ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 5 of 2011

BETWEEN

CHU MAN KEUNG — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

and

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 44 of 2011

BETWEEN

CHU MAN KEUNG — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

and

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 45 of 2011

BETWEEN

CHU MAN KEUNG	Appellant
and	
PRIVACY COMMISSIONER FOR PERSONAL DATA	Respondent

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and

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 60 of 2011

BETWEEN

CHU MAN KEUNG	Appellant
and	
PRIVACY COMMISSIONER FOR PERSONAL DATA	Respondent

Coram: Administrative Appeals Board

Date of Hearing: 16 May 2012

Date of Handing down Written Decision with Reasons: 25 June 2012

REASONS AND DECISION

The Appeals

1. 4 appeals by the same appellant Mr. Chu Man Keung ("the Appellant") were heard by this Administrative Appeals Board in succession on 16th May 2012. They all concern the decisions by the Privacy Commissioner for Personal Data ("the Commissioner") under section 39(2) of the Personal Data (Privacy) Ordinance (Cap 486) ("the Ordinance") in refusing to carry out an investigation of certain complaints made to the Commissioner by the Appellant against the Hong Kong Society for the Blind ("HKSB"). Although each of the 4 Appeals was heard, considered, and decided separately on their own evidence, facts and merits (except that the Appeal under No. 60 of 2011 involves consideration of matters in the 3 other Appeals), it is convenient to set out the reasons and decisions of this Appeals Board in respect of all 4 Appeals below.

2. Section 39(2) of the Ordinance provides that: "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."

3. The policies of the Commissioner in respect of a decision under section 39(2) of the Ordinance were set out in section B of a written policy statement "Complaint Handling Policies" ("the Policies") (which have been gazetted) copied at p.169 of the hearing bundle, and such document has been given to the Appellant in respect of all the Appellant's said complaints. Under section 21(2) of the Administrative Appeals Board Ordinance (Cap 442), this Appeals Board "shall" (meaning it is obligatory to) have regard to the Policies, in considering the merits of the 4 Appeals.

4. Section B of the Policies is reproduced herein for convenience of discussion below:

> **"(B) Discretion under section 39(2) to refuse to carry out or continue an investigation**
>
> Section 39(1) and (2) of the Ordinance contain various grounds on which the Commissioner may exercise his discretion to refuse to carry out or continue an investigation. In applying some of those grounds, the PCPD's policy is as follows:
>
> a) the act or practice specified in a complaint may be considered to be trivial, if the damage (if any) or inconvenience caused to the complainant by such act or practice is seen to be small;
>
> b) the complaint may be considered to be vexatious, if the complainant has habitually and persistently made to the PCPD other complaints against the same or different parties, unless there is seen to be reasonable grounds for making all or most of those complaints;
>
> c) the complaint may be considered to be made not in good faith, if the complaint is seen to be motivated by personal feud or other factors not related to concern for one's privacy.

In addition, an investigation or further investigation may be considered to be unnecessary if:

d) after preliminary enquiry by the PCPD, there is no *prima facie* evidence of any contravention of the requirements of the Ordinance;

e) the data protection principles are seen to be not engaged at all, in that there has been no collection of personal data. In this connection it is important to note that, according to case law, there is no collection of personal data by a party unless that party is thereby compiling information about an identified person or about a person whom it seeks or intends to identify;

f) the complainant and party complained against are able or should be able to resolve the dispute between them without intervention by the PCPD;

g) given the mediation by the PCPD, remedial action taken by the party complained against or other practical circumstances, the investigation or further investigation of the case cannot be reasonably expected to bring about a more satisfactory result; or

h) the complaint in question or a directly related dispute is currently or soon to be under investigation by another regulatory or law enforcing body.

