

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO.40 OF 2006

BETWEEN

何添錦 and 李小雲

Appellants

and

THE PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 21 December 2006

Date of Decision: 9 January 2007

Date of Written Decision with Reasons: 9 January 2007

DECISION

Background Facts

1. The Appellants are the owners of Flat 332, Peng Lai Court, Peng Chau. By Notice of Appeal dated 8 August 2006, the Appellants appealed to this Board the decision of the Respondent made on 31 July 2006 under Section 39(2)(d) of the Personal Data

(Privacy) Ordinance, Cap.486 (“the Ordinance”) not to carry out or continue an investigation initiated by a complaint of the Appellants against (i) 周永泉 (“Mr. Chow”), the former chairman of The Incorporated Owners of Peng Lai Court (the “Incorporation”), and (ii) 嘉怡物業管理有限公司 (the “Manager”), the former manager of Peng Lai Court. The circumstances which give rise to the Appellants’ complaint are as follows.

2. On or about 21 May 2006, the Appellants and the owners of 14 other flats of Peng Lai Court, who together held not less than 5% of the total number of undivided shares of the building, made a written requisition (the “Requisition”) for a general meeting of the Incorporation pursuant to paragraph 1(2) of the Third Schedule to the Building Management Ordinance.

3. The Requisition listed a total of 10 matters relating to the management or affairs of Peng Lai Court for discussion and resolution at the proposed general meeting. The Requisition was, apparently, personally signed by each of the owners of the 15 flats in question. In addition to their signatures, their names and their flat numbers are also stated in the Requisition.

4. The Requisition was addressed to the chairman (i.e. Mr. Chow), the secretary and the management committee members of the Incorporation.

5. Pursuant to the Requisition, on 6 June 2006 the Incorporation gave written notice to the owners of Peng Lai Court that a general meeting of the Incorporation would be held on 25 June 2006.

6. On or about 21 June 2006, Mr. Chow issued a written declaration (the "Declaration") in his capacity as chairman of the Incorporation. In the Declaration, Mr. Chow purported to respond to or clarify a number of accusations relating to the management or affairs of Peng Lai Court which apparently had previously been raised against the members of the management committee of the Incorporation by some unidentified person(s). In the Declaration, Mr. Chow alleged that the accusations raised by those unidentified person(s) were deliberate acts to blacken the character of the members of the management committee and were misrepresentations. Mr. Chow's Declaration had attached to it a number documents, including in particular the Requisition with the names, signatures and flat numbers of the requisitionists stated therein.

7. Apparently, the Declaration together with the attachments were distributed by the Manager, upon the direction or instruction of Mr. Chow, to all the owners of Peng Lai Court, except those who signed the Requisition, by inserting a copy of the same to their letter boxes.

8. On 23 June 2006, the Appellants lodged a complaint with the Respondent against Mr. Chow and the Manager, alleging that their conduct in distributing the Requisition to the owners of Peng Lai

Court in the aforesaid circumstances amounted to a mis-use of their personal data.

9. As earlier mentioned, the Respondent decided on 31 July 2006 not to carry out or continue an investigation of the Appellants' complaint.

The Respondent's Reasons for the Decision

10. The Respondent identified Principle 3 of the Data Protection Principles as being the relevant principle in the present case. Principle 3 states as follows:-

“Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than –

- (a) the purpose for which the data were to be used at the time of collection of the data; or
- (b) a purpose directly related to the purpose referred to in paragraph (a).”

11. The Respondent considered that the purpose of the Requisition was to request for a general meeting of the Incorporation. On the other hand, the Incorporation, as the owners' representative, was under a duty to explain to the owners the reasons for convening the general meeting and other related matters. The Respondent took the view that the Incorporation was acting in discharge of its said duty when it published the Requisition to the owners in order to inform

them that the general meeting was convened at the request of a number of owners of Peng Lai Court. Hence, the publication of the Requisition to the owners of Peng Lai Court was for a purpose which was directly related to the purpose for which the relevant personal data were to be used at the time of collection of the data, and was permitted by Principle 3(b) of the Data Protection Principles. Accordingly, the Respondent decided not to carry out or continue an investigation of the Appellants' complaint.

The Appellants' Notice of Appeal

12. In their Notice of Appeal, the Appellants relied on, inter alia, the following matters in support of their appeal:-

- (1) Mr. Chow's use and publication of the Requisition to the other owners of Peng Lai Court was not authorised by the Incorporation and thus he could not be regarded as acting for or on behalf of the Incorporation.
- (2) Mr. Chow's Declaration was not for the purpose of informing or explaining to the owners the reasons for convening the general meeting or that the general meeting had been convened at the request of a number of owners of Peng Lai Court.
- (3) It was unnecessary for Mr. Chow to publish the Requisition to the owners to inform them of the proposed

general meeting on 21 June 2006, because formal notice of the meeting had already been given to the owners on 6 June 2006.

