

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 28/2020

BETWEEN

SO CHUNG LEUNG

Appellant

and

THE PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr. Erik Ignatius SHUM Sze-man (Deputy Chairman)
- Mr. Eugene Chan Yat-him (Member)
- Ir Lau Wing-yan (Member)

Date of Hearing: 4 February 2021

Date of Handing down Written Decision with Reasons: 19 February 2021

DECISION

Introduction

1. This is an appeal brought by the Appellant to the Administrative Appeals Board (the “**Board**”) against the Decision of the Respondent dated 3 September 2020 (the “**Decision**”) whereby the Respondent decided not to carry out further investigation into the complaint lodged by the Appellant against the Person Bound (the “**Complaint**”), pursuant to sections 39(2)(ca) and 39(2)(d) of the

Personal Data (Privacy) Ordinance (Cap. 486) (the “**Ordinance**”) and paragraphs 8(d) and 8(e) of the Respondent’s Complaint Handling Policy.

2. The Appellant acted in person throughout the appeal proceeding and at the appeal hearing. He presented his oral submissions at the appeal hearing before this Board. The Respondent was represented by Ms. Clemence Wong, Assistant Legal Counsel, while the Person Bound was represented by Ms. Agnes Fong, Government Counsel.

History of the Complaint

3. The Appellant was at the material times a Senior Station Officer in the Fire Services Department (“**FSD**”) of the Person Bound.

4. The Person Bound commenced an investigation and instituted disciplinary proceedings against the Appellant (the “**Disciplinary Proceedings**”) for failing to carry out the lawful order to attend and handle a fire protection complaint on 12 June 2015 without good and sufficient cause (the “**Incident**”).

5. On 28 May 2018, the Appellant made a data access request to the Person Bound (the “**2018 Request**”) for “*all relevant reports / documents / correspondence associated with investigation(s) on [the Appellant] which led to disciplinary charge against [the Appellant] with regard to [the Incident], which formed part of [the Appellant’s] personal data under relevant legislations, which are current under custody by [the Person Bound]*”.

6. On 30 July 2018, the Person Bound provided the Appellant with certain documents in response to the 2018 Request, which included, *inter alia*:

- (1) the incident log records of the Incident;
- (2) investigation findings in relation to the Incident;
- (3) transcript of the conversations between officers concerned on 12 June 2015;
- (4) written statements of the officers concerned in relation to the Incident;
and
- (5) recommendation of disciplinary action to be administered against the Appellant.

7. On 12 October 2018, the Person Bound further provided the Appellant with documents relating to the Disciplinary Proceedings for the Appellant's preparation of his defence thereof.

8. On 14 April 2019, the Appellant made another data request to the Person Bound (the "2019 Request") which is the subject matter of the complaint lodged with the Respondent and the present appeal for the following documents:

*"Items as stated in the attached **supplementary sheet**, which should be included in relevant dossier on disciplinary charge against [the Appellant] with regard to the Incident, which formed part of [the Appellant's] personal data under relevant legislations, which are currently under custody by [the Person Bound]."*

9. The items stated in the said supplementary sheet referred to in the Appellant's 2019 Request are:

- “(1) Documents/records/any materials showing actions taken as envisaged in General Orders (GO) paragraph 9-12 (i) to (iv);*
- (2) Documents/records/any materials showing actions taken as envisaged in General Orders (GO) paragraph 9-12A;*
- (3) Documents/records/any materials showing actions taken as envisaged in General Orders (GO) paragraph 9-12AA;*
- (4) Documents/records/any materials showing actions taken as envisaged in General Orders (GO) paragraph 9-12AB; and*
- (5) Documents/records/any materials showing consideration taken as envisaged in General Orders (GO) paragraph 9-14”*

10. The paragraphs of the Person Bound's General Order (the “GO”) referred to in the 2019 Request detail the general procedures in respect of the mechanism of disciplinary proceedings conducted by the FSD.

11. On 24 April 2019, the Person Bound issued a letter to the Appellant and requested the Appellant to specify the personal data requested in the 2019 Request. The Appellant replied on 29 April 2019 by merely reproducing the contents of the 2019 Request without giving any additional or clarifying information.

12. The Person Bound stated in its letter to the Appellant dated 29 May 2019 that all relevant documents/materials in relation to the investigation of the Appellant which led to the Disciplinary Proceedings against him regarding the Incident had been disclosed to him. It transpired that no further clarification as to the personal data requested was provided by the Appellant to the Person Bound in the subsequent correspondences between the parties.

