

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 22 of 2007

BETWEEN

DORIS YIU

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 11 December 2007

Date of handing down Decision with Reasons : 25 January 2008

DECISION

1. The appellant Doris Yiu lodged a claim at the Labour Tribunal against HSBC. The claim was heard on 12.10.2006 before Presiding Officer Mr. Tam Lei Cheung. The appellant was not satisfied with the conduct of Mr. Tam at the hearing. She was also not satisfied with the determination of her claim. After the hearing, the appellant verbally complained to the Deputy Registrar of the Labour Tribunal, Ms Ma Wan Shan. She requested that her case be reopened and heard by another Presiding Officer. Her requests were rejected by Mr. Tam.

2. On 18.10.2006, the appellant filed a formal application for review of her case by another Presiding Officer. She complained to the Chief Magistrate that Mr. Tam had stopped her from stating her case at the hearing and had induced her to withdraw her claim, thereby infringed

her right to be heard. She also complained that Mr. Tam was unprofessional and negligent in his duty as well as 'arrogant and perfunctory' in his working attitude. In addition, she complained that Mr. Tam had no foresight and judgment.

3. On 20.10.2006, the Acting Registrar of the Labour Tribunal, Mr. W.M. Wong notified the appellant that her application for review was set down on 31.10.2006 for hearing before Mr. Tam.

4. On 27.10.2006, the appellant wrote to Mr. Wong and requested him to postpone the hearing to 4.11.2006. In the same letter, the appellant objected to Mr. Tam conducting the review hearing, on the ground that she had lodged a complaint against Mr. Tam to the Chief Magistrate and the Chief Justice. In her letter, the appellant told Mr. Wong that it was wrong to set down her review before Mr. Tam since it would be a conflict of interest and against the rules of natural justice for Mr. Tam to hear the application for review.

5. On the same day, the Chief Magistrate, in response to the appellant's complaint, wrote to her and informed her that since her review would be heard on 31.10.2006, it would be inappropriate for him to comment or interfere at that stage. He told her he would revert to her complaint after the conclusion of the review.

6. On the same day, Mr. Wong acceded to the appellant's request for postponement of the review hearing and re-fixed the hearing date to 14.11.2006.

7. On 28. 10. 2006, the appellant wrote to the Chief Magistrate and reminded him that he should give an answer to her complaint within 7 days of receipt of her complaint. Apparently, the appellant's letter crossed in the post with the Chief Magistrate's reply which was sent to her the day before.

8. On 31.10.2006, Ms Vera Leung of the Labour Tribunal notified the appellant that her request for another Presiding Officer to hear her review was refused by the Principal Presiding Officer.

9. On 3.11.2006, the appellant's husband Mr. Lui telephoned Mr. Wong and asked him why there was no response to the appellant's objection to Mr. Tam hearing the review. Mr. Lui asserted that Mr. Wong admitted on the phone that he was negligent in failing to address the issue of conflict of interest and bring it to the notice of Mr. Tam and the Chief Magistrate. Mr. Lui also asserted that during telephone conversation, Mr. Wong admitted that the hearing on 12.10.2006 before Mr. Tam did cause hardship to the appellant, but he could not interfere with the matter since it was a judicial decision. Mr. Lui then told Mr. Wong to accede to the appellant's request, or further complaint would be made.

10. On the same day, Mr. Wong wrote to the appellant. He referred to his earlier telephone conversation with Mr. Lui. Mr. Wong advised the appellant that the administration was not in a position to interfere with judicial decisions and any complaint in that regard should be addressed to the Chief Magistrate.

11. On 6.11.2006, responding to the appellant's complaint on 27.10.2006, the Chief Magistrate wrote to the appellant and explained to her the meaning of section 31 of the Labour Tribunal Ordinance. The Chief Magistrate informed her that under the law, only in very exceptional circumstances that a review hearing would be transferred to another Presiding Officer and there was no breach of the rules of natural justice or conflict of interest for Mr. Tam to hear the review. The appellant was advised that if she felt aggrieved by the decision on the review, she could take the case to appeal.