If any of the above grounds a) to h) is satisfied, the Commissioner may, having regard to all the circumstances of the case, exercise his discretion under section 39(2) to refuse to carry out or continue an investigation. "

5. Paragraph (a) of Section B sets out the policy in respect of the word "trivial" in section 39(2)(b). Paragraphs (b) and (c) of Section B set out the policies in respect of the words "vexatious" and "not made in good faith" respectively in section 39(2)(c).

6. Paragraphs (d) to (h) of Section B set out the policies in respect of section 39(2)(d) ("any other reason"). Paragraphs (d) and (e) are to some degree similar to the jurisprudence developed concerning some of the grounds under Order 18 rule 19 of the Rules of the High Court Cap 4 for striking out pleadings. Paragraph (g) reflects the spirit and purpose of section 50(1)(b)(iii) of the Ordinance (Cap 486) as to the contents of the enforcement notice i.e. in seeking remedial results. That subsection provides: "...(iii) directing the data user to take such steps as are specified in the notice to remedy the contravention or, as the case may be, the matters occasioning it within such period (ending not earlier than the period specified in subsection (7) within which an appeal against the notice may be made) as is specified in the notice; and".

7. The policies of the Commissioner in respect of section 50 of the Ordinance in relation to issuing enforcement notice is set out in Section D of the Policies.

8. Section D of the Policies is reproduced as follows:

> **"(D) Issuing an enforcement notice under section 50**
>
> As the result of an investigation, the Commissioner will have the discretionary power to serve on the party complained against an enforcement notice under section 50(1) if one of the following conditions is satisfied:
>
> a) that party is found to be contravening a requirement of the Ordinance; or
>
> b) that party is found to have contravened such a requirement in circumstances that make it likely that the contravention will be repeated.
>
> Where a contravention is found to have occurred but is not continuing, whether the Commissioner considers it likely for the contravention to be repeated in the future may depend on factors including the following:

a) whether the contravention found was a first-time or repeated contravention, accidental or deliberate;

b) whether the party complained against is willing to prepare a written undertaking to the Commissioner regarding improvement to its future conduct in such form as the Commissioner deems fit; or

c) whether the party complained against has shown remorse during the course of the investigation by co-operating fully with the PCPD, taking appropriate remedial actions, etc.

Under section 50(2), in exercising his discretion to serve an enforcement notice, the Commissioner shall consider any damage or distress, or likelihood of such damage or distress, to the complainant. In addition, it is the Commissioner's policy to consider also whether, practically speaking, the serving of an enforcement notice in the circumstances of the case will in fact enable specific steps to be taken to prevent any future repetition of the contravention by the party complained against."

9. At least in the context of the 4 Appeals, in relation to Sections B and D of the Policies set out above (save for paragraphs (f) and (h) of Section B which are not relevant to any of the 4 Appeals), this Appeals Board does not see anything ultra vires, unreasonable, or wrong in such policies of the Commissioner. On the contrary, they are sound and reasonable, and are proper interpretation of the spirit and purpose of sections 39(2) and 50, when considered in the light of the Ordinance as a whole. Thus, due regard should be given to such policies in considering the 4 Appeals.

Appeal No. 5 of 2011

The Complaints

10. The Appellants made 3 complaints on 16th February 2011 to the Commissioner as follows.

11. The Appellant is a severely visually handicapped person. He has joined classes and activities run by HKSB in its headquarter premises, East Wing ("the Premises") in Sham Shiu Po, since 2008. The Premises have had CCTV installed, video-recording the activities there, including the Appellant's, but the Appellant had not been notified that he (together with anyone who happened to come under the view of the CCTV) was being videotaped. After the Commissioner wrote to request HKSB to take measures to inform the visually handicapped persons about the CCTV (in relation to a previous complaint by the Appellant to the Commissioner made in 2010), HKSB still failed, the Appellant alleged, to take proper measures to inform him of the operations of the CCTV, when the Appellant went to the Premises in December 2010 and January 2011 ("complaint A").

