

ADMINISTRATIVE APPEALS BOARD  
ADMINISTRATIVE APPEAL NO. 26/2015

BETWEEN

---

LIU YAN CHIM

Appellant

and

PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA

---

Coram: Administrative Appeals Board  
Ms. Cissy Lam King-sze (Deputy Chairman)  
Mr. Law Chi-yuen (Member)  
Mrs. Julie Ma Li Mun-wai (Member)

Date of Hearing: 15 December 2015

Date of Handing Down Written Decisions with Reasons: 8 March 2016

---

DECISION

---

1. In 2009, the Appellant was engaged in litigation in Hong Kong (“the High Court Action”) with, inter alia, his stepmother (“Madam Cheung”). Ms. Liu Yuk-ling (“Ms. Liu”) is the daughter of Madam Cheung and the Appellant’s half sister. In June 2009, Ms. Liu was a staff of the Student

Financial Assistance Agency (“SFAA”).

2. In June 2009, the Appellant received 28 pages of documents (“the Documents”), which bore two fax headings. One heading showed “15-JUN-2009 17:05 SFAA(AUTH)” plus SFAA’s fax number and the corresponding page number. The other heading showed the name and fax number of the solicitors acting for Madam Cheung in the High Court Action (“Madam Cheung’s solicitors”) plus the date and time of fax and the page numbers.

3. Pursuant to that, the Appellant made successive complaints to the SFAA, the Education Bureau (“EDB”), the Chief Secretary for Administration’s Office (“CSO”) and the Audit Commission (“AC”).

4. Dissatisfied with all their replies, in November 2014 the Appellant brought his complaint to the Privacy Commissioner for Personal Data against the SFAA, the EDB, the CSO and the AC.

5. By letter dated 23 April 2015, the Deputy Privacy Commissioner for Personal Data (“the Commissioner”) informed the Appellant that she had decided not to pursue the complaint further. The “Reasons for decision not to pursue the complaint further” (“Reasons for Decision”) was annexed thereto. Dissatisfied with the Commissioner’s decision, on 26 June 2015, the Appellant lodged his appeal to the Administrative Appeals Board.

6. At all material times, the Appellant was, and still is, residing in Canada. The Appellant did not appear at the hearing of the present appeal, whether by himself or by his representative. By letter of 7 December 2015, the Appellant informed this Board that, by reason of poor health and the expenses involved, he would not attend the hearing, but would rely on his

written submissions together with all the annexures. He accepted that the appeal could be heard and dealt with in his absence.

7. In the light of the Appellant's letter and having regard to the materials before us, this Board was satisfied that we had sufficient materials to proceed with the hearing of the appeal, and we so did in accordance with section 20(1)(b) of the Administrative Appeals Board Ordinance, Cap.442 ("the AAB Ordinance").

### **The Background Facts**

8. In order to understand why SFAA's name and fax number appeared at the heading of the Documents, one must refer to the witness statement in Chinese dated 19 December 2011 made by Ms. Liu for the purpose of the High Court Action ("the Witness Statement") [Appeal Bundle/147-152], wherein she set out the events as follows:-

- (1) In the High Court Action, the Appellant through his solicitors ("the Appellant's Solicitors") sought copies of documents relating to Majestic Investment Company Limited ("Majestic") from Madam Cheung. The deadline was 16 June 2009.
- (2) In order to comply with the deadline which was imminent, on 15 June 2009 at around 5:00p.m., Ms. Liu used the fax machine in her office, i.e. the fax machine of the Authentication Team of the SFAA, to fax the Documents (plus a covering page, making a total of 29 pages), to Madam Cheung's Solicitors.

