

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 45/2016

BETWEEN

FUNG MAN YEE JUDY

Appellant

and

PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Mr Douglas LAM Tak-yip, SC (Deputy Chairman)

Miss Carmen CHAN Ka-man (Member)

Dr Lianne LAM Ki-wai (Member)

Date of Hearing: 2 March 2017

Date of Handing down Written Decision with Reasons: 21 November 2018

DECISION

A. Introduction and Background

1. By a Notice of Appeal dated 1 August 2016 (the “**Notice of Appeal**”), the Appellant, Ms FUNG Man Yee Judy (“**Ms Fung**”), appeals to the

Administrative Appeals Board (the “**Board**”) pursuant to section 39(4) of the Personal Data (Privacy) Ordinance (Cap 486) (the “**PDPO**”) against a decision of the Privacy Commissioner for Personal Data (the “**Commissioner**”) dated 7 July 2016 (the “**July 2016 Decision**”), whereby the Commissioner decided not to pursue further the Appellant’s complaint in Case No. 201607189 pursuant to Section 39(1)(a) and (2)(d) of the PDPO and paragraph 8(e) of the Commissioner’s Complaint Handling Policy (the “**CHP**”).

2. First of all, the Deputy Chairman of the Board sincerely apologises to the parties for the delay in issuing this Written Decision, the fault for which lies solely with him due to his other professional commitments.

3. The factual background of the matter, which is largely undisputed, is set out in the preface to the Commissioner’s reasons for the July 2016 Decision (the “**Commissioner’s Reasons**”) and may be summarised briefly (with some supplementation based on contemporaneous documents) as follows:

- (1) Ms Fung’s parents were the two shareholders of Carson Garments Factory Limited (“**Carson Garments**”). In July 2010, Carson Garments applied for a loan facility (the “**Loan**”) from The Hongkong and Shanghai Banking Corporation Limited (“**HSBC**”) under the Special Loan Guarantee Scheme (the “**Scheme**”) set up by the Government’s Trade and Industry Department (“**TID**”);
- (2) On 15 July 2010, Ms Fung’s father (“**Mr Fung**”) told HSBC that Ms Fung was willing to act as one of the guarantors of the Loan under the Scheme and provided a copy of Ms Fung’s Hong Kong identity card to HSBC (the “**HKID Card**”);

- (3) On 22 July 2010, Ms Fung signed a personal guarantee in favour of HSBC in respect to the Loan (the “**Personal Guarantee**”) at the office of Messrs Alfred Lam, Keung & Ko, Solicitors (“**ALKK**”). Ms Fung’s parents were the other two guarantors of the Loan. HSBC then submitted the signed application forms for the Scheme together with (presumably, amongst other things) Ms Fung’s HKID Card copy, as one of the supporting documents, to the TID;
- (4) The Borrower subsequently defaulted on its obligations under the Loan, and, amongst other things, Ms Fung’s account balances with HSBC were frozen in December 2012 pursuant to enforcement actions on the Personal Guarantee.

4. On 19 May 2016, Ms Fung filed a complaint with the Commissioner (the “**May 2016 Complaint**”), being the complaint to which the July 2016 Decision relates (Case No. 201607189)¹. The said complaint may be summarised briefly as follows:

- (1) Ms Fung was a HSBC retail banking customer and had provided her HKID card data and number and possibly a copy of her HKID Card to HSBC when she opened her account at HSBC and whenever she applied for HSBC services if requested by HSBC. She was aware on each occasion of the purposes of HSBC

¹ Ms Fung had filed two earlier complaints with the Commissioner in 2013 and 2016 respectively in relation to the Loan and the Personal Guarantee, namely, Case No. 201316591 and Case No. 201601578. In both instances, the Commissioner exercised his powers under the PDPO not to pursue the complaints further. There was no appeal against either of those decisions.

obtaining such information (except in relation to the subject matter of her complaint);

