

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 5 of 2008

BETWEEN

YUEN OI YEE, LISA

Appellant

and

THE PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 19 May 2008

Date of Written Decision with Reasons : 30 June 2008

D E C I S I O N

1. The appellant Yuen Oi Yee, Lisa and Ms Miranda Lam were two of 12 defendants in High Court Action HCA 1974/2007. The action

was brought by Ms Cuade ('Demy') and two domestic helpers. Messrs Johnson Stokes and Masters represented the 1st to the 7th defendants. Ms Lam and her brother Mr Lam were among these seven defendants. Messrs King and Co represented the 11th defendants. On 18.10.2007 the case was heard in the Court of First Instance. The Appellant was ordered by the Court to give a written undertaking to the Court while Ms Cuade was ordered to give her new employer's address to the Court for correspondence purposes. Copies of these documents were made by the Court and passed to the legal representatives of the other defendants.

2. The appellant at the time was under investigation by the Immigration Department in connection with a criminal offence. She was on bail. Because the date of hearing of the high court case clashed with the appellant's bail returnable date, the appellant had asked the Court to fix a different date. She submitted her bail forms in support of her request. Ms Cuade who was also involved in the immigration offence and was then on bail, also submitted her bail forms to the Court for the same purpose.

3. A few days after 18.10.2007, Ms Cuade's new employer received an envelope containing the appellant's undertaking and her bail forms. The envelope also contained the documents submitted by Ms Cuade. A claim form from the Small Claims Tribunal filed by the appellant on behalf of herself and two other domestic helpers was also enclosed.

4. The appellant was surprised that these documents were circulated to a third party without her consent. She made enquiry with King & Co. about it. She was told that the firm had not sent them to Ms Cuade's new employer. The appellant then made enquiry with the clerk of the Court. The clerk confirmed that the documents were only given to the parties in the court proceedings and no one else.

5. The appellant considered that these documents contained her personal data and should be confined to use in the court proceedings and whoever without her consent, disclosed them to a person unconnected with the case committed a breach of Data Protection Principle 3 (DPP3) of the Personal Data (Privacy) Ordinance (Ordinance.). She therefore made a complaint to the Privacy Commissioner. In her complaint she alleged that Messrs Johnson Stokes and Masters and the seven defendants they represented had without her consent disclosed the documents to Ms Cuade's new employer and had contravened the requirements of DPP3.

6. Mr. Ronald Kwan, Personal Data Officer of the Privacy Commissioner's Office, followed up the appellant's complaint. He made contact with the appellant by phone to ascertain the background of and the reasons for her complaint. The appellant told the officer on the phone that she surmised that it was Ms Lam who sent the envelope to the new employer to reveal Demy's involvement in the civil and criminal cases. However, she had no evidence to support her suspicion. As to

Messrs Johnson Stokes and Masters and the other defendants, she told Mr. Kwan that she no longer suspected them. She also provided to the Commissioner copies of the documents sent to Ms Cuade's new employer together with the envelope that contained them. Among these documents were three bail forms of the appellant dated 16.4.2007, 16.5.2007 and 11.10.2007 with returnable dates on 14.5.2007, 15.6.2007 and 8.11.2007, respectively.

7. The Commissioner after considering the information provided by the appellant in support of her complaint, found that there was no prima facie case that Ms Lam had contravened a requirement of the Ordinance. On 2.1.2008, the Commissioner informed the appellant that having considered all the circumstances of her case, he decided under section 39(2)(d) of the Ordinance that investigation or further investigation of the complaint was unnecessary.

8. The appellant appealed to this Board against the Commissioner's refusal to investigate her complaint. Her grounds of appeal as stated in the notice of appeal involved two points:

1. She had evidence and justifications in support of her allegations.
2. She could prove that her personal data had been used for a purpose other than that for which the Immigration had collected her personal data or a directly related

purpose.

9. Pausing here, it should be noted that the appellant's grounds of appeal have no substance. What the appellant stated was no more than a declaration that she was able to prove her allegations. They do not add anything to the information she had previously provided to the Commissioner. We do not think they raised any arguments against the Commissioner's reasons for refusing to investigate.

10. The case of the appellant was that she had provided sufficient information to the Commissioner to commence an investigation, since by the process of elimination, it could be proved that it was Ms Lam who sent out the envelope with the documents. The appellant also submitted that even if she had not provided sufficient information, the Commissioner should have asked her for further information and should not have simply based on the telephone conversation to refuse to investigate.

11. In the appeal bundle, there is a short note of the telephone conversation that Mr. Kwan had with the appellant at the time of the preliminary enquiry of the complaint. The contents of this note are not disputed by the appellant and we have summarised them in paragraph 6 above. We note that apart from that, the appellant provided nothing else to the Commissioner in support of her complaint.