12. On 7.11.2006, Mr. Lui telephoned Ms Joanna Chung, Access Information Officer of the Judiciary, and asked her how he could obtain the "explanation/ statements from the complained-against Registrar and Presiding Officers and the whole complaint investigation report if a complaint is lodged". Ms Chung advised him to follow the procedure in the Personal Data (Privacy) Ordinance ("the Ordinance") and submit a data access request form and pay the relevant charges.

13. On the phone, Mr. Lui asked Ms Chung about “the procedures to obtain the current instructions or circulars issued by the Civil Service Bureau for Judiciary Department to observe and abide by in handling and avoiding situations of ‘conflict of interest’” According to Mr. Lui, Ms. Chung told him to contact the Civil Service Bureau instead of the Judiciary and when he criticized her for her “improper or unhelpful attitude as an Access Information Officer in response to a citizen’s requests”, Ms Chung replied in a rude, impatient and reluctant manner that “if he wished, he could write in to get them”. Mr. Lui told Ms Chung he might complain against her over this incident.

14. On 11.11.2006, the appellant applied for an indefinite postponement of the hearing of the review. The application was refused and the appellant was informed thereof by Miss Leung Chin Ying of the Labour Tribunal by a letter dated 13.11.2006. The hearing was, however, re-fixed to 28.2.2007. On 13.11.2006, Mr. Wong gave the appellant notice of the new hearing date.

15. On 20.11.2006, the appellant complained to the Chief Justice against Mr. Tam, Mr. Wong, Ms Chung, and Mr. Li. In her letter, she described the events that gave rise to her complaints and her grounds of complaint. (We have summarized these events in the foregoing paragraphs. We do not propose to set out her grounds of complaint. We do not think they are relevant to this appeal). Attached to the appellant’s letter was a Data Access Request (“DAR”) in the proper form under the Ordinance. In paragraph 42 of her letter, she referred to the DAR and requested the Judiciary to furnish to her the documents specified therein within 40 days as prescribed under the Ordinance.

16. Paragraph 2 of the DAR specified the data requested by the appellant as follows:

“Please see my complaint letter dated 20 Nov 2006
as attached at para. 42 (b) to (g)”

17. Paragraphs 42 (b) to (g) are as follows:

(b) The explanation/witness statements given by Mr. Tam, Mr Li

in response to her accusations.

- (c) The complaint report written by Ms Ma recording her verbal complaint against Mr. Tam on 12.10.2006 with copy to Mr. Li.
- (d) The transcript of recording of the proceedings on 12.10.2006 in respect of the hearing of her claim before Mr. Tam in Court No. 6.
- (e) The whole investigation report including the development, findings and recommendation on the case.
- (f) Any follow up and disciplinary actions against Mr. Tam and Mr. Li.
- (g) The current Judiciary complaint handling procedure regarding complaints against a judge's misconduct and the performance pledge, vision, mission and value of the Judiciary.

18. On 29.12.2006, the Judicial Administrator informed the appellant that documents (b), (c) and (f) did not exist and the Judiciary would not be able to comply with her request. As to item (d), the Judicial Administrator said they were judicial documents to which the Personal Data (Privacy) Ordinance did not apply. Item (e) was not available at that stage and item (g) did not contain the appellant's personal data. Nevertheless, the Judicial Administrator enclosed a copy of item (g) with the letter to the appellant.

19. On 15.1.2007 and 18.1.2007, Mr. Lui had two telephone conversations with Ms Frieda Leung of the Judiciary Administrator's office. During these conversations, Mr. Lui asked Ms Leung why there was no witness statement of Mr. Tam and whether there was any investigation and why did Ms Leung say that the complaint report did not exist notwithstanding having said she had compiled that report. In the conversations, Mr. Lui also raised various other matters which did not relate to the appellant's DAR.

