ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 52 of 2004

BETWEEN

HO MEI YING Appellant

and

THE PRIVACY COMMISSIONER FOR PERSONAL DATA Respondent

Coram : Administrative Appeals Board

Date of Hearing : 23 December 2005

Date of Written Decision with Reasons : 18 April 2006

D E C I S I O N

Background Facts

1. By Notice of Appeal dated 30 November 2004, the Appellant appealed to this board the decision of the Respondent made on 8 November 2004 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 Appellant against Hong Kong Broadband Network Ltd.("HKBN"). The circumstances which give rise to the Appellant's complaint are as follows.

2. On 7 August 1999, the Appellant registered with City Telecom (HK) Ltd. ("CTI") for their IDD1666 telephone services and dial-up internet services known as "CTInets". At that time, the Appellant elected to pay for the use of those services by means of autopay from her VISA credit card account at Dah Sing Bank. For the purpose, the Appellant provided to CTI details of her credit card account.

3. In 2000, CTI spinned off the business of dial-up internet services to an associated company, namely HKBN. Notice to that effect was given to the customers of CTI by means of a standard form letter, in both English and Chinese, dated 1 March 2000. The Appellant cannot now recall whether she received a copy of that letter. CTI also transferred the Appellant's personal data, including her credit card information, to HKBN.

4. Apparently, the Appellant continued to use the dial-up internet services provided by HKBN for 5 more months and the relevant services charges, known as "PNET charges", were duly debited from her said credit card account.

5. On 12 March 2003, the Appellant applied to HKBN for their Home Telephone Services (家居電話服務), and elected to pay for those services by "cash". In the application form signed by the Appellant for the Home Telephone Services provided by HKBN, the following was expressly stated:-

"無論本人(何女士)不時選擇任何付款方法，若本人於香港寬頻賬戶內之結欠於有關之最後繳款日仍未繳付，本人同意及授權香港寬頻將所有該等結欠金額記入上述信用卡賬戶內。本人同意授權香港寬頻於其不時認爲合適的情況下，更新本人提供予香港寬頻久信用卡資料以繳付任何應繳金額予香港寬頻。如本人沒有於本表格內提供任何信用卡資料，本人同意及授權香港寬頻保留及使用本人以往曾提供予香港寬頻的信卡資料，不論以作信用覆核及/或繳付任何應繳金額予香港寬頻。.....若逾期繳賬30天，本人同意香港寬頻有權將本人未繳金額記人下述之信用卡賬戶內或以往提供之信用卡賬戶內或以所繳之按金扣除，不得異議。.....本人同意，香港寬頻保留及使用以往提供之信用卡資料，以作信用覆核及繳付一切逾期賬項。"

6. Also, the standard terms of HKBN relating to their Home Telephone Services provided that: "The Subscriber agrees and authorizes HKBN to debit the full amount payable under HKBN's invoice or any amount due and payable by the Subscriber to any of the Group Companies from the Subscriber's credit card account registered with HKBN, if any, and the Subscriber shall be responsible for renewing such authorization from time to time...".

7. On 1 April 2004, the Home Telephone Services charges of HK$165 became due and payable by the Appellant. However, the same was not settled for over 90 days because, according to the Appellant, she did not receive any invoice from HKBN for payment of those charges. In due course, HKBN debited the outstanding amount from the Appellant's aforesaid credit

card account.

8. On discovering from her monthly credit card statement dated 16 August 2004 that her credit card account had been debited for the said amount in favour of CTI, the Appellant immediately made inquiries with the bank to find out the nature of that payment, and eventually found out that the payment was in favour of HKBN for the said outstanding Home Telephone Services charges.

9. The Appellant considered that she had never provided her credit card account details to HKBN and that HKBN had no authority to debit her credit card account for the said outstanding Home Telephone Services charges. On 25 August 2004, the Appellant lodged a complaint with the Respondent against HKBN for the mis-use of her personal data.

10. The Respondent commenced preliminary investigation into the Appellant's complaint, and received certain explanation from HKBN for their conduct. Eventually, HKBN (i) agreed to, and did, return the said sum of HK$165 to the Appellant and decided to pursue the outstanding charges by other means and (ii) undertook not to use the Appellant's credit card information for the purpose of collecting outstanding charges in future without the express agreement or authorization of the Appellant.

