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ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 38/2012

CORRIGENDUM

The Decision made by this Board on 26 July 2013 has the following amendment:

- (1) Page 1, the name of the Appellant "YANG YUNG FAI" should be changed to read "YAN YUNG FAI". •

Dated this 20th day of August 2013.

(signed)

(Yung Yiu-wing)
Deputy Chairman
Administrative Appeals Board

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 38/2012

BETWEEN

YANG YUNG FAI

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 24 April 2013

Date of handing down Written Decision with Reasons: 26 July 2013

DECISION

Complaint against FEHD

1. At all material times the Appellant was a Senior Health Inspector with the Food and Environmental Hygiene Department (“FEHD”). In April 2010 the Appellant made a complaint to Public Service Commission (the “PSC”) against one of its staff members. He alleged that he was wrongly excluded from taking part in the appraisal of his subordinates for the reporting cycle of 2007/2008. In the course of dealing with the complaint, PSC sent an e-mail dated 22 April 2010 (“the e-mail”) to the Appellant purporting to answer certain queries raised by him. In the e-mail

PSC stated in effect, among other things, that “it noted from the membership list provided by FEHD that the Appellant did serve as one of the members of the relevant assessment panels in 2007/2008.” Relying on these representations, the Appellant made a data access request (“the Request”) under section 18 of the Personal Data (Privacy) Ordinance (“the Ordinance”) to FEHD on 17 February 2012. The details set out in the Request were in the following terms: “Reference is made to para.3 of a reply e-mail from PSC dated 22.4.2010 at Appendix, I am demanding all my personal data as appeared in the “membership list” being held by the Grade Management Section of the Department. Besides, please also provide me with the relevant attendance record likely containing my personal data.”

2. On 8 March 2012 FEHD responded to the Request by letter that the Appellant did not serve on the assessment panels in question and that therefore the membership list and the attendance record did not contain his personal data. The Appellant did not think FEHD had complied with his data access request and hence lodged a complaint to the Respondent in June 2012.

Decision of the Respondent

3. While conducting the usual preliminary enquiry, the Respondent learned that after the Appellant lodged his complaint against FEHD, he had made a similar data access request to PSC for the membership list on 12 March 2012. Responding to this request PSC provided the Appellant a redacted copy of the membership list omitting the personal particulars of other members with an added-on remark: “the list is an outdated version which was not adopted eventually.”

4. In a conversation over the telephone with an officer of the Respondent, the Appellant confirmed that he was not allowed to attend the meetings of the Assessment Panels. In a fax letter to the Respondent he further explained that the

reason for making the Request was to learn the truth as he wanted to check the Attendance Record to see if someone had forged his signature on it.

5. Responding to the enquiry by the Respondent, FEHD confirmed that the Appellant was not a member of the Assessment Panels and did not attend their meetings. It further stated that there was no such attendance records for the meetings as requested by the Appellant and, to prove its point, provided the reports of Assessment Panels showing the composition of the panels and the attendance of the members. The name of the Appellant did not appear in those reports. As to the membership list provided by PSC, FEHD admitted it was prepared by the Principal Hawker Control Officer of Yau Tsim Office and forwarded to PSC. It further explained that it was “a preliminary list” as the Appellant and other members on that list had been posted out when the Assessment Panels convened and their successors were appointed in their place. A new list was not drawn up to reflect the change of composition.

6. The Respondent informed the Appellant of the above response of FEHD. Despite that, the Appellant insisted that FEHD had withheld his requested data as it failed to provide the final membership list he requested and alleged that it had employed its usual distracting tactics.

7. Based on the information obtained, the Respondent found the explanation given by FEHD to be reasonable in the circumstances and decided to exercise his discretion not to pursue further the complaint. He gave two broad reasons. Firstly, PSC had already provided the Appellant a copy of the preliminary membership list retained by FEHD and therefore the Respondent did not think any useful purpose could be served by further investigation. Secondly, it appeared to the Respondent that the Appellant was motivated by personal feud or other factors not related to concern for his privacy or protection of his personal data.

Grounds of Appeal

8. Ground I---the decision of the Respondent is unsound as it is based on false, half true and misleading information provided by FEHD.

9. Ground II---The Respondent has failed to fully take into account the background information surrounding the case.

10. The Appellant amassed quite a large amount of materials to support his complaint to the Respondent in this appeal. It is not necessary for this Board to go into details of these materials. Suffice to say most of these materials served to show the questionable integrity of some officers of FEHD, their lack of sense of duty in enforcing the law, and the unfair treatment or retaliation of the Appellant by his department.