20. On 18.1.2007, the Judiciary replied to the appellant on the complaint matters raised in her letter of 20.11.2006.

21. On 18.1.2007, Mr. Wong wrote to the appellant. He referred to the conversations he had with Mr. Lui. The following paragraphs of this letter are relevant:

“Mr. Lui asked whether Ms. Ma has recorded anything in writing concerning your case. I replied that on 13 October 2006, Ms. Ma had by way of a minute to PPO submitted your request for PPO to review that case on his own motion. The 7 points of allegations as raised by you were included for PPO’s consideration.”

Mr. Lui asked whether I have sent Ms. Ma’s minute to the Chief Magistrate when I reported his complaint to him. I replied that since you have copied your complaint letter which contained full details to the Chief Magistrate, I did not sent Ms. Ma’s minute to the Chief Magistrate for information.

Mr.Lui asked whether I have on my own motion pass the case file to the Chief Justice or the Chief Magistrate and whether any or both of them has called the case file for their investigation of your complaint, I replied that I have not passed the case file to them and both of them have not called for the case file via me.”

22. On 19.1.2007, the appellant wrote to the Office of the Privacy Commissioner for Personal Data (Commissioner) and lodged a complaint against the Chief Justice for failing to comply with her DAR dated 20.11.2006 within 40 days thereof without reasonable excuse. Her main grounds of complaint are in paragraphs 2(b) to (d) of her letter and these are as follows:

“ (b) Even though the explanation/witness statements in whatever format to be given by Mr.Tam Lei-cheung and Mr. Patrick Li in response to my accusations are not ready, the

Hon Chief Justice LI shouldn't reply to me in such an irresponsible and illegitimate manner that 'these documents do not exist'. Instead, he should say that these documents concerning my personal data are not ready to submit to me at the moment with rationale given. Does the Chief Justice LI have any intention and sincerity to investigate into my complaint by enquiring the two complained-against Officer and Magistrate concerned in response to my accusations?

- (c) The Chief Justice LI is suspected to have made a blatant mistake by telling me that the document (complaint report written by the Deputy Registrar of Labour Tribunal recording my verbal complaint against TAM on 12-10-2006 with copy to the Chief Magistrate) do not exist too because I authorized my husband who had telephone verified on 11-01-2007 with Mr. WM Wong, Registrar of Labour Tribunal, who admitted to have seen such complaint report which he knew to have been sent by the Deputy Registrar, Ms Heidi MA, to the Principal Presiding Officer Mr. TAM Lei-cheung for follow up action.
- (d) The Hon Chief Justice LI didn't even respond to my data access requests as mentioned at para. 42(f) and (h) which is considered to be acting in contempt under the PDP(P)O".

23. On 14.2.2007, Ms Betty Leung of the Judiciary Administrator's office replied to these queries and explained to Mr. Lui, inter alia, that Ms Frieda Leung being an administrative staff, was not in a position to handle investigation into complaints against Judicial Officers and so was Ms Ma and therefore she had not compiled any complaints report.

24. In the mean time, the Commissioner began preliminary inquiries to ascertain if there was a prima-facie case of contravention of the requirements of the Ordinance. These inquiries included writing to the Judiciary and the appellant on 28.2.2007 for further information of the case and telephone contacts between the Commissioner and the parties to the complaint.

25. On 6.3.2007, Mr. Lui contacted APDO, Ms Lee On Kei Angel. Referring to the Commissioner's letter of 28.2.2007 in which the Commissioner asked the appellant to provide evidence to show the existence of items (b), (c) and (f) of the DAR, Mr. Lui told Ms Lee that it was the Commissioner's responsibility to find out from the Judiciary whether these items existed or not. According to the telephone note of Ms Lee, Mr. Lui admitted to her that items (b) and (f) did not exist at the time the Judiciary received the DAR since these items related to the complaint that was made on the same day as the DAR and could not have existed before that time. Mr. Lui also agreed that he had no evidence that item (c) existed at the material time.

