ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 39 OF 2008

BETWEEN

THE HONGKONG & SHANGHAI BANKING CORPORATION LIMITED — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Mr Chan Cheuk Christopher, Chairman, Dr Albert Cheung Chi-tong and Dr Anthony Tyen Kan-hee, members

Date of Hearing: 21 October 2009 and 26 January 2010

Date of handing down Written Decision with Reasons: 3 June 2010

DECISION

The Appeal

This is an appeal under Section 50(7) of the Personal Data (Privacy) Ordinance (Cap 486) by the Hongkong and Shanghai Banking Corporation Limited ("the Bank") from the decision of the Privacy

Commissioner for Personal Data ("the Commissioner") arising out of a complaint made by Mr. Yung Wai-kai ("the Complainant").

2. The decision is found in a report known as Result of Investigation by the Commissioner dated 21st November 2008 ("the Report"). As a result of the investigation, the Commissioner issued an Enforcement Notice under Section 50 of the Personal Data (Privacy) Ordinance, Chapter 486. The Bank applies to overturn the decision and to set aside the Enforcement Notice.

Declaration of Interests

3. Before the substantive hearing commenced, the Chairman declared that he had bank accounts with the Bank and that the Bank had granted him certain credit card facilities as well as a mortgage loan. He also held shares in the Bank but not in substantial amount. Notwithstanding disclosure of his interests, the parties had no objection that the Chairman continued to hear the case.

4. Dr Tyen, a member of this Board, also made known to the parties that he knew Mr. Paul Constable, a witness in this case, who had made a witness statement on behalf of the Bank in support of its case. He also disclosed that he had bank accounts, credit cards and other facilities with the Bank and held some shares in the Bank. Parties also raised no issue on the disclosures.

5. In the course of approving this draft decision Dr Cheung also

stated that at the material times he had bank accounts with the Bank and the Bank had also issued him credit card.

The Complaint

6. By a letter dated 9th February 2006 the Complainant lodged a complaint with the Commissioner that the Bank, without any prior notification to him, made credit checks on him on monthly basis totaling seven times respectively during the material period from June 2005 to January 2006. He found that it was an act of unreasonable invasion of his privacy.

7. It is not disputed that the Complainant had an account with the Bank and the Bank granted him several credit facilities including Platinum Visa Card, Premier Credit Card and Renminbi Credit Card. It is also an agreed fact that the Complainant had not made any default in meeting his payment obligation. The Complainant felt aggrieved that the Bank made such frequent checks on his credit information as if he were a defaulter. He was of the view that such checking was excessive and unnecessary. So he lodged his complaint with the Commissioner.

Results of the Investigation

8. After a lengthy process of investigation lasting for more than two and half years, the Commissioner found that the practice of the Bank having monthly access to the credit data of the Complainant held by TransUnion Information Services Limited (now known as TransUnion Limited), a credit reference agency, for credit monitoring is in

contravention of Data Protection Principles 1(1) and 1(2). (*A credit reference agency is a company carrying on the business of providing a consumer credit reference service*)

9. The Commissioner was also of the opinion that the Bank would continue and repeat such practice and pursuant to section 50 of the Personal Data (Privacy) Ordinance, Chapter 486, the Commissioner issued an enforcement notice requiring the Bank, inter alia, to cease the practice forthwith and to destroy all credit data of all customers obtained from TransUnion through the practice.

The Commissioner's Reasons

10. The Commissioner's main argument is that because the Bank has failed to observe the provisions of the Code of Practice on Consumer Credit Data ("the Code"), it follows that it is in contravention of the two Data Protection Principles. The Code is a set of guidance rules published by the Commissioner pursuant to Section 12 of the Ordinance for reference by the data users. He finds that the monthly collection by the Bank of the Complainant's credit data does not fall within the permitted circumstances under the provisions of the Code. For the reason that the Code does not provide for collection of personal data under such circumstances as described by the Bank he considers that the collection is unnecessary and excessive and therefore is in contravention of DPP 1(1) ("the 1st breach").