- (3) Subsequently, Madam Cheung's Solicitors forwarded the Documents to the Appellant's Solicitors by fax.
- (4) As with all fax machine, upon sending the Documents by fax, the machine generated and printed on the top of each page the date and time the fax was sent, the name and fax number of the company/organization from which the fax was sent, and the number of pages sent.
- (5) Because Ms. Liu used the fax machine of the Authentication Team of the SFAA to fax the Documents, by the time the Documents reached the Appellant's Solicitors, "SFAA (AUTH)" and its fax number together with the date and time the fax was sent appeared at the top of the Documents as well as Madam Cheung's Solicitors' name and fax number and other particulars.
- (6) Madam Cheung's Solicitors subsequently demanded from the Appellant's Solicitors' photocopying charges in the sum of \$84. The Appellant through his solicitors disputed his liability to the sum. This sum was later revised to \$28, and Madam Cheung's Solicitors duly informed the Appellant's Solicitors by letter of 3 July 2009.
- (7) The photocopying charges remained outstanding until 16 December 2009, when the Appellant sent to Madam Cheung directly a cashier order for the sum of \$84 made out to Madam Cheung, and not Madam Cheung's Solicitors. Up to the time of the Witness Statement, Madam Cheung had not cashed the

cashier order.

(8) In about February 2010, Ms. Liu was asked by her superior to explain whether she had used SFAA's fax machine for her personal purposes and why she had demanded from the Appellant photocopying charges of \$84. It was then that Ms. Liu learned for the first time that the Appellant had written to the SFAA complaining about the use of the fax machine to send the Documents and about the photocopying charges.

(9) Ms. Liu duly explained the circumstances to her superior.

(10) After investigation, SFAA found that, while it was understandable that Ms. Liu was prevailed upon by constraint of time to use the office machine to fax the Documents, it was improper for her to do so without prior permission from her superior. She was required to give a written undertaking that she will never again, without prior permission, use SFAA's fax machine for personal purposes, and she was given a verbal warning by her superior.

9. Apart from signing the Witness Statement, Ms. Liu further signed a declaration of truth (屬實申述) in Chinese to verify the Witness Statement [Appeal Bundle/154].

10. Ms. Liu further exhibited with the Witness Statement the Documents and the covering page as "LYL-1". According to the covering page [Appeal Bundle/284], the Documents were all related to Majestic, and consisted of bought and sold notes, notice of dividend, credit advice, notice of

change of receiver and cashier's order application receipts. The Appellant had selected with some pages of the Documents to be included in his various correspondence and they are included in the Appeal Bundle. Some, but not all, of the cashier's order application receipts named the Appellant as the payee. The Documents were clearly Ms. Liu's personal documents in that they bore no relation to her job or any business of the SFAA.

11. According to the Appellant, he received the Documents on 17 June 2009 by email.

12. By letter of 1 February 2010 to the SFAA [Appeal Bundle/127-128], the Appellant complained, inter alia, that SFAA had no legal right to "*obtain/store any record of our financial matters of our trust & beneficiaries including banking accounts & matters, business investments, savings & other personal data and subsequently deliver to outsiders*"; that "*a government department may not collect personal information unless it relates directly to an operating program or activity of the department (operation needs) with the subject person's consent ... this is ... to protect the public safety and security as well as the privacy rights of the public ...*"; that "*by which authorisation and what reasons your agency infringed our privacy?*"

13. SFAA replied to the Appellant by letter of 17 March 2010 [Appeal Bundle/157-158]. It stated that SFAA had conducted a thorough investigation of the matter. The investigation revealed that a staff of the Authentication Team had made use of the fax machine of the Authentication Team to fax 29 pages of documents for private purposes. The fax machine in question was checked and it was found that none of the Appellant's personal information was stored in the machine. The solicitors in question had neither worked for SFAA or the Authentication Team. Neither SFAA nor the Authentication Team

had collected, stored or transmitted the Appellant's personal information. The fax was sent by the staff privately. The use of office equipment should normally be restricted for official purposes. The staff had been duly advised of this office practice.

14. SFAA reiterated its position in its letter of 11 May 2010 [Appeal Bundle/406-407]. Neither SFAA nor its Authentication Team had collected, stored or transmitted the Appellant's personal information. The investigation revealed that 29 pages of document was transmitted with the use of a fax machine in the Authentication Team by one of the staff. No personal information of the Appellant was stored in the fax machine or was kept by SFAA. The fax machine was equipped with automatic sheet feeder function where manual paper feeding was not necessary and the total time it took to fax the 29 pages of documents was less than 8 minutes. There was no evidence of the use of the office photocopying machine for private purpose in the incident. The staff involved was duly advised that the use of office equipment should normally be restricted for official purpose.