26. Later on the same day, Mr. Lui had further telephone conversations with Ms. Lee. According to Ms Lee's telephone note, Mr. Lui clarified that item (c) was a written record by Ms Ma to the Chief Magistrate and this was about the appellant's verbal complaint against Mr. Tam. Mr. Lui further clarified that this could be a memo/minute rather than a complaint report as the appellant had specified in her DAR. Ms Lee advised Mr. Lui to make another DAR and specify clearly therein the data he requested so that the Judiciary could locate the requested data. Ms Lee also told Mr Lui that since he Judiciary had answered the appellant's complaint that the requested documents were not available at the time they received the DAR, there was no evidence that the Judiciary had contravened the Ordinance.

27. On 2.5.2007, the Commissioner informed the appellant that, having regard to all the circumstances of the case, he decided not to carry out a full investigation. In his reasons for decision, the Commissioner said:

“...According section 19(3) [of the Personal Data(Privacy) Ordinance], the personal data to be supplied in compliance with a DAR [made under section 18 of the Ordinance] shall be supplied by reference to the data at the time of receipt of the request by the data user. That is to say, a data access request made under the Ordinance does not cover data that do not exist at the time of the request. Furthermore, it should be noted that a data access request is for access to ‘personal

data' contained in a document and not for a copy of the document or all the information contained therein.”

28. The Commissioner said that after making enquiries and obtaining the relevant information, it was clear to him that the requested items (1),(4) and (5)(i.e. paragraphs 42(b),(e) and (f) of the appellant's letter of 20.11.2006) did not exist at the time of the appellant's DAR and it was also clear that item (6) (i.e. paragraph 42(f) of the appellant's letter of 20.11.2006) did not contain personal data about the appellant. As to item (2), (i.e. paragraph 42(c) of the appellant's letter of 20.11.2006) did not cover the minute of Ms Ma to Mr. Tam regarding the appellant's request for a review by Mr. Tam of his own motion. In addition, the minute was part of the court case and is not covered by the Ordinance.

29. On 20.6.2007, the appellant lodged an appeal to the Administrative Appeals Board (“the Board”) against the Commissioner's decision not to investigate her complaint. Attached to her notice of appeal are 7 pages of grounds of appeal in 18 paragraphs. Only paragraphs 2 to 15 are relevant to the appeal. They may be summarized as follows:.

1. Section 39 of the Ordinance requires that if the Commissioner refuses to carryout an investigation of a complaint, he shall within 45 days after receipt of the complaint serve on the complainant a written notice of refusal on the complainant. The appellant received the Commissioner notice 3 months after her complaint. The Commissioner had breached section 39.
2. The Commissioner failed to resolve her case within the time stated in the Commissioner's performance pledge.
3. As regards items (1), (4) and (5), the appellant realized that they did not exist at the time of her DAR but she had asked the Chief Justice to compile them and furnish to her within 40 days after they were prepared.

4. Mr. Wong in his letter of 18.1.2007 admitted that Ms Ma had, in a minute to the PPO, submitted the appellant's request for a review of her by the PPO of his own motion but the Judiciary in the letter of 14.2.2007 stated that Ms Ma has not compiled any report on her complaint against the PPO. The Commissioner should investigate into these contradictory statements.
5. By insisting that there was no such report, the Judiciary Administrator is suspected of covering up evidence of contravention of the Ordinance and the Commissioner should investigate into the matter and to find out whether Ms Ma had actually compiled the report since Ms Ma had admitted its existence and Mr. Wong had read it.
6. The Commissioner should not have stopped his investigation before he had a complete and full picture of the case.
7. The minute was written sometime outside and after the tribunal hearing and dismissal of the case by the Presiding Officer on 12.10.2006. The minute related to Mr. Tam's misconduct only and did not form part of the materials of the proceedings. At the time of compiling documents relating to the appellant's complaint, Ms Ma was not a judicial officer. The document is therefore not a court document and should be covered by the Ordinance.
8. Even if it were a court document to which the Ordinance did not apply, the Commissioner should have advised her of the proper way to retrieve it.
9. The Commissioner should have clarified and verified with Ms Ma, the Registrar of the Labour Tribunal and the Judiciary Administrator the contradictory statements before concluding that there was no prima facie case of contravention of the Ordinance. The Commissioner's failure to do so raised doubt as to his integrity, impartiality accountability and professionalism.