11. Contrary to the complaint the Commissioner finds that the Bank

has given notification; the notification was contained in the monthly Statement of Account dated 18th June 2005. But, he considers that the content of the notification is misleading and unfair and therefore the Bank is in contravention of DPP 1(2)(b)("the 2nd breach").

The 1st Breach

12. The Commissioner considers that the Bank's monthly checking of the customers' credit information amounts to conducting credit surveillance and monitoring the customer's credit that does not fall within any of the permitted circumstances where data information is allowed to be collected by the Bank under the Code. The permitted circumstances under the Code can be briefly summarized as follows with the relevant clauses of the Code in brackets:

a. For the purpose of updating consumer credit data (Clause 2.8 of the Code)
b. In the course of consideration of any grant of customer credit (2.9.1.1), review of existing consumer credit facilities granted (2.9.1.2) and renewal of existing consumer credit facilities (2.9.1.3);
c. For the purpose of monitoring of the indebtedness of a customer who is in default (2.9.2);
d. During the transitional period in the course of granting new consumer credit and reviewing existing credit facilities (2.10).

13. The Bank contends that the monthly collection is for the purpose of review under Clause 2.9.1.2 of the Code.

14. Clause 2.9.1.2 states as follows:

> *"2.9 .....a credit provider may, through a credit report provided by a CRA (credit reference agency), access consumer credit data held by CRA on an individual:*
>
> *2.9.1 in the course of:*
>
> *2.9.1.1 .....*
>
> *2.9.1.2 the review of existing consumer credit facilities granted;*
>
> *2.9.1.3 .....*
>
> *to the individual as borrower...."*

15. The Bank maintains that it has the right under clause 2.9.1.2 to access a customer's credit through TransUnion, a credit reference agency, for the purpose of reviewing the credit facilities granted to the Complainant.

16. The Commissioner takes a different view and points out that the word "review" has a special meaning under the Code and a review can only be carried out under the circumstances stipulated by the Code as follows:

> *"....the word "review" means consideration by the credit provider of any of the following matters (and those matters only) in relation to the existing credit facilities, namely;*
>
> *2.9.3 an increase in the credit amount;*

2.9.4 the curtailing of credit (including the cancellation of credit or a decrease in the credit amount); or

2.9.5 the putting in place or the implementation of a scheme of arrangement with the individual."

17. The Commissioner is of the view that the Bank was not carrying out any of the above three activities during the material period of the Complaint. What the Bank did was conducting a credit monitoring exercise not only on the Complainant alone but on all the customers who have existing credit facilities with the Bank. The Commissioner contends that such exercise is not allowed by the Code.

The Bank's purpose of collection

18. At the hearing Mr. Joseph Fok SC for the Bank submits that such monitoring exercise is necessary. The Bank has millions of consumer credit lines. It is not practical to carry out manual review of all the credit lines by individual credit officers in the traditional way. However, the Bank has to keep its credit exposures under control. The Bank has formed specialist credit risk control units which with the assistance of an automated system oversee the overall quality of the credit lines. The above fact submitted by Mr. Fok is supported by the witness statement of Mr. Paul Constable, the contents of which has not been challenged.

19. Mr. Fok describes the system as follows. The Bank has had an ongoing arrangement with TransUnion, a credit reference agency, that TransUnion would each month supply the Bank two files of same content

containing credit information of all customers with existing credit facilities with the Bank.

20. The first file is a "report image" file in a readable format loaded to a secure imaging retrieval system for use in manual review, if necessary e.g. when the customer applies for increase in credit limit. The monthly file can only be maintained in a readable format for three months and thereafter cannot be retrieved.

21. The other file is an electronic file called TURF (which contains the same information and data as the first "report image" file) but in different form. Upon receipt it will be automatically processed by the Bank's own system and stored in its database (called "Mango database") for use in an automated credit environment. The data are stored in the Mango database in a format that can only be read by the machine and it is difficult to extract from the machine information of an individual account.

