ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 52/2011

BETWEEN

L — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board

Date of Hearing: 23 May 2012

Date of Handing down Written Decision with Reasons: 26 July 2012

DECISION

Note: references in this Decision to "AB" are references to the Appeal Bundle referred to in paragraph 26 herein and references to "the Ordinance" are references to the Personal Data (Privacy) Ordinance, Cap. 486.

THE FACTS

1. The Appellant is an ex-employee of the Standard Chartered Bank (Hong Kong) Limited ("SCB").

2. By a data access request form dated 17th January 2011 ("the DAR"), he requested from SCB copies of his personal data kept by SCB as listed in an appendix to the DAR (AB, 176).

3. Under cover of a letter dated 25th February 2011 (AB, 184), and in response to the DAR, SCB forwarded to the Appellant a bundle of copies of documents ("the readily accessible documents") which related to the DAR.

4. SCB requested, 'as part of its compliance with' the DAR, payment of HK$672.00, being the administrative costs of locating the readily accessible documents, photocopying/printing charges and courier charges.

5. SCB also informed the Appellant that, given the DAR covers an extensive period of time, some of the potentially relevant documents were not currently readily accessible. For this reason, SCB was 'continuing to retrieve and review the potentially relevant documents over the relevant period' and that, should further relevant documents be located, they will be provided to the Appellant.

6. By a letter dated 1st March, the Appellant wrote to SCB, (1) requesting confirmation of when SCB will *fully* comply with his DAR and (2) complaining that HK $672.00 was excessive (AB, 185).

7. By a letter dated 9th March 2011 (AB, 188), SCB informed the Appellant that (i) for the sake of completeness, it was retrieving some back-up files to further identify documents which may be relevant to the DAR; (ii) the laptop of one of the individuals identified in the DAR had crashed, resulting in loss of data and SCB was 'currently in the process of restoring certain back-up files to see whether some additional data can be identified'; and (iii) extra costs would therefore be involved and would, as quoted by SCB's IT provider, be approximately USD 1,740.00. The Appellant was advised that SCB considers itself entitled to recover such costs from him and that, if the Appellant should prefer SCB not to undertake this exercise, he should let it know so that the incurring of further costs associated with the retrieval of the back-up files could be avoided.

8. By a letter dated 15th March 2011, the Appellant replied saying that compliance with his DAR was still incomplete and that, unless he received a reasonable reply by 18th March 2011, he would complain to the Respondent, the Privacy Commissioner for Personal Data. He also requested clarification as to whether he would be asked to pay for the repair of the crashed laptop. (AB, 190)

9. By a letter dated 17th March 2011 (AB, 192), SCB replied stating, inter alia, that (1) it had already discharged its duty under the Ordinance, that (2) the offer to retrieve the back-up files was on an entirely voluntary basis, that (3) they are fully entitled to recover the fees from the Appellant and (4) such fees do not relate to the repair of the laptop (in other

words they relate only to the retrieval of the back-up files). The Appellant was also supplied with a breakdown of the charges amounting in total to HK $672.00 in respect of the readily accessible documents: viz. photocopying charges (377 pages at HK $1.00 per page); HK $40.00 nominal processing fee and HK $255.00 nominal courier charges for two CDs from the UK to Hong Kong.

10. On 21st March 2011, a complaint was lodged by the Appellant to the Office of the Respondent (AB, 171). In it, the Appellant expressed dissatisfaction with the courier and photocopying charges in relation to the readily accessible documents as well as being asked by SCB to pay the costs of retrieving the back-up files in relation to the data which was potentially relevant, but was not readily accessible. The Appellant further complained that his DAR was not fully complied with insofar as the data in the back-up files which might be relevant to his DAR had not been provided to him.

11. On 30th March 2011, the Respondent wrote to SCB requesting certain information from it (AB, 204). SCB wrote in reply on 12th April 2011 (AB, 207), enclosing some documents (viz. a chain of e-mails) which indicated that orders from SCB to its IT provider to commence the retrieval process were given as early as 2nd March 2011. Indeed, the process was described as 'urgent' and that 'costs was not a problem' (AB, 218-222). Also included was a quotation from the IT provider for such services. As calculated in accordance with the said quotation (see AB, 221) and on the basis that the relevant back-up files spanned a period of 29 months from August 2007-December 2009 (see AB, 220), the total fees involved were estimated to be approximately USD 1,740.00.