- (2) Prior to signing the Personal Guarantee on 22 July 2010, Ms Fung had not signed any application form or other documents relating to the Personal Guarantee or the Loan and had not spoken to any HSBC staff about the Personal Guarantee. She was therefore not aware or expecting HSBC to have taken her HKID Card copy or data to use for a credit check for the purpose of the Loan on 15 July 2010, prior to her signing the Personal Guarantee;
- (3) HSBC confirmed to the Commissioner that it had used Ms Fung's HKID card to assess her credit-worthiness as a potential guarantor before accepting her as one of the guarantors. The HSBC facility letter for the Loan dated 16 July 2010 already named Ms Fung as one of the intended guarantors. HSBC's use of such data was thus for a new purpose, namely, a commercial loan to a separate HSBC corporate customer in which she had no interest, without her consent;
- (4) Ms Fung further suggested that HSBC reduced or waived Carson Garments' security requirement of a HK\$500,000 cash security deposit for the Loan after HSBC took into account Ms Fung's intended personal guarantee and her credit worthiness;
- (5) Although Ms Fung did not dispute that she told her father that she would agree to act as a guarantor for the Loan prior to her signing the Personal Guarantee on 22 July 2010, she contended that this

was irrelevant as it was a private conversation between them with no commitment, and was not an implied consent to HSBC.

5. As mentioned above, by the July 2016 Decision, the Commissioner terminated his investigation and decided not to pursue the May 2016 Complaint further. His reasons were as follows:

- (1) Ms Fung provided no evidence to show that her HKID Card copy used by HSBC for assessing her credit-worthiness on 15 July 2010 was the one obtained from her when she opened her account at the bank. To the contrary, in her previous complaint (Case No. 201601578), Ms Fung claimed that the copy of her HKID Card used in assessing her credit-worthiness on 15 July 2010 had been collected by HSBC from someone else, namely, Mr Fung;
- (2) HSBC maintained that Ms Fung's HKID Card copy that was used for assessing her credit-worthiness as a potential guarantor of the Loan was the one collected from Mr Fung on 15 July 2010. Ms Fung's suggestion that HSBC had used data that had been previously obtained from her was "mere speculation" and that in the absence of any evidence to the contrary, there was no reason for the Commissioner to suspect that HSBC had used her HKID Card copy collected from sources other than Mr Fung. The Commissioner therefore found no contravention of Data Protection Principle ("DPP") 3 on the part of HSBC;
- (3) In any event, under section 39(1)(a) of the PDPO, the Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if the complainant has had

actual knowledge of the act or practice specified in the complaint for more than two years immediately preceding the date on which the Commissioner received the complaint, unless the Commissioner was satisfied that in all circumstances of the case it was proper to carry out or not to terminate such investigation;

- (4) As Ms Fung agreed with Mr Fung that she would act as a guarantor for Carson Garments, she should have been aware that HSBC would access her credit-worthiness as a potential guarantor of the Loan, and she did sign on the Personal Guarantee on 22 July 2010 (some six years ago) at ALKK's office;
- (5) Irrespective of the source of the copy of her HKID Card used by HSBC, Ms Fung had actual knowledge of the fact that HSBC had used her HKID Card copy for accessing her credit-worthiness as a potential guarantor of the Loan more than two years immediately preceding the date on which the Commissioner received the May 2016 Complaint. In the circumstances, the Commissioner did not find it proper to carry out an investigation in respect of the complaint.