Decision of the Board

11. To properly understand and evaluate the grounds for the decision of the Respondent and to realise the fallacy of the arguments of the Appellant, it is worthwhile to note two points of law. Firstly, there is an important distinction between “data” and a “document”. As it is clearly pointed out and explained by Mr Justice Saunders in the case of *Wu Kit Ping V AAB (HCAL 60/2007)* that the right of an individual to have access to his personal data is not the same as his right to a copy of the document containing his personal data. Secondly, in the event that a document contained inaccurate personal data of an individual, compliance of a Data Correction Request under section 22 of the Ordinance is not necessarily by means of eliminating the document from their record altogether as if it never existed. The duty of the data user in such a case is to rectify the record of the personal data of the data subject effectively in a way not to mislead anyone who may examine the record into believing that the wrong data remain to be correct. Common sense dictates that it may not even be proper under some circumstances for the data user to obliterate the

document from its record or to keep and present its record leaving no traces that such mistake (recording the wrong personal data) was ever made.

12. The Respondent found the explanation given by FEHD reasonable. This finding of fact was hotly disputed by the Appellant on two grounds. He demonstrated at length that the list provided to him was not a "preliminary list" as alleged and contended that it should be the final list and in support he advanced two reasons. Firstly his former assistant had prepared a preliminary list which was submitted before the formation of the Assessment Panels. He said this list should still be in the file of Yau Tsim Office. Secondly, as the Board understood, he argued that the background materials must have dented the credibility of the department or the individual officers involved. On the basis of the poor credibility allegedly established, the Appellant sought to fault the decision of the Respondent.

13. The allegation that the Respondent had not taken into consideration of the background of the case cannot be substantiated. There is nothing to doubt the claim of the Respondent that he had noted the various matters of the background. It is true that the Respondent did not specifically dealt with most of these matters in his reasoning or in his defence statement filed in this appeal. However this Board agrees with him that all those matters not specifically dealt with should not be his concern.

14. The argument of the Appellant was to the effect that all the background materials when looked at together should be enough for the Respondent not to accept the explanation of FEHD. However it is noted that most of the background materials would not even be relevant and admissible under the strict rules of evidence in a court of law or tribunal of fact. This Board notes that the Respondent may not be obliged to apply the strict rules of evidence, at the very least, not at the stage of preliminary enquiry. Be that as it may, the Respondent has to analyse these materials in a proper and meaningful way. The issue in this regard is therefore

whether the Respondent was entitled to regard these materials not of his concern after a proper analysis.

15. As mentioned before, the Appellant made various allegations about the integrity, misconduct and impropriety of the officers involved. The Ordinance only empowers the Respondent to investigate complaints concerning breaches of its requirements. The Respondent's hands were tied if he wanted to look into the truthfulness of each and every such allegations, albeit determining its truthfulness or otherwise. He had no power to investigate or even make enquiry about such allegations against the officers as shirking their enforcement duty, instituting malicious prosecution against the Appellant and the like. Such enquiry or investigation, if the Respondent had chosen to undertake, could only be justified on the ground that it was reasonable for him to do so in the course of his enquiry or investigation of complaints relating to breaches of the requirements of the Ordinance. It would not be reasonable if these allegations were totally unrelated to the complaint.

16. The crux of the argument of the Appellant was that these allegations were related to his complaint in the sense that these allegations which he claimed to be true supported his view that FEHD was covering up their breach of the requirements of the Ordinance. The circumstances of the case strongly suggest that these allegations were not related to the complaint the Respondent was dealing with. The Respondent would have been excused for ignoring them altogether but he had not. He had taken them into consideration. He did not have to adjudicate on the truthfulness of every single allegation unless he had reasons to believe that the truthfulness or otherwise of these allegations would assist him in determining a probable breach of the requirements of the Ordinance. The correct approach, which he had adopted, was to take a global view of the information obtained from all parties concerned especially the background materials including those aforesaid allegations of misconduct etc. He had to assess the reply by FEHD in the light of the allegations levelled against it and its officers before taking the next step, if necessary.

17. The background information that the Appellant provided can be briefly summarised as follows. It all started when some of the subordinates of the Appellant were found smoking cigarettes on the premises of FEHD. With the explicit consent and knowledge of his superior the Appellant undertook enforcement actions by issuing summons against the guilty party. These enforcement actions provoked strong reaction by the union prompting his superior to deny that he had ever sanctioned in any way the enforcement actions taken by the Appellant. Not only that, the Appellant alleged that subsequently there were various retaliations by the department, notably transferring him out to another district and removing him from the Assessment Panels. Removing him from the Assessment Panels would have an adverse effect on the assessment of his subordinate which had assisted him in taking enforcement action against other colleagues. His strong disapproval of FEHD and its officers for their neglect of duty on other occasions could also be the cause of retaliations.