12. By a letter dated 26th April 2011 to the Appellant, SCB stated, inter alia, that it was under no obligation to proceed with the task of the retrieval/restoration of the back-up files (which began, as we have seen, in early March 2011) without any undertaking from the Appellant to reimburse SCB for out-of-pocket expenses associated with this process. (AB, 226) It is common ground that the Appellant never agreed or undertook to pay for such retrieval costs.

13. In or about 4th May 2011, SCB reduced its charges in respect the readily accessible documents from the original HK $ 672.00 to a sum of HK $336.00 (see AB, 246) and, despite what it said in its letter dated 26th April 2011, above, the retrieval/restoration process proceeded and was eventually completed. There is no direct evidence as to precisely how long the retrieval/restoration process took, but (i) we can see from an e-mail at AB, 221 that the IT provider initially estimated the process to take 15 working days and (ii) from the document referred to in the next paragraph herein, we can infer that, by late May 2011, the back-up files had already been retrieved, processed and reviewed by SCB and it was found that some 200 pages were relevant to the DAR.

14. By a letter dated 25th May 2011 (AB, 237), SCB wrote to the Respondent and informed the Respondent that SCB has completed the review process and that the quantity of the restored data which was relevant to the DAR ("the retrieved documents") amounted to some 200 pages. SCB further expressed the view that it was not obliged to provide them to the Appellant unless and until the Appellant complies with its request to reimburse SCB for (1) the out-of-pocket expenses associated with the restoration process (which amounted to USD 1,640.00); (2) photocopying/printing charges and other administrative costs.

15. Having considered the complaint, the Respondent, by a letter dated 3rd June 2011, informed the Appellant of his decision not to pursue his complaint any further, together with reasons for the said decision. (AB, 238-245) This is what SCB referred to as "the June decision" in its Statement, (AB, 140), a terminology which we shall gratefully adopt in our Decision herein.

16. The Appellant was informed of the June decision on 7th June 2011. On the same day, the Appellant sent an e-mail to the Respondent (AB, 250) contending inter alia, that SCB restored the files voluntarily and without any request from him or the Respondent. Besides, SCB might have retrieved the lost data for a purpose other than complying with the DAR and which was of benefit to it. In any event, since it is now in possession of the retrieved documents, it should hand them over to him forthwith upon payment of a reasonable administration or other reasonable fee. The Appellant submitted that, under such circumstances, he should not be asked to pay for the voluntarily incurred recovery/retrieval fees.

17. On 24th June 2011, the Respondent replied to the Appellant's e-mail dated 7th June 2011 (AB, 253). He reiterated his view that SCB was not obliged to retrieve the lost data but voluntarily did so at an expense of USD 1,640.00, which was "directly related to and necessary for complying with the DAR", and which it was entitled pass on to the Appellant. We shall consider the meaning and significance of this phrase in due course.

18. On 5th July 2011, the Appellant phoned the Respondent to voice his dissatisfaction with his reply and, on the next day (6th July 2011), wrote to the Respondent further expressing his dissatisfaction in the form of a very detailed and comprehensive written

submission (AB, 257), which we shall not take the trouble to set out here. Suffice it to say that the submission dealt with (a) the onus of proof regarding the incurring of expenses directly related to and necessary for the compliance of a DAR and whether it had been discharged in this case, (b) whether SCB was obliged to supply the retrieved documents and whether they were retrieved solely for the purpose of complying with the DAR and (c) whether or not the charges/fees in relation to both the readily accessible and retrieved documents claimed by SCB were excessive.

19. On 26th August 2011, the Respondent replied to the Appellant's letter dated 6th July 2011, dealt with the Appellant's submission point by point and maintained both the June decision and the reasons given for the said decision (AB, 260). This is what SCB referred to as "the August decision" in its Statement, (AB, 140); again, a terminology which we shall gratefully adopt.

THE APPEAL

20. On 1st September 2011, a Notice of Appeal was lodged by the Appellant against the August decision (see AB, 115). We note that, by that date, the time within which he must appeal against the June decision had already expired (see section 9 of the Administrative Appeals Board Ordinance, Cap. 442). However, neither the Respondent nor SCB has taken any issue on this and, in our view, quite rightly so. The Respondent's August decision was a considered decision with a comprehensive review and point by point answer of the Appellant's detailed submissions contained in his letter of 6th July 2011. It involved more than simply a matter of affirming the June decision and adopting its reasons. As the Respondent himself said at the final paragraph of his August decision, the decision to

maintain the June decision was taken *after* having considered the Appellant's most recent submission and after having reviewed the information obtained (paragraph 3) (AB, 262-3). The August decision, therefore, was not simply a carbon copy of the June decision. It had a life of its own. The present appeal, which is against the August decision, is hence lodged well within time and is one which this Board may proceed to hear and to determine.

