ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 74/2011

CORRIGENDUM

The Decision made by this Board on 8 February 2013 has the following amendment:

(1) Paragraph 1, line 2: "the Personal Data (Privacy) Ordinance, Cap. 468..." should be changed to read "the Personal Data (Privacy) Ordinance, Cap. 486...".

Date this 27th day of March 2013.

(signed)

(Ms Cissy Lam King-sze)

Deputy Chairman

Administrative Appeals Board

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 74/2011

BETWEEN

MICHAEL REEVE	Appellant
and	
PRIVACY COMMISSIONER FOR PERSONAL DATA	Respondent

Coram: Administrative Appeals Board

Date of Hearing: 18 December 2012

Date of Handing down Written Decision with Reasons: 8 February 2013

DECISION

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1. The Appellant complains that there was non-compliance with his data correction requests under the Personal Data (Privacy) Ordinance, Cap. 468 ("the Privacy Ordinance"). Save otherwise provided, all statutory provisions referred to below are references to provisions in the Privacy Ordinance.

2. Section 18(1):

> "(1) An individual, … …, may make a request –
>
> (a) to be informed by a data user whether the data user holds personal

data of which the individual is the data subject;

(b) if the data user holds such data, to be supplied by the data user with a copy of such data."

3. Section 22(1):

"(1) Subject to subsection (2), where –

(a) a copy of personal data has been supplied by a data user in compliance with a data access request; and

(b) the individual, … …, who is the data subject considers that the data are inaccurate,

then that individual … … may make a request that the data user make the necessary correction to the data."

4. Section 23(1):

"(1) … … a data user who is satisfied that personal data to which a data correction request relates are inaccurate shall, not later than 40 days after receiving the request –

(a) make the necessary correction to those data; … …"

5. Section 24(3):

"(3) A data user may refuse to comply with section 23(1) in relation to a data correction request if–

(a) … …

(b) the data user is not satisfied that the personal data to which the request relates are inaccurate;

(c) … …

(d) the data user is not satisfied that the correction which is the subject of the request is accurate; … …"

6. Section 25:

"(1) A data user who pursuant to section 24 refuses to comply with section 23(1) in relation to a data correction request shall, as soon as practicable but, in any case, not later than 40 days after receiving the request, by notice in writing inform the requestor–

(a) of the refusal and the reasons for the refusal; … …

(2) Without prejudice to the generality of subsection (1), where –

(a) the personal data to which a data correction request relates are an expression of opinion; and

(b) the data user concerned is not satisfied that the opinion is inaccurate,

then the data user shall –

(i) make a note, whether annexed to that data or elsewhere –

(A) of the matters in respect of which the opinion is considered by the requestor to be inaccurate; and

(B) in such a way that those data cannot be used by a person (including the data user and a third party) without the note being drawn to the attention of, and being available for inspection by, that person; and

(ii) attach a copy of the note to the notice referred to in subsection (1) which relates to that request.

(3) In this section, "expression of opinion" includes an assertion of fact which –

(a) is unverifiable; or

(b) in all the circumstances of the case, is not practicable to verify."

7. Section 26(1):

"(1) A data user shall erase personal data held by the data user where the data are no longer required for the purpose (including any directly related purpose) for which the data were used unless-

(a) any such erasure is prohibited under any law; or

(b) it is in the public interest (including historical interest) for the data not to be erased."

The Relevant Facts

8. By a data access request dated 3 March 2011 ("the DAR", Appeal Bundle ("AB") pp.240-245) sent by the Appellant to Dr David Palmer ("Dr Palmer"), the Appellant requested for copies of all correspondence written by Dr Palmer from September 2008 and to date which referred to the Appellant.

9. Dr Palmer replied by letter of 29 April 2011 (AB p.169) stating that there were grounds for him to refuse to comply with the DAR. Despite those grounds and without prejudice to his right to assert them in future, he decided to settle the matter voluntarily by providing the Appellant with the documents requested. He made it clear to the Appellant that: "*Pursuant to Section 26(1) of the Ordinance, after making and sending you the aforementioned copies of the requested correspondence, since your case is closed and there is no need to retain the data, I have deleted all originals and copies of the data from my own records.*"

10. Among the documents provided were the following two documents (collectively "the 2 Reports") :-

(1) Report on conversations between David Palmer and Michael Reeve, held on 26-28 September 2008 ("the 2008 Report") and

(2) Report on a meeting between David Palmer and Michael Reeve on 25 May 2010 ("the 2010 Report").

