

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 5/2021 and 6/2021

BETWEEN

DR MICHAEL CHOW

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

(Heard Together)

Coram: Administrative Appeals Board

Mr Cheung Kam-leung (Deputy Chairman)

Ms Mary Grace Chiu Hang-mei (Member)

Mr Tong Yee-hang (Member)

Date of Hearing: 24 September 2021

Date of Handing down Written Decision with Reasons: 25 April 2022

DECISION

Common Background

1. The present two appeals involve some common issues and share the same background. For convenience, the two appeals will be dealt with together.
2. Dr. Michael Chow, the Appellant, has lodged no fewer than 13 complaints against the Owners' Committee of Ocean Shores ("**the Owners' Committee**") with the Privacy Commissioner for Personal Data ("**the Commissioner**") over a range of matters. The present appeals (AAB 5 and 6 of 2021) arose out of the decisions of the Commissioner, made pursuant to s.39(2)(d) of the Personal Data (Privacy) Ordinance, Cap. 486 ("**the Ordinance**"), not to further investigate his complaints against the Owners' Committee.
3. Ocean Shores is a private residential development in Tseung Kwan O. The Owners' Committee is an unincorporated association formed by the owners of Ocean Shores. The present matters concern the so-called "**the 9th Committee**", which comprised 17 members, who were all owners of Ocean Shores.
4. At all relevant times, Kai Shing Management Services Ltd. ("**the Manager**") was the manager of Ocean Shores.
5. The developer of Ocean Shores has retained the ownership of certain lands, including a land reserved for a public transport interchange ("**the Interchange**"). In around 2020, the developer applied for an exemption from the Lands Department so that it could turn the Interchange into a visitors' car park. The Lands Department approved the applications on condition that a waiver fee be paid for the exemption. A number of owners/residents of the Ocean Shores were concerned about the

proposal to turn the Interchange into a visitors' carpark. The Appellant was apparently one of the residents who shared the concern. On 19 November 2020, the 9th Committee issued a questionnaire (“**the Questionnaire**”) and invited the owners of Ocean Shores to state their views. The Questionnaires were inserted into the letterboxes at the lobbies of the residential blocks. The Manager was entrusted with the duty of collecting the completed Questionnaires from the owners.

6. The Questionnaire, the focus of the Appellant's complaints, contains a section for the individual owners to fill in their name(s) and address, and a space for them to sign. It is clearly marked on the Questionnaire that it was intended for the owners.

7. The Appellant took the view that the Questionnaire was defective and filed a complaint with the Commissioner. After investigation, the Commissioner considered that the complaints and the evidence did not justify further investigation. The Appellant was dissatisfied with the Commissioner's decision and filed the present appeals.

AAB 5/2021

8. The Appellant's grounds of appeal are summarised in a letter attached to the Notice of Appeal filed under AAB 5/2021 dated 22 February 2021. Quite a number of arguments are raised in the letter and the Appeal Tribunal will summarise the main ones as follows:

- (1) The Commissioner had failed to properly consider the role of the Owners' Committee, and was wrong in concluding that the Committee was acting in accordance with its functions and duties;

- (2) Given that the 9th Committee was not in a position to verify the signatures of the owners in the completed questionnaires, there was no point in asking the owners to sign and state their address in the questionnaire;
- (3) Some of the background facts in the Questionnaire are untrue or misleading. Therefore, the Questionnaire was defective, and the Owners' Committee did not have any legal right to collect the Owners' opinions.

9. The Appellant also argues that the Questionnaires were issued for an ulterior purpose, that is to say to facilitate the campaign of those who intended to get elected for the new committee (the term of the 9th Committee was about to expire).

The Appellant's Status

10. At the beginning of the hearing of these appeals, the Appeal Tribunal raised its concern about two matters, namely:

- (1) the status of the Appellant;
- (2) whether the Appellant has provided his personal data to the Owners' Committee.

11. It is plain from the wordings of the Questionnaire that it is intended for the owners of Ocean Shores. For reasons not known to this Tribunal, the Appellant had

been adamant in refusing to clarify with the Commissioner whether he was at the relevant times an owner of Ocean Shores. The Appellant's status is important in that the Questionnaire has nothing to do with him unless he is an owner. Likewise, if the Appellant has never been asked to provide and indeed has never provided any of his personal data to the Owners' Committee, he is not a "data subject" and the Owners' Committee cannot be said to be a user of his personal data.

12. During the hearing of the present appeals, the Appellant admitted the following:

- (1) He is not and never was an owner of Ocean Shores;
- (2) He has not filled in the Questionnaire;
- (3) He has not provided any of his personal data to the Owners' Committee.

13. Plainly, the Appellant is not a "data subject". Hence, he does not have the right to file a complaint under s.37 of the Ordinance. For this reason alone, the present appeals are liable to be dismissed. However, for completeness, the Appeals Board will go on to deal with the grounds of appeal raised by the Appellant.

