

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 11/2018

BETWEEN

TSUI KIN CHUNG

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr Erik Ignatius SHUM Sze-man (Deputy Chairman)
- Miss Grace CHAN Man-yee (Member)
- Mr Dennis WONG Chiu-lung (Member)

Date of Hearing: 1 February 2019

Date of Handing down Written Decision with Reasons: 21 February 2019

DECISION

Background of the Appellant's High Court Actions

1. The Appellant was a litigant in a High Court judicial review case with number HCAL 121 of 2016, having commenced on 25th June 2016 his

application for leave to apply for judicial review against various decisions of firstly, the Court of Appeal and secondly, the Registrar of Court of Final Appeal, declining to grant the Appellant leave to appeal in relation to decisions of the Lands Tribunal.

2. Madam Justice Au Yeung of the Court of First Instance refused to grant the Appellant leave to apply for judicial review on 13th September 2016.

3. The Appellant appealed against Madam Justice Au Yeung's decision in CACV 188/2016 on 19th September 2016. The Court of Appeal dismissed the Appellant's said appeal on 8th November 2016, delivering a judgment ("Judgment") which was reported and became a public document in due course. The report was cited as [2016] 5 HKLRD 757 and published by Thomson Reuters Hong Kong Limited (i.e. the person bound by the decision appealed against ("the Person Bound")), trading as Sweet & Maxwell.

The Appellant's Complaint to the Respondent

4. The Appellant made a data access request ("DAR") dated 23rd April 2018 to the Person Bound for copies of his "personal data" contained in the following documents, namely "the documents in relation to *[2016] 5 HKLRD 757 submitted to Lam VP for review and His Lordship feedback or otherwise (including but not limited to letters, memos etc.) according to your company letter dated 21 March 2017*" ("the Documents").

5. The Person Bound replied on 24th May 2018 to the Appellant refusing to entertain the DAR.

6. The Appellant hence lodged a complaint with the Respondent against the said refusal by the Person Bound (“Complaint”).

7. Pursuant to the Complaint the Respondent conducted enquiries, obtained and examined relevant information provided by the Person Bound, including the Documents which the Appellant sought from the Person Bound. At the end, the Respondent decided not to investigate the Complaint further pursuant to section 39(2)(d) of the Personal Data (Privacy) Ordinance, Cap. 486. (“PDPO”) and paragraph 8(e) of the Respondent’s Complaint Handling Policy (Fifth Revision) (“CHP”).

8. Section 39(2)(d) of PDPO provides as follows:

“The Commissioner may refuse to carry out ... 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.”

9. Paragraph 8(e) of CHP provides as follows:

“... 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 Ordinance.”

The Appellant's Appeal to the Administrative Appeals Board

10. The Appellant lodged the present appeal to the Administrative Appeals Board on 2nd August 2018. In the Notice of Appeal, the Appellant stated the sole ground of appeal as follows:

“Whether Thomson Reuters is a “data processor” or “data user” in accordance with sections 2(1), 2(12) and Data Protection Principle (“DPP”) 2(4) of the Personal Data (Privacy) Ordinance (“PDPO”)?”

11. The Respondent's reasons for his decision not to further investigate the Appellant's Complaint are contained in a decision letter issued by the Respondent to the Appellant dated 25th July 2018. In paragraphs 9, 10 and 14 of the said decision letter, the Respondent relied primarily on its view that in the circumstances of the case and in the context of section 2(12) of PDPO and the Documents, the Person Bound was not a data user in respect of the Appellant's name and the citation of the Judgment, but was a data processor.

12. Section 2(12) of PDPO provides that: -

“A person is not a data user in relation to any personal data which the person holds, processes or uses solely on behalf of another person if he does not hold, process or use the data for his own purposes”.

13. At the outset, this Board received submissions from the Respondent in relation to three complaints previously made by the Appellant to the Respondent with case numbers 201700701, 201703271 and 201704122 in

relation to matters which were connected with personal data allegedly held by the Person Bound. It transpired that for the first two complaints, after the Respondent decided that he would not pursue the complaints, the Appellant lodged appeals to the Administrative Appeals Board in AAB No. 5/2017 and AAB No. 14/2017 respectively. The Appellant however abandoned appeals on 20th August and 28th November 2017 respectively. As to the third complaint, after the Respondent issued a letter dated 14th November 2017 informing the Appellant that the Respondent would not pursue the complaint, the Appellant did not lodge any appeal against the decision.

