

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 46 OF 2014

BETWEEN

YIU WING CHING, JOHN

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr Yung Yiu-wing (Deputy Chairman)
- Mr Richard Ho Kam-wing (Member)
- Mr Kenneth Lau Kwai-hin (Member)

Date of Hearing: 6 February 2015

Date of Handing down Written Decision with Reasons: 25 March 2015

DECISION

Evidence and Findings of Facts

1. On or about 18 March 2013 Appellant had lodged a complaint¹ to the Respondent against the three equity partners of a firm of solicitors (hereinafter

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referred to as “ONC”) for releasing his personal data to a money lender (hereinafter referred to as “Orix”) without his consent. The Appellant joined ONC as a salaried partner on 22 March 2012, and gave his notice of resignation from the partnership on 15 November 2012 and ceased to be a partner on 31 December 2012.

2. In March 2013 the Appellant obtained his credit report from a credit agency. He was surprised with certain information in the report and was not happy with it prompting him to lodge a complaint to the Respondent. To understand properly his complaint it is useful to quote the relevant parts in his complaint form:

“ To my surprise, the three loans in the sum of HK\$4 million also appeared in my credit report. A copy of the first three pages of my Trans Union report is attached for your reference. You can see that the three unauthorised loans appeared as items 2.1.1, 2.1.2 and 2.1.3 on page 3 of the report. I did not provide any consent to the borrowing of any of the three loans. In addition, you can see that the entering of the record by Orix Asia Limited of the two loans in items 2.1.1 and 2.1.2 were *14 December 2012 and 30 November 2012* (highlight added). Those two dates were after my resignation of my position with ONC lawyers i.e. 15 November 2012. It seems that the three equity partners have unlawfully released my personal data including the identification document and address proof to Orix Asia Limited for the purpose of borrowing the three *unauthorised* loans (highlight added). Such conduct is a clear contravention of Section 64 of the Personal Data (Privacy) Ordinance.

Once I discovered the unauthorised borrowing and illegal release of my personal data by my ex-partners, I suffer from tremendous stresses (sic). The stress and the illegal activities committed by my ex-partners cannot be resolved by mere reconciliation. In addition, Mr Ludwig Ng, who always reminds everyone in different occasions that he is a director of Tung Wah Group of Hospitals, always decides all matters behind the back of all salaried partners and staff. Mr Ludwig Ng will only defend that he reasonably believed I had consented to the release of my personal data and that he and the two equity partners had provided an indemnity to our liabilities in my employment letter. Even though they agreed to indemnify me for the liabilities, their release of my personal data to Orix Asia Limited without my consent is unlawful. This type of *criminal activities* (highlight added) can only be redressed by prosecution. A contravention of Section 64 of the Personal Data (Privacy) Ordinance is clearly a serious offence and I urge the Commissioner to conduct a thorough investigation into the matter. *As the wrongful data in my personal credit report can only be removed by proper channel, I invite the Commissioner to take serious and immediate step against the wrongful data user* (highlight added).

For your information, the three data users might have committed other offences of conspiracy to defraud banks and finance companies for the purpose of obtaining favorable terms of commercial loans. I have reported their suspected criminal conducts to the Commissioner of Police. As an officer of the High Court, I am duty bound to report

such criminal conduct, in particular those committed by fellow professionals.”

3. In the course of enquiry with the data users, the Respondent came across and obtained the following additional information and circumstances. The Appellant did report to the police about the offences he suspected to have been committed by his former co-partners. Orix informed the Respondent that the police had closed the case. This has not been contradicted by the Appellant nor by his counsel at the hearing. There is no reason for the Administrative Appeals Board (“this Board”), nor the Respondent to dispute that the case was in fact closed. In any event, it is not for the Respondent nor for this Board to conduct criminal investigations into those offences the Appellant suspects to have been committed by ONC. On 28 May 2013 after discussion with an officer of the Respondent, the Appellant has dropped a separate complaint against Orix in relation to the same matter. The information the Appellant found objectionable in his credit report was removed by the credit agency after intervention by the Respondent. To all intent and purpose, the remaining complaint is against ONC.

