

**ADMINISTRATIVE APPEALS BOARD**

**ADMINISTRATIVE APPEAL NO.41 OF 2006**

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BETWEEN

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Appellant

and

PRIVACY COMMISSIONER FOR  
PERSONAL DATA

Respondent

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Coram: Administrative Appeals Board

Date of Hearing: 7 February 2007

Date of handing down Decision with Reasons: 27 March 2007

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DECISION

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Background Facts

1. The Appellant is an occupant of Flat 2507, Block M, Luk Yeung Sun Chuen, Tsuen Wan, New Territories. By Notice of Appeal dated 16 August 2006, the Appellant appealed to this Board the decision of the Respondent made on 19 July 2006 not to carry out or continue an investigation initiated by a complaint of the Appellant against the management company of Luk Yeung Sun Chuen (the "Management Company") in respect of an alleged mis-use of her personal data. The circumstances which give rise to the present appeal are as follows.

2. In the evening of 3 March 2006, at about 10:15 p.m., the Appellant made a verbal complaint to the Management Company that there was a strong smell of thinner in the corridor outside her flat. Apparently, the Appellant and her neighbours had in the past year or so made numerous complaints to the Management Company about smells of thinner or insecticides in the common areas on the upper floors of Block M of Luk Yeung Sun Chuen. However, the Management Company had not been able to trace the sources of the smells despite investigation.

3. On this occasion, a security officer, one Mr. Wong, came to the Appellant's flat to make investigation, and informed the Appellant that a report would be made to the police. In due course, the police contacted the Appellant by telephone to inquire about the complaint. Later, the police arrived at the Appellant's flat to carry out further investigation. The police asked the Appellant whether it was her who had made the report. The Appellant answered that the report was made by the Management Company, not by her. The police then asked the Appellant to provide her personal particulars, presumably as part of the police's normal investigative procedures. However, the Appellant refused to provide the particulars sought. The police left the scene shortly afterwards.

4. The Appellant's complaint against the Management Company is that it had, without her consent and contrary to her expressed wishes, disclosed her personal data to the police, including her address and telephone number. According to the Appellant, she had, on 3 March 2006 and also previously, expressly told representatives of the Management Company (including one Mr. Lai) that if the Management Company should decide to make a report to the police, the Management Company should not disclose her identity or personal particulars to the police. She also said that Mr. Lai had expressly agreed to preserve her anonymity and promised to make a written note of her request in the Management Company's records so that other security officers would be informed of her said request.

5. It is not in dispute that the Management Company did provide the police with the personal particulars, including the address and telephone number, of the Appellant as the complainant. According to the Management Company, they did so upon the request of the police and in order to assist the police in the investigation of the Appellant's complaint.

6. On 21 March 2006, the Appellant made a written complaint to the Respondent against the Management Company alleging mis-use of her personal data. The Appellant's complaint was investigated by the Respondent. As earlier mentioned, the Respondent eventually decided not to carry out or continue with the investigation under the Personal Data (Privacy) Ordinance, Cap.486 ("the Ordinance").

The Respondent's reasons for its decision

7. Broadly stated, the Respondent's reasons for its decision are as follows:-

- (1) there is no prima facie case of any breach of the relevant Data Protection Principle, namely, Principle 3 of the Data Protection Principles set out in the Schedule to the Ordinance;
- (2) in any event, the use of the Appellant's personal data is exempt from the provisions of Data Protection Principle 3 in the circumstances of the present case by virtue of Section 58(2) of the Ordinance; and/or
- (3) the act or practice specified in the Appellant's complaint is trivial and hence the Respondent is entitled, in his discretion, not to carry out or continue the investigation by virtue of Section 39(2)(b) of the Ordinance.

8. The decision of the Respondent forms the subject matter of the present appeal before this Board.

Did the Management Company expressly agree with or promise the Appellant that it would not disclose the Appellant's identity or personal particulars to the police?

9. This is a question of fact. The Management Company's case is that, accordingly to its records and the result of its investigation, there was no such agreement made with, or promise given to, the Appellant.