14. It is not alleged that the Appellant repeated the same complaint in the present case. This Board will not take into account any matters in relation to the said three complaints and/or the two administrative appeals previously lodged but abandoned by the Appellant when this Board considers the merits of the present appeal.

15. Similarly, this Board will not consider the point made by the Person Bound in its letter to the Appellant refusing to entertain the DAR relating to confidentiality as a ground to reject the DAR. It does not matter whether the Person Bound made a justified or wrong reason for rejecting the Appellant's DAR. Having received the Complaint of the Appellant and investigated the same, the Respondent was entitled to give and rely on his own reasons for the decision relating to the Complaint. This Board was informed that the Respondent's decision did not relate to confidentiality of any personal data of the Appellant which formed no part of the reasons for the Respondent's decision. This Board is not attracted by the point about confidentiality relied on by the Person Bound. This Board in any event should focus on the reasons given by the Respondent of his decision not to pursue the Complaint.

Furthermore, by the nature of the present appeal, this Board should look at the whole matter afresh and see whether the Respondent's decision is justified or is wrong and is in any event not bound by the said point of confidentiality raised by the Person Bound.

16. From all the information relevant to the case as submitted by the Appellant and supplied by the Respondent obtained in the course of investigation, it is obvious that the Judgment contained the personal data of the Appellant as the Appellant was a litigant in the judicial review application and appeals related thereto. A copy of the Court of Appeal's judgment reported by the Person Bound is in the hearing bundle ("the Reported Judgment") and is accessible by subscribers of the Reported Judgments published by the Person Bound. At the same time the delivered Judgment in its original form is accessible by the public free of charge from the Judiciary website. The contents of the Judgment including any personal data of the Appellant are within the public arena as a public document. The personal data included in the Judgment was not the subject matter of the Appellant's DAR to the Person Bound. The above is a very important background fact in relation to the Appellant's present appeal.

17. It is common ground that other than reproduction of the Judgment itself, the Person Bound was required under the tender contract with the Judiciary dated 28th October 2014 ("the Contract") to prepare the headnote and catchwords (collectively known as "the Headnotes") for the Reported Judgment. The Headnotes prepared by the Person Bound could be seen from the Reported Judgment. They include nothing concerning any personal data of the Appellant which is not already contained in the Judgment itself. This is logically the case

since the Headnotes should contain only those matters contained in the Judgment.

18. From the above, it can be seen that the DAR issued by the Appellant to the Person Bound falls within an extremely narrow scope when the personal data in the Judgment itself which has already been in the public arena is disregarded. One would be unable reasonably to anticipate what personal data other than those already included in the Judgment were to be found in the Documents, namely the correspondence between the Person Bound and the Judiciary in respect of the seeking of approval from the latter of the Headnotes.

19. The legal test of distinction between a “personal data user” and a “personal data processor” is found in section 2(12) of PDPO as reproduced above in paragraph 12. If the Person Bound was holding, processing or using the data “solely on behalf of the Judiciary”, which means that it was not holding, processing or using such data “for any of its own purposes”, then it is not a data user. The consequence is that the Person Bound would not under a duty to comply with the DAR. The DAR should be issued by the Appellant to the Judiciary. Whether the Judiciary is required to comply with any such DAR would be the subject matter outside of this appeal. There are obviously other considerations which will decide whether the Judiciary needs to comply with such DAR directed to it.

20. From the nature of the editing and publishing work of the Headnotes, it is obvious that the Person Bound was not “compiling” or “collecting” personal data of the Appellant. Any personal data of the Appellant must have been supplied by the Judiciary in the Judgment itself which would be digested and reproduced in the Headnotes. There is no evidence at all to indicate, especially

having regard to the subject Headnotes in this case of the Reported Judgment, that anything new was collected or compiled by the Person Bound. The above would imply that the Person Bound was not collecting or holding or processing any personal data of the Appellant which was not already included in the Judgment.