11. Having regard to the aforesaid voluntary remedial action taken by HKBN, the Respondent decided not to carry out or continue the investigation into the Appellant's complaint, and informed the Appellant of its decision by letter dated 8 November 2004.

12. The Appellant was dissatisfied with the Respondent's decision and brought the present appeal on 30 November 2004.

The Grounds of the Respondent's Decision

13. The Respondent's decision was based on two grounds:-

(1) there was no prima facie case of breach of Principle 3 of the Data Protection Principles set out in Schedule to the Ordnance, which the Respondent identified as being the relevant principle applicable to the present case; and

(2) in any event, in view of the voluntary remedial action taken by HKBN, the Respondent considered that the investigation or further investigation of the case could not reasonably be expected to bring about a more satisfactory result.

14. In so deciding, the Respondent applied the provisions set out in its complaint Handling Policy, which, so far as material, states as follows:-

> "(B) Discretion under section 39(2) to refuse to carry out or continue an investigation
>
> ...
>
> In addition, an investigation or further investigation may be considered to be unnecessary if:
>
> d) after preliminary inquiry by the PCO, there is no prima facie evidence of any contravention of the requirements of the Ordinance;

g) given the mediation by the PCO, remedial action taken by the party complained against or other practical circumstances, the investigation or further investigation of the case cannot be reasonably expected to being about a more satisfactory result.

Whether a more satisfactory result can be achieved

15. The power of the Respondent to take enforcement actions, following the completion of an investigation, is set out in Section 50 of the Ordinance. Section 50(1) provides as follows:-

> "Where, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user –
>
> (a) is contravening a requirement under this Ordinance; or
>
> (b) has contravened such a requirement in circumstances that make it likely that the contravention will continue or be repeated,
>
> then the Commissioner may serve on the relevant data user a notice in writing –
>
> (i) stating that he is of that opinion;
>
> (ii) specifying the requirement as to which he is of that opinion and the reasons why he is of that opinion;
>
> (iii) directing the data user to take such steps as are specified in the notice to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the period specified in subsection (7) within which an appeal against the notice may be made) as is

specified in the notice; and

(iv) accompanied by a copy of this section."

16. At the hearing of the present appeal, Mr Chris Cheng on behalf of the Respondent submitted that even if the investigation of the complaint lodged by the Appellant should result in a finding that HKBN had contravened a requirement under the Ordinance, namely, Principle 3 of the Data Protection Principles, in practice, the enforcement action which the Respondent could take under Section 50(1) of the Ordinance would unlikely bring about any further remedy than what HKBN had already done voluntarily, in particular its undertaking not to use the data relating to the Appellant's credit card for the purpose of collecting outstanding charges in future, without the express agreement or authorization of the Appellant.

17. Under Section 39(1), the Respondent has a wide discretion whether to carry out or continue an investigation. In particular, under subsection 39(2)(d), 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. It seems to us that it was reasonably open to the Respondent to come to the view that any further investigation of the Appellant's complaint was unnecessary in view of the voluntary remedial action taken by HKBN.

18. In coming to this conclusion, we note that the Respondent's decision is in line with its published policy. However, we are not satisfied that the Appellant was or could reasonably have been expected to be aware of that policy at the time of the making of the decision being the subject of the

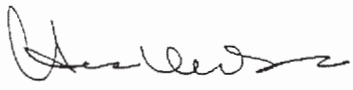
appeal, and therefore we do not place any weight on that policy (see Section 21(2) of the Administrative Appeals Board Ordinance). Nevertheless, we are satisfied that the Respondent was entitled, in the present circumstances, to consider that any further investigation of the Appellant's complaint was unnecessary and exercise his power not to carry out or continue the investigation under Section 39(2)(d) of the Ordinance.

Whether prima facie case of breach

19. In view of our conclusion that the Respondent's decision is justifiable under section 39(2)(d) of the Ordinance, it is not necessary for us to express any view on whether there is a prima facie evidence of breach of Principle 3 of the Data Protection Principles on the part of HKBN. We also consider it undesirable for us to say any more on this ground of the Respondent's decision, save to make it clear that this board must not be taken to have agreed with the Respondent that there is no prima facie evidence of breach of Principle 3 of the Data Protection Principles by HKBN.

Conclusion

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



(Mr Anderson CHOW Ka-ming)
Deputy Chairman
Administrative Appeals Board