

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 35 of 2003

BETWEEN

YUEN MAN TAK

Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 31 August 2004

Date of Decision : 7 September 2004

Date of handing down Reasons for Decision : 7 September 2004

DECISION

On 8.10.2002, the Appellant Yuen Man Tak E-mailed to the Privacy Commissioner for Personal Data ("the Commissioner") and made the following complaints against the To Kwa Wan Public Library ("the Library") :

- a. "...the library has been keeping record of library users of the Internet facilities etc. It appears that it just keeps the records for record purpose, without laying down specific rules to regulate the

manner and period of using the data.”

b. “ On 8 October I have orally asked a library staff member for a privacy policy statement but to no avail. I think the library has NOT yet established rules to use and dispose of library users’ personal data.”

2. On 25.10.2002, the Commissioner informed the Appellant that before his complaint could be processed, he had to provide proof of his identity and consent to disclosure of his identity to the party complained against and other parties concerned. The Appellant provided proof of his identity on 25.11.2002. The Commissioner then proceeded to carry out a preliminary inquiry.

3. On 17.1.2003, the Librarian of the Library (“the Librarian”) in response to the Appellant’s complaints, wrote to the Commissioner in the following terms:

“ Regarding Mr. Yuen’s complaint, we collected personal data related to Mr. Yuen for his effective use of the library services in accordance with the provisions of the Personal Data (Privacy) Ordinance (“PDPO”) on various occasions in 2002. Mr. Yuen Man-tak submitted (a)Form (LCS 8): the Reservation for Internet and CD-ROM Search Services form, (b)Form (LCS 132): the Call Slip for Printed Materials/Microform and (c) Form (HKPL – F4): the

Conditions of Use of the Electricity Supply for Portable Computer on various occasions for using library services in the TO Kwa Wan Public Library. Copies of the forms are attached for your information. The data provided on the above forms are collected when readers require using the services...

... A Personal Information Collection Statement (“PICS”) is provided on forms (LCS 8) and (LCS132). The purpose for collecting personal data is clearly stated on the forms. The statement on form (LCS 8) also notifies the reader that he may collect the portion of the form with his personal data after using the services. On form (LCS 132), it is stated that when reader returns the library materials to the library, the portion of the Call Slip on which the data appear will be returned. The form (HKPL –F4) is collected for the purpose of collating usage statistics and is not intended to ascertain the identity of an individual. All the above forms are properly disposed of after all necessary procedures have been completed...”

4. The Librarian further informed the Commissioner that the Leisure and Cultural Services Department (“LCSD”) had provided to the public a statement of Personal Data Privacy Policy and Practices, and a PDPO Notice was posted up on the notice board in the Library. The Librarian maintained that the Library had closely adhered to the PDPO

when collecting personal data and had established rules for the use and disposal of personal data.

5. The PICS in LCS 8 is as follows:

“The personal data to be collected on this slip will be used by this library for this application and for making contact when necessary only. You may collect this portion after using the service.”

6. The PICS in LCS 132 is similar but longer and is as follows:

“The personal data to be collected from you on this Call Slip will be used to establish your identity before you can be given the relevant library materials for use in this library. The provision of the data is voluntary but if you refuse to provide them, we will not be able to establish your identity and as a result your requisition for library materials may not be acceded to. The data will be used by his library for processing this requisition. The telephone no. you provide on this form enables us to contact you immediately in circumstances, e.g. when the library material borrowed by you is not returned to us or returned incomplete. When you return the library materials to this library, the portion of the Call Slip on which your data appear will be returned to you.”

7. Form HKPL –F4 sets out the conditions of use of electricity supply for portable computers and contains an application for use of electricity with a declaration by the user to abide by the conditions of use. It contains no PICS.

8. The LCSD statement sets out the departmental policy on handling personal data, declares the Chief Executive Officer as the department's personal data controlling officer and informs the public that data access and correction may be requested in accordance with the PDPO for which a charge may be levied.

9. The PDPO Notice declares that personal data collected will be used for library application and posting library notices only. It also informs the public that access and correction of personal data may be made in accordance with the PDPO for which a charge may be made.

10. On 13.3.2003, the Appellant wrote to the Commissioner and stated that the Library did not consider the information collected on the relevant forms personal data since the identity of the library user could not be ascertained from them. He asked the Commissioner to investigate the matter.