21. At the hearing of this appeal, both the Respondent and SCB were present and represented by their respective legal representatives; the Respondent by Miss Catherine Ching and SCB by Miss Natalie Kong of Simmons & Simmons. However, the Board was informed, by a letter from Simmons & Simmons dated 8th May 2012 (AB, 341), that Miss Kong, although present at the hearing on behalf of SCB, would not be making any representations as SCB had already set out its position in its written submissions contained in its Statement dated 20th October 2011 (AB, 140).

22. The Appellant was absent. We were informed by the Secretary that she had received a telephone call from the Appellant late in the evening of the previous day and was informed by the Appellant that he would not be attending the hearing. The reasons he gave for not attending the hearing were two-fold: namely that (i) all he wished to say had already been said in his written submissions and (ii) he did not wish to incur any additional costs.

23. Section 20(1) of the Administrative Appeals Board Ordinance provides as follows:

> If on the day and time fixed for the hearing of the appeal the appellant fails to attend the hearing or fails to make representations either in person or by counsel or a solicitor or by some other person, the Board may-

(a) if satisfied that the appellant's failure to attend was due to sickness or any other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;
(b) proceed to hear the appeal; or
(c) by order dismiss the appeal.

24. In the light of the reasons given by the Appellant for his non-attendance, it was obvious that any adjournment would be meaningless. We also did not think it was either fair or desirable to dismiss the appeal without a hearing on the merits. We therefore decided to proceed to hear the appeal in the Appellant's absence in accordance with section 20(1)(b) of the Administrative Appeals Board Ordinance.

25. Before we did so, however, we had to deal with a preliminary matter. By letters dated 4th May 2011 and 8th May 2011 (AB, 341a & 342), the Appellant made two applications to the Board: (a) for the appeal hearing to be in private ("the first application") and (b) for an anonymity order ("the second application"). After having considered submissions from both the Respondent and SCB (AB, 348), we rejected the first application, but allowed the second. We accordingly made an order in these terms, namely that "The name of the Appellant should appear as the letter 'L' in any report of the present appeal and in the titular page of the Board's decision released to the public. The naming or identification of the Appellant in the context of any report of this appeal is prohibited". Our ruling on these applications was orally delivered by the Presiding Chairman at the commencement of the hearing of this appeal. It has since been reduced into writing and a copy of the same is annexed to this Decision.

26. Neither the Respondent nor SCB called any witnesses. However, a bundle of documents relating to the appeal was submitted for our consideration in the form of an

Appeal Bundle ("AB") which we received as evidence pursuant to section 21(1)(b) of the Administrative Appeal Boards Ordinance, Cap. 442.

THE RELEVANT STATUTORY PROVISIONS & LEGAL PRINCIPLES

27. The following statutory provisions are relevant to this appeal:

Section 18(1) of the Ordinance:

An individual, or a relevant person on behalf of an individual, may make a request-

(a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject;

(b) if the data user holds such data, to be supplied by the data user with a copy of such data.

Section 19(1) of the Ordinance:

Subject to subsection (2) and sections 20 and 28(5), a data user shall comply with a data access request not later than 40 days after receiving the request.

Section 28 of the Ordinance:

(1) A data user shall not impose a fee for complying or refusing to comply with a data access request or data correction request unless the imposition of the fee is expressly permitted by this section.

(2) Subject to subsections (3) and (4), a data user may impose a fee for complying with a data access request.

(3) No fee imposed for complying with a data access request shall be excessive.

(4) Where pursuant to section 19(3)(c)(iv) or (v) or (4)(ii)(B)(II) a data user may comply with a data access request by supplying a copy of the personal data to which the request relates in one of 2 or more forms, the data user shall not, and irrespective of the form in which the data user complies with the request, impose a fee for complying with

the request which is higher than the lowest fee the data user imposes for complying with the request in any of those forms.

(5) A data user may refuse to comply with a data access request unless and until any fee imposed by the data user for complying with the request has been paid.

(6) Where-

(a) a data user has complied with a data access request by supplying a copy of the personal data to which the request relates; and

(b) the data subject, or a relevant person on behalf of the data subject, requests the data user to supply a further copy of those data,

then the data user may, and notwithstanding the fee, if any, that the data user imposed for complying with that data access request, impose a fee for supplying that further copy which is not more than the administrative and other costs incurred by the data user in supplying that further copy.