22. With such information the machine will process the data collected and do the analysis. Apart from detecting delinquent accounts, the analysis may show certain behavior pattern that alerts the Bank to be careful in granting or maintaining credit facilities to certain segment of the society. For example, if it is found that customers belonging to a certain trade have been late or have failed in meeting repayment obligation, the Bank has to exercise special care in dealing with customers having connection with that trade.

The Commissioner's view

23. It is the Commissioner's view that the Code does not allow the gathering of such large amount of information and making use of them in such manner. According to the Code the Bank may gain access to consumer credit data held by a credit reference agency only under the circumstances mentioned at paragraph 11 above.

24. Mr. Wilson Lee for the Commissioner submits that access to credit information held by a credit reference agency should not be used for monitoring the overall credit exposure of the Bank

25. The Bank's automated system, Mr. Lee also submits, is to put in place a credit scoring system. This is not something allowed by the Code. The Code only allows access for any of the situations mentioned in paragraph 11 above. To seek support of his view Mr. Lee traced back to the historical background leading to the revision of the Code in 2003.

Commissioner's Contention

26. As the Complainant had made no default in payment of his credit card or other facilities granted by the Bank and nor has he applied for increase in the facility amount, the Commissioner finds no justification or "need" (i.e. the circumstances as specified in the Code) for the Bank to have monthly access to the consumer data held by TransUnion.

27. It is submitted on behalf of the Commissioner that "the

indiscriminate manner and the frequency of the Practice were chosen solely for the convenience of the Bank and without due regard to their need and data privacy of All Relevant Customers at all."

28. It is further submitted that the Bank's monthly access in the pretext of "review", if allowed, will make the restrictions on access under the Code redundant.

29. The Commissioner concludes that the Bank's practice does not fall within the situation of review under the Code 2.9.1.2 or any access permitted by the Code. The Bank's monthly collection of customer credit data of all customers having existing credit lines was unnecessary and excessive under Data Protection Principle 1(1).

Contention of the Bank

30. Mr. Fok contends that the monthly access to credit data was to review the credit facilities granted to the Complainant for the increase, decrease or cancellation thereof. In fact the Complainant's credit card facilities were increased in September 2005. It is within the meaning of review under clause 2.9.3 and 2.9.4 of the Code.

31. He does not agree with the Commissioner's finding that the Bank is conducting credit monitoring not related to any of the matters under Clause 2.9.3 or 2.9.4 of the Code.

32. He submits that there is no meaningful distinction between

"review" and "monitoring" for the purpose of interpreting the Code. He cites Shorter Oxford English Dictionary to support his argument. According to the Dictionary the word "review" means "*An inspection, an examination; a general survey or reconsideration of some subject or thing*" while "monitor" is defined as "*observe, supervise, keep under review, measure or test at intervals, esp. for the purpose of regulation or control*". He submits that to label the Bank's monthly exercise as monitoring does not remove it from the scope of "review".

33. He disputes the Commissioner's reference to Clause 2.9.2 as evidence in support of the theory that there is a difference between "monitoring" and "review". The Commissioner submits that monitoring is allowed in a default situation but not in the situation that the customer has made no default. Mr. Fok considers that which word should be used is a matter of semantics. It is rather unusual and awkward to say "review an indebtedness" in clause 2.9.2. For semantic reason the word "monitor" is used in that clause.

34. Mr. Fok is of the view that it is wrong in law to make any reference to Consultation Paper or its Report as the word "review" in the Code does not give rise to any ambiguity in meaning.

Discussion

35. The Board is of the unanimous view that there is a distinct difference in meaning between "review" and "monitor". The latter means keep under review, measure or test carried out at intervals. In

other words, monitor can be taken to mean constant review, not only once but several times. We note that it is not the Commissioner's position that monthly review or monitoring per se is not allowed. Frequency is not an issue if it is justified that a need arises to do so (i.e. if it falls within one of the circumstances specified by the Code, for example, in case of default under clause 2.9.2). It depends on the circumstances of the case.