30. Paragraphs 16, 17 and 18 are complaints on misconduct of judicial officers at the tribunal hearing and complaints against the administration staffs of the Judiciary for neglect of duty in failing to comply with her DAR in accordance with the provisions of the Ordinance. These are neither grounds relevant to her appeal against the Commissioner's decision nor matters within the Board's jurisdiction and we do not think they need be set out here.

31. In his statement relating to the decision, the Commissioner said that section 18 of the Ordinance only covered personal data existing at the time the DAR was received. He said preliminary inquiry revealed that at the time of receipt of the DAR, the Judiciary did not have the witness statement and disciplinary action and investigation report. This was not disputed by the appellant. Further the Judiciary had informed the appellant that the administration staffs did not compile any report on her complaint against Mr. Tam since they were not in a position to do so. The minute in question related to the appellant's application for review of her case in the Labour Tribunal. It was not a report on the appellant's complaint against Mr. Tam with copy to the Chief Magistrate. In any case the minute was a court document to which the Ordinance did not apply. The appellant's request for the audio-tape of the proceedings on 12.10.2006 should be made in accordance with judicial procedures and not via a DAR under section 18 of the Ordinance. The information as to which presiding officer would hear the appellant's review did not contain the appellant's personal data and in any case, the appellant had not requested such information in her DAR.

32. The Commissioner contended that failure to comply with section 39 would not render his decision on the appellant's complaint invalid. The Commissioner pointed out the appellant provided further letters only three days before the expiry of the 45 day period although she had earlier indicated that she had no further information in supply of her complaint, implying that the delay in giving the notice of his refusal to investigate was partly the appellant's fault. The Commissioner said that section 18 the Ordinance gave no right to an individual to request person data that had not yet come into existence. The data user was only required to comply with a DAR by reference

to the data at the time when the request was received.

33. On clarification of contradictory statements, the Commissioner considered that the minute by Ms. Ma to the Chief Magistrate regarding the appellant's review was not a complaint report as requested in the appellant's DAR. He said that it was the data requestor's duty to provide sufficient information to enable his data to be retrieved by the data user. The data user had no duty to inform the data requestor what data were being held by him.

34. The Commissioner submitted that sufficient inquiries had been made on the appellant's complaint and having regard to what had been said hereinbefore, he was entitled to conclude that there was no prima facie case of breach of the provisions of the Ordinance by the Judiciary. Accordingly he refused to carry out investigation into the appellant's complaint.

35. The issue in this appeal, as we see it, is whether the Commissioner was right to exercise his discretion under section 39 of the Ordinance not to investigate the appellant's complaint that the Judiciary had failed to comply with her DAR within the prescribed time. Before we go further, we wish to say that looking at the series of events that gave rise to the present appeal, the crux of the matter is the appellant felt aggrieved that she had not been properly and fairly treated by Mr. Tam at the hearing of her Labour Tribunal claim and her subsequent complaints against Mr. Tam and requests for information as to the results of her complaints via her DAR were met by bureaucracy in the Judiciary Administration. She also felt aggrieved that the Commissioner had not investigated her complaints to the Commissioner against the Judiciary for failure to comply with her DAR. As may be seen from her grounds of appeal, the appellant put all her grievances before us and apparently hoped that we would take the Judiciary to task on these issues. While we understand the frustration the appellant must have had if what she had asserted were correct and those who are found to be in the wrong should be given the right dessert, we have to say that we are not here to deal with judicial misconduct, which is a matter for the Chief Justice, nor are we concerned with any breach of the rules of natural justice by the

Presiding Officer in his conduct of the tribunal hearing of the appellant's case, which is a matter of appeal for the High Court. We are also not concerned here with complaints of neglect of duty or gross misconduct on the part of non judicial officers of the Judiciary or on the part of officers of the Commissioner's Office, the former being a matter for the Judiciary Administration while the latter is for the administration of the Commissioner's office, or to take it further, for the Office of the Commissioner for Administrative Complaints.