28. In a decision of this Board in Commissioner of Correctional Services v. Privacy Commissioner for Personal Data, AAB No. 37 of 2009, the Board laid down the following legal principles with regard to the interpretation and application of section 28 of the Ordinance, which, subject to the clarification and/or slight modification mentioned in sub-paragraphs (7) and (8) below, we respectfully agree with and shall gratefully adopt in our determination of this appeal:

(1) The section should be construed in a way consistent with the legislative purpose of the Ordinance, which is to protect the privacy of individuals in relation to personal data.

(2) Since complying with a DAR is a statutory obligation, the costs and expenses of such compliance ought to be borne by the person on whom the obligation is imposed. If the statute expressly allows him to charge a fee, he may do so only to such extent as the statute allows him to. As such, any statutory provision which allows him to charge a fee must be construed strictly.

(3) What section 28(2) allows is a fee for complying with a DAR. Hence the fee imposable by a data user must be related to his compliance with the DAR and is therefore a cost-related fee.

(4) By not stipulating fixed sum fees and merely providing that no excessive fees should be imposed, the legislature intended that there be flexibility in the imposition of fees and that whether a fee purportedly imposed is excessive or not is to be considered according to the circumstances of each case.

(5) In allowing a data user to impose a fee and in permitting him not to comply with a DAR unless and until the fee has been paid (section 28(5)), the legislature clearly had in mind the protection of the data user who may have to incur costs which may be substantial and far from being nominal.

(6) In striking a balance between the interest of the data user and the data requester, the legislature contemplates that there may be situations where it may not be just to allow the data user to recover the full costs actually incurred by him in complying with a DAR. Accordingly if a data user chooses to comply with a DAR in a form that is more costly, he would not be able to charge a fee higher than what would otherwise be chargeable if he had complied with the request in a form that is less costly. In other words, he would in effect be able to recover only those costs which are *the least of all alternative courses available* for complying with the DAR.

(7) The word "excessive" in sub-section (3) should be construed as confining the fee only to cover those costs which are *directly related and necessary for* compliance with a DAR and hence a data user can only recover from the data requester such costs and no more than that. Here we would like, with respect, to clarify and/or add a slight modification to this principle. We think that not only has it to be shown that the costs were directly related and necessary for complying with the DAR, but these costs must also be shown to be not "excessive" in the circumstances of the particular case. We can envisage situations where the data user may have, unnecessarily and/or

without justification, *created* an extraordinary situation whereby certain excessive costs *must* directly and necessarily be incurred in order to comply with the DAR. We do not think that, under these circumstances, the data user ought to be permitted to pass on such costs to the data requester. In other words, even if the costs are directly and necessarily incurred, they would, nevertheless, be irrecoverable if they are, in the particular circumstances of the case, found to be "excessive" in the sense that they amount to much more than they would have been under normal circumstances had it not been for the *extraordinary* situation created by the data user. To hold otherwise would, in our view, be contrary to the clear words of section 28(3). Take the present case, for example. If there is evidence to show that the crash of the laptop was due to the fault of SCB and hence this made it necessary for huge and exorbitant fees to be directly incurred to recover data lost as a result of the crash, it would seem to us quite unjust and contrary to section 28(3) to allow such fees to be borne by the Appellant.

(8) The evidentiary onus is on the data user to show that the fee it proposes to impose is directly related and necessary for complying with the DAR and does not go beyond that. For the reasons referred to in sub-paragraph (7) above, we would, with respect, go a bit further than this. In our view, the onus should be on the data user to show that such fee is directly and necessarily incurred in complying with the DAR *and* that it is not, in the circumstances, excessive. There may, of course, be cases where even without evidence from the data user, the Board may be satisfied that the fee imposed is not excessive (e.g. the amount of the fee is on its face eminently non-excessive, or there may be circumstantial evidence to show that the fee does not cross the excessive side---circumstances may vary). But, generally speaking, the data user bears the evidentiary burden to show that the fee imposed does not exceed its direct and necessary costs and, we would add, is non-excessive. "Direct and necessary" does not necessarily mean "reasonable". An item of cost may be one which a reasonable data user would incur, but it might not be one which is necessary, as it may still be possible for him to comply with the DAR without incurring that item.

(9) Section 28(3) only restricts a data user from imposing a fee that is excessive. It does not prevent a data user from imposing a fee that is less, or to waive a fee that he may otherwise be entitled to charge.