4. If the Appellant to suggest that he ceased to be a partner on the day he tendered his notice, i.e. 15 November 2012, this is not supported by evidence. According to paragraphs 22 and 23 ²of the employment letter he signed, unless some other arrangement or agreement was made, the termination of his employment did not terminate on the day of the notice. The Respondent noted that the record kept by the Business Registration Office, and the outgoing date for the Appellant was 31 December 2012. That being the case, it is right for the Respondent to find that the Appellant was still a partner until 31 December 2012. Furthermore even assuming

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that the termination took place immediately on tendering the notice, it would not affect the decision of the Respondent for reasons that can be gathered from the following paragraphs.

5. ONC and Orix both confirmed to the Respondent that the three loans in question were applied for in the name of ONC, the firm, upon the personal guarantee of all three equity partners. At one time the Board had a query. If the Appellant is somehow personally liable to Orix for repayment of these loans, there would have been more reasons for ONC to supply his personal data to the lender. In this regard, it is regrettable that the Board could not have any useful assistance from counsels. The Respondent kept arguing and citing various provisions in the Partnership Ordinance (Cap. 38) to the effect that a partner is jointly liable for the debt of the partnership. Counsel for the Appellant kept saying that the Appellant would be liable only if he had been holding out as a partner of the firm but steadfastly refrained from stating whether there had been such holding out on the part of the Appellant. A partner indeed is liable for the debt of his firm but he might not be liable for a loan that other partners obtained without his authority express or implied or apparent. The Respondent should not be blamed insisting that the Appellant was liable for the loan, if that was what his counsel really meant. It is because according to the telephone attendance note³ the Appellant indicated to the officer of the Respondent when discussing the case on 28 May 2013 that he was considered a principal borrower of the three loans. If the Appellant really agreed that he was rightly considered a principal borrower of the loans, he would have no cause for complaint to the Respondent as it would then be normal for the lender to ask for personal data for verification of the identity of the borrower and for the borrower to supply the same for the same purpose. In all fairness the Board thinks what the Appellant alleged in

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effect was that he was considered a principal borrower of the loans but he should not be so considered. For the purpose of this appeal, the Appellant should not be considered as personally liable to Orix for the loans. Whether or not he would be made liable for the debt of the partnership is quite besides the point, for one simple reason. It is noted that the credit agency must have taken the same view after consulting with Orix or they would not have removed the reference to the loans in the Appellant's credit report.

6. Orix claimed it noticed that there was a new partner in ONC and therefore asked ONC to supply personal data of the Appellant for verification purpose by citing a statutory requirement to carry out under Part 2 of Schedule 2 to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615). The Respondent rightly finds that Orix is so legally obligated to carry out customer due diligence measures which include verifying the identity of its customers. Even without these legal requirements it is also reasonable for Orix to update the identity of its customers for good business reasons.

Decision of the Respondent

7. There are two grounds that the Respondent relies on for making his decision. Firstly there is no prima facie evidence to show ONC or anyone acting on its behalf to have committed any contravention of the Personal Data (Privacy) Ordinance (Cap. 486) ("the Ordinance"). The other ground is obvious from the findings as mentioned previously. The reference to the three loans in the credit reports were removed after the intervention of the Respondent. The Respondent does not think any better result could have been reasonably expected if he carries on with the investigation.

Grounds of Appeal and Decision of the Board

8. The Appellant contends that the purpose of supplying his personal data to Orix is without his consent or not for a purpose directly related to the original purpose of their collection. He suggested that the purpose was to obtain a loan or on a favourable term. This Board finds that the purpose of supplying the personal data in question is not for the purpose of obtaining a loan. Like what the ONC pointed out, it is not possible to obtain a loan by providing the personal data of a person without his signature. From the materials and information the Respondent obtained, the Board accepted the version of events as related by ONC and Orix relating to the supplying of personal data to Orix. Out of the need to verify the identity of each partner, the Orix asked for and ONC supplied the personal data of the Appellant to the former. The fact that at the time of so supplying the personal data the Appellant had given a notice to leave the firm is irrelevant. As the Respondent has noted and this Board has so found that the Appellant remained to be a partner until 31 December 2012. Being a salaried partner does not mean that the Appellant was in every respect an employee. He held himself out to the outside world that he was a partner. He was recorded as a partner in the public record accessible to the public with a small fee, he was so described in the firm's stationery letter head, and his name appeared as a partner in the website of the firm. Needless to say he was also described as a partner in the Law List maintained by the Law Society accessible to the public free of charge. There might be a dispute as whether he was explicitly told that his personal data would be released to banks or other parties for a legitimate purpose for verifying the identity of the partners of the firm. On the assumption that he did not give such explicit consent or prescribed consent when ONC collected his personal data when appointing him as a salaried partner, the purpose for collecting such personal data of his must include the purpose for supplying them for any

