

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 3/2020

BETWEEN

TANG CHIK SIU JACK Appellant

and

PRIVACY COMMISSIONER Respondent
FOR PERSONAL DATA

Coram: Administrative Appeals Board
Mr Robert Pang Yiu-hung, SC (Deputy Chairman)
Ms Christine Yung Wai-chi (Member)
Mr Tong Yee-hang (Member)

Date of Hearing: 29 September 2020

Date of Handing down Written Decision with Reasons: 24 November 2021

DECISION

A. Introduction

1. This is an appeal by Mr Tang Chik Siu Jack (“the Appellant”) against the decision of the Privacy Commissioner for Personal Data (“the Respondent”) to

terminate investigation into the Appellant's complaint under s.39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO"), and the application of s.58(1) of the PDPO in dismissing his complaint.

2. The Commissioner of Police is the person bound by the decision of the Respondent ("the Person Bound"). The decision relates to a refusal/failure by the Person Bound to comply with a data access request ("DAR") made by the Appellant against the Person Bound.

B. Background Facts

3. On 4 September 2016, the Hong Kong Police Force ("HKPF") received a report of assault. As a result of the report, the Appellant was arrested and charged with assault occasioning actual bodily harm. The Appellant was convicted at first instance in the magistrate's court, but his appeal to the Court of First Instance was allowed and he was acquitted of the charge on appeal in February 2018.

4. Subsequently, the Appellant made DARs to the HKPF:

- (1) A DAR under s. 18(1) of the PDPO on 16 April 2018, acknowledged by the HKPF on 20 April 2018;
- (2) A DAR under the PDPO on 11 October 2018, acknowledged by the HKPF on 16 October 2018;
- (3) On 24 July 2018 and 10 October 2018, the Appellant also made data access requests under the Code on Access to Information ("CAI") to HKPF. (These DARs are not the subject of the present decision under appeal)

For provision of Investigation Report in TSW RN16027512 (*i.e.* the case which led to the Appellant's prosecution).

5. By letter dated 31 December 2018, HKPF refused the DARs under the CAI pursuant to paragraph 2.6(e) of the CAI, *i.e.* "*the requested investigation report in connection to the case under Police Ref: TSW RN 16027512 could not be provided to you because the information contains details of police operation and investigation. The disclosure of such information would harm or prejudice the prevention, investigation and detection of crime and offences, and the apprehension or prosecution of offenders.*"

6. Section 19(1) of the PDPO provides that a data user must comply with a DAR within 40 days after receiving the request. This is subject to section 20 of the PDPO which provides that a data user may refuse to comply with a DAR on specified grounds, but if so, the data user must inform the requestor of the refusal and the reasons for such within 40 days. Therefore, at the latest by 20 November 2018, the HKPF was required to either comply with the DAR or give notice of refusal together with the reasons therefor.

7. HKPF did not comply with the DARs under the PDPO, nor did they notify the Appellant within the required time period.

8. On 8 November 2019, nearly a year after the time when HKPF were required to respond to the DARs, the Appellant made a complaint to the Respondent, detailing his DARs and the lack of response from the HKPF.

9. The Respondent commenced investigation into the matter and notified the HKPF about the complaint, requesting relevant information by letter dated 10 December 2019.

10. On 3 January 2020, the HKPF wrote to the Appellant in response to the Appellant's DAR of 16 April 2018. The substance of that reply was as follows:

The investigation report involves police operation and investigation details. According to Section 58(1a) and 58(2) of the Personal Data (Privacy) Ordinance, as the disclosure of the investigation report would prejudice the prevention, detection and investigation of crime, the investigation report would not be disclosed.

11. The HKPF replied to the Respondent's enquiries by letter dated 6 January 2020. The relevant parts of the HKPF's response are that:

- (1) After receipt of the Appellant's DAR on 16 April 2018 and acknowledging receipt of the same on 20 April 2018, the staff of the HKPF were busy with their work and did not respond immediately.
- (2) Subsequently, on 31 December 2018, the HKPF replied to the Appellant, dealing with the DARs under the PDPO and the DARs under the CAI together and replying thereto, stating that the disclosure of such information would harm or prejudice the prevention, investigation and detection of crime and offences, and the apprehension or prosecution of offenders.
- (3) The Appellant and his wife had made DARs using 2 different bases for a total of 7 times. The staff of HKPF had not noticed that there were 2 different time limits for responding to DARs under the different

regimes, and so did not respond to the DAR under the PDPO within 40 days as required. The HKPF also stated that they were at the time very busy handling nearly 400 cases, and expressed regret at not responding within the time limit as required.