TWO CATEGORIES OF DOCUMENTS

29. There are two batches or categories of documents involved in this appeal, which raise different issues, namely (1) "the readily accessible documents" and (2) "the retrieved documents". We shall deal with them separately and in turn.

THE READILY ACCESSIBLE DOCUMENTS

30. As far as the readily accessible documents are concerned, the issue raised in this appeal is whether or not the fee/costs imposed by SCB on the Appellant were directly and necessarily incurred in compliance of the DAR and whether they were excessive. The fee originally charged was HK$ 672.00. The Appellant gave a breakdown of these charges in its letter dated 17th March 2011 (AB, 192) (as summarized at paragraph 9, above). We are satisfied that incurring the photocopying charges was an inevitable consequence of complying with the DAR and was directly and necessarily incurred for the purpose of complying with the DAR. In the Appellant's letter to the Secretary of this Board dated 1st December 2011 (AB, 332-335), the Appellant pointed out that the Labour Tribunal is charging at $0.5 per page and that shops in Hong Kong are charging as low as $0.3 per page. On the other hand, so far as Government departments are concerned, it appears from AB, 326 & 327 that both the Judiciary and the Immigration Department are charging $1.0 per photocopy. Further, apart from the mechanical process of photocopying, it is also necessary to retrieve the data in order to comply with a DAR. It is thus inappropriate to

simply compare such costs with the fees for mere photocopying which is charged by shops in Hong Kong. We therefore do not see how these charges may be considered prima facie excessive, nor can we think of any alternative which may be cheaper.

31. As for the courier charges, SCB submitted that, since the DAR related to information held by its employees in both the Hong Kong office and group entities in London, it was necessary to send the information held by certain individuals in London to the Hong Kong office for processing. Due to the volume of the requested data, it was more cost-effective and less time consuming to burn the relevant information onto a CD as opposed to sending the information by numerous e-mails. Moreover, the option of printing out all the data and sending the documents to the Hong Kong office would undoubtedly have cost much more than the courier charges actually incurred. The Respondent accepted this explanation and we see no reason why we should not do the same.

32. In any event, these charges were, as we have seen, subsequently reduced by as much as 50% to HK $336.00. This reduced fee was paid by the Appellant (see paragraph 4 of SCB's Statement at AB, 140). In AAB No. 37/2009, the Board said that "there may be cases where even without evidence from the data user, the Board may be satisfied that the fee imposed is not excessive (e.g. the amount of the fee is on its face eminently non-excessive, or there may be circumstantial evidence to show that the fee does not cross the excessive side---circumstances may vary)". We think this is probably one of those cases. Under these circumstances, we are unable to say that the Respondent erred in considering this issue between the Appellant and SCB to be "resolved" and that no further investigation was necessary. We think, therefore, that this part of the Appellant's appeal, i.e. insofar as it relates to the readily accessible documents, ought to be dismissed.

THE RETRIEVED DOCUMENTS

33. We turn now to consider the issues raised by the matter of the retrieved documents. SCB's submission (which was accepted by the Respondent) runs as follows: Insofar as the relevant data was not "readily accessible" in that it was contained in certain back-up files stored with its IT provider, it was data which ought to be considered "lost or destroyed". A data user has no legal obligation to provide such data to the data requester. However, since SCB voluntarily instructed its IT provider to retrieve/recover the said data and incurred expense in so doing, it was entitled to pass on such expense to the data requester; such expense being actually incurred by the data user and was "directly and necessarily incurred" for the purpose of complying with the DAR (see AB, 162-3; paragraphs 19-21). We regret to say that, unlike the Respondent, we are far from satisfied with this SCB's explanation as to why it is entitled to pass on the data retrieval costs to the Appellant. Indeed, we have a number of observations and/or queries regarding this submission which we shall raise in the paragraphs which follow.

34. First of all, we cannot help but notice a logical fallacy in SCB's submission. It is this: if, as SCB claims, it is not legally obliged to retrieve the "lost/destroyed" data, then how can it be said that the voluntarily incurred retrieval costs were "directly and necessarily incurred" for the purpose of complying with the DAR? Needless to say, if such costs were not "directly and necessarily incurred" for the purpose of complying with the DAR, then it must follow that they are irrecoverable. SCB must be bound to hand over the 200 pages of retrieved documents to the Appellant upon the payment of a reasonable fee at the same level as charged for the supply of the readily accessible documents and no more than that. The

Appellant will *not*, under such circumstances, be bound to pay for the retrieval costs in the amount of USD 1,640.00 as claimed by SCB.