12. The Appellant complained to HKSB that he was assaulted by certain staff of HKSB when he was precluded from boarding the transport for the "tour the Peak" function organised by HKSB. Certain staff of the HKSB video-taped the incident. After the incident and the complaint, HKSB set up a committee of investigation to investigate the complaint, and the committee viewed the video. The Appellant on 16th February 2011 complained to the Commissioner that the committee viewed the video without his consent ("complaint B").

13. The Appellant was photographed and/or videotaped during his participation in the activities of HKSB at his graduation (from the class organised by HKSB) ceremony on 26th February 2010, golf activities with his golfing coach on 25th July

2009, and cooking competition in October 2009, all allegedly without the prior notification from HKSB and without the Appellant's consent ("complaint C").

Reasons and Decisions

Complaint A

14. The operations of the CCTV installed at the Premises have never been targeted at the Appellant or any particular person, and the identities of the persons recorded by the CCTV were not of interest to HKSB. They were not operated for the purpose of videotaping, and thus to collect personal data of, the Appellant. Clearly, they were to monitor those areas of the Premises for security and management purposes, whoever might come into the views covered by the CCTV. After preliminary enquiry by the Commissioner, there is no evidence or prima facie case to the contrary. Thus, following the majority decision of the Court of Appeal in *Eastweek Publisher Limited & Another v. Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83, there was no collection of personal data and the protection under the Ordinance is not engaged, and the Appellant has no case at all. For that reason, and pursuant to the policies under paragraphs (d) and (e) of section B of the Policies, no investigation should be carried out pursuant to section 39(2)(d) of the Ordinance, and the Commissioner was clearly correct in his decision not to carry out an investigation of complaint A. The appeal against that decision is hereby dismissed unanimously.

15. An alternative ground for unanimously dismissing this appeal against that decision of the Commissioner, is as follows. This Appeals Board is clearly of the view that HKSB has taken proper remedial measures in its attempt to bring to the notice to users of the Premises the operations of the CCTV, in particular those who are visually handicapped and cannot read normal notices in writing, the operation of the CCTV, in the result that no damage has been caused or will be caused to those users of the Premises. In particular, no damage could have been caused to the Appellant in

relation to his visits to the Premises in December 2010 and January 2011 as the Appellant has had prior knowledge of the CCTV, a knowledge he has had ever since he first complained of their operations in 2010. Thus, this is clearly a case where no enforcement notice should be issued even if the complaint is substantiated (applying Section D of the Policies), and no investigation should be begun (applying Section B paragraph (g) of the Policies).

Complaint B

16. Schedule 1 of the Ordinance sets out the Data Protection Principles. Principle 3 sets out as follows:

> "3. **Principle 3-use of personal data**
>
> 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)."

17. The staff of HKSB videotaped the incident/dispute, clearly for the purpose of recording what really was happening during the dispute. The Appellant complained to HKSB that he was assaulted during the dispute, and, according to HKSB, the Appellant orally invited HKSB to view the video to see what happened. Such explanation by HKSB was confirmed by a sound recording disc provided by HKSB (the recording disc was inserted at p. 219 of the hearing Bundle, which this Appeals Board listened to after the hearing had concluded).

18. Thus, the personal data in the video was used by HKSB for the purpose for which the data was collected, or at least for a purpose related to the former purpose, in which case, according to Principle 3 above, no consent from the Appellant is required.

19. Alternatively, the Appellant has given the prescribed consent, as confirmed by the abovesaid sound recording.

20. Thus, it is clearly right that no investigation should be made into such a complaint. Such decision is also consistent with Section B paragraph (d) of the Policies. The appeal against such decision by the Commissioner is unanimously dismissed.

