

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 5 OF 2010

BETWEEN

LAM KA YAU

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

CORRIGENDUM

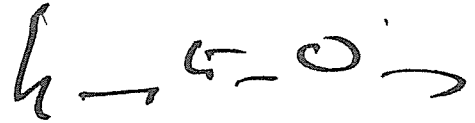
The Decision made by this Board on 7 September 2010 has the following amendments:

- (1) the word "Credit" should be added to the words between "Consumer" and "Data" in the 3rd line of paragraph 4(b) on page 3 and in the 4th line of paragraph 7 in page 5;
- (2) the surname Mr. "Law" should be replaced by Mr. "Lam" in the 1st line of paragraph 6 in page 3;
- (3) the word "as" should be added between the words of "far" and "it" in the 5th line from the top in page 4;
- (4) the abbreviation of "DDP" should be replaced by "DPP" in pages 14 and 15;
- (5) the word "he" should be added between the words of "As" and "was" in

the last sentence of paragraph 24 in page 14; and

- (6) the title of “counsel” should be replaced by “Legal Counsel” in paragraph 26 in page 15.

Dated this 22nd day of November 2010.

A handwritten signature in black ink, appearing to read 'Yung Yiu-wing' in a cursive style.

(Mr Yung Yiu-wing)

Deputy Chairman

Administrative Appeals Board

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Coram: Administrative Appeals Board

Date of Hearing: 13 July 2010

Date of Written Decision with Reasons: 7 September 2010

DECISION

Background

1. The facts relevant to this Appeal can be collected from the correspondence between Mr. Lam, the Appellant, and the Privacy Commissioner for Personal Data ("the Commissioner"), the Respondent; and between the Appellant and the party bound, TransUnion Limited ("TransUnion"), a credit reference agency. These facts are not in dispute.

2. In or about July 2009, Mr. Lam applied to a bank for credit facilities. A few days later, the bank informed him that he had 'unsettled debt'. He made

enquiry with the bank but it could not provide details and advised Mr. Lam to approach TransUnion. When he approached TransUnion, he was advised to obtain a credit report. He did so as advised. He also asked the staff member of TransUnion who handled his enquiry if he had any unsettled debt and was told he had none. In the credit report Mr. Lam subsequently obtained, he noticed in paragraph 5 a reference to a civil action in District Court in which he was the Defendant. The writ of the action was taken out in April 2004. Mr. Lam and the Plaintiff of the case reached agreement to settle the case in January 2005. That this settlement agreement was not reflected in the report formed the subject-matter of complaint by Mr. Lam against TransUnion, and to the Commissioner.

3. The Commissioner refused to investigate the complaint and Mr. Lam is now appealing against the decision.

Grounds of Appeal

4. Mr. Lam was permitted to appeal by letter. There are two grounds of appeal. They were set out in paragraph 3 of his letter which reads:

“ I now wish to appeal against the Commissioner on the following grounds:-

- (a) Never had I mentioned in my letter of complaint that Tn¹ should inform me in advance for collection of para. 5 of my credit report (the data). In para. 3 of my encl. (4)², I only mentioned that Tn³ should

¹ TransUnion

² Complaint letter of 13th October 2009 from Mr. Lam to the Commissioner

³ TransUnion

inform me of the data so kept in the **first instance**⁴ so that I could update my record.

- (b) The Commissioner says there is no requirement under para. 3.8 of the Code of Practice on Consumer Data (the Code) issued under the Ordinance that Tn⁵ has to inform me before collecting my data (given para. 3(a) above, my complaint was twisted) in para. 8 of encl. (5)⁶. Hence it refused to investigate. However neither the Code says that Tn⁷ is not required to do so in the interest of the stakeholders. Under the circumstances of my case, I clearly spelt out in encl.(4)⁸ that Tn⁹ should inform me of the data so kept in the first instance for the reasons mentioned.”

5. To support his appeal Mr. Lam enclosed the relevant page of the credit report and the correspondence in the course of his complaint. To fully understand his grounds of appeal and to evaluate their merit, these documents should be looked at in their proper context.