15. There followed further correspondence between the Appellant and the SFAA because the Appellant was not satisfied with SFAA's reply [Appeal Bundle 366-369].

16. Subsequently in 2012, after the Appellant had received the Witness Statement and read that Ms. Liu was told of the Appellant's complaint by her superior, the Appellant raised a second complaint with SFAA. In his letter of 13 January 2012 [Appeal Bundle/135], which was sent to both the SFAA and the EDB, the Appellant complained that "*all the details about the said informer case were found completely leaked out to public from SFAA & Education Bureau, even the informer's personal identity and all the evidences*

*provided.”*

17. Pursuant to the complaints, the Appellant had numerous correspondences with the SFAA, both written and by telephone. In their letter of 27 June 2013 [Appeal Bundle/163-165], the SFAA reiterated “*the transmission of some documents held personally by a staff of the Agency to a law firm using a facsimile machine of the Agency was done solely in the private capacity of the staff. As such, the request for a letter of apology from the Government in this regard was not relevant and there was no question of any remedial action or compensation on the part of the Government.*” Regarding the second complaint, the SFAA stated as follows: “*... for the purpose of a thorough investigation, there is a need for the subject of the complaint to be provided with the necessary details of the complaint relating to her so that she could make a fair representation for herself, and the management could only decide on the proper course of action when all aspects of the complaint case have been comprehensively looked into and considered. Hence we do not see any inappropriateness in this regard.*”

18. Further, in the letter of 17 October 2013 [Appeal Bundle/425-426], SFAA reiterated: “*As elaborated on repeated occasions, the transmission of personal documents by the staff of the Agency on 15 June 2009 to a law firm using a facsimile machine of the Agency was done solely in the private capacity of the staff concerned. Arising from the incident, the Agency has taken appropriate action, in particular to remind our staff to exercise prudence in the use of government facilities for all purposes at all times. As the transmission of documents was solely a private act of the staff, there is no question of any remedial action on the part of the Agency.*” And regarding the second complaint, the letter stated: “*As to the disclosure of details of the complaint to the staff concerned, you may wish to note that the Agency did*



*this on a need-to-know basis solely for the purpose of internal investigation. The staff concerned was only provided with details of the part of the complaint pertaining to her, and not the entire complaint. Such disclosure was apt and necessary as the staff concerned could only make fair representation for herself when she was provided with the necessary details of the complaint relating to her, and it was only with such feedback from the subject of the complaint and information provided by the complainant that the management could decide on the proper course of action to be taken in relation to the complaint.”*

19. Dissatisfied with the SFAA’s reply, by separate letters dated 31 October 2014, the Appellant complained to the CSO and the AC [Appeal Bundle/381-382 & 357-358].

### **The Complaints**

20. In his “Grounds of appeal” [Appeal Bundle/78], the Appellant formulated his complaints into “Case 1” and “Case 2”.

21. Case 1 – “The illegal collection, storage, disclosure & transmission of personal information by SFAA and under the name and heading of SFAA used for ‘private and personal purposes/ benefits’ of SFAA staff(s)”.

22. Case 2 – “The illegal disclosure of the informer’s personal identity including all the strictly confidential informer cases details by SFAA”.

23. The Appellant referred to his letter of 1 February 2010 as the basis of “Case 1” and his letter of 13 January 2012 as the basis of “Case 2”.

24. In the Reasons for Decision, the Commissioner identified 6 “allegations” from the Appellant. “Case 1” and “Case 2” are respectively “Allegation 1” and “Allegation 4” referred to by the Commissioner.

25. The other allegations identified by the Commissioner are:-

- (1) The Appellant was dissatisfied that SFAA had neither apologized nor taken appropriate remedial actions in response to his complaint (“Allegation 2”).
- (2) The Appellant brought his complaint against the SFAA to the EDB. He was dissatisfied that EDB referred his complaint back to SFAA (“Allegation 3”).
- (3) The Appellant brought his complaints against the SFAA and the EDB to the CSO and was dissatisfied that the CSO referred his complaints back to SFAA for handling (“Allegation 5”).
- (4) The Appellant complained against the AC about their poor supervision over SFAA’s internal control mechanism in respect of Ms. Liu’s misuse of its fax machine (“Allegation 6”).