11. According to Dr Palmer as per his letter of 27 September 2011 (AB pp.139-140) in reply to enquiries from the Office of the Respondent (see para.18 below), the 2 Reports were collected for the following purpose:-

> "(a) I collected the Reports in my capacity as a volunteer community advisor ("Auxiliary Board Member") of the Baha'i community of Hong Kong, a religious community, acting on behalf of the governing body of the organization (the Spiritual Assembly of the Baha'is of Hong Kong.) At the time, Mr Reeve was a member of the Baha'i community. Since the Assembly had received a complaint that he had behaved inappropriately toward a young woman in the community, in violation of both cultural and religious norms, I was asked by the Assembly to meet with him informally and to (1) obtain his account of his relationship with the young woman; (2) explain to him that the woman did not want to pursue a relationship with him; (3) advise him to cease communicating with her; (4) give him advice about the Chinese culture in Hong Kong and advise him to avoid any behavior which could give rise to misunderstanding in his relations with members of the opposite sex and particularly younger ones; (5) report to the Assembly about the content and outcome of the meeting with Mr Reeve. I met with him, and I wrote a Report [the 2008 Report] on the conversations to the Assembly. The meeting and report was "for the purpose of the prevention, preclusion or remedying (...) seriously improper conduct (...) by persons." (Privacy Ordinance, Section 58(1)(d)).
>
> Since he felt he was being treated unjustly by the Baha'i institutions, Mr Reeve wrote many letters and emails to various Baha'i individuals and institutions, including the supreme body of the Baha'i community worldwide (the Universal House of Justice), and received a few letters from the Universal House of Justice, offering him guidance on how to solve the problem. But since he was not following the advice he had been given, I was asked by the Assembly to meet with Mr Reeve again, in order to study with him the letters he had received from the House of Justice, and try to convey the meaning to him, and to report to the Assembly on the meeting. I met with him on May 25, 2010, and then wrote a report to the Assembly, summarizing our conversation and conveying Mr Reeve's point of view. The purpose, again, was "for the purpose of the prevention, preclusion or remedying (...) seriously improper conduct (...) by persons."

12. After obtaining the 2 Reports, the Appellant sent a letter dated 14 May 2011 ("DCR1", AB p.170) to Dr Palmer enclosing the 2 Reports annotated with the Appellant's

own comments on the margin and at the end thereof ("the Annotated Reports", AB pp.171-175). He asked Dr Palmer to "*reconsider these reports and make the necessary corrections. This request is made under the provision of the Privacy Commissioner. (sic.)*"

13. Dr Palmer replied to the Appellant on 6 June 2011 (AB p.176) as follows:-

> "In regards to your letter dated 14th May 2011, which appears to be a Data Correction Request under the Hong Kong Privacy Ordinance, please note the following:
>
> 1. As mentioned to you in my previous correspondence, the reports referred to and copied in your letter have already been erased by me in accordance with Section 26 of the Privacy Ordinance.
>
> 2. Furthermore, in accordance with Section 24(3)(b) and (d) of the Ordinance, there is in any case no grounds to comply to such a request, since I am not satisfied that the data referred to is inaccurate, and I am not satisfied that your proposed corrections are accurate. ... ...
>
> 3. Most of your proposed corrections are comments, annotations, underlinings, and expressions of opinion about my reports. You are free to express such opinions, and since, in accordance with Section 26 of the Ordinance, I am not keeping records on your case, I have sent your letter and annotated copies of my reports, as well as this letter, to the Spiritual Assembly of the Baha'is of Hong Kong, for its own reference".