Complaint to TransUnion

6. Mr. Law wrote his first letter of complaint to TransUnion on 24 July 2009. After setting out his unhappy experience with the bank he set out the substance of his complaint. In his first ground of appeal, Mr. Lam alleged that the

⁴ the emphasis is ours

⁵ TransUnion

⁶ the Commissioner's Reasons for Decision

⁷ TransUnion

⁸ Complaint letter of 13th October 2009 from Mr. Lam to the Commissioner

⁹ TransUnion

Commissioner had twisted his complaint made to him. The complaint to TransUnion is relevant to this issue. Further as the Appellant did not attend the hearing of this appeal, this Board did not have the opportunity to clarify his complaints made to TransUnion and to the Commissioner, and even more importantly to ascertain the full extent of his grievances in so far it would fall within the jurisdiction of this Board to redress. Under these particular circumstances it is only necessary and fair for the Board not to paraphrase inaccurately and unfairly Mr. Lam's complaints. It is therefore helpful to set out verbatim of relevant paragraphs of his letters. He framed his complaint in his first letter to TransUnion in these words:

“ On 23.7.2009, I personally approached your Company and was advised to obtain a credit report. I did so. I also asked your staff whether I had any unsettled debt. The answer is negative.

*A look at my credit report, I was astounded to find out that the case DCCJ 2205/2004 (case) still appears in my credit report. In fact, the case had long been settled **outside the court**¹⁰ and was accepted by the Master of the case in Jan 2005, i.e. the case had long been concluded and disposed (of).*

Common sense prevails that the case, a trivial civil case, should not have been allowed to linger on for over 5 years without any outcome or disposal. I am very shocked and disappointed that your company had failed to

¹⁰ The emphasis is ours

take any interest or initiative to clarify the case regarding its disposal/outcome with me or the Court concerned. I have to point out that it is your duty to do so in the interest of the stakeholders.

I also wish to say that it is entirely wasting my time and resources to make the clarification on your behalf because of your negligence.

You are now requested to delete the entire para. 5 from my credit report and send me the amended one for perusal.”

7. TransUnion replied on 29th July 2009. In the letter it firstly explained in general terms its function as credit agency. It then proceeded to give its defence and explanation which was in fact simple. Firstly, it had collected and kept the data according to Clause 3.6.1 of the Code of Practice on Consumer Data. Secondly it had no means to access **the further status of the case**¹¹. In this regard it wrote in these terms:

“ The details of writs disclosed to the public by the High Court and the District Court of Hong Kong is one of the sources of information. For years the High Court and District court of Hong Kong notify the Public of every writ case filed with them; however, access to detailed information of a writ case, including court judgment, is strictly restricted to Defendant(s) and Plaintiff(s). In

¹¹ The emphasis is ours

*other words, our company has **no means of knowing any further status of a particular writ case***¹².

As a responsible organization, we strongly welcome individuals or companies to provide us with proof of their court judgments or any further status so that we can update our data base accordingly.

Further, we would like to emphasize that according to clause 3.6.1 of the Code of Practice on Consumer Credit Data issued by Office of the Privacy Commissioner for Personal Data, public record will be kept by us for 7 years after the date of commencement of the action as shown in the official records.”

8. Immediately, on 29th July 2009 Mr. Lam took up the invitation of TransUnion to provide it with the relevant supporting documents of the court case. It is not in dispute that TransUnion updated its record accordingly on the same day.

9. In the meantime, on 31st July 2009 Mr. Lam wrote to TransUnion taking issue with its defence and explanation. Apart from the pleasantries, the content of the letter is as follows.

“ Notwithstanding the clause 3.6.1 of the Code of Practice on Consumer Credit Data issued by the Office of the Privacy Commission for Personal Data, your office has

¹² The emphasis is ours

no mechanism to update para. 5 of my credit report as you are not in a position to do it on your own.

While you mentioned in your letter you welcome individuals to provide proof of court findings so that you could update your database, I wonder how I could provide you the information needed for updating in the absence of my knowledge of the existence of such record. To put it simple, your office is operating in the shade.