6. In the Notice of Appeal, Ms Fung raised the following 4 grounds as to why the Commissioner was wrong not to pursue the complaint further:

- (1) Her complaint was not confined to the physical copy of her HKID Card provided by Mr Fung, but more importantly, the HKID Card data that she provided to HSBC for retail banking purposes, which was then used to enable HSBC corporate banking staff and the

credit department to check her bank records for its credit check (the “**First Ground**”);

- (2) The Commissioner was wrong to suggest that as long as a data user (HSBC) could obtain the same personal data that a data subject (Ms Fung) provided before from someone else (Mr Fung), then the data user could use it for a new purpose. That would make DPP3 very easy to circumvent (the “**Second Ground**”);
- (3) She was not only complaining HSBC had used her personal data for credit-worthiness assessment to determine whether she was qualified to act as a guarantor, but she was more concerned about HSBC having used her personal data for the purpose of deciding or adjusting material terms of the Loan, which she would never have expected when she signed the Personal Guarantee and was unfair to her (the “**Third Ground**”); and
- (4) She did not have “actual knowledge” or concrete evidence that HSBC had used her personal data for the “new purpose” until she received the Commissioner’s decision letter dated 28 April 2016 related to her previous complaint in Case No. 201601578 (which explained that HSBC’s purpose for collecting Ms Fung’s HKID Card copy on 15 July 2010 from Mr Fung was to enable it to assess Ms Fung’s credit-worthiness as a potential guarantor of the Loan) (the “**Fourth Ground**”).

7. We consider below each of Ms Fung’s grounds of appeal in turn. Before we do so, we set out for completeness the relevant principles and legislation in this case.

B. Relevant Principles and Legislation

The PDPO

8. The Commissioner's power to terminate an investigation and the complainant's right of appeal are set out in section 39 of the PDPO, which provides that inter alia:

“(1) Notwithstanding the generality of the powers conferred on the Commissioner by [the PDPO], the Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if -

(a) The complainant ... has had actual knowledge of the act or practice specified in the complaint for more than 2 years immediately preceding the date on which the Commissioner received the complaint, unless the Commissioner is satisfied that in all the circumstances of the case it is proper to carry out or not to terminate, as the case may be, the investigation;

...

(2) The Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case -

...

(d) any investigation or further investigation is for any other reason unnecessary.

...

(3A) If the Commissioner decides to terminate an investigation initiated by a complaint before its completion, the Commissioner must, as soon as practicable by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant -

(a) of the decision; and

(b) of the reasons for the decision.

(4) An appeal may be made to the Administrative Appeals Board -

(a) against any refusal or termination specified in a notice under subsection (3) or (3A); and

(b) by the complainant on whom the notice was served (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person, or either).”

9. The conduct of proceedings before this Board is set out in section 21 of the Administrative Appeals Board Ordinance (Cap 442) (the “AABO”) which provides that inter alia:

“(1) For the purposes of an appeal, the Board may -

...

(j) subject to subsection (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit;

(2) The Board, in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the respondent with the Secretary under section 11(2)(a)(ii), if it is satisfied that, at the time of the making of the decision being the subject of the appeal, the appellant was or could reasonably have been expected to be aware of the policy.

(3) The Board, on the determination of any appeal, may order that the case being the subject of the appeal as so determined be sent back to the respondent for the consideration by the respondent of such matter as the Board may order.”

10. Hence, an appeal before this Board is by way of a *de novo* hearing and determination, and the Board may make confirm, vary or reverse the Commissioner’s decision as it thinks fit, or alternatively, the Board may remit

the case back to the Commissioner for reconsideration. In making its determination, the Board is required, however, to have regard to any statement of policy lodged by the Commissioner with the Secretary of the Board, after having been served with the notice of appeal pursuant to section 10 of the AABO.

11. There is no dispute that the statement of policy referred to in section 21(2) of the AABO includes the CHP. Paragraph 8 of the CHP provides that *inter alia*:

“Section 39(1) and (2) of the [PDPO] contain various grounds on which the Commissioner may exercise his discretion to refuse to carry out or decide to terminate an investigation. In applying some of those grounds, the PCPD’s policy is as follows:

...

In addition, an investigation or further investigation may be considered unnecessary if:

...

(e) after preliminary enquiry by the PCPD, there is no *prima facie* evidence of any contravention of the requirements under the [PDPO];

...”

12. This appeal is concerned primarily with whether there has been a contravention of DPP3 (contained in Schedule 1 of the PDPO), which provides that, amongst other things:

“(1) Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose.