13. The Appellant lodged the Complaint against the Person Bound for failing to comply with the 2019 Request in that the latter failed to provide him with any of the Request data and to confirm if the Person Bound held the Requested data.

14. After conducting preliminary enquiries and considering the Appellant's and the Person Bound's respective representations, the Respondent made the Decision on the following grounds:

- (1) the Person Bound had provided the requested documents to the Appellant in response to the 2018 Request and the Disciplinary Proceedings;
- (2) the 2019 Request was not a valid data access for the Person Bound to comply since the Appellant failed to answer the Person Bound's reasonable request for clarification and to make clear what personal data was requested; and
- (3) the Appellant should consider redress through other channels instead of making a data access request for the purpose of conducting his defence in or for matters relating to the Disciplinary Proceedings,

relying on and with reference to Wu Kit Ping v Administrative Appeals Board [2007] 4 HKLRD 849.

15. On 10 September 2020, the Appellant lodged the present appeal against the Decision.

Reasons for this Board's decision

16. In arriving at the Decision, the Respondent relied on sections 39(2)(ca) and 39(2)(d) of the Ordinance which provide:

“39(2) 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-

...

(ca) the primary subject matter of the complaint, as shown by the act or practice specified in it, is not related to privacy of individuals in relation to personal data; or

(d) any investigation or further investigation is for any other reason unnecessary.”

17. This Board's function is to consider whether there is sufficient evidence and reason to disturb the Respondent's exercise of discretionary power under the Ordinance, and in so doing consider if the grounds of appeal are valid.

18. The Appellant lodged the present appeal to this Board relying on the following grounds:

- (1) That he had already made clear the personal data requested in the 2019 Request (“**Ground 1**”); and

- (2) . That the Respondent had wrongly applied the case of *Wu Kit Ping* (“Ground 2”).

Ground 1

19. The Appellant submits that he has already complied with his duty as a data subject to make clear the personal data requested under the 2019 Request.

20. As stated hereinabove in paragraphs 8 and 9, in the 2019 Request the Appellant merely referred to “documents/records/any materials showing the actions/consideration taken as envisaged” as stated in the respective paragraphs of the Person Bound’s GO which is exclusively intended to set out the procedural matters of the Person Bound’s disciplinary mechanism. However, the 2019 Request is general and fails to specify the nature and type of the documents requested.

21. The GO of the Person Bound in fact referred to the nature and particularity of various documents which might contain person data of the subject officer such as the “brief account of the case, statements from members concerned and relevant documents” (see paragraph 9-12(iii) of the GO) and “investigation reports and the subsequent decision” (see paragraph 9-12(iv) of the GO).

22. The Appellant does not dispute that the Person Bound has already supplied to him various documents in relation to the Disciplinary Proceedings pursuant to the 2018 Request. The Appellant did not specify exactly what other documents the Person Bound had failed to provide under the 2018 Request. Further, in the 2019 Request, other than what was reproduced in paragraphs 8 and 9

hereinabove, again the Appellant did not specify what documents in relation to the Disciplinary Proceedings or otherwise were missing in the 2018 Request.

23. Upon the Person Bound's request for clarification, the Appellant merely made a verbatim reproduction of the 2019 Request in his reply letter dated 29 April 2019 to the Person Bound.

24. The Person Bound's interpretation of the 2019 Request was that the personal data requested under the 2019 Request was the information relating to the Disciplinary Proceedings which was obviously the purpose of quoting the paragraphs in the GO in the Appellant's supplementary list attached to the Request. The Person Bound's case is that such documents had already been provided to the Appellant upon the 2018 Request.

25. The Appellant does not dispute that the Person Bound did provide him with hundreds of pages of documents and information under the 2018 Request and also during the Disciplinary Proceedings. In the course of the Respondent's investigation of the Complaint, the Respondent invited the Appellant to distinguish the data requested under the 2019 Request and the documents/information previously provided to him by the Person Bound. The effect of this distinction is again to ascertain what other documents the Appellant considered to be missing that the Person Bound was required to supply under the 2019 Request. Regrettably, the Appellant only insisted that the documents supplied to him under the 2018 Request did not contain what he requested in the 2019 Request without any further elaboration. The above reply of the Appellant was unhelpful and amounted to a circular explanation.

26. Upon lodging the present Appeal to this Board and at the appeal hearing, the Appellant still fails to specify what exactly he was requesting under the 2019 Request which was missing from the documents already provided to him by the Person Bound pursuant to the 2018 Request.