My credit report will be kept for 7 years while it is being kept without my knowledge & you are incapable to update the record (para. 5 of my credit report) on your own. I consider why it should be kept in the first place. As far as I am concerned, it is extremely biased & detrimental in keeping my record (para. 5) for 7 years without any updating & my knowledge.

*Similarly, while keeping such record in para. 5, you should inform me, as the main stakeholder of the record so kept in the first instance. **By failing to inform me as required**¹³, I not only could not provide you the development & outcome of my court case for your updating, but also had long disposed of all relevant receipt(s) & documents concerning the disposal of the case. Obviously & unfortunately, it is not in the interest of all stakeholders i.e. your office, the banks/financial institutions or me.*

¹³ The emphasis is ours

Given the above & your mode of operation, it is detrimental or has a very negative impact on my application for transfer of mortgage in the instant case with HSBC, not to mention all the unnecessary disruption, delay & inconveniences so caused. It also adversely affects my credit lines.

Furthermore, it has been a great damage to my credibility & reputation as the negative data in para. 5 had been kept for over 5 years (only a trivial contract dispute case) while in fact, it was long concluded & disposed of in Jan 2005."

10. The prejudices described in the letter are not in dispute in these proceedings. That the prejudices are the adverse consequence of para. 5 of the credit report is also not in dispute.

11. Mr. Lam took issue with the defence and explanation. He raised two main points. Firstly, while he did not dispute the alleged inability of TransUnion to update the record, Mr. Lam contended that exactly because of this inability to update them TransUnion should not collect and keep the data. Secondly, he pointed out the fact that at no time (before applying for credit facilities with the bank) he was informed of the collection and keeping of the data recorded in para. 5 of the credit report.

12. TransUnion responded on 15th September 2009 after Mr. Lam followed up the complaint by letter on 7th September 2009. On this occasion TransUnion after repeating that they were merely following the Code of Practice on Consumer

Credit Data added that **it was not their practice to inform all defendants**¹⁴ upon collecting the data. It also attempted to placate Mr. Lam that it would consider his recommendation.

Complaint to the Commissioner

13. Mr. Lam copied his follow up letter mentioned in the previous paragraph to the Commissioner for his comment enclosing his correspondence with TransUnion. The Commissioner replied by the letter of 6th October 2009. The Commissioner declined to give specific comments on the case as it would be in conflict with the Commission's investigative role. However the Commissioner gave Mr. Lam a brief description of the investigative role of the Commission and provided him some useful information about the relevant provisions in the *Personal Data (Privacy) Ordinance* ("the Ordinance") and finally advised him to take independent legal advice.

14. A week later, on 13th October 2009, Mr. Lam lodged a complaint by letter with the Commissioner against TransUnion. After referring to the materials enclosed to support the complaint, he continued to state his case in the rest of his letter in these words:

"3. To sum up, my grievances are:

(a) para. 5 of my credit report refers:

The TransUnion has no mechanism to update para. 5 of my credit report as it could not access the judgment/outcome of my court

¹⁴ The emphasis is ours

case, i.e. it is not in a position to do so on its own. Hence it could not deal with the correction issue, as mentioned in para. 8 of your letter (ref 200913953).

(b) para. 6 of your letter (ref 200913953) refers

*I was not informed of the record so kept in para. 5 of my credit report by TransUnion. By failing to inform me as required, I could not provide the development & outcome of my court case for updating by TransUnion. Obviously & unfortunately, it is not in the interest of the main stakeholder, i.e. me, not to mention the TransUnion & the financial institutions concerned. If I were so informed in the first instance, I could have informed the TransUnion the Court judgment of my case in the earliest possible moment in the interest of my application for credit lines. **DDP1(2) requires that personal data shall be collected by means which are fair in the circumstances of the case, however, the means of collection without informing the main stakeholder clearly contravenes the spirit of the principle.***

4. *Hence I wish to complain that it is not appropriate for TransUnion to keep record of para. 5 of my credit report without my knowledge while it is incapable to update the data on its own.*