18. It should be noted that the crux of the contention of the Appellant is that FEHD covered up something by providing false and misleading materials and concealing information material to the investigation. He insisted that the membership list retained by FEHD was the final list and maintained that if there was ever a preliminary list it would be the one prepared by his subordinate. For these reasons he seemed to suggest that FEHD provided false or misleading information, and covering up the existence of the preliminary list. The other document which was allegedly withheld was the attendance record of meetings of the Assessment Panels. He suspected that on this record someone forged his signature. Apart from those documents just mentioned, the Appellant did not specify clearly what information or documents were false or misleading or what information was withheld.

19. Taking the argument of the Appellant to its highest, the background materials were relevant to his complaint for one and only one possible reason, namely the credibility of the explanations tendered by FEHD. Generally speaking the

Appellant suggested the purpose of tendering such explanation as they did, FEHD and its officers were to cover up the misconduct of the officers or malpractice of FEHD. On close analysis of the explanation given by FEHD, it did not help them to achieve this purpose. For instance, whether the institution of prosecution or of disciplinary proceedings against the Appellant was proper did not depend on the explanation being given to the Respondent being true, and whether they had been shirking the duty of enforcing the law had nothing to do with the explanation given. The Appellant must rely on three essential facts to substantiate these allegations of misconduct and malpractices etc. Firstly he was once a proposed member of the Assessment Panels, secondly he was transferred out of the district and thirdly he was not allowed to input his own assessment on his subordinate. These essential facts were admitted by FEHD. These facts are not in dispute and no question of credibility could possibly arise. That they described a final list as a preliminary list, did not damage whatever credibility of the Appellant might have in his various allegations against his department or his colleagues. In the premises, whether FEHD could justify the alleged misconduct of the officers in its personnel management and enforcement of the law, or to rationalise the various actions viewed by the Appellant as retaliation had no bearing on the credibility of FEHD or his officers with regard to the explanation tendered to the Respondent. The Respondent was entitled to note that those allegations were not his concern and to conclude that the explanation given by the FEHD was reasonable and accepted it. Therefore the first ground of appeal that the decision of the Respondent was unsound as it was based on false and misleading materials must fail. Likewise, the second ground of appeal that the Respondent failed to take into consideration the background materials had no merit and must also fail.

20. The Appellant served the Request for the sole purpose of establishing the fact he was unfairly and improperly deprived of his inputs to the Assessment Panels. Such purpose had already been achieved by getting confirmation from FEHD and

PSC that he was once on the membership list. That it was qualified as a preliminary list is hardly a subject-matter of complaint. It is because this qualification is accurate according to the circumstances which are not in dispute. As the Board understands, the Appellant's criticism was that the list was intended to be a final list. Be that as it may, it is not the concern of the Respondent. The Appellant alleged it was intended to cover up something.

21. This argument did not stand to reasons. He could not say what could be covered up by qualifying the list as a preliminary one. As has been said above that FEHD and PSC admitted he was removed from the Assessment Panels and did not cover up this element of grievance of the Appellant. Secondly he was only entitled to access to his personal data and not to the personal data of other officers who was sitting on the Assessment Panels and he could have no legitimate complaint that the personal data of other members were redacted from the list.

22. One of the reasons for the Respondent not to pursue any further the complaint was that it was motivated by personal feud or other factor not related to concern for his own privacy and data protection. From the background information supplied by the Appellant, it would be quite clear the Appellant was more anxious to discover some documentary proof in order to find out who played what part in the retaliations than to protect his privacy and personal data. To clarify if the Appellant harboured a genuine concern for the protection of his privacy, the Board asked him what personal data apart from his name, rank, and current posting, and that he was named as a member on the Assessment Panels could be found on the membership list he was seeking. He frankly admitted there was none. On being asked for what purpose he wanted the so called final membership list, he said he wanted his personal data corrected to show he was not serving as a member. This is contradictory to his criticism that the list was improperly qualified to show in fact he was not a member of the panels. More importantly, the Appellant's right is restricted to access to his personal data and not to a document which contains his personal data. Therefore

whether there was such a preliminary list was quite besides the point. The Appellant failed to convince the Board that he had any genuine concern for the protection of his privacy or personal data when making the Request and lodging the complaint with the Respondent. For all these reasons the Respondent was right to conclude that the complaint was motivated by personal feud and not related to concern for the privacy and protection of personal data.

23. The Board finds that the Respondent has taken a proper approach to evaluate the materials obtained before him. He is entitled to accept the explanation offered by FEHD. Despite having been informed of the response of his department, the Appellant persisted on pursuing the complaint raising the most serious allegation that someone might have forged his signature on the attendance record. Such allegation should never have been made as there was nothing to suggest this probability. Looking at the background of the circumstances, especially the large volume of materials which, to say the very least, bore out the disagreement the Appellant with the department, the Board cannot fault the conclusion of the Respondent that the complaint was motivated by personal feud or other factors not related to concern for his privacy and data protection and also agrees with the Respondent that it served no useful purpose to deal further with the complaint for the following reason.