27. In 馬光宙先生 與 個人資料私隱專員 (Administrative Appeal No. 29/2005, Decision dated 25 April 2006, particularly in paragraph 20), it was held that a data subject is required to indicate clearly the data that he requests to access and it is insufficient to only state generally the scope of the requested access.

28. The Respondent concluded that the Person Bound was excused from complying with the 2019 Request by virtue of section 20(3) of the Ordinance and the decision in the case of Wong Man Leung v The Privacy Commissioner for Personal Data (Administrative Appeal No. 16/2008, Decision dated 21 April 2009) on the ground that the Appellant failed to provide clarification of the information/documents requested when the Person Bound reasonably required to ascertain the nature and kind of personal data requested. This Board finds the Appellant's submission that (1) the Respondent's finding that "it is not unreasonable for the Person Bound to request for clarification" is too lenient and (2) the Respondent should positively consider if the request for clarification is "reasonable" is highly technical, pedantic and not useful. In essence the Respondent considered that the Person Bound's request for clarification is reasonable in the circumstances.

29. The Appellant also contends that the Respondent's application of the Wong Man Leung is wrong because "*the investigation conducted by the [Respondent] failed to substantiate there was difficulty encountered by the Person Bound in the course of complying with the [2019 Request]*".

30. The Appellant's said contention is unmeritorious as it is clear from the correspondences and content summarised above that given the vagueness of the 2019 Request the Person Bound made reasonable enquiry of the Appellant for clarification of the 2019 Request to which the Appellant failed to answer. In the premises, this Board considers and holds that in the circumstances, the 2019 Request requesting for documents other than those already supplied by the Person Bound was far too vague and general with only references to paragraphs in the GO and hence was not a valid data access request with which the Person Bound needs to comply.

31. For the reasons given hereinabove, it was reasonable for the Respondent not to carry out further investigation for the Complaint. On this ground alone the Appeal is dismissed.

Ground 2

32. For the sake of completeness, this Board will also consider the Ground 2 of the Appeal which relates to the application of the *Wu Kit Ping* case.

33. In *Wu Kit Ping*, it was held that the right of an individual to obtain data is limited to that individual's personal data and the entitlement of a data subject is confined to knowing what personal data the data user holds. The learned judge in that case held that it is not the purpose of the Ordinance to “*enable a data subject to locate information for other purposes, such as litigation*” (§45) or to “*supplement rights of discovery in legal proceedings, nor to add any wider action for discovery for the purpose of discovering the identity of a wrongdoer either*” (§34).

34. The Board entirely agrees with the above principles announced in Wu Kit Ping (*supra*). Though the Disciplinary Proceedings in the present case were not legal proceedings, the same principle should apply for such disciplinary proceedings. It is not the legislative intent of the Ordinance to facilitate data subject to gain access to documents or information for the purpose of such disciplinary proceedings, especially when discovery of documents in litigations and disciplinary proceedings is governed by other legal principles and procedures. The procedural guidelines of the FSD reasonably require the Person Bound to disclose relevant documents in disciplinary proceedings to any persons subjected to disciplinary proceedings. Hence, the Appellant was not left with no other redress to request for the relevant documents apart from making a data access request under the Ordinance. The principles of Wu Kit Ping apply in the present case.

35. The issue therefore remains: whether the purpose of the 2019 Request was, as the Appellant claimed, to “*examine [his] own personal data, enable himself to check on and if necessary rectify, data held by the [Person Bound]*” as opposed to supplementing his rights of discovery in the Disciplinary Proceedings.

36. Although the Appellant denies that the purpose of the 2019 Request was related to the Disciplinary Proceedings, the 2019 Request made reference to certain paragraphs of the Person Bound’s GO, which specifies the Person Bound’s disciplinary mechanism. Moreover, the documents referred to in the said paragraphs of GO clearly relate only to the Disciplinary Proceedings.

37. In the premises, there are good and valid reasons for the Respondent to form the view that the 2019 Request was for the purpose of the Disciplinary

Proceedings and the application of the principle in *Wu Kit Ping (supra)* is proper in light of all information and submissions in this Appeal.

38. In the premises, this Board finds that Ground 2 is unmeritorious.

Costs

39. The Respondent and the Person Bound indicated at the end of the appeal hearing that in the event that the appeal is dismissed they would not seek costs against the Appellant. In the circumstances, the Board makes an order dismissing the appeal with no order as to costs.

(signed)

Erik Ignatius SHUM Sze-man

(Deputy Chairman)

Administrative Appeals Board