12. The appellant in her submission before us today, however, told us that there was more information to support her suspicion of Ms Lam than she told Mr. Kwan on the phone. She said that if she had been asked for this information, she would have provided it to the officer. Her further information was this. Since she was arrested in connection with the immigration offence, she had been put on bail and had to renew her bail at regular intervals. She therefore had a number of bail forms with her. Prior to 18.10.2007, she had submitted the two bail forms to the Court to support her request for a change of the hearing date. Each time she did so, she copied the forms to Messrs Johnson Stokes and Masters. She said it was likely that Ms Lam had been given a copy of them by her solicitors. But she did not copy the bail forms to King & Co. On 18.10.2007 she submitted the latest bail form i.e. the one dated 11.10.2007 to the Court together with her undertaking. At the same time, Ms Cuade submitted her new employer's address with her bail form. She said that on 18.10.2007, every party to the High Court proceedings had a copy of the new employer's address as well as her bail form dated 11.10.2007 but only Messrs Johnson Stokes and Master had both the address and all the bail forms including those she submitted to the Court three months earlier. Thus, only Ms Lam was capable of sending out all the documents to the new employer. She said she had discounted the other defendants as the culprit because they were Ms Lam's employees and would do what Ms Lam told them to do. She also discounted Messrs Johnson Stokes and Masters. In addition, she and Ms Lam were having a civil dispute and Ms Lam had all the reasons to send out the

documents. She did not mind the disclosure to the new employer of her undertaking since that was already made public but she was annoyed that her bail forms were so disclosed to strangers. She submitted that there was reasonable suspicion to raise a prima facie case for the Commissioner to embark on an investigation of her complaint.

13. Counsel for the Commissioner on the other hand told us that according to the information provided on the phone by the appellant, her three bail forms and the address of Ms Cuade's new employer were all submitted to the Court on 18.10.2007. All parties to the High Court proceedings had a copy of them. The Commissioner's understanding at the time was that since everyone had access to the documents, the appellant should provide more information to support her suspicion of Ms Lam being the culprit. But except her surmise, the appellant was unable to say why she pointed her finger at Ms Lam.

14. In our view, before the Commissioner commences to investigate a complaint, there must be sufficient information to raise a reasonable suspicion that the person complained of had committed a contravention of the provisions of the Ordinance. Such information should be able to show that if an investigation based on the information is made, there will be evidence, if the evidence is accepted as true, to show that the person complained of has committed the contravention. Bare allegations of contravention would not be sufficient. Information bordering on surmise or speculation would be at the most suspicious circumstances

without a reasonable basis.

15. In the present case, the information provided by the appellant to the Commissioner was that Ms Lam was one of the defendants who had access to the documents and the address. The appellant inferred from such information that it was Ms Lam who sent out the envelope with the documents. We do not think this is sufficient to give rise to a reasonable suspicion that Ms Lam was the culprit. One has to bear in mind that on the information provided by the appellant, all the defendants and their legal representatives had similar access to the documents. There is no evidence to show none of the defendants other than Ms Lam had sent out the envelope. Even if this can be shown, it does not necessarily mean that Ms Lam had sent it.

16. As we have said in previous decisions, a complaint must be supported by evidence and grounds. The Commissioner must ascertain if there is such support before embarking on an investigation of the complaint, otherwise it would be unfair to the person complained of and would encourage unreasonable complaints leading to an abuse of the complaint process.

17. The Commissioner's decision not to investigate the appellant's complaint was based on the information available to him at the time. The additional information the appellant told us today was not before the Commissioner. His conclusion that there was no prima facie evidence

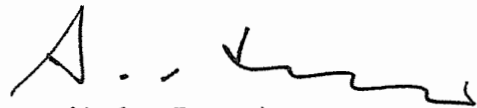
that Ms Lam contravened DPP3 could not be said to be wrong or unreasonable. That being the case, the Commissioner was entitled to decide under section 39(2)(d) of the Ordinance that in all the circumstances of the case, an investigation of the complaint was unnecessary.

18. Having said that, we wish to add if the appellant's additional information was available at the time to the Commissioner, the Commissioner might have concluded otherwise. This information would probably give rise to a strong support of the appellant's suspicion of Ms Lam being the culprit. That would provide a reasonable basis for the Commissioner to commence his investigation into the complaint. An appeal might have been thereby averted. Unfortunately the appellant did not bring such information before the Commissioner. We do not know if this additional information is the appellant's afterthought. Neither do we know if further enquiry by a different method had been made by Mr. Kwan, such additional information would have been forthcoming from the appellant.

19. In view of the above, we do not think we can do anything more in this case than to express that it does not appear to us that enquiry by phone is a sufficient and thorough method to make preliminary enquiry of a complaint. A face to face interview with the complaint may be more direct in obtaining information. In the interest of justice, the Commissioner may think it proper to revisit their general practice of

making enquiry by phone and consider adopting other more thorough methods in the future.

20. With those closing remarks, we dismiss the appeal.

A handwritten signature in black ink, appearing to read 'A. Leong', with a stylized flourish at the end.

(Arthur Leong)
Chairman
Administrative Appeals Board