36. A member of this Committee (hereinafter referred to as "the Minority") accepts the Commissioner's argument that the monthly access by the Bank is mainly for the purpose of minimizing the Bank's overall credit exposure to risk. The real intention is not to consider increase, decrease or cancellation of the credit facilities granted to the Complainant. For that reason he is of the view that the monthly collection of the credit data held by the TransUnion is not something allowed or contemplated by the Code.

37. The Chairman and the other member of this Commission forming the majority (hereinafter referred to as "the Majority") hold a different view as set out in paragraph 41 below.

The 2nd Breach

38. The Complainant also complained that the Bank had not notified him before making the monthly collection of credit data. Most probably, he was not aware of a note ("the Notification") in small print found at the end of the monthly statement dated 18th June 2005 that he had received. It states:

"*The Bank may, from time to time during the next 12 months, require access to the consumer credit data of an individual and/or guarantor held by the credit reference agency to review the existing consumer credit facilities, which includes increasing, decreasing or cancelling the credit amount and/or putting in place or implementing a scheme of arrangement.*"

39. The Commissioner does not argue that the Bank had given no Notification or that the Notification was inadequate. His main contention is that the content of the Notification was "misleading". The Bank's main objective of the monthly collection, the Commissioner submits, was credit monitoring and profiling and was not for the purpose of reviewing the Complainant's credit facilities as stated in the Notification. In paragraph 49 of his Report the Commissioner finds that the means of collection was unfair because it was misleading to state in the Notification that it was for the purpose of review and in fact it was not. It was unfair and is in breach of Data Protection Principle 1(2).

40. The Minority accepts the view of the Commissioner.

41. The Majority thinks otherwise and considers that employing the automated system as a way to review the Complainant's credit facilities falls within the meaning of Code, though it is not so direct as the traditional manual way of review. In this case the review is so often that it becomes a monitoring exercise. But, it does not take away the character of reviewing the Complainant's credit facilities for the purposes

mentioned in the Notification i.e. increasing, decreasing or cancelling the credit amounts. In fact the Complainant's credit card amount was increased in September 2005. For that reason the two members are of the view that the purpose of monthly collection by the Bank falls within the meaning of review under the Code and is permitted by it.

42. They do not consider that the Notification is misleading as the monthly collection of credit information is for the purpose of carrying out the function of review and is not in breach of the Code. But, it does not mean that the notice or Notification has no room for improvement.

43. Under Section 14 of the Administrative Appeals Board Ordinance every question before the Board shall be determined by the opinions of the majority of members hearing the appeal except on point of law. The Majority is of the view that the Bank is not in breach of Code and so the Board can conclude that the Bank is not in contravention of the Data Protection Principles.

44. For the sake of completeness we have also considered whether the Bank in fact is in breach of the Data Protection Principles. We have invited the parties to make submission.

45. Having heard the submissions from the parties, the Minority still finds that the monthly collection of credit data of all its customers with credit facilities is unnecessary. It mainly serves the Bank's own private interests to safeguard against credit risks. It takes such huge amount of

information not directly related to its declared purpose to review the credit facilities of a particular customer.

46. He also thinks that the Bank's monthly collection is an abuse of the Code. The Code has been revised to assist the business of the credit providers including the banks. He is of the view that the Code is meant to facilitate the protection of individual personal data. It clearly defines the scope of information that credit reference agency may hold and the types of persons who may have access to the information. The Code also sets out the circumstances under which credit providers may have access to the information.

47. The Code is not unilaterally imposed by the Commissioner. Through consultation with all stakeholders and the public and with due regards to all their concern, the Code has evolved by different revisions. The last revision took place in 2003 and was welcomed by all stakeholders including the bankers.

48. If the Bank is allowed access as it did, it is unfair to those who follow the Code. The provisions of the Code are for those concerned to follow. The Minority finds it difficult to accept that the Bank is allowed not to follow the Code. Codes of conduct are found in other professions like those of accountants, solicitors and engineers. In those professions any one found in breach of any provision of the codes receives some form of punishment. Rectification of the breach has to be carried out. Hence, the Enforcement Notice is justified.