- (4) The HKPF relied on s.58(1)(a) and (2) of the PDPO to refuse provision of copies of the investigation report. The investigation report contains details of HKPF's investigation into the case, and indirectly reflects on the procedures and analysis of the evidence from different points of view, so disclosure thereof would be likely to prejudice the HKPF's ability in the prevention or detection of crime.
- (5) HKPF had issued the letter dated 3 January 2020.

12. On 17 January 2020, the Respondent wrote to the Appellant stating that it had decided to terminate the investigation into the Appellant's complaints pursuant to s.39(2)(d) of the PDPO (being of the opinion that further investigation is unnecessary). The Respondent accepted that if the HKPF disclosed the investigation report, it would reveal the police action and details of the investigation and would therefore be likely to prejudice the investigation of crime and the work of prosecution. In the circumstances, HKPF was exempt from complying with the Appellant's DAR by virtue of s.58(1)(a) of the PDPO. Since the HKPF had explained the reasons for refusal to comply with the DAR, the Respondent decided not to investigate further.

C. The Appellant's Grounds

13. The Appellant submits that the Respondent's reliance on s.39(2)(d) is unreasonable, that the Respondent relied on s. 58(1)(a) of the PDPO without reasonable grounds. The provision of the investigation report would in no way

prejudice detection of crime and detection and investigation and prosecution of offenders.

14. The Appellant stressed that the delay in response to the DARs in a timely manner was a clear breach of the HKPF's duties. The explanation provided by the HKPF was unsatisfactory. For example, there was no elaboration on exactly how it was that the relevant persons in HKPF handling the matter was busy with duties specifically, and whether the 400 cases which the HKPF said the relevant unit was handling at the time referred to 400 cases at the same time, or over what sort of period.

15. As to the reliance on s.58(1)(a), the Appellant submitted that this could not be a shield behind which the HKPF could invariably hide behind without question and the Respondent was under a duty to investigate to see if the conditions in s.58(1)(a) were actually made out.

D. Delay

16. It is not and cannot be disputed that the response to the DARs was late. The original deadline for response to the DARs was 20 November 2018. The HKPF did not respond until 3 January 2020.

17. Although the HKPF's reply to the Respondent's enquiry is that they had responded dealt with the DARs under the PDPO and CAI together by their letter dated 31 December 2018, we reject any notion that the letter of 31 December 2018 was in fact a response to the DARs. The letter of 31 December 2018 was clearly headed in relation to the Code on Access to Information. The requests for information detailed in that letter referenced the DARs under the CAI and

referred to the dates of those DARs. No reference at all was made to the DARs under the PDPO.

18. The upshot of this is that the Appellant's DARs were not responded to until 3 January 2020, more than one year past the last date for a response by the HKPF.

19. The Respondent clearly was of the same view that the HKPF had contravened the 40-day notification requirement under s.21(1) of the PDPO¹.

20. However, the Respondent considered that any further investigation into this aspect of the case was unnecessary in view of the voluntary remedial actions taken by the HKPF, including :

- (1) Reminder to handle DARs in compliance with PDPO;
- (2) Reminder by the relevant police station of the requirements and obligations under the PDPO;
- (3) The relevant police station had reviewed this incident; and
- (4) The relevant police station had issued emails to officers responsible for handling DARs to ensure they were aware of the requirements of the PDPO.

21. We agree that the further investigation was unnecessary. The HKPF and the relevant personnel dealing with DARs had been reminded of the importance of handling DARs under the PDPO. There is a wide discretion to not carry out further investigation if further investigation is unnecessary. Any further investigation would not bring about a better result.

¹ Para. 28 of the Statement Relating to Decision

22. Although the Appellant does not accept the reasons given by the HKPF for failure to comply with the time limits, *i.e.* the work load of the officers, and that the Appellant had made numerous requests, we consider that the fact of the matter is that the DARs were unanswered not for any sinister reason, but simply because they had been overlooked.

23. Importantly, we consider that substantially the same reason for the ultimate refusal to comply with the DARs had in fact been communicated to the Appellant in the HKPF's letter of 31 December 2018, namely "*...the information contains details of police operation and investigation. The disclosure of such information would harm or prejudice the prevention, investigation and detection of crime and offences, and the apprehension or prosecution of offenders...*" albeit referencing requests under the CAI.

24. It has not escaped our attention that even the letter of 31 December 2018 is beyond the 40-day time limit. However, we see no necessity to further investigate given that the HKPF has taken steps to try to prevent future occurrences of this nature.