...

- (4) In this section - new purpose, in relation to the use of personal data, means any purpose other than -
- (a) the purpose for which the data was 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).”

C. Discussion

13. In short, we agree with the July 2016 Decision and the Commissioner’s Reasons, and we regret to say that the grounds of appeal are unsustainable.

The First Ground

14. We have some difficulty understanding this ground of Ms Fung’s appeal. First of all, as noted by the Commissioner, there is no evidence to suggest that the source of the data on Ms Fung’s HKID Card used by HSBC was other than from Mr Fung in July 2010. This is especially so given that that was the basis of Ms Fung’s earlier complaint. There was thus no new use of the data on Ms Fung’s HKID Card copy as provided by Mr Fung.

15. In any event, HSBC presumably used the data on HKID Card as a means of identification to search for Ms Fung’s account records and credit information held by the bank for the purpose of considering the Loan and the Personal Guarantee. It seems to us that the gravamen of Ms Fung’s complaint is not any new use of the data on the HKID Card itself, but her account and credit information held by HSBC for the purpose of considering the Loan and the Personal Guarantee. However, as noted by the Commissioner in his submissions to this Board, this complaint had already been the subject matter of a previous compliance investigation conducted by the Commissioner against

HSBC arising from Ms Fung's earlier complaint in Case No. 201316591. The purpose of that compliance investigation was to ascertain whether the practice of HSBC in gaining access to a potential guarantor's personal data maintained in its database for processing a new facility application prior to obtaining consent from the potential guarantor would contravene a requirement of the PDPO.

16. In this connection, the Commissioner examined the terms of the HSBC's "Notice relating to the PDPO" (the "**Notice**") which had been provided to Ms Fung when she opened her account with HSBC. Relevant parts of the Notice for present purposes provide as follows:

- "(a) From time to time, it is necessary for individuals to supply the Bank with data in connection with the opening or continuation of accounts and the establishment or continuation of banking facilities or provision of banking services or compliance with any laws, guidelines or requests issued by regulatory or other authorities.
- (b) Failure to supply such data may result in the Bank being unable to open or continue accounts or establish or continue banking facilities or provide banking services.
- (c) It is also the case that data are collected from (i) customers in the ordinary course of the continuation of the banking relationship (for example, when customers write cheques, deposit money or apply for credit), (ii) a person acting on behalf of the individual whose data are provided, and (iii) other sources (for example, information obtained from credit reference agencies). Data may also be generated or combined with other information available to the Bank or any member of the HSBC Group...
- (d) The purposes for which data may be used are as follows:
...

- (ii) conducting credit checks (including without limitation upon an application for consumer credit (including mortgage loans) and upon periodic or special reviews of the credit which normally will take place one or more times each year);
- ...
- (v) ensuring ongoing credit worthiness of customers;
- ..."

17. The Commissioner was of the preliminary view that the use of the customers' personal data by HSBC for assessing their eligibility to act as guarantors may fall within the broad purposes of "conducting credit checks" or "ensuring ongoing credit worthiness of customers" under paragraphs (d)(ii) and (d)(v) of the Notice but such use may still amount to a contravention of DPP3 if it is unexpected to customers in the circumstances. The Commissioner considered that a reasonable interpretation of paragraphs (d)(ii) and (d)(v) of the Notice would be that credit checks may be conducted only when there is a genuine need to do so, such as when HSBC received an application for a loan.

18. In the course of the compliance investigation, HSBC informed the Commissioner that it has taken corrective measures, namely, to implement a new policy of obtaining the prior consent of potential guarantors prior to using their personal data maintained in HSBC's database for the purpose of assessing their eligibility as guarantors. Having considered the improvement measures and the circumstances of the case, the Commissioner decided not to proceed further with the compliance investigation and informed Ms Fung of the outcome of the same in August 2015.