### **Relevant Statutory Provisions**

26. Save where otherwise stated, the following statutory provisions are provisions of the Personal Data (Privacy) Ordinance, Cap. 486 (“*the Privacy Ordinance*”) and Data Protection Principles (“*DPP*”) are those contained in

Schedule 1 of the Privacy Ordinance.

27. Section 2(1) defines “data user” as “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”.

28. DPP3<sup>1</sup> : “Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than - (a) the purpose for which the data was to be used at the time of the collection of the data; or (b) a purpose directly related to the purpose referred to in paragraph (a).”

29. Section 39(1)(a): “(1) Notwithstanding the generality of the powers conferred on the Commissioner by this Ordinance, the Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if (a) the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) has had actual knowledge of the act or practice specified in the complaint for more than 2 years immediately preceding the date on which the Commissioner received the complaint, unless the Commissioner is satisfied that in all the circumstances of the case it is proper to carry out or not to terminate, as the case may be, the investigation; ... ..”

30. Section 39(2)(d): “The Commissioner may refuse to carry out or decide to terminate 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.”

---

<sup>1</sup> As the acts complained of happened prior to 1 October 2012, the previous version of DPP3 effective before its amendment on 1 October 2012 is used.

31. Paragraph 8(e) of the Complaint Handling Policy issued by the Commissioner (“CHP”): “... ..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; ...”

32. Copies of the CHP in both English and Chinese had been duly sent to the Appellant on 8 January 2015. By section 21(2) of the AAB Ordinance, this Board, in the exercise of its powers under subsection 21(1)(j), shall have regard to the CHP.

### **Our Decision**

33. The Appellant founded Case 1/Allegation 1 against SFAA on the fax heading “SFAA (AUTH)” and its fax number at the top of each page of the Documents. But a fax heading, without more, tells little. It proves nothing more than that the Documents were most probably faxed from a fax machine that belonged to a person or organization called “SFAA (AUTH)”. Ms. Liu is the Appellant’s half sister. Presumably he knew where she worked and made the connection that “SFAA” was short for Student Financial Assistance Agency. He followed it up with various enquiries and complaints with the SFAA.

34. To answer his complaint, the SFAA had conducted a thorough investigation and had duly replied the Appellant. “SFAA (AUTH)” and its fax number appeared at the top of each page of the Documents because the Documents were sent using a fax machine that belonged to the Authentication Team of the SFAA. The Documents clearly had nothing to do with SFAA. They were the personal documents of a staff. She sent the Documents

without prior permission.

35. SFAA's reply was consistent with the chain of events set out in the Witness Statement of Ms. Liu. The Documents were her personal documents. Her use of the fax machine was done without prior permission. It was done improperly, whereby she was given a verbal warning and was required to give a written undertaking to never do the same again.

36. In its investigation, SFAA had questioned the staff concerned, namely Ms. Liu, and it had checked the fax machine in question to make sure that nothing was stored in the machine. It was equipped with an automatic feeder. All that one was required to do was to put the Documents in the feeder and the fax took only 8 minutes. There was no need to use any computer or photocopying machine, and indeed there is no evidence that any computer or photocopying machine of SFAA was used. In his complaint to the SFAA, the Appellant also complained about the demand for photocopying charges of \$84. But it was Madam Cheung's solicitors who made the demand, not SFAA.

37. We agree with the Commissioner that in the circumstances, SFAA was not a data user of the Documents within the definition of section 2(1) of the Privacy Ordinance. SFAA did not control the collection, holding, processing or use of the data contained in the Documents, if any.

38. Regarding Case 2/Allegation 4, we think SFAA's reply in their letters of 27 June 2013 and 17 October 2013 provides a complete answer to this complaint. True, the Appellant directed his complaint to SFAA, not Ms. Liu. But Ms. Liu was the one who sent the fax and who could explain what happened. Precisely because Ms. Liu did not obtain prior permission, SFAA

had no knowledge of what happened, and the only way they could find out was by questioning Ms. Liu. And in order to do so, and as a matter of fairness, Ms. Liu had to be told the necessary details of the complaint. One cannot be expected to answer an allegation unless one knows what the allegation is.