11. On 20.5.2003, the Commissioner informed the Appellant that he would not carry out an investigation of the complaints. The Commissioner gave his views as follows:

“On the basis of the information provided to me, I take the view that the information collected by the respective Forms do amount to “personal data” as defined under the Ordinance. However, I am satisfied that the library had complied with the requirements of DPP 1(3) and DPP 5 by providing the PICS and privacy policy statement containing the necessary information as aforesaid. Although there was no PICS printed on the Form HKPL –F4, the posting up of the Notice is, in my view, sufficient for the purpose of complying with DPP1(3). ... The reason for my decision is that, having regard to all the circumstances of the case, there is no prima facie evidence of any contravention of the requirements of the Ordinance on the part of the library, so that any investigation is unnecessary...”

12. On 16.6.2003, the Appellant appealed to this Board against the decision of the Commissioner. His grounds of appeal are set out in 8 pages of submissions attached to his notice of appeal. These may be summarised as follows:

- (1) The Commissioner was aware that the Library used the information on the relevant forms for statistical purpose and did not regard them as personal data. This alone merits an investigation by the Commissioner.

- (2) The use of such information for statistical purpose was without his consent and this is a breach of the Data Protection Principles.
- (3) The Library informed the Commissioner that the information would not be kept by the Library and would be destroyed in a few days. But to his knowledge, the information was kept for months. The Commissioner should therefore investigate.
- (4) The Commissioner has ignored that his complaint is also about the Library keeping personal data. Having a Privacy Policy Statement and PICS does not mean that the Library follows them. The Commissioner should investigate whether the Library in fact did so.
- (5) The Commissioner did not have regard to the absence of a PICS in the PDPO Notice and the preliminary inquiry is therefore incomplete.
- (6) The Commissioner should not merely rely on s.39(2)(d) to decide not to carry out an investigation but should have considered other grounds for refusing to investigate as set out in s. 39(2).

(7) The Commissioner's notice of his decision not to investigate was not served within 45 days after receipt of the complaint as required by s. 39(3). The decision is invalid.

(8) In all the circumstances of the case, the Commissioner should carry out an investigation of his complaints.

13. On ground (1), Mr. Ross, Counsel for the Commissioner, submits that both the Commissioner and the Library had treated the data as personal data as defined in the PDPO. He refers to the Commissioner's letter to the LCSD dated 21.5.2003 where the Commissioner reiterated his view that the data collected on the relevant forms by the Library amounted to personal data.

14. Ms Wong, Counsel for the LCSD in her written statement, submits that the Library did not use personal data of library users for compilation of statistical work. The Library only takes the number of usage of the library services.

15. We do not find evidence that the personal data on the relevant forms were not regarded by the Library as personal data within the meaning of the PDPO. The PICS in LCS 8 and LCS132 clearly states that the collection of data is for library services and contacting the library user when necessary. Similarly, a HKPL-F4 enables the Library to trace a library user who fails to abide by the conditions of electricity supply. This

must be the purpose of requiring a library user who applies for electricity supply to fill in such form and to agree to abide by the conditions of supply. The Library statement on 17.1.2003 that HKPL –F4 is collected for collating usage statistics and not to establish the identity of the library user does not necessarily mean that the Library did not regard the personal data so collected as personal data. The Commissioner both in his letter of 21.5.2003 to the LCSD and his decision dated 20.5.2003 reiterated that the information on the relevant forms amounted to personal data. In our view, both the Commissioner and the Library have all along regarded the information on the relevant forms as personal data. This ground must fail.

16. As regards ground (2), we note that the Appellant only raised the issue that the Library had used his personal data for statistical purpose without his consent after the Commissioner had made his decision not to investigate. This issue was never decided by the Commissioner and should not be made a ground of appeal against the Commissioner's decision. Nevertheless, since the Commissioner in his Statement relating to the decision has dealt with it and both Mr. Ross and Ms Wong have also made submissions in this regard, we feel bound to consider this ground.

17. The Commissioner's contention on ground (2) is this: the personal data contained in LCS8 and LCS132 are returned to the library users after their use of library services. There is no evidence that these

personal data are or would be used for a purpose other than that stated in the PICS. The personal data collected on HKPL –F4 were collected for collating usage statistics and s. 62 of the PDPO exempts such use from DPP 3. Even if s.62 does not apply, such use of the personal data is for a purpose directly related to the supply of electricity to the Appellant and complies with DPP3.

18. Ms Wong submits in her written statement that the personal data on LSC 8 and LSC132 are not used or have not been used for statistics purpose and there is no evidence to show the contrary. The PICS on both forms makes it clear the purpose is for library services. In any case, all personal data collected on these two forms as well as HKPL-F4 are not kept longer than is necessary after completion of all library procedures. Since 21.5.2003, the HKPL-F4 has been revised by including a PICS and a library user may now collect the portion of HKPL – F4 with his personal data after using the library services.