19. The Commissioner further submits, and we agree, that there has in any event been no contravention of DPP3 by HSBC even if it had used Ms Fung's

personal data retrieved from its own records for assessing Ms Fung's credit-worthiness as a potential guarantor of the Loan:

- (1) Ms Fung had knowledge of the Loan application and accepted Mr Fung's request to act (or at least to be considered) as a guarantor of the Loan. There was a genuine need for HSBC to assess Ms Fung's credit-worthiness before accepting her as a guarantor;
- (2) In the circumstances, it would not have caused any surprise to Ms Fung even if HSBC had retrieved her personal data from HSBC's own records for such assessment, since such use fell within paragraphs (d)(ii) and (d)(v) of the Notice;
- (3) Ms Fung was or ought to have been aware of the potential uses of her data held by HSBC as specified in the Notice when she opened her account, and by agreeing to maintain her banking relationship with HSBC, she consented to such usage by HSBC;
- (4) Alternatively, even if there was a contravention on the part of HSBC, HSBC had already taken remedial actions mentioned above and further investigation of the case could not reasonably be expected to bring a more satisfactory result.

20. In the circumstances, we would reject the complaint in this ground.

The Second Ground

21. As mentioned above, there is no evidence to suggest that the source of the data on Ms Fung's HKID Card used by HSBC was other than from Mr

Fung in July 2010. The use of that data would have been as a means of identification to search for Ms Fung's account records and credit information held by HSBC for the purpose of considering the Loan and the Personal Guarantee. There is no question of circumvention of DPP3. Again, we would reject the complaint in this ground.

The Third Ground

22. We agree that with the Commissioner's submission that the purpose of securing a better term of the Loan is part and parcel of the process of approving the Loan and assessing Ms Fung's credit-worthiness as a potential guarantor.

23. Such use of Ms Fung's personal data was in accordance with the Notice and there was no contravention of DPP3. Although Ms Fung contends that she had no intention to use her credit-worthiness to help Carson Garments obtain better terms of the Loan, as such terms had put her in an unfavourable position as a guarantor, we agree with the Commissioner that that is a dispute concerning her liability to HSBC and not an issue of personal data privacy. We would again reject the complaint in this ground.

The Fourth Ground

24. In the light of our conclusions in relation to the First, Second and Third Grounds above, it is unnecessary for us to deal with this ground, since the Commissioner was justified in not pursuing the complaint further, irrespective of whether there was any delay on the part of Ms Fung in filing it.

25. In any event, we would accept the Commissioner's submission that Ms Fung likely became aware that HSBC had used her personal data for assessing her credit-worthiness as a potential guarantor at the time when she signed the Personal Guarantee. Moreover, in her earlier complaint form dated 8 July 2013 which gave rise to Case No. 201316591, she stated that,

“I only noticed last year that HSBC Commercial Banking had, without any of my consent and without informing me, collected and used my personal data to approve a facility letter...In doing so, HSBC had also, without any of my consent and without informing me, approved me as one of the guarantors for the Borrower.” (emphasis added)

Hence, she must have become aware of the basis of her complaint that she now makes, at the latest, by 2012.

D. Conclusion

26. For the reasons above, the appeal is dismissed. The Commissioner has reserved his position as to costs in the present appeal. Under sections 21(1)(k) and 22(1) of the AABO, the Board may make an award as to costs against an appellant, if it is satisfied that he/she has conducted his/her case in a frivolous or vexatious manner. Whilst noting that this is the third complaint made by Ms Fung in relation to the same or similar subject matter, we do not believe that this case reaches the relatively high threshold of having been conducted in a frivolous or vexatious manner.

27. That said, if any further complaints were to be made by Ms Fung to the Commissioner and appealed before this Board in relation to the same matter, in

the absence of any new and viable grounds, the Board may well consider exercising its discretion to award costs against Ms Fung.

(signed)

(Mr Douglas LAM Tak-yip, SC)

Deputy Chairman

Administrative Appeals Board