39. We agree with the Commissioner that in the circumstances, any use of personal data by SFAA was for the purpose for which the data was to be used at the time of the collection, or for a purpose directly related to that purpose, namely a fair and proper investigation of the Appellant's complaint; and there was no contravention of DPP3.

40. In the materials submitted by the Appellant, he has made references to a number of statutory provisions and government circulars, such as the Prevention of Bribery Ordinance and general circulars on how to handle public complaints or the use of office facilities. There are also newspaper cuttings of cases which have no bearing on the present case. We do not find them relevant or helpful. The only issue before us is whether SFAA had acted in contravention of the Privacy Ordinance. We find nothing in the materials and arguments submitted by the Appellant to tell us more than what the fax heading tells us, namely that one of SFAA's fax machines had been used to send the Documents. SFAA's investigation revealed that it was a staff, namely, Ms. Liu, who sent the Documents and she did so without prior permission; and in order to carry out that investigation, SFAA acquainted Ms. Liu with the necessary details of the Appellant's complaint. We agree with the Commissioner that in the circumstances, there is no prima facie evidence of any contravention of the Privacy Ordinance by SFAA.

41. In the Reasons for Decision, the Commissioner further relied on

section 39(1)(a) of the Privacy Ordinance. It is clear from his letter of 1 February 2010 [Appeal Bundle/127-128] that from the very first, the Appellant was already alleging infringement of the right to privacy as his ground of complaint [see paragraph 12 above]. The Appellant was also fully conversant with the facts of his second complaint having read the Witness Statement. It must be clear to the Appellant by January 2013 [Appeal Bundle/160-161], if not earlier, what SFAA's reply to both of his complaints was. He chose to not to bring his complaint to the Commissioner until November 2014. The 2 years limitation stipulated in section 39(1)(a) runs from the time the complainant has had actual knowledge of the act or practice specified in his complaints. We agree with the Commissioner that in the circumstances, the Appellant has had actual knowledge of the act or practice specified in his complaints for more than 2 years immediately preceding the date on which the Commissioner received the complaints. Ignorance of the law is no excuse. In any event, far from being ignorant, the Appellant has shown himself highly vigilant and a person who knows his every right. The Commissioner did not consider the delay in lodging the complaint justified and the Commissioner was not satisfied that it was proper to carry out or not to terminate the investigation. We agree with him. Section 39(1)(a) is applicable.

42. Regarding the remaining allegations, Allegation 2 against SFAA falls with Case 1/Allegation 1 and Case 2/Allegation 4. As to Allegations 3, 5 and 6 against the EDB, the CSO and the AC, according to the Appellant, he brought his complaint to the EDB and the CSO because they were the "superior" department/bureau/office of SFAA, and he brought his complaint to the AC because these other departments did not respond to his complaint. We have looked at the Appellant's correspondence with the EDB, the CSO and the AC. We agree with the Commissioner that the Appellant's complaints

against these departments do not involve any act done in contravention of the Privacy Ordinance by these departments. They fall outside the ambit of the Privacy Ordinance, and hence outside the jurisdiction of the Commissioner.

### **Conclusion**

43. In conclusion, we agree with the Commissioner that there is no prima facie evidence of any contravention of the requirements under the Privacy Ordinance by the SFAA, the EDB, the CSO and the AC. We agree that the Commissioner was right to decide not to pursue the complaint further under section 39(2)(d) of the Privacy Ordinance. Further, we agree that section 39(1)(a) of the Privacy Ordinance is applicable in the circumstances to Case 1/Allegation 1 and Case 2/Allegation 4. Any investigation or further investigation of the Appellant's complaint is unnecessary.

44. By section 21(1)(j) of the AAB Ordinance, we confirm the Commissioner's decision not to pursue the complaint further and dismiss the appeal.

(signed)

(Ms. Cissy Lam King-sze)

Deputy Chairman

Administrative Appeals Board