of speech except under clear authority of law. In our view, the law does not provide the right to protect data privacy over that of freedom of speech, certainly not under Section 61.

Practical difficulty

31. The Appellant had suggested in her skeleton that the personal data requested would be used for a defamation claim. This submission must also be rejected.

32. The Honourable Mr Justice Saunders in the recent case of *Wu Kit Ping v Administrative Appeals Board* HCAL 60/2007, 31 October 2007 said that it is not the purpose of the Ordinance to supplement rights of discovery in legal proceedings nor to add any wider reliefs for discovery of identity of a wrong doer in a *Norwich Pharmacal* situation, nor enable a data subject to locate information for other purposes, such as litigation :-

> "34. *It is not the purpose of the Ordinance to enable an individual to obtain a copy of every document upon which there is a reference to the individual. It is not the purpose of the Ordinance to supplement rights of*

discovery in legal proceedings, nor to add any wider action for discovery for the purpose of discovering the identity of a wrongdoer under the principles established in Norwich Pharmacal v Commissioners of Customs and Excise [1974] AC 133. That conclusion is entirely in accord with the decision of Deputy Judge Muttrie in Gotland Enterprises Ltd v Kwok Chi Yau [2007] HKLRD 236 at 231-2.

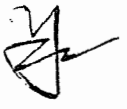
...

45. *... it is not to enable a data subject to locate information for other purposes, such as litigation"*

33. The present request is in our view a request that was intended as a collateral attack against Ming Pao. On this ground we would also reject the Appellant's complaint.

Conclusion

34. The appeal should therefore be dismissed.



(Andrew Mak)
Deputy Chairman
Administrative Appeals Board