E. Likely to Prejudice the Prevention or Detection of Crime

25. The main issue is whether the Respondent was justified in terminating the investigation because provision of the investigation report would be likely to prejudice the prevention or detection of crime.

26. The Respondent accepted the HKPF's reason for refusing to comply with the DAR, namely that "*the investigation report contains the details of the HKPF's*

*investigation into the case, and would indirectly reflect on the HKPF's criminal investigation procedures and analysis of evidence from different viewpoints, and would likely prejudice the HKPF's prevention and detection of crime in the future if disclosed."*²

27. The Respondent considers that *"the disclosure of the concerned investigation report would divulge details of HKPF in criminal investigations and operations. This would in turn undermine the criminal investigation and operations carried out by HKPF"*.

28. However, there is no elaboration whether on the part of the Respondent or the HKPF as to what details would be divulged and how those details would prejudice any future investigation. No consideration was given by the Respondent as to whether what the HKPF said about the investigation report was justified. Indeed, the Respondent (or those tasked with investigating the complaint) had not even looked at the report or even a sample of such a report. Nor did the Respondent consider whether a redacted copy of the investigation report could be disclosed. It would appear to us that the Respondent too easily accepted what the HKPF said without actually ascertaining whether it was in fact justified.

29. The investigation into a case of assault is a simple matter. The investigating authority ascertains whether there are any witnesses to the assault, and interviews these witnesses. The factors relevant to a decision as to whether to prosecute a person accused of a crime is not a state secret and is readily available to anyone on the website of the Department of Justice which sets out the Prosecution Code. Procedures for handling different crimes are also available

² Para 2(iv) of HKPF's response

on the HKPF's website. While we accept that in certain cases, e.g. commercial crimes or crimes involving the use of technology the actual methods used in the investigation may be something which the HKPF may not wish to be made public knowledge, it is hard to imagine that would be the case in a criminal investigation of an assault which is alleged to have occurred in a public place.

30. It would appear, therefore, that the Respondent had terminated its investigation too early, without ascertaining whether the reasons given by the HKPF for refusing to comply with the DARs were justified.

31. However, the Respondent has one further argument, namely that the expressed purpose of the Appellant in seeking disclosure of the investigation report is not a purpose protected by the PDPO. The Appellant was asked what exactly he wanted, and he said that he wanted the investigation report and the whole procedure and the statements of the investigators and the results of the investigations, and the accuracy of the report, which was used for the decision to prosecute and communication with the Department of Justice.

32. The Respondent referred to the case of *Wu Kit Ping v Administrative Appeals Board* [2007] 4 HKLRD 849 where Saunders J. considered the purpose of the PDPO in interpreting the expression "personal data". The court highlighted the distinction between "data" and "document", holding that the entitlement of a data subject is to know what "personal data" is held by the data user, but not an entitlement to see every document which refers to the data subject. The judge held that:

"It is not the purpose of the Ordinance to enable an individual to obtain a copy of every document upon which there is a reference to the

individual. It is not the purpose of the Ordinance 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 under the principles established in Norwich Pharmacal & Others v Commissioners of Customs and Excise [1974]AC 133.

33. Applying the principles set out in that case, the Appellant is entitled to obtain a copy of the data, but not necessarily every document which referred to the Appellant. The relevant data was produced at the Appellant's trial, where the Appellant was entitled to have all relevant information and material whether it was used or not intended to be used by the prosecution at trial, which included witness statements. Any report for the purpose of a decision to prosecute or to seek the advice from the Department of Justice is arguably legally privileged and does not contain the Appellant's data, even though the Appellant may have been mentioned in such reports. The request for the investigation report is not for the furtherance of any data protection principles, but for the Appellant to seek evidence of perceived wrongdoing on the part of the HKPF.

34. We are aware that this did not form part of the original reasons as to why the Respondent terminated the investigation. However, the nature of a hearing of the Board is by way of rehearing on the merits and not simply by way of review. (see *Li Wai Hung Cesario v. Administrative Appeals Board & anor.* CACV 250/2015) The Board can simply decide the matter *de novo*, and in fulfillment of the due process entitlement of the Appellant. We consider that even if we remitted the matter back to the Respondent for further investigation, the Respondent would be fully justified to consider the matters raised and decline to investigate further on the basis of the matters set out at paragraphs 31-33 above.

35. Accordingly, the appeal is dismissed. No application for costs was made and we make no order.

(signed)

(Mr Robert Pang Yiu-hung, SC)

Deputy Chairman

Administrative Appeals Board