Complaint C

21. When the Appellant joined HKSB, he had already signed to consent to such visual record being taken of him in the future activities of HKSB in which the Appellant would participate. Since the previous complaint by the Appellant, HKSB on 9th November 2010 promised the Commissioner to seek prior consent for each occasion rather than to rely on the blanket consent given at the beginning. An example of such prior consent in writing given by a member on 28th January 2011 for an occasion on the same date, is included at p.222 of the hearing bundle. The matters complained of by the Appellant all pre-dated such promise and the new measures by HKSB. Even if the complaints were substantiated and the Commissioner issued an enforcement notice, no better result could have been achieved. Thus, according to the policy in Section B paragraph (g), clearly the right decision must be that there should not be an investigation.

Conclusion

22. For the aforesaid reasons, the appeal under No. 5 of 2011 is unanimously dismissed.

Appeal No. 44 of 2011

The Complaints

23. The Appellant made 2 complaints.

24. On 6th July 2010 the Appellant requested for a copy of the video taken of him by HKSB on 6th November 2009 (the same video as mentioned in Complaint B above), but the same was sent to him by HKSB only on 9th September 2010 ("Complaint D").

25. The Appellant complained to the Commissioner on 4th May 2011 that Miss Lee of HKSB on 6th November 2009 in room 409 of the Premises disclosed to others present the Appellant's sick leave certificate, that he was on sick leave, and that the doctor prohibited him from joining the "tour the Peak" function of HKSB ("Complaint E").

Reasons and Decisions

Complaint D

26. According to section 18(1) of the Ordinance, the Appellant has a right to such data access request, and under section 19(1), such request should have been complied

with within 40 days. In the present case, HKSB supplied the copy well after the deadline.

27. HKSB has explanations for the delay. They first contacted the other participants in the event who also was videoed in the same tape to check if they consented to the disclosure to the Appellant (see section 20(1)(b) and 20(2) of the Ordinance).

28. After about 2 weeks, it had been ascertained that all of the other participants refused to give such consent. Then, as HKSB did not have the expertise to edit the video in order to exclude the images of other participants, it wrote on 23rd July 2010 to the Appellant informing him of its inability to supply the copy.

29. After that, HKSB received a request from the Social Welfare Department Independent Complaints Committee Secretariat and received assistance from an independent person to engage professional to do the editing, and thus an edited copy was supplied to the Appellant.

30. Further, upon the intervention of the Commissioner, HKSB undertook to the Commissioner that they would in future seek outside professional assistance in editing such video and comply with such requests for data access within 40 days in future.

31. Thus, considering also the policies under paragraph (g) of section B and Section D of the Policies, no better result could have been achieved and clearly there is no reason at all to begin an investigation.

32. Thus the appeal against the Commissioner's decision not to carry out an investigation into this complaint is unanimously dismissed.

Complaint E

33. The background of the dispute has been set out in paragraphs 12 and 25 above. It arose of HKSB's refusal to allow the Appellant to join the "tour the Peak" function because the Appellant was then on sick leave as certified by a doctor.

34. In a preliminary enquiry, the investigating staff of the Commissioner viewed the video-recording of the incident and found that Miss Lee of HKSB and other staff of HKSB did not show the sick leave certificate to others or disclose the Appellant's sickness details or other particulars stated in the sick leave certificate to the others present in the room, but the staff of HKSB was just making the point to the Appellant, in reliance on that certificate, that the Appellant was not fit to join that function as the doctor had so opined. Thus, clearly there was no contravention. If there was any contravention, or any damage suffered at all, they must be trivial. The policies in Section B paragraphs (a) and (d) of the Policies should apply.

35. Upon the complaint by the Appellant, and the intervention of the Commissioner, HKSB undertook to the Commissioner that in future similar situations they would do it in a private room with no other 3rd party present. No better result could have been achieved by an investigation. The policy in paragraph (g) of Section B of the Policies applies.

36. Thus, clearly there should not be carried out an investigation into such complaint. The appeal against such decision of the Commissioner is unanimously dismissed.