10. In support of her case on this issue, the Appellant relied on (inter alia) a taped telephone conversation allegedly between the said Mr. Lai and herself. The Appellant did not, however, mention the existence of the tape when opening her appeal. She only sought to adduce evidence of the taped conversation when making her reply submissions, after the Company and the Respondent's legal representatives had completed their submissions. Both the Management Company and the Respondent's legal representatives objected to the late attempt by the Appellant to adduce the taped conversation as evidence in the appeal. The Appellant was unable to provide any satisfactory explanation for not giving advance notice of her intention to adduce the evidence in question.

11. The Board decided to reserve its ruling on whether to permit the Appellant to adduce the evidence of the taped conversation, and proceeded to listen to a part of it, which, on its face, did support the Appellant's allegation. Neither of the legal representatives of the Management Company or the Respondent sought any adjournment of the appeal to deal with the new evidence adduced by the Appellant.

12. For the purpose of the present appeal, this Board will proceed on the basis of the Appellant's version referred to in paragraph 4 above. This Board is prepared to accept the Appellant's evidence on this issue even without reference to the taped conversation. Accordingly, it is strictly not necessary for the Board to decide whether it ought to grant leave to the Appellant to adduce evidence of the taped conversation. Had it been necessary to do so, the Board would have been willing to exercise its discretion in favour of the Appellant on this matter.

### Discussion

13. This Board agrees with the Respondent that Principle 3 of the Data Protection Principles is 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 the collection of the data; or
- (b) a purpose directly related to the purpose referred to in paragraph (a).”

14. It is not in dispute that, in the evening of 3 March 2006, the Appellant did provide her personal data, including her name, address and telephone number, to the Management Company in the course of her complaint about the strong smell of thinner in the corridor outside her flat. The Management Company collected the Appellant's personal data for the purpose of investigation of her complaint, in connection with which the Management Company made a report to the police. When the Management Company provided the Appellant's said personal data to the police upon the latter's request, the Management Company

was, in our view, using them for a purpose which was directly related to the purpose for which the personal data were collected in the first place. Accordingly, there was no breach of Principle 3 of the Data Protection Principle.

15. Further, Section 58(2)(a) of the Ordinance provides that personal data are exempt from the provisions of Data Protection Principle 3 in any case in which the use of the data is for any of the purposes referred to in Section 58(1) (and whether or not the data are held for any of those purposes). The purposes referred to in that subsection includes:-

- (1) the prevention or detection of crime;
- (2) the apprehension, prosecution or detention of offenders; and
- (3) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons.

16. In the present case, the Appellant's complaint to the Management Company, subsequently reported to the police, was one of deliberate nuisance committed by some unidentified person or persons. In order that the police could properly investigate the complaint, they need to have some basic information of the complainant, including her name, address and telephone number. The provision of such information by the Management Company to the police is, in our view, a use of the data for a purpose falling within the scope of Section 58(1), and hence exempt from the provisions of Data Protection Principle 3.

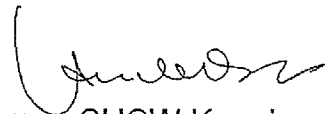
17. Finally, the Appellant has not suggested that she has suffered any significant or material loss or damage as a result of the provision of her personal data by the Management Company to the police. In our view, the Respondent is justified to exercise his discretion not to carry out or continue the investigation on

the ground that the Appellant's complaint is trivial, by virtue of Section 39(2)(b) of the Ordinance.

18. In passing, we note that in the Respondent's Statement dated 14 September 2006, reliance was placed on Section 39(2)(d) (instead of 39(2)(b)) of the Ordinance, which provides that 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 – "any investigation or further investigation is for any other reason unnecessary". At the hearing of the appeal, the Respondent's legal representative confirmed that the reference to Section 39(2)(d) was an error. This Board wishes to take this opportunity to point out that the grounds under Sections 39(2)(b) and (d) are, it appears, mutually exclusive by reason of the underlined words quoted above, although they may form alternative grounds. Care should be taken to specify the correct ground on which the Respondent bases his decision in future cases.

#### Conclusion

19. For the above reasons, this Board considers that there is no valid ground to challenge the Respondent's decision in the present case. Accordingly, the appeal is dismissed, with no order as to costs.



(Anderson CHOW Ka-ming, SC)

Deputy Chairman

Administrative Appeals Board