19. Data Protection Principle 3 provides as follows:

“ 3 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 were 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).”

20. Section 62 of the PDPO is this:

“62 Personal data are exempt from the provisions of data protection principle 3 where –

(a) the data are to be used for preparing statistics or carrying out research;

(b) the data are not to be used for any other purpose; and

(c) the resulting statistics or results of the research are not made available in a form which identifies the data subjects or any of them.”

21. We do not find any evidence that the Library used the personal data collected on LCS 8 and LCS132 to compile statistics. The evidence shows that such personal data are used for library procedures, a purpose stated in the PICS which the Appellant was aware of and gave his consent to it when they were collected. There was no non compliance with DPP 3. S. 62 does not apply in this event.

22. With regard to HKPL – F4, it does not contain any PICS and is silent on the purpose for which the personal data are collected. Although a library user may be taken to have known that a HKPL – F4 is collected, as we have said, to enable the Library to trace him when necessary, he

would not have known that it would also be used for other purposes such as collating usage statistics. Since s. 62 only applies in a case where the personal data are collected for preparing statistics or carrying out research and for no other purpose, it does not apply to HKPL –F4 to exempt it from DPP 3. Further, we find it difficult to see how the purpose for which HKPL –F4 is collected, i.e. to obtain the library user’s agreement to abide by the conditions of electricity supply and to enable him to be traced, could be directly related to collating usage statistics. In these circumstances there is a prima facie case that the Library has used HKPL-F4 without the consent of the Appellant for a purpose other than that for which the form has been collected and the Library has failed to comply with the requirement of DPP3.

23. On ground (3) and (4), there is no evidence that the personal data on the relevant forms are kept by the Library for a few months or longer than is necessary. The Library states that the forms are normally destroyed after use and on return of library material, the portion of LCS132 containing the library user’s personal data will be returned to him. Nothing has been shown that this is not the case or the Library has not acted in accordance with their Privacy Policy Statement and the PICS. These grounds must also fail.

24. In the case of ground (5), the Commissioner submits that Personal Information Collection Statement (PICS) and Privacy Policy Statement (PPS) are not statutory requirements. They are merely convenient terms of the information envisaged under DPP1(3) and 5 that

are required to be provided by the data user to the data subject. In our view, a data user is not required by statute to make such statements. What is required by statute is that reasonable steps must be taken by the data user to make known to the public its policy and practices relating to personal data, the purpose for which the data are collected, the kind of personal data held by him and the main purpose for which the data so held will be used. These requirements are set out in Data Protection Principles 1(3) and 5. So long as these steps are taken, in whatever form they may be, the requirements are satisfied. The Commissioner is satisfied that the Library has complied with such requirements and no investigation is necessary. We agree with him.

25. On ground (6), section 39(2) of the PDPO provides as follows:

(2) The Commissioner may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case –

(a) the complaint, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Commissioner was of the opinion that there had been no contravention of a requirement under this Ordinance;

- (b) the act or practice specified in the complaint is trivial;
- (c) the complaint is frivolous or vexatious or is not made in good faith; or
- (d) any investigation or further investigation is for any other reason unnecessary.”

26. The section gives the Commissioner the discretion not to investigate a complaint in any of the circumstances specified in paragraphs (a) to (d). The Appellant’s complaints are in effect that the Library did not comply with the requirements of Data Protection Principles. The Commissioner has decided that the case is one to which only paragraph (d) applies. This is entirely within the Commissioner’s discretion and we see nothing wrong in it. This ground has no substance.

27. The question in ground (7) is whether the intention of s.39(3) is that a decision not to investigate would be rendered void if notice of it is not given within 45 days from the receipt of the complaint.

28. Section 39(3) is as follows:

- (3) Where the Commissioner refuses under this section to carry out or continue an investigation initiated by a complaint, he shall, as soon as practicable but, in any case, not later than 45 days after receiving the complaint, by notice in writing served on the complainant

accompanied by a copy of subsection(4), inform the complainant –

(a) of the refusal; and

(b) of the reasons for the refusal.

29. It should be noted that the section does not require a decision to be made within the 45 day period. However, since no notice can be given until a decision has been made, the effect of the section on the face of it is that a decision has to be made within that time. The appellant contends that since the section provides that the Commissioner “shall...in any case not later than 45 days” give notice of the decision, the requirement is therefore mandatory and failure to comply with this requirement would render the Commissioner’s decision invalid.