Conclusion

37. The appeal in No. 44 of 2011 is unanimously dismissed.

The Complaints

38. The Appellant made 2 complaints.

39. The Appellant made a request for the sound recordings of the meetings (a data access request under section 19 of the Ordinance) the Appellant had with HKSB on 9th and 15th December 2009 ("the 2nd meeting" and "the 3rd meeting" respectively). HKSB refused on the ground that there was no such recording ("Complaint F").

40. On 27th April 2011 the Appellant requested for the recording of the meeting the Appellant had with HKSB and other government departments on 4th September 2009 ("the 1st meeting"), as well as the sound recordings of the 2nd and 3rd meetings. HKSB in response only re-supplied (as it had previously on 5th March 2010 already done so, together with the written minutes and the dotted version for the visually handicapped) a recording of a person reading out the minutes of the 1st meeting, but not the live sound recording of it ("Complaint G").

Reasons and Decisions

Complaint F

41. All those who were present at the 2nd and 3rd meetings confirmed to the Commissioner in writing that there was no video or sound recording of the 2nd and 3rd meetings. On the other hand, the Appellant only guessed (in that he was asked if he consented to recording and he did), but did not know as a fact, that there were recordings of the 2 meetings. HKSB had entertained the Appellant's several other requests for recordings of meetings, and there is no reason why HKSB should

particularly deny the existence of recordings of the 2 meetings in order to deny access to them to the Appellant.

42. Thus, on the preliminary enquiry, there is no prima facie of a contravention, and Section B paragraph (d) of the Policies applies. Thus clearly no investigation should be carried out.

43. Alternatively, the Appellant having himself kept sound recordings of the 2nd and 3rd meetings, there cannot be any damage or inconvenience from such lack of access to HKSB's recordings (if they exist at all). The Appellant could not at the hearing put forward any rational reason why he wished to have them from HKSB. Thus, pursuant to the policy under section B paragraph (a), there should not be carried out an investigation of such complaint.

Complaint G

44. In the light of the way that the Appellant formulated his request in writing, it is understandable that HKSB initially mistook the Appellant's request and only sent the recording of the minutes. In any event, since the Commissioner's intervention and HKSB knowing of the Appellant's complaint and thus the real nature of the Appellant's request, HKSB had supplied the recording of the 1st meeting to the Appellant. Thus, an investigation cannot bring about a better result and there is no point of issuing an enforcement notice. The policy under paragraph (g) of Section B of the Policies is clearly applicable.

45. In the circumstances, plainly, there should not be carried out an investigation into this complaint.

Conclusion

46. The appeal under No. 45 of 2011 is unanimously dismissed.

Appeal No. 60 of 2011

The Complaints

47. The Appellants made 2 complaints on 21st July and 1 on 9th August 2011.

48. The Appellant complained that HKSB videotaped him on 6th Nov 2009 (during the incident set out in paragraph 12 above) in secret and without his consent, and allowed the committee of HKSB to view the video without his consent (the viewing referred to in paragraph 12 above) ("Complaint H").

49. The Appellant complained against HKSB for charging him $20.00 for supplying him the disc of the recording of the meeting on 4th September 2009 ("Complaint I").

50. The Appellant complained of the social worker of HKSB, Miss Chan Wai Bing, of disclosing his being sick and on sick leave to others present (the incident set out in paragraphs 25 and 34 above), and complained against HKSB staff disclosing that incident to reporters and other participants of functions at HKSB at the main entrance of the ground floor of the Premises ("Complaint J").

Reasons and Decisions

Complaint I

51. It has been previously decided in AAB No. 37 of 2009 that only the actual costs of complying with a data access request should be charged. This Appeals Board respectfully agrees with that.

52. It is clear that HK$20.00 is a very modest sum, and is wholly reasonable in the circumstances. It is plainly inconceivable that such would exceed the costs of HKSB in providing a disc of the record of the meeting to the Appellant.