Ground (1)

14. The Appellant has raised a number of points under ground (1), such as whether the individual members of the 9th Committee were in breach of their duties under the Deed of Mutual Covenants, whether the Owners' Committee, not being a separate legal entity, was supposed to issue the Questionnaires, and so forth.

15. It must first be noted that the Commissioner is only concerned with matters that fall within the four corners of the Ordinance. Its functions and powers are defined under s.8 of the Ordinance. It is certainly not its function or duty to deal with building management disputes.

16. In respect of the argument that the Owners' Committee, not being a separate legal entity, has no right to collect personal data of the owners of Ocean Shores, it should be noted that there is nothing in the Ordinance that precludes a group of persons from collecting personal data. In fact, "data user", in relation to personal data, means "*a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data*" (s.2 of the Ordinance). It simply does not matter that the Owners' Committee is not a body corporate. The Appellant's argument is clearly misconceived.

17. Of course, the Commissioner has power to take action against any individual members of the Owners' Committee if there is a breach of the provisions in the Ordinance on their part. In the present appeals, however, there is simply not any evidence against any members of the Owners' Committee.

18. The Appellant has made quite a few serious allegations against the Owners' Committee and the Manager, such as deceiving the owners, fabricating a story for the purpose of collecting personal data, not acting in accordance with the Deed of Mutual Covenants, etc. As a matter of general principles, there is a duty on the part of a complainant to adduce some evidence to substantiate his allegations. It is not open to the complainant to go the Commissioner, make some allegations, and expect the Commissioner to find some evidence to substantiate the allegations. In the

present appeals, suffices it to say that the very serious allegations are not supported by any evidence. As noted in various AAB Decisions (*AAB 8/2007*; *AAB 32/2004*; *AAB 52/2004*), the Commissioner is not bound to further investigate bare allegations.

19. In the circumstances of the present appeals, the Commissioner cannot be said to be wrong in refusing to further investigate each and every allegation of fraud and misconduct.

20. The Appellant has raised a few other complaints against the Manager of Ocean Shores. Some of the complaints do not concern personal data at all. It is unquestionably right for the Commissioner to decide against further investigation. In any event, given that the Manager merely acted as the Owners' Committee's agent and did not hold, process or use the relevant data for purposes of its own, the Manager is not a data user for the purpose of the Ordinance: s.2(12) of the Ordinance.

Ground (2)

21. It seems to be the argument of the Appellant that the collection of the owners' signatures is unnecessary and amounts to excessive collection of personal data, contrary to Principle 1 of the Data Protection Principles.

22. The Commissioner's conclusion that the Owners' Committee had not unnecessarily and excessively collected the personal data of the owners cannot be said to be wrong. The requirement that the Questionnaire must be signed by the owners of Ocean Shores with their address stated was necessary in the circumstances in that the Owners' Committee needed to ensure that each owner would complete and return no more than one questionnaire, and that the completed questionnaires

would reflect the true views of the owners. In fact, there is nothing unusual in the requirement. Be that as it may that there may be other arguably better ways to ascertain the views of the owners, the Commissioner is certainly right in refusing to engage in any extended argument with the Appellant as to what is the best way to conduct an opinion survey.

Ground (3)

23. In many ways, ground (3) overlaps with ground (1). The Appeal Tribunal repeats what is already said under Ground (1) above.

24. As for the argument that the background part of the Questionnaire contains some misleading information and gives rise to some serious doubt about the motive of the Owners' Committee, the Appeal Tribunal has reviewed the materials disclosed by the parties and is unable to identify any evidence that the Questionnaire is "defective, misleading, false, incomplete and of a dubious purpose".

25. S.39(2)(d) of the Ordinance provides that the Commissioner may terminate an investigation if he is of the opinion that any further investigation is unnecessary. The Appeals Board sees no reason to disrupt the exercise of the Commissioner's discretion to terminate further investigation.

AAB 6/2021

26. Appeal AAB 6/2021 concerns the role of the Manager. The Appellant complained to the Commissioner and alleged that the Manager had conspired with the Owners' Committee and resolved to collect personal data of the owners through

unlawful means. After investigation, the Commissioner concluded that there was no substance in the complaint and decided against further investigation.

27. The arguments raised in the present appeal are the same as those raised in AAB 5/2021. The Appeal Tribunal do not intend to deal with the arguments afresh as they are already dealt with in AAB 5/2021. Suffice it to say that the arguments are misconceived and liable to be dismissed for the following reasons:

- (1) It is not the function or duty of the Commissioner to deal with building management disputes;
- (2) The Owners' Committee is capable of giving instructions to the Manager;
- (3) The very serious allegations of fraud, ulterior motive, etc., are unsubstantiated;
- (4) The Commissioner's decision to terminate investigation is not an improper exercise of its discretion under s.39(2) of the Ordinance.

Orders

28. The following orders are made:

- (1) The Appellant's appeals be dismissed;

- (2) The Respondent be at liberty to apply for costs of these appeals within 21 days from the date of this Decision. In the absence of an application, there be no order as to costs.

(signed)

(Mr Cheung Kam-leung)

Deputy Chairman

Administrative Appeals Board