21. The only remaining act which is referred to in section 2(12) of PDPO is the act of “using”. It is the Respondent’s case that from the relationship established under the Contract between the Judiciary and the Person Bound, the latter used any personal data of the Appellant wholly on behalf of the Judiciary and not for its own purposes. The Respondent raised the following points in support of the above submission,

- (i) the identity of the Appellant was completely indifferent to the Person Bound;
- (ii) the Judiciary had exercised complete control over the use of personal data contained in the Judgment and appeared in the Headnotes. This is supported by the fact that the Judiciary exercised exclusive control over the final decisions of the contents, format and editorial matters in the whole of the Reported Judgment;
- (iii) that the Person Bound had commercial gain as a result of the publishing the Reported Judgment is irrelevant;
- (iv) similarly, whether the copyright of the Headnotes vested in the Person Bound is irrelevant; and

- (v) the fact that the Person Bound dealt with and was responsible for the marketing work and subscription of the Reported Judgment is again irrelevant in the context of PDPO.

22. Among the above points with all of which this Board agrees, the most important consideration in the context of the issue of whether the Person Bound “used” any personal data of the Appellant in their edited Headnotes for its own purposes and not only on behalf of the Judiciary is: the complete control of the Judiciary, in this case exercised through the Court of Appeal who delivered the Judgment. It is not disputed that under the Contract the Judiciary had complete control on the contents and format of the Headnotes. That was exactly why the Person Bound issued messages annexing the whole drafted Reported Judgment including the Headnotes for the Court’s approval, hence giving rise to the existence of the Documents requested in the DAR. This Board finds that due to the above complete control by the Judiciary in respect of the Headnotes, if any personal data appears in such Headnotes the Person Bound was using them wholly on behalf of the Judiciary and not for its own purposes in the context of section 2(12) of PDPO. The whole matter could be viewed objectively as though the Judiciary through the Court of Appeal compiled the Headnotes including any personal data contained therein; but instead of doing the job itself, the Court commissioned another person i.e. the Person Bound to accomplish the job on the Court’s behalf.

23. Once the above is appreciated, it would be understood that in the context of the PDPO, especially section 2(12), the use of any personal data in the Headnotes would be used by the Judiciary exclusively. The Person Bound only used the personal data, if any, on behalf of the Judiciary. Once the Headnotes

are approved and the Reported Judgment printed as required under the Contract, the regime of the PDPO ceases to be engaged. All the subsequent work of marketing, sale and control of target subscribers by the Person Bound are totally irrelevant.

24. As a result of the above analysis, it follows that the correspondence between the Person Bound and the Judiciary pertaining to the seeking of approval of the Headnotes, i.e. the Documents sought in the DAR, are part and parcel of the process of the Person Bound using the personal data on behalf of the Judiciary. Being a mere personal data processor and not a data user, the Person Bound is under no obligation in law to comply with any DAR of the Appellant.

25. The above is sufficient to dispose of the present appeal.

26. This Board has considered all the submissions made by the Appellant, in writing and orally at the appeal hearing. However, none of the said submissions of the Appellant would make a difference in relation to the above conclusion and reasons relied on by this Board.

27. In the premises, the appeal is dismissed.

28. This Board would add that although the Respondent has included two short documents which are the Documents sought by the Appellant in the DAR, this Board does not rely on the contents of such documents. This Board determines the appeal with no consideration of the said two documents. The said documents were not provided to the Appellant for submissions or comments. This Board appreciates the said documents are the subject matters

of the DAR so that if they were supplied to the Appellant that contradicts the positions of both the Respondent and the Person Bound and is contrary to their stands of opposing the appeal. Since this Board does not rely on the said documents to come to its decision, there is no prejudice to the Appellant in any way.

29. The present appeal relates to legal arguments and interpretation of provisions in the PDPO which to layman including the Appellant may not be easy to understand and grasp, not to speak of making logical arguments in support of the appeal. This Board after taking into account all the relevant circumstances does not consider that on this particular occasion there should be a costs order against the Appellant though he fails in all the arguments he advanced in support of the appeal. This Board orders no order as to costs.

(signed)

(Mr Erik Ignatius SHUM Sze-man)

Deputy Chairman

Administrative Appeals Board