35. Secondly, we do not, in any event, agree with SCB and the Respondent that such data should be considered "lost or destroyed". The essential attribute of a thing which is lost or destroyed is that it cannot, by *any* means, be recovered, restored or located. To put it in simple language, it is permanently gone. A thing which may be recovered, restored or retrieved albeit via a process which could take some time and involve some expense is not, in our view, lost or destroyed. If the data was neither lost nor destroyed, then the data user would be under a legal obligation to provide it to the data requester. The question then becomes whether or not the expense/costs of doing so was "directly and necessarily incurred" and whether they were "excessive".

36. The evidentiary burden lies with the data user to produce evidence which shows that the costs/expenses were directly and necessarily incurred for the compliance with the DAR *and* that they were not excessive, unless it may be said that such costs were on their face prima facie non-excessive. USD 1,640.00, it seems to us, is not, on its face, an insubstantial or nominal sum. Moreover, there is indication that when SCB decided to engage in the recovery process in early March 2011, it did not pay any consideration at all to the amount of costs which such process might entail (see the e-mail dated 2nd March 2011 at 8 pm where Ms. Pearl Graham to SCB instructed Scope International Ltd. "Please go ahead with the RMS. Costs is not a problem"). What evidence is there to show that they were non-excessive? It is a fact that the recovery process involved files spanning a period of 29 months, and that, although there is no evidence as to how long the process actually took, the time estimated for completion of the process was, according to Scope International Ltd.,

approximately 15 working days (AB, 221). We also note that the actual costs incurred by SCB (USD 1,640.00) were USD 100.00 less than that originally quoted by Scope International Ltd. (USD 1,740.00). But we cannot from these facts alone conclude that the costs of recovery were non-excessive. Furthermore, no evidence has been submitted to us by SCB which shows how and why the laptop crashed, which necessitated incurring this expense in the first place. Under normal circumstances, had it not been for the crashing of the said laptop, the data would not have had to be retrieved and hence the costs necessary to comply with the DAR would have been much less. As we mentioned earlier in paragraph 28(7) above, the reason for the crash of the laptop has a bearing upon whether the recovery/retrieval costs may be passed on to the Appellant. The onus is on SCB to produce evidence to show how and why the said laptop crashed and that it was not due to any fault on its part. This onus has not been discharged.

37. Besides, there is, in our view, further evidence which casts doubt on whether these costs (or at least part of these costs) were *necessarily incurred* in the first place and on whether they could have been much less than they turned out to be. We can infer from the chain of e-mails at AB, 218-220 that the back-up files were, apparently, stored with SCB's IT provider, namely Scope International Limited, a privately owned subsidiary of SCB, UK. On Wednesday March 2nd 2011 at 11:38 pm, Mr.Veerasamy Sureshkumar (a technical analyst of Scope International Ltd.) requested his team to "please check & restore below mentioned backup file for period Aug 2007 to Dec 2009 month end backup files and confirm to us for the PST extraction". At 2:13 am on Thursday March 3rd 2011, Mr. Edward Ho (a member of the team) informed his colleagues that the relevant back-up files could not be located and asked for indexing to be done. On 4th March at 13:00 hours, Mr. Sureshkumar had to inform Ms. Pearl Graham of SCB, UK that his team was not able to index the back-up files

and Scope International Limited had to ask their "storage team" to locate the said files. At the same time, he also instructed Mr. Edward Ho and the rest of his team to start the restoration and PST extraction process "once received the input from the storage team". Now, on this factual scenario, the questions which come to mind are these: why was it necessary for SCB to store its back-up files with Scope International Limited instead of within its own computer network? If this was not necessary, why was it done? If the files were stored with SCB's own computer system, could the data have been retrieved more quickly and at considerably less cost? Was the rate for the cost of retrieval provided for in the contract between SCB and Scope International Limited and, if so, should not the costs be based on the contractual rate rather than on an ad hoc quotation submitted by the IT provider? Was the rate quoted at arms-length? Given the fact that the quoted rate was based on restoration per tape, was it in fact the case that the tapes only contained data requested by the Appellant and nothing else and, if not, how could it be said that all the restoration costs were directly and necessarily incurred in complying with the DAR? Regrettably, and bearing in mind the onus was on SCB to do so, no evidence has been submitted to us which may provide answers to these questions. These are matters which, it seems to us, are relevant in determining whether the recovery/retrieval costs of the data in the back-up files were (i) directly and *necessarily* incurred in complying with the DAR and (ii) whether they were excessive or could have been less expensive. Unfortunately, they are matters which the Respondent did not consider and hence failed to investigate.