14. By Complaint Form dated 7 June 2011 (AB p.164), the Appellant complained to the Respondent that in his reports to The Spiritual Assembly of the Baha'is of Hong Kong, Dr Palmer had misrepresented the facts and attempted to turn the Assembly against him by a process of defamation. He contended that he had documentary evidence to prove this.

15. Following his complaint, the Appellant had a meeting with Miss Poon of the Office of the Respondent on 15 June 2011 (her Attendance Notes may be found at AB pp.187-188).

16. After that meeting, the Appellant sent Dr Palmer another letter dated 16 June 2011 ("DCR 2", AB pp.210-211) in which he objected to the deletion of the 2 Reports. He said Dr Palmer should retrieve copies of the 2 Reports to make the necessary corrections. On the question of accuracy, he relied on SMS messages and e-mails which he had sent to Dr Palmer. He then specified certain parts of the 2 Reports which he claimed should be deleted and certain words in the 2010 Report which he claimed should be changed. He ended by giving Dr Palmer "an additional 10 days" to comply with his request, because he himself also saw DCR 2 as an extension of his DCR 1.

17. Dr Palmer did not reply to DCR 2. By Complaint Form dated 28 June 2011 (AB 234), the Appellant complained again to the Respondent.

Dr Palmer's letter of 27 September 2011

18. Pursuant to the 2 complaints, the Respondent wrote to Dr Palmer by letter of 16 September 2011 (AB pp.226-229) to request for information. Dr Palmer replied by the letter of 27 September 2011 (AB pp.237-239).

19. In the letter of 16 September 2011, Dr Palmer was asked (a) to specify the original purpose of collection of the 2 Reports and why he considered that such purpose had been attained. Dr Palmer's reply is quoted in para.11 above.

20. Dr Palmer was asked (b) to specify the date the 2 Reports were erased and the reason for such erasure. Dr Palmer replied as follows:-

> "(b) I erased the Reports on 29 April 2011, immediately after making a copy of the Reports for sending to Mr Reeve in response to his DAR. The reason for erasing the Reports was pursuant to section 26(1) of the Privacy Ordinance: "... ..." Mr Reeve's membership in the Baha'i community had been revoked a few months earlier than the DAR. Since he is no longer a member of the Baha'i community, there is no need for me to keep any data on him. His DAR reminded me of the fact that I had inadvertently omitted to erase my data on him once his membership had been terminated. Therefore, I erased the data after responding to Mr Reeve's DAR. I am no longer a Data User in respect to data on Mr Reeve."

21. Dr Palmer was asked (c) whether he had erased the Annotated Reports. Dr Palmer replied that he had not because he expected the Appellant "*to, sooner or later Complain to the Privacy Commissioner, and so kept them in case they would be needed by the Privacy Commissioner.*"

22. Dr Palmer was asked (d) whether he had received DCR 2 and explain why he did not respond to it and whether he had erased the Annotated Reports attached to DCR 2. Dr Palmer replied that he received DCR 2 on 17 June 2011. He did not respond to it "*because it was basically a redundant repeat of his first request*". He had not erased the Annotated Reports for the same reason given above.

23. Lastly Dr Palmer was asked (e) if he had any other response to the matter raised in the complaint. Dr Palmer replied as follows:-

"(e) 1. Please see my attached response to Mr Reeve's DAR, in which I stated grounds for refusing to comply with the DAR... ... The data was released to Mr Reeve only voluntarily, as a friendly gesture in order to settle the matter, and reserving the rights to assert these or other grounds in the future.

2. Mr Reeve has requested that I delete various paragraphs of the Reports, but I had already deleted the ENTIRE Reports. I am no longer a Data User. It is absurd for me to make changes to data which I no longer keep. The only copies of the Reports that are now in my possession are the hard copies which Mr Reeve sent me along with his Data Correction Request. The only reason that I have kept them is in anticipation of the Respondent requesting to see them. I hereby include with his letter, those hard copies as well as the originals of Mr Reeve's letters, for your reference, and for you to dispose of as you see fit. Having sent you these materials, I will, from the moment of posting this letters, no longer have any copies of the aforementioned materials."