5. *Given the above & the mode of operation of TransUnion, it is very detrimental & has a very negative impact on my application for transfer of mortgage with HSBC in July 2009, not to mention all the unnecessary disruption, delay & inconvenience so caused. It also had seriously & adversely affected my previous application for credit lines.*

6. *Furthermore, it has been a great damage to my credibility & reputation as the negative data in para. 5 of my credit report had been kept for over 5 years without any updating, while in fact, the merely trivial contract dispute case was long concluded & disposed of in January, 2005. (Please see the attached judgment of my court case DCCJ2205 of 2004)”*

Decision of the Commissioner

15. On 5th January 2010, the Commissioner notified Mr. Lam the decision not to carry out an investigation. Annexed to the notification letter is the Reasons for Decision.

16. The complaint as understood by the Commissioner was set out in the first four paragraphs of the Reasons for Decision. Only one of these paragraphs is relevant, i.e. paragraph 3, which reads:

“ You were dissatisfied that TU¹⁵ has no mechanism to update the progress and results of the Claim. In addition, you complained against TU for collecting the Public Record and including the same in your credit report without notifying you in advance.”

17. The Commissioner decided that investigation is unnecessary under section 39(2) of the Ordinance. The reasons¹⁶ given can be summarized as follows :

(I) Under paragraph 3.8 of the Code¹⁷, there is no requirement for TransUnion to inform Mr. Lam in advance of collection of data;

(II) The subject data are Public Record and there was no suggestion that they were not accurate:

(III) It follows that there was no prima facie breach of any provision of the Code or the Ordinance¹⁸;

(IV) TransUnion has recorded the case result into your credit data held by them after receipt of the relevant data from you.

Issues

18. The first ground of appeal is merely a statement of fact, namely that Mr. Lam had not mentioned in his letters that TransUnion should inform him in advance of the collection of the data. It is true that he did not mention that in so many words. However, he did as the Commissioner correctly understood that

¹⁵ TransUnion

¹⁶ see Reasons for Decision paras 8,9,10,&11

¹⁷ the Code of Practice on Consumer Data

¹⁸ the Personal Data (Privacy) Ordinance

one of the complaints was that he was not informed in advance of the collection of the data. In his letter of 31st July 2009 he joined issue with the defence and explanation offered by TransUnion. It was Mr. Lam himself who pointed out that TransUnion should have informed him in the first instance. His argument in the same letter was that if he had been so informed he would have TransUnion updated its record on settlement of the claim.

19. The correspondence including this letter formed the basis of his complaint against TransUnion. Looking at this letter alone and in the context of the correspondence, Mr. Lam was not satisfied with the practice of TransUnion to collect data without notifying him in advance. He was complaining about this, although it is not the only complaint or primary complaint. In his second ground of appeal, Mr. Lam repeated his dissatisfaction with the fact that he was not so informed in advance by TransUnion.

20. It might well be the case that Mr. Lam was alleging some other things. Unfortunately, he did not attend the appeal hearing, and this Board had no opportunity to clarify the matter with him. As this Board understood, the first ground of appeal simply stated the factual basis to support the second ground of appeal. The tone of first ground of appeal, however, suggested that his main complaint was that TransUnion should not have collected the data about his court case at all. This interpretation should be the most favourable one to Mr. Lam. Indeed the two grounds of appeal should be considered together.

21. The first ground of appeal in so far as alleging that the Commissioner misunderstood his complaint has no merit on the facts that this Board has found.

22. Similarly the allegation in the second ground of appeal that the Commissioner twisted the complaint of Mr. Lam had no merit on facts.

23. Looking at materials before the Commissioner and this Board, and interpreting the grounds of appeal in the light of these materials in a way most favourable to Mr. Lam, the remaining issues raised in the two grounds of appeal together are as follows:

- I. Whether TransUnion was in breach of the provisions of DDP¹⁹1 (2) of the Ordinance in collecting and keeping the data of the court case;
- II. Whether TransUnion was in breach of the provisions of DDP1 (2) of the Ordinance in not informing Mr. Lam in advance;
- III. Whether TransUnion was in breach of the provisions of the Ordinance before including the subject data in the credit report.