49. The Code is to provide proper safeguard to the collection and use of the credit data against abuse. Due regard and respect should be given to the provisions of the Code. The Bank should not take the benefit of the Code gaining access to more information and is not willing to follow its provisions limiting the incidents of access and use.

50. The Minority also finds that the Bank has not been fair to all those customers who have credit facilities with it. They put their trust in the Bank and confide their information to it; it is wrong for the Bank to freely access their information without restriction and uses it to pursue the Bank's own interests without due regard to the Code.

The view of the Majority

51. The view of the Majority is different in that the Code serves as a practical guide to those who want to collect and use the personal data. It is not a set of mandatory statutory rules. The situations provided in the Code are not the only situations allowed by law. We have to consider each case on its own merits whether it is in breach of the Data Protection Principles in Schedule 1 to the Ordinance.

52. Principles 1(1) and (2) are the two relevant principles that the Commissioner considers that the Bank is in contravention. Both principles are set out as follows:

"Principle 1—purpose and manner of collection of personal data

(1) 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; and

(c) The data are adequate but not excessive in relation to that purpose.

(2) Personal data shall be collected by means which are –

(a) lawful; and

(b) fair in the circumstances of the case.

(3)……."

53. Even if the primary purpose of the Bank in carrying out the monthly collection of its customers were solely for the benefit of the bank to minimize its credit risk exposure, the Majority still thinks that as a prudent and responsible banker it is not wrong for the Bank to undertake regular risk based assessments and reviews of all credit facilities. It is a lawful purpose directly related to a function or activity of the Bank. Such exercise is also consistent with good customer service and sound credit management practice generally supported by its supervising authority i.e. the Hong Kong Monetary Authority, and shared by the trade organizations of its business i.e. the Hong Kong Association of Banks and the DTC Association as can be found in the evidence in the form the correspondences appeared in the hearing bundle. Members of the Majority also think that credit risk management or credit checking are recognized by the Commissioner to be lawful as the Code allows credit provider to gain access on certain circumstances like "considering a grant

of consumer credit", "renewal", and "monitoring of the indebtedness of the individual who is in default" etc. What the Bank is doing is credit checking in a large scale.

54. Having found the information supplied by the credit reference agency is not sufficient to serve its forward looking purpose, there is nothing wrong for the Bank to develop its own automated risk scoring model system using statistical formulae to analyze the credit information obtained. The behavioral credit method is employed by the Bank which requires such amount of information to do the analysis. For that reason it cannot be said that such amount of information is excessive.

55. The Majority also finds that such collection is not unfair or unlawful. It is fair to say every bank has its own way to safeguard its own interest. The Bank has considered it as an effective way to use the behavioral credit method which incidentally involves a large amount of personal credit data. Such amount of information is necessary. The Majority members are of the view that such practice is in line with the spirit of Data Protection Principles, particularly DPP 1.

56. For the above reasons the Majority comes to the conclusion that the Bank is not in breach of any of the said Data Protection Principles.

Decision

57. In accordance with Section 23 of the Administrative Appeals Board Ordinance -- every issue shall be decided by the opinions of the

majority of members -- this Board has by majority found that the Bank is not in breach of the Data Protection Principles and should allow the appeal of the Bank, overturn the decision of the Commissioner and set aside the Enforcement Notice.

58. For the reasons above given this Board by majority with a member dissenting allows the appeal and sets aside the Enforcement Notice.

59. The Board, apart from hearing, has had four sessions of deliberation with intent to coming into a consensus decision and ultimately finds it not possible to do so. This decision has been written by the Chairman and approved by the other two members. The Chairman wishes to express his thanks to them for their effort and contribution made.

60. The Board also likes to show its appreciation for the assistance rendered by all counsel who have appeared before it in this case.

(Christopher Chan Cheuk)
Chairman
Administrative Appeals Board

Mr. Joseph Fok S.C. (only on 21st October 2009) and Mr. Abraham Chan instructed by Messrs. JSM for the Appellant
Mr. Wilson Lee for the Respondent