53. Thus there is no merit in this complaint at all, and clearly there should not be carried out an investigation of this complaint, pursuant to the policy in paragraph (d) of Section B of the Policies.

Complaints H and J

54. These 2 complaints are dealt with together as they share one feature: a plain and obvious case of vexatious complaints within the meaning in section 39(2)(c) of the Ordinance.

55. These 2 complaints concerned the same subject matter of previous complaints made by the Appellant against HKSB in respect of the same incidents to the Commissioner, and already dealt with by the Commissioner.

56. In respect of Complaint H, that incident was the subject of complaint in Complaint B set out in paragraph 12 above. In respect of Complaint J, that incident was the subject of complaint E set out in paragraph 25 above. Complaints B and E were dealt with by the Commissioner as abovementioned on 12th April 2011 and 15th July 2011 respectively.

57. In addition to pursuing an appeal against both decisions, the Appellant made complaints H and J to the Commissioner concerning very similar matters.

58. The reasons this Appeals Board gave for the decisions in respect of Complaints B and E apply to Complaints H and J as well. There clearly should not be carried out an investigation into these 2 vexatious Complaints, pursuant to section 39(2)(c) of the Ordinance.

59. Further, as seen above, the Appellant made a total of 10 complaints against HKSB within the period of about 11 months (2nd September 2010 to 9th August 2011). The merits of such complaints have been discussed above. There is no reasonable ground for making Complaints H to J which are totally unmeritorious, if not in relation to all 10 Complaints. Viewed in the background of the preceding Complaints, by the time of making the last 3 Complaints H to J, these 3 Complaints fall squarely within the situation in Section B paragraph (b) of the Policies.

60. Also, in such totality of circumstances, and the manner that the Appellant during the hearings of the 4 Appeals repeatedly made large volume of highly disparaging and degrading (but totally unsubstantiated) accusations against HKSB and its staff, this Appeals Board firmly concludes, as the only reasonable, and irresistible, inference (and therefore certainly on a balance of probabilities, which is the burden of proof in these Appeals), that the Appellant did not make Complaints H to J in good faith, but out of personal spite against HKSB, within the situation described in paragraph (c) of Section B of the Policies.

61. Thus, the appeal against the Commissioner's decision not to carry out an investigation into Complaints H and J is unanimously dismissed.

Conduct of this Appeal

62. Complaints H and J were made vexatiously in that the matters or very similar matters have been dealt with upon previous complaints to the Commissioner. All 3 Complaints H to J were obviously unmeritorious, and are vexatious and not made in good faith within paragraphs (b) and (c) of Section B of the Policies. Nevertheless, despite the obviously correct decisions of the Commissioner in refusing to carry out an investigation into the 3 Complaints, the Appellant commenced, and persisted in pursuing and arguing this Appeal in an attempt to pursue the vexatious Complaints. Such conduct of this Appeal, coupled with the fact that the Appellant during the hearing of this Appeal made a large number of highly disparaging and degrading (but totally unsubstantiated) accusations against HKSB and its staff, when most of the accusations are in any event totally irrelevant to this Appeal, is clearly an abuse of the process, wasting much time of everybody concerned, and putting the whole appeal process in disrepute. The Appellant conducted this Appeal in a most frivolous and vexatious manner.

63. Pursuant to section 22(1) of the Administrative Appeals Board Ordinance, the Appeals Board is firmly of the view that costs must be awarded to the Respondent against the Appellant on the ground that the Appellant has conducted this Appeal in a most frivolous and vexatious manner.

Conclusion

64. The Appeal under No. 60 of 2011 is unanimously dismissed, with costs to be paid by the Appellant to the Respondent pursuant to section 22(4)(b) of the Administrative Appeals Board Ordinance, to be taxed on the basis of the scale of costs specified in Part I of Schedule 1 to Order 62 of the Rules of the District Court.

(signed)

(Mr. Chan Chi Hung, SC)
Deputy Chairman
Administrative Appeals Board