24. Having considered all relevant circumstances, the Respondent decided not to pursue the complaints further pursuant to section 39(2)(d) of Privacy Ordinance. The Appellant was informed of the Respondent's Decision and the reasons thereof by letter dated 18 November 2011 (AB pp.123-129).

25. By a letter of the same day (AB pp.280-284) the Respondent informed Dr Palmer of his decision not to pursue the complaints further, but he reminded Dr Palmer to strictly comply with the requirements of the Privacy Ordinance when handling data correction request in future, with particular reference to sections 22(1), 23(1), 24(3), 25 and 27 of the Privacy Ordinance.

The Notice of Appeal

26. Dissatisfied with the Respondent's Decision, the Appellant lodged the present appeal. In his Notice of Appeal dated 8 December 2011 (AB pp.121-122), the Appellant stated his grounds as follows:-

"Dr Palmer has played an active role in seeking to destroy my credibility within the Baha'i community of Hong Kong. In an attempt to ascertain the extent of his role, I secured copies of correspondence obtained by DAR. I then sent Dr Palmer a DCR, as two of his reports contained false and malicious allegations. Dr Palmer refused to attend to my DCR. It appeared that he was unable to separate opinion from fact. My second DCR stipulated precisely the corrections to be made and was accompanied by further documentary proof. Dr Palmer did not respond, hence my complaint.

In addition, immediately after retrieving copies of the documents requested in my first DAR, Dr Palmer destroyed all documents and files relating to me.

In my opinion, such action was irresponsible in the extreme. Since the case was still open and Dr Palmer's role in my case could well have led to civil action.

The act of destroying potentially damaging evidence against him is a very serious consideration.

My second DCR stipulated clearly the corrections to be made, yet the acting dep. Privacy Commissioner claims that his/her office is not in a position "to assume the role of adjudicator or arbitrator to resolve any factual dispute between antagonistic parties".

I maintain, however, if the factual evidence lies in favour of requests made in a DCR, then the Commissioner has the authority to demand that the necessary corrections are made."

The Respondent's Reasons for his Decision

27. In essence, the Respondent's reasons were as follows (AB pp.123-129):-

(1) At the time of receipt of DCR 1, Dr Palmer had already erased in his possession all the data regarding the Appellant. He was no longer a data user and was fully entitled to refuse to comply with DCR 1.

(2) By the said letter of 6 June 2011, Dr Palmer had provided detailed and sufficient reasoning regarding his reason for refusing to comply with DCR 1. That was sufficient compliance with the provisions of the Privacy Ordinance.

(3) In general, save for an obvious mistake or omission committed by the data user, it is beyond the jurisdiction of the Respondent to assume the role of an adjudicator or arbitrator to resolve any factual dispute between antagonistic parties. It is not the function or role of the Respondent, or the purpose of the Ordinance, that the Respondent should deal with the kind of disputes or matters raised in the Appellant's complaints. They should be more appropriately dealt with through other proper channels.

(4) Dr Palmer did not respond to DCR 2 seeing it as a redundant repetition of DCR 1. The Respondent did not consider Dr Palmer unreasonable in taking that view. In not responding to DCR 2, Dr Palmer had by conduct maintained his position of refusing to comply with the Appellant's DCRs.

(5) The Respondent has reminded Dr Palmer of the provisions of the Privacy Ordinance.

(6) In all the circumstances, any further investigation is unnecessary under s.39(2)(d) of the Privacy Ordinance.

This Board's Decision

28. We accept that Dr Palmer was correct to erase the 2 Reports relying on s.26. Data Protection Principle 2(2) is also relevant. It stipulates that "*Personal data shall not be kept longer than is necessary for the fulfillment of the purpose (including any directly related purpose) for which the data are or are to be used.*" The 2 Reports were collected as part of an investigation into a complaint made to the Baha'i Community against the Appellant as a member of that religious organisation. That investigation had been completed. The Appellant had since been removed from the member roll of the Baha'i Community. From the point of view of Dr Palmer and the Baha'i Community, the purpose for which the 2 Reports were made had been served. They have no further use of the 2 Reports.