38. Towards the end of the hearing, Miss Ching put forward two "new" arguments, not hitherto mentioned by the Respondent, for our consideration. She invited us, first of all, to focus on one point in time, namely at the time SCB received the DAR (on or about 17th January 2011). At this point in time, although SCB envisaged that some potentially

relevant data *might* be contained within the back-up files, they could not be certain about it as such files were not then readily accessible. The situation then, therefore, was that SCB was under no obligation to provide any of the data in the back-up files to the Appellant. It is as if the data did not exist. We have to say we are extremely reluctant to accept such a proposition. It is tantamount to suggesting that it is permissible for a data user who thinks that there *might* be data relevant to a DAR within his control, but is not certain about it, to turn a blind eye to this fact and not even attempt to ascertain whether or not the data he controls is relevant to the DAR. As was pointed out in AAB No. 37/2009, the data user is under a statutory obligation to comply with a DAR. It would not, in our view, be consistent with the legislative intent of the Ordinance for it to be construed in the manner suggested by Miss Ching.

39. The second "new" argument put forward by Miss Ching is on a slightly different vein. It centers upon the statutory definition of "personal data" in section 2(1) the Ordinance, namely data which (a) relates directly or indirectly to a living individual, (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained and (c) in a form in which access to or processing of the data is practicable. "Practicable" means "reasonably practicable". Once again, we are invited to focus on the point in time when SCB received the DAR, i.e. at a time when the relevant data was still contained in the back-up files and had yet to be retrieved. It is submitted that the data was then in a form in which access to or processing of the same was not practicable. Hence the data in question was not "personal data" within the definition of the Ordinance and SCB was under no obligation to provide it to the Appellant. With respect, we cannot see how it may be said that the relevant data was in a form whereby access to or the processing of the same was not reasonably practicable. At the time of receipt of the DAR, the said data was stored

in a computer network of SCB's IT provider. As such, it was reasonably practicable for the IT provider to access this data and to forward it to SCB for processing. This was in fact done and, after processing and reviewing it, SCB produced some 200 pages of documents which were relevant to the Appellant's DAR. Accordingly, we fail to see how, at the time when SCB received the DAR, such material was not "personal data" of the Appellant.

40. We therefore reject the two "new" arguments which Miss Ching has urged upon us to accept.

41. In any event, these two arguments are based upon two fundamental fallacies. First of all, insofar as their purpose is to persuade us that SCB was, at the time of receipt of the DAR, under no obligation to provide the data in the back-up files to the Appellant, we do not, with respect, see how far this advances the respective cases of the Respondent and SCB. As we pointed out earlier, if SCB was indeed under no obligation to provide the data, but nevertheless voluntarily proceeded to retrieve the same and incurred expense in so doing, we do not see how it can possibly be said that the said expense was "directly and necessarily incurred for the purpose of complying with the DAR". Secondly, we do not see why we have to focus on just one point in time, namely the time when SCB received the DAR, and ignore everything which occurred afterwards. It is an undeniable fact that, after it received the DAR, SCB proceeded to recover the data in the back-up files and is currently in possession of some 200 pages of the personal data of the Appellant which relates to the said DAR. The question then becomes whether SCB is entitled to impose, as a condition for handing over such data to the Appellant, the costs/expenses it incurred in the recovery process.

CONCLUSION & ORDER

42. By reason of the foregoing, and after having considered all the evidence and the submissions of the parties, we have come to the following conclusions:

(1) Upon receiving the DAR, SCB, as a data user, was obliged to ascertain (so far as it was reasonably practicable to do so) whether it held and/or controlled any data of the Appellant which is or might be relevant to the DAR. This included the data which was in the back-up files. We reject the submission that such data had been "lost or destroyed", such that it was not reasonably practicable for it to be recovered/retrieved or that it could not be reasonably practicable for SCB to ascertain whether or not it was relevant to the DAR. SCB was, therefore, legally obliged to engage in the recovery process and to provide to the Appellant copies of the 200 pages of his personal data which was contained in the back-up files.

(2) Such obligation to do so is, however, subject to payment by the Appellant of such recovery charges, photocopying charges and administration fees which are non-excessive, having regard to the particular circumstances of the present case.