Submissions of the Appellant

24. Mr. Lam did not attend the appeal hearing but presented his points of argument in the letter of appeal, and expressed his views in other letters during the course of complaint. When making the decision, the Commissioner relied on paragraph 3.8 of the Code. Mr. Lam argued that while the Code did not say TransUnion was required to inform him in advance, equally it did not say TransUnion was not required to do so. He contended that under the circumstances of his case, namely the TransUnion was not in a position to update the record, it should have informed him. As was not so informed, he might have lost or disposed of the necessary documents to support his later request for updating the record.

¹⁹ Data Protection Principles

25. For the same reasons, Mr. Lam argued, that TransUnion should not have collected the subject data in the first instance. He contended that DDP²⁰1 (2) **requires that personal data shall be collected by means which are fair in the circumstances of the case²¹**. According to Mr. Lam TransUnion was therefore contravened the spirit of DDP1 (2).

Submissions of the Commissioner and Ruling of this Board

26. The subject data in para. 5 of the credit report is Public Record and it is accurate. This cannot be disputed. Therefore Mr. Yum, counsel for the Commissioner, submitted that there is no requirement under the Ordinance to notify Mr. Lam. The requirement to notify Mr. Lam of the purpose of the collection of his personal data only arises if TransUnion collects data from Mr. Lam. This requirement is laid down in DDP1 (3). This Board accepts Mr. Yum's submission.

27. As this Board has allowed some laxity on the grounds of appeal, in fact extending them beyond what is represented in the letter of appeal, this Board has to consider the provisions of DDP1 (2). Mr. Lam is right in submitting that DDP1 (2) requires TransUnion to collect personal data by means which are lawful and fair in the circumstances. Mr. Yum drew our attention to the provisions of Paragraph 3.1.3 of the Code²². Which provides, inter alia, that *a credit reference agency may collect public record and related data that are publicly available relating to any action for the recovery of a debt against an individual*. Therefore TransUnion is permitted to collect the data as recorded in the credit report. Furthermore paragraph 3.6.1 permits TransUnion to keep the record for 7 years.

²⁰ Data Protection Principles

²¹ see P.17

²² the Code of Practice on Consumer Credit Data

Nothing before the Commissioner or before this Board suggests that TransUnion collected the public record of Mr. Lam's civil action by any means unlawful or unfair. It is only right to find that the TransUnion has complied with letters of provisions of the Ordinance.

28. As to whether TransUnion has contravened the spirit of "fairness", Mr. Lam appeared to rely on his own particular circumstances and grievance. No other specific circumstances have been mentioned in the materials before the Commissioner and this Board.

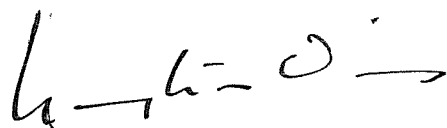
29. The primary contention of Mr. Lam is that the data should not go into the credit report. It is because the data appeared under the main heading: "Public Records of Potential Relevance" and sub-heading, "Potentially Relevant Writ Information". The message that the data sought to convey is that Mr. Lam was once a defendant in a civil action for debt. It may look harmless to a layman. People are often wrongly sued. To persons in the credit industry, this would put them on notice to clarify the matter. It is also common knowledge that banks, at least those seemingly over-cautious ones, or conservative ones, would seek clarification about the outcome of the case. This is exactly what HSBC did. The clarification would delay the approval of credit facilities and bring prejudice to the data subject, in this case Mr. Lam. On the other hand, the information is of relevance, though the relevance pales off with time. This Board believes that the Ordinance is intended to strike a balance between these two factors and therefore limits to 7 years the time the data allowed to be kept. It is the view of this Board that the spirit and letters of the Ordinance in this respect are one and the same. This Board finds that the Commissioner was right in coming to the conclusion that there was no prima facie breach of any provision of the Code or the Ordinance.

Decision

30. This Board initially had some concern about the updating of this kind of data. TransUnion contended that it had no means to