29. The Appellant complained that "s*uch action was irresponsible in the extreme. Since the case was still open and Dr Palmer's role in my case could well have led to civil action. The act of destroying potentially damaging evidence against him is a very serious consideration.*" But it is not the intent or purpose of the Privacy Ordinance to assist a person in his litigation against another person or organisation. The Privacy Ordinance ensures that data cannot be used for any purpose other than the purpose for which they were collected. The 2 reports were not collected for the purpose of litigation. They cannot be kept for reasons of litigation. In any event, the Appellant has copies of the 2 Reports in his own possession. He can use them as "evidence" or in any other way he thinks fit.

30. Having erased the 2 Reports, we agree that Dr Palmer was no longer a data user of the 2 Reports. We draw support from s.22(2) which provides that: "*(2) A data user who, in relation to personal data-(a) does not hold the data; but (b) controls the processing of the data in such a way as to prohibit the data user who does hold the data from complying ... ... with section 23(1) in relation to a data correction request which relates to the data, shall be deemed to be a data user to whom such a request may be made ... .*" It follows that a data user who does not hold the data and who does not prohibit the data user who actually holds the data from complying with the request is not a data user to whom a data correction request may be made.

31. We further draw support from Data Protection Principle 2(1) which provides that: "*All practicable steps shall be taken to ensure that- ... (b) where there are reasonable grounds for believing that personal data are inaccurate having regard to the purpose*

(including any directly related purpose) for which the data are or are to be used (i) the data are not used for that purpose unless and until those grounds cease to be applicable to the data, whether by the rectification of the data or otherwise; or (ii) ***the data are erased****; ... .*" (emphasis added). Dr Palmer had erased the data (accurate or not) before the DCRs. He was no longer a data user.

32. Further, we accept that Dr Palmer was entitled to rely on s.24(3) to refuse to correct the Reports. Dr Palmer stated categorically in his letter of 6 June 2011 that he was not satisfied that the data was inaccurate, and he was not satisfied that the proposed corrections were accurate. Insofar as the 2 Reports were concerned with what actually took place in the 2 meetings and the words exchanged by each side, these were matter of facts of which there are only two persons in this world who will know where the truth lies. If Dr Palmer says that his reports were accurate reports of what went on in those meetings, it is not for the Commissioner or this Board to make him say otherwise. We cannot direct Dr Palmer to be satisfied that his 2 Reports are inaccurate (see s.23(1)). If the Appellant thinks the facts were not accurately reported by Dr Palmer, he could and can always write to the Baha'i Community and state his own report of the facts.

33. Insofar as the reports were concerned with the impressions Dr Palmer had of the Appellant or of what the Appellant said or did in those meetings, these are Dr Palmer's opinions which by definition are not verifiable and not practicable to verify. Neither the Commissioner nor this Board can direct Dr Palmer to come to a different view. The best that we can do under s.25(2) is to make sure that the 2 Reports will not be used by Dr Palmer or the Baha'i Community without considering also the Appellant's opinions in the matter.

34. Dr Palmer clearly has no further use of the 2 Reports. He made it clear in his letter of 27 September 2011 that the only reason he kept the Annotated Reports was because he knew the Appellant would be making complaints to the Respondent and he might be required to produce them. He returned his copies of the Annotated Reports and the Appellant's two DCRs with that letter and let the Respondent dispose of them as he deemed fit.

35. Insofar as the 2 Reports had been sent to a third party, namely the Baha'i Community, it is apparent that the Baha'i Community has likewise no further use of the 2 Reports. The investigation had been completed. The purpose of the 2 Reports had been spent. In any event, Dr Palmer had sent the Appellant's DCR 1 and the Annotated Reports to the Spiritual Assembly of the Baha'i Community. That, in our opinion, is sufficient compliance with s.25(2) and Data Protection Principle 2(1)(c).