legitimate purpose of verifying the identity of the partners of the firm. As it has been pointed out the purpose for verifying the identity in the circumstances of the case is lawful and legitimate. Such purpose must therefore be a purpose directly related to the original purpose of collecting the same. To find otherwise is affront to common sense. The Appellant was not personally present at the hearing of the Appeal and the Board was deprived of an opportunity to hear his response to the rhetoric questions: Would he have agreed to releasing his personal data for a legitimate purpose of verifying the identity of the partners if he had been expressly asked by the firm on appointing him as a salaried partner? Has he made it clear to his present firm that even though he is a partner specific consent is required each time his personal data is supplied for a legitimate purpose for verifying his identity? In the premises this Board agrees with the finding of the Respondent that there was no prima facie case of contravention of a requirement of the Ordinance.

9. S38 of the Ordinance obliged the Respondent to *carry out* an investigation specified in the complaint. This obligation is subject to his discretion under s39 which empowers him to refuse to *carry out* an investigation or to terminate it after its initiation. If an investigation is formally initiated, the Respondent would have certain drastic powers, including search of premises, summoning witnesses etc. and to write a report at the end of the investigation. With the greatest sympathy to the Respondent that he is often misunderstood when he decides not to carry out an investigation or not pursue further the investigation. Such words carry a false and misleading impression that the Respondent has not done or does not want to do any investigation in the ordinary sense. In the instant case, the Respondent has made enquires with all three data users involved, gathered further information from the Appellant, discussed with him the complaint achieving some results desired by the Appellant. All this work by the Respondent would certainly be viewed as the investigation in the

ordinary sense of the word. To proceed further, the investigation would be on the basis of doubting the veracity of the ONC and Orix and looking at the materials before the Respondent, there is no such basis to doubt the veracity of the two. Furthermore the Board cannot see any other special circumstances to justify further investigation. The Appellant and his counsel have not assisted us on this point. That being the case it is only reasonable for the Respondent to rely on his Complaint Handling Policy to exercise his discretion not to carry out an investigation or to pursue further the investigation. Furthermore by section s21(2) of the Administrative Appeals Board Ordinance (Cap. 442), this Board must have regard to the policy of the Respondent.

10. For all the above reasons, the decision of the Respondent can be justified by his first ground alone. As to his second ground, it is the argument of the Appellant that the Respondent can by serving an enforcement notice to prohibit future contravention not just to remedy the harm done. Counsel for the Appellant suggests that it is the interest of the public rather than the self interest of the Appellant at stake. From the complaint details, the Board fails to see it is in the public interest that the Appellant is concerned with in so far as it relates to the handling of personal data. The Appellant is more concerned with the vulnerable position of salaried partners. The Board has every sympathy for his concern. He is rightly concerned with the financial difficulties of the firm was facing at the time. In the unfortunate event that the partnership is unable to pay its debts, what protection a salaried partner can get out of the indemnities by the equity partners? If their indemnities are worth anything the partnership would not be in a situation of being unable to pay its debts in the first place. Public interest is too often cited without any justifications. In the instant case, if there is public interest involved it would not be relating to the handling of personal data. Especially it is not reasonable to expect that the Respondent would eventually

find there was a contravention of a requirement of the Ordinance, or there would likely be one in the future.

11. It is the finding of this Board that the Respondent is entitled to exercise his discretion following his declared Handling Complaint Policy and such exercise of discretion is reasonable and lawful contrary to the arguments presented by the Appellant. This Board hereby dismisses the Appeal.

(signed)

(Yung Yiu-wing)

Deputy Chairman

Administrative Appeals Board