24. The Appellant had already had a copy of the membership list from the PSC. Even if there was another copy which was prepared by his subordinate, there was nothing to suggest that the contents were not the same, in particular with regard to his own personal data. Whether PSC was right to qualify the membership list to show it was not eventually adopted, whether it should be redacted to conceal the personal data of other members and whether it was right for FEHD to describe it as a preliminary list, the important fact remained that the Appellant had already obtained access to his personal data and which data were correct, namely his name, current rank and posting, and the fact that he was once a member and was subsequently

replaced. Further enquiry or investigation into the complaint could not possibly discover any other personal data, be they correct or incorrect, of his in the membership list whatever its descriptions given by PSC and FEHD. As to the alleged attendance record, it must be a forged one if it ever existed. There is not an iota of evidence that there was such document. On the contrary reports produced by FEHD proved otherwise. As the Respondent rightly accepted the explanation given by FEHD, there was no legitimate ground or reason to pursue this allegation any further.

25. The Respondent has the discretionary power under S39(2)(d) of the Ordinance to refuse an investigation and set up his policy to govern the exercise of this discretion. In the instant case, the two reasons discussed above were based on findings rightly reached and both of them fell within the letter and spirit of the Ordinance and the policy. The Respondent initially also relied on the ground under S39(2)(c) that the complaint was frivolous or vexatious or not made in good faith but he did not elaborate clearly his reasons notified to the Appellant and did not seek to argue on that ground in the appeal. However the Board finds that his reasons based on S39(2)(d) is sufficient to justify his decision and dismisses the appeal.

Costs

26. The Respondent applied for costs. The Appellant and the Respondent both agreed that the Board should summarily determine the quantum of costs should it allow any party costs. The Respondent submitted a statement of itemised costs incurred up to the date of hearing in the total sum of \$9,638.66. There was no challenge to this amount. The Board finds that the costs set out therein totalling \$9,638.66 are reasonable, if not on the low side, in terms of hourly rates and time spent. Accordingly the Board assessed the costs of the Respondent up to the day of hearing to be the same amount as claimed.

27. The Respondent also claimed the costs of attending the appeal hearing including costs for its Chief Legal Counsel. After the hearing the Appellant wrote to the Board submitting that the claim for costs of attendance by the Chief Legal Counsel should be excluded for the sake of fairness. The preparation of the appeal may be tedious and complicated but the presentation of argument at the hearing should not be expected to be complicated and in fact it transpired that nothing unexpectedly complicated arose in the arguments at the hearing. Based on this factor, the Board assessed the costs for the hearing at \$1,500 and this amount is reasonable whether or not the Chief Legal Counsel had attended.

28. The Appellant shall only be made liable for costs if he has conducted his case in a frivolous or vexatious manner. Looking at the circumstances of the case, the Board agrees with the Respondent that the Appellant has conducted his case in a frivolous and vexatious manner. Not only his grounds of appeal have no merits at all and he should have known this, no useful purpose could be served by pursuing the appeal for the protection of his personal data and privacy. After the hearing, the Appellant submitted documents showing he had made a data correction request to have his name deleted from the membership list. He did not make it clear the purpose for submitting these documents to the Board. As have been said, the record kept by FEHD and PSC are correct, in that it shows the Appellant was once a member of the Assessment Panels but did not subsequently serve on the panels. Again even if such request was complied with to the letter, there was nothing wrong or improper for the departments concerned to record this event in some other way. This Board cannot overstate the point that making such data access request does not advance the merit of the Appellant's case in this appeal and was of no assistance to him in resisting the Respondent's application for costs. Furthermore such correction as requested did not help the Appellant in redressing the grievance that he had.

29. The Appellant should be liable to pay the costs of the Respondent. He has conducted the appeal in a frivolous and vexatious manner, especially when he

had obtained the full list he should have abandoned the appeal. However there were mitigating circumstances. The Respondent did not go into any details for his finding that most of the background information was immaterial or irrelevant. It would be better if he can give a detailed reasoning for this finding to make clear the point to the Appellant. The other important point that should be made clear to the Appellant was that pursuing the complaint did not serve any useful purpose for the protection of his personal data or privacy. Taking all circumstances into account, the Board awards 50% of the costs of the Respondent.

Orders

30. In the premises, the Appeal be dismissed and the Appellant do pay the Respondent costs of this appeal in the round sum of \$5,569 $\{(1,500 + 9,638.66) \times 1/2\}$.

(signed)

(Yung Yiu-wing)

Deputy Chairman

Administrative Appeals Board