36. On the same analysis, we accept that there was no contravention of the Privacy Ordinance as regards DCR 2.

37. The Respondent takes the view that save for an obvious mistake or omission, it is beyond his jurisdiction to assume the role of an adjudicator or arbitrator to resolve any factual dispute between antagonistic parties. He relies on the Administrative Appeals Board's decision in Administrative Appeal No. 22/2000 in support. We agree with the Respondent's view. While the Respondent may not be absolutely precluded from stepping in and assuming the role of investigator and adjudicator in each and every case, it is certainly inappropriate in the present case for the Respondent to do so. Any attempt to adjudicate on the veracity of the corrections requested would involve the Respondent descending into the arena and becoming caught up in the long drawn out conflict between the Appellant and the Baha'i Community/Dr Palmer. This would be utterly improper.

38. Section 39(2):

> "(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–
>
> (c) the complaint ... ... is not made in good faith; or
>
> (d) any investigation or further investigation is for any other reason unnecessary."

39. By para.8(c) of the Complaint Handling Policy (AB p.180), "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."

40. By paras.8(d) and (g) of the Complaint Handling Policy, an investigation or further investigation may be considered unnecessary if after preliminary enquiry by the Respondent, there is no prima facie evidence of any contravention of the requirements under the Privacy Ordinance; or if given the remedial action taken by the party complained against or other practical circumstances, the investigation of the case cannot reasonably be expected to bring about a more satisfactory result.

41. Copies of the Complaint Handling Policy had been sent to the Appellant under cover of the Respondent's letters of 8 June 2011 and 18 November 2011. By s.21(2) of the Administrative Appeals Board Ordinance, Cap. 442, this Board must have regard to the Complaint Handling Policy in arriving at our decision.

42. For the reasons given above, we agree with the Respondent that further

investigation is unnecessary and the Respondent was right in his decision to refuse to continue the investigation under s.39(2)(d).

43. Further, we are troubled by the fact that the present appeal seems to be one motivated not by concerns of one's privacy, but by personal feud. In his Notice of Appeal, the Appellant stated that it was to ascertain the extent of Dr Palmer's role in seeking to destroy his credibility within the Baha'i community of Hong Kong that he made the DAR. The Appellant needs to understand that it is not the purpose of the Privacy Ordinance to help a person in his personal vendetta against another person or organisation. Rightly or wrongly, the Baha'i Community has made a decision to remove the Appellant's name from its member roll. No doubt this decision was based on a number of considerations, not just on the 2 Reports. It is not for the Respondent or this Board, whether by means of data correction requests or otherwise, to make the Baha'i Community "correct" this decision. It is something that the Appellant has to settle with that organisation himself.

44. Despite the Respondent's decision, in March 2012 the Appellant made another data correction request to Dr Palmer regarding the 2 Reports. As it is not the subject of the present appeal, we do not intend to examine it save to remind the Appellant that the Privacy Ordinance should not be engaged for any purpose other than a genuine concern for one's privacy.

Conclusion

45. In conclusion, we find that:-

(1) Dr Palmer was correct to erase the 2 Reports under both s.26 and Data Protection Principle 2(2).

(2) Having erased the 2 Reports, Dr Palmer was no longer a data user of the 2 Reports to whom a data correction request could be made.

(3) Dr Palmer was not satisfied that the 2 Reports were inaccurate or that the corrections requested were accurate. Insofar as the 2 Reports concerned matters of facts, Dr Palmer was entitled to rely on s.24(3) to refuse to accede to the DCRs and he had duly informed he Appellant by the letter of 6 June 2011.

(4) Insofar as the 2 Reports concerned expression of opinions, Dr Palmer no longer intended to use the 2 Reports, whatever copies he had were copies of the Annotated Reports and he had duly sent the Annotated Reports to the Spiritual Assembly of the Baha'i Community. There was sufficient compliance with s.25(2).

(5) The Respondent was right to take the view that he should not adjudicate on the veracity of the corrections requested.

(6) A complaint must not be motivated by personal feud, otherwise it may be considered to be made not in good faith.

(7) In all the circumstances, there was sufficient compliance with the relevant provisions of the Privacy Ordinance and the Respondent was right in his decision to refuse to continue the investigation under s.39(2)(d).

(8) We hereby confirm the Respondent's decision and dismiss the appeal.

(signed)
(Ms Cissy Lam King-sze)
Deputy Chairman
Administrative Appeals Board