30. Mr. Ross contends that this requirement is only directory and the Commissioner’s decision is in all the circumstances a valid one. Mr. Ross asks us to consider the question following the approach in *Au Kwok Hung* and The Appeal Panel appointed under section 7A(1) of the Housing Ordinance CACV426/2000 and we should ascertain what the legislature intended to be a consequence of non compliance with the 45 day limit.

31. He submits that the Commissioner may be prevented from making a decision not to investigate within the 45 day period because evidence that the complaint has not been made in good faith do not come to light until that period has expired, or mediation between the

complainant and the data user has gone over 45 days or the complainant cannot be traced for over 45 days. To interpret the section to prevent the Commissioner in such circumstances from refusing to continue to investigate after the 45 day period would be illogical and unfair to the party being complained against. In any case, the Commissioner's non compliance with the requirement does not prejudice the appellant's right of appeal to this Board since appeal is available within 28 days of the receipt of the notice of refusal.

32. We note that the section provides that notice "shall" be given not later than 45 days from the receipt of the complaint. On its face, this is a mandatory requirement. But we do not see anything in the section that indicates non observance of the time limit would prevent a complainant from asserting his legal rights so that it would be in the public interest to render void the Commissioner's decision. S. 39(4) provides that the Appellant may appeal against the Commissioner's decision to this Board. Under the Administrative Appeals Board (AAB) Ordinance, the time for appeal is 28 days from the date of the Appellant's receipt of the Commissioner's decision and not from the Commissioner's receipt of the complaint. The Appellant's right to appeal to this Board against the Commissioner's decision is not affected by the decision being given after the 45 day period. Also, non compliance with the time requirement would not bar the appellant's right to apply for judicial review of the decision. In the present case, the appellant did not provide proof of his identity to the Commissioner until 25.11.2002 i.e. after the 45 day period had expired, making it impossible for the Commissioner to consider his complaints

within the prescribed time. In these circumstances, if the requirement under s.39(3) is mandatory, the Commissioner would be obliged to carry out an investigation despite the case being one which the Commissioner may, by reason of the Appellant's failure to provide proof of his identity within the 45 day period, refuse to investigate under s.39(2). Is this anomaly the intention of the legislature? We do not think so. In our opinion, the intention of the legislature cannot be that non compliance would render the Commissioner's decision void. We dismiss ground (7).

33. Even though we have concluded earlier that there is a prima facie case that the Library had failed to comply with DPP 3 in respect of HKPL-F4 and this would have been a question that should be investigated, but as we said before, non compliance with DPP3 was never a subject of complaint. This was never before the Commissioner for his decision. His refusal to investigate has no bearing on this question. Thus, for the reasons stated above, we cannot say that in all the circumstances of the case the Commissioner was wrong in deciding not to investigate the complaints of the Appellant. Ground (8) is dismissed.

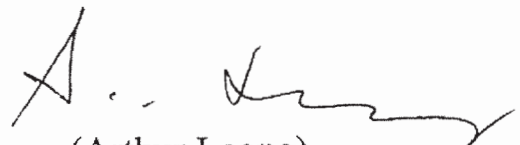
34. In addition, Ms Wong informs us that following the advice of the Commissioner, the Library has revised HKPL-F4 to include a PICS so that a library user is aware of the purpose for which his personal data collected on the form would be used and it would be unlikely that the Library would fail to comply with DPP 3 again. We take the view that even had this question been investigated by the Commissioner, there would have been little difference in the result. After all, the object of the

whole exercise is to ensure compliance by data users with the requirements of the PDPO and that has been achieved.

35. For the sake of clarity, the Librarian may think it proper to include in the PICS in HKPL-F4 a statement that the personal data collected may also be used for statistical or research purposes.

36. We dismiss the appeal.

37. To complete this decision, we think we should include our preliminary ruling on the question whether the Commissioner's operation manual – the Enquiry Complaint Handling Manual, should be supplied to the Appellant pursuant to his request for particulars under s. 12 of the AAB Ordinance. The manual is concerned with the administrative and operational work flow and use of computerized systems in the Commissioner's office. In our opinion, the manual has no bearing on the Appellant's issue. It provides no assistance to solve the issue in this case. It cannot be regarded as particulars within the meaning of s. 12 of the AAB Ordinance. We rule that the manual should not be supplied to the Appellant.



(Arthur Leong)

Chairman

Administrative Appeals Board