- (4) The Respondent failed to consider the true purpose for which Mr. Chow published the Requisition to the owners of Peng Lai Court.

The Hearing

13. At the hearing of the appeal, the Appellants maintained the points made in their letters dated 11 October 2006 and 12 December 2006 respectively to this Board in support of the appeal. The Appellants further submitted 4 letters written by certain owners or officer holders of the management committee of the Incorporation in support of their appeal. The Respondent objected to the late production of the 4 letters and submitted that the Respondent did not have sufficient opportunity to consider or investigate the contents of the 4 letters. The Respondent did not, however, seek any adjournment of the appeal.

14. The Board has considered the contents of the 4 letters and takes the view that they do not involve any new allegation of fact or law. Accordingly, the Board in the exercise of its discretion decides to admit the 4 letters as evidence in the appeal.

15. In addition to the grounds set out in the Notice of Appeal, the Appellants alleged at the hearing that the Requisition was also distributed to outsiders or at a place or places outside Peng Lai Court. However, the Appellants have no personal knowledge of such alleged distribution of the Requisition. Further, the Appellants were unable to adduce any evidence as to who was responsible for allegedly distributing the Requisition to outsiders or at a place or places outside Peng Lai Court. This allegation also did not appear in the original complaint to the Respondent or in the Notice of Appeal. Accordingly, the Board does not propose to take into consideration this allegation for the purpose of the present appeal.

16. The Respondent relied on the facts and matters set out in the Statement dated 13 September 2006 to this Board to resist the appeal. In addition, the Respondent submitted that it was a proper exercise of his discretion under Section 39(2)(d) of the Ordinance not to carry out or continue an investigation initiated by the complaint of the Appellants by reason of 4 particular factors, namely: (i) the information contained in the Requisition was information which it was proper for the Incorporation to bring to the attention of the owners of Peng Lai Court, (ii) the Requisition was published only to the owners of that building, (iii) the Appellants had not suffered any substantial damage as a result of the publication of the Requisition to the owners of that building, and (iv) there was little risk of repetition of the conduct complained of, having regard to the fact that Mr. Chow was no longer the chairman of the Incorporation and the Manager was no longer the manager of Peng Lai Court.

The Board's Consideration

17. Before Data Protection Principle 3 is engaged, it is necessary to show that the data user has done some act which can amount to a "collection" of personal data. In the present case, the Requisition was sent by the Appellants and some other owners of Peng Lai Court to the chairman, the secretary and the management committee of the Incorporation for the purpose of requesting that a general meeting of the Incorporation be convened. It does not seem to the Board that either Mr. Chow or the Manager can be said to have "collected" any personal data of the Appellants, and the Board has some reservation as to whether Data Protection Principle 3 is engaged on the facts of the present case. Nevertheless, the Respondent considers that there was "collection" of personal data and the Board will, for the purpose of this appeal, proceed on this basis.

18. On the assumption that Data Protection Principle 3 has application, the Board agrees with the Respondent's submission that there has not been any breach of Data Protection Principle 3. It appears, from the Appellants' submissions, that the Appellants' main concern is not that their personal data (consisting of their names, signatures and flat number) have been disclosed to other owners of Peng Lai Court. Rather, their concern is that if one reads Mr. Chow's Declaration and the Requisition together, it would be clear that Mr. Chow's allegations are in fact directed against the requisitionists, including the Appellants. The Board does not propose to express any

view on whether this is the right way of reading Mr. Chow's Declaration. If the Appellants consider that their reputation has in any way been harmed or damaged by Mr. Chow's Declaration, it is up to the Appellants to decide whether to take civil action to redress that matter. This having been said, the Board wishes to make it clear that it is not encouraging the Appellants to do so.

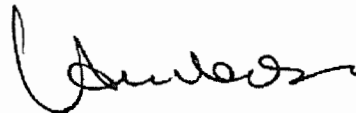
19. On the issue of whether Mr. Chow was duly authorised by the Incorporation to issue the Declaration or publish the Requisition to the owners of Peng Lai Court, the Board considers that this is an internal matter of the Incorporation and is not a matter for determination by the Respondent.

20. In any event, even if there is any breach of Data Protection Principle 3, the Respondent has under Section 39(1) of the Ordinance a wide discretion whether to carry out or continue an investigation. In particular, the Respondent may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case, or any investigation or further investigation is for any other reason unnecessary (subsection 39(2)(d)). For the reasons advanced by the Respondent at the hearing of the appeal, the Board considers that the Respondent is entitled, in the proper exercise of his discretion, not to carry out or continue an investigation initiated by the Appellants' complaint in the present case.

21. The Board has considered carefully all that the Appellants have said in their Notice of Appeal and written representations and at the hearing of the appeal, but do not find that there is sufficient ground to overturn the Respondent's decision.

Conclusion

22. Accordingly, the appeal is dismissed, with no order as to costs.



(Mr Anderson CHOW Ka-ming, SC)

Deputy Chairman

Administrative Appeals Board