(3) The evidentiary burden is on SCB to show that the recovery charges which it incurred (USD 1,640.00) was "directly and necessarily incurred for the purpose of complying with the DAR" *and* that they were not "excessive". We find (for the reasons referred to in paragraph 36 & 37 above) that there is insufficient evidence to show that this burden has been discharged. From paragraph 7 of SCB's Statement (AB, 141), it appears that SCB had asked the Appellant to pay a fee of USD 1,640.00

(covering the cost of recovering/retrieving the data in the back-up files) and HK$223.00 (covering the cost of photocopying, printing and administration). The Appellant has in fact already paid SCB the Hong Kong dollar equivalent of USD 1,640.00 and, at present, only the HK$ 223.00 photocopying, printing and administration fee remains outstanding. There is no indication from SCB that it had handed over the 200 pages of relevant personal data to the Appellant. In the circumstances, it appears to us that there is a *prima facie* case that SCB may be in breach of its statutory obligation under section 19(1) and/or of section 28 of the Ordinance.

(4) The Respondent should, in the circumstances, investigate and ascertain whether SCB is in fact in breach of its obligation or of the provisions of the Ordinance and, if so, take such measures as he sees fit, in accordance with the provisions of the Ordinance, to remedy or rectify the situation.

(5) It follows that the Respondent has wrongly decided that it was unnecessary to further investigate and/or pursue the Appellant's complaint.

(6) The part appeal which relates to the retrieved documents should, accordingly, be allowed.

43. Section 21(1)(j) of the Administrative Appeals Board Ordinance provides that, for the purposes of an appeal, the Board may, 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. Section 21(2) provides that 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. Section 21(3) then provides that 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.

44. Having considered the matters hereinabove, as well as the Respondent's Complaint Handling Policy, we hereby:

(i) dismiss the part of this appeal which concerns the readily accessible documents and affirm the Respondent's decision relating thereto, and

(ii) allow the part of this appeal which concerns the retrieved documents, reverse the Respondent's decision not to pursue the Appellant's complaint any further and exercise our discretion under section 21(3) to order as follows:

That the case being the subject of this appeal, as determined by the Board hereinabove, be sent back to the Respondent for him to consider:

(a) whether or not SCB was in breach of section 19(1) and 28 or of any other provision/requirement of the Ordinance; and

(b) without prejudice to the generality of (a) above, exercising his powers of investigation in respect of:

(1) whether it was "necessary" for SCB to have placed its back-up files with its IT provider, Scope International Limited, as well as the related matters mentioned in paragraph 37 above;

(2) whether the crash of the laptop was in any way the fault of SCB and/or its employees or agents; and

(3) in the light of his investigations as regards the above, whether the charges incurred by SCB (USD 1,640.00) in respect of the recovery of the back-up files were "necessarily incurred" in complying with the DAR; and/or whether the said charges were, in all the circumstances, "excessive" and, if so, what "non-excessive" fee should SCB have charged.

(c) In the event that a breach or breaches of any provision(s) of the Ordinance is/are found, what appropriate measures ought to be taken to remedy or rectify such breaches pursuant to the powers conferred upon him by the Ordinance.

COSTS

45. We turn now to the question of costs. Section 21(1)(k) of the Administrative Appeals Board Ordinance, Cap. 442 gives the Board power, subject to section 22, to make an award to any of the parties to the appeal of such sum, if any, in respect of the costs of and relating to the appeal. Normally, in civil litigation, the general rule is for costs to follow the event. However, as far as this Board is concerned, the rule is modified to some extent by section 22(1), which provides that:

> The Board shall only make an award as to costs under section 21(1)(k)-
>
> (a) against an appellant, if it is satisfied that he has conducted his case in a frivolous or vexatious manner; and
>
> (b) against any other party to the appeal, if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.

46. In deciding the question of costs, we bear in mind the following:

(a) The Appellant is partially successful in overturning the Respondent's decision. Similarly, the Respondent and SCB are partially successful in defending it.

(b) We cannot say that the Appellant has in any way acted in a frivolous or vexatious manner in conducting his case.

(c) The Appellant has acted in person throughout and has not appeared at the hearing. He has not, therefore, incurred any legal fees in pursuing this appeal.

(d) Although the Appellant must have spent considerable time and effort in formulating his very helpful written submissions to this Board, we cannot go to the extent of saying it would be unjust and inequitable not to order costs in his favour against the Respondent and/or SCB.

We have therefore decided that the most appropriate course to take would be to make no order as to costs.

(Signed)

(Mr Thong Keng Yee)

Deputy Chairman

Administrative Appeals Board