36. In this appeal, our sole concern is, as we said earlier, the correctness of the Commissioner's decision not to investigate. Section 39(2)(d) of the Ordinance gives the Commissioner the discretion to refuse to carry out an investigation of a complaint if he is of the opinion that having regard to all the circumstances of the case, inter alia, "any investigation or further investigation is for any other reason unnecessary." Thus the Commissioner has a wide discretion not to carry out an investigation of a complaint, provided such a discretion is exercised legally and not unreasonably. If the Commissioner, having regard to all circumstances he has before him, reaches the conclusion that there is no prima facie evidence supporting the allegations in the complaint, this is one of the "other reasons" for which the Commissioner may under section 39(2)(d) refuse to investigate. Contrary to the appellant's contention that, like the police must investigate a crime report, the Commissioner has a duty to investigate every complaint, the Ordinance imposes no such duty on the Commissioner in respect of complaints he receives.

37. The Commissioner says that having looked at all the relevant documents and considered all the information obtained through enquires with the parties, there is no prima facie evidence of contravention of the provisions of the Ordinance by the Judiciary. The appellant says on the other hand that the Commissioner had not looked into the matter sufficiently and concluded prematurely that there was no prima facie case.

38. In order to resolve the question, we think we should start from the DAR of the appellant. The personal data the appellant requested in paragraph 42 of her letter of 20.11.2006 belonged to three categories:

- (a) The witness statement of Mr. Tam (item (b)), the complaint report prepared by Ms Ma (item (c)), and the investigation report and follow up disciplinary action (items (e) and (f));
- (b) The transcript of recording of the proceedings on 12.10.2006 before Mr. Tam;
- (c) Handling Procedures of Complaints against Judicial Officers.

39. The appellant's DAR was made to the Judiciary under s. 18 of the Ordinance the relevant part of which is as follows:

“s.18 (1) 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.”

40. It should be noted that subsection (1)(b) only requires the data user to comply with the request by supplying the data requestor a copy of the data if the data user holds such data. That is to say, if the data user does not hold the data requested, he is not obliged to comply with the request. It would be absurd to require him to do the impossible if he does not hold the data. The Ordinance does not oblige the data user to find out whether the requested data exist or if they exist, to secure them for the purpose of complying with the DAR. Secondly, the section only covers personal data of which the data requestor is the data subject. Thus, even if the data user holds the data requested by the DAR but they are not personal data or personal data of which the data requestor is the data subject, the data user is not obliged to comply with the DAR.

41. On the question of whether at the time the Judiciary received the DAR, the Judiciary held the data requested by the appellant, the circumstances for the Commissioner to consider included the following:

- (a) The Judiciary's replies to the appellant and the Commissioner had stated more than once that there was no witness statement of Mr. Tam, nor investigation reports and disciplinary action results and therefore they would not be able to comply with the request for these documents.
- (b) The appellant's acknowledgement in paragraph 2(b) of her complaint letter to the Commissioner dated 19.1.2007 that these documents were not ready at the time of her DAR.
- (c) The appellant's complaint in that letter that the Chief Justice should have told her honestly the documents were not ready for delivery to her, instead of saying they were not in existence.
- (d) The appellant's acknowledgement in her grounds of appeal, that she realized that these documents did not exist at the time of the DAR and what she in fact asked the Judiciary was to compile these documents and supply them to her within 40 days.
- (e) Mr. Lui's acknowledgement on 6.3.2007 on behalf of the appellant, to APDO Ms Lee that these documents related to the complaint the appellant made on the same day as her DAR and could not have existed at the time when DAR was received by the Judiciary.
- (f) The appellant's request at item (c) of her DAR was "The complaint report written by Ms Ma regarding her verbal complaint against Mr. Tam on 12.10.2006 with copy to Mr. Li". Ms Ma stated she did not compile any such report.
- (g) Ms Ma acknowledged that she had made out a 'minute' on 12.10.2006 but that was in connection with the appellant's

application for review of her Labour Tribunal claim.

- (h) Mr. Wong stated that Ms. Ma's minute was submitted to the Principal Presiding Officer since it was in connection with the appellant's application for review. It was not sent to Mr. Li, the Chief Magistrate because the appellant's complaint letter was copied to Mr. Li.
- (i) Mr. Wong acknowledged that he had reported the appellant's verbal complaint to the Mr. Li the Chief Magistrate but he had not referred the minute to him. Both the Chief Justice and the Chief Magistrate had not called for the case file.
- (j) Ms Betty Leung of the Judiciary Administration office categorically stated in her letter dated 14.2.2007 to the appellant that Ms Ma being an administrative staff could not deal with complaints against judicial officers and she could not have compiled any such complaint report as requested by the appellant in her DAR.
- (k) Mr. Lui's clarification with Ms Lee on 6.3.2007 that item (c) was the written record to the Chief Magistrate of the appellant's verbal complaint and not a complaint report as requested under the DAR.
- (l) There is no evidence contrary to show the above circumstances were untrue.

42. In our opinion, in the light of the above circumstances, the Commissioner was entitled to conclude as a fact that the Judiciary did not hold items (b), (e) and (f) requested by the appellant in her DAR. Also, having regard to the description of item (c) in the DAR and there was no minute of the appellant's verbal complaint, the Commissioner was entitled to conclude that the appellant's request in her DAR could not be the 'minute' made out by Ms Ma regarding her review and there was no complaint report in existence at the time the Judiciary received the DAR.

43. That being the case, we agree that the Judiciary committed no breach of s. 18 of the Ordinance in failing to supply to the appellant a copy of item (b), (c) (e) and (f) in accordance with her DAR.

44. We also agree that the minute made out by Ms. Ma was part of the process of the application by the appellant for a review of her claim by another Presiding Officer. This is part of the judicial proceedings at the Labour Tribunal and is outside the scope of the Ordinance. Thus, even stretching 'minute' to mean 'report', it is not part of the administrative process relating to complaints against judicial officers or non judicial officers. Failure to supply it to the appellant does not contravene the Ordinance.

45. Similarly, the transcript of the recording of the hearing at the Labour Tribunal on 12.10.2006 is part of court proceedings and it can be accessed by application to the Presiding Officer of the Labour Tribunal in accordance with the procedures of the Tribunal. It is a court document and cannot be accessed via a DAR under section 18 of the Ordinance. The Judiciary committed no breach of the Ordinance in failing supply to the appellant item (d) of her request.

46. The Judiciary has published a booklet on "Complaints against a Judge's Conduct" and the "Complaints Handling Procedure" is to be found in paragraph 6 of the booklet. The booklet is published for information of the general public and open to access by the public. It contains no personal data let alone personal data of which the appellant is the data subject. Thus, as has been explained earlier, item (g) of the DAR contains no personal data and does not come within section 18 of the Ordinance.

47. In the circumstances, the Commissioner's conclusion that there was no prima facie case of the Judiciary failing to comply with the appellant's DAR and for that reason investigation into the complaint of the appellant was unnecessary, must be right.

48. We are now left with one issue that has raised some concern among us. The appellant complained in her grounds of appeal that the Commissioner had failed to inform her of his refusal to investigate,

within 45 days of her complaint as required by section 39(3) of the Ordinance. The Commissioner does not dispute that the refusal was conveyed to the appellant later than 45 days after receipt of her complaint. We note that the delay was three months and not a few days or weeks. This is unreasonable and unacceptable. The Commissioner does not seem to have any explanation for it except claiming that the appellant had thrown in four additional letters at the last minute. The additional information might have caused the Commissioner to reconsider his decision and delayed its announcement to the appellant, but in our opinion, that should not have caused a three months delay. This was a breach of section 39(3) of the Ordinance. Be that as it may, this is not a matter related to the Commissioner's decision not to investigate. Remedies for breach of section 39(3) are not within our jurisdiction and have to be sought elsewhere. Similarly, inefficiency of the Commissioner's office is a matter for the administration. With these passing remarks, our conclusion on this appeal is that it must be dismissed.



(Mr Arthur LEONG Shiu-chung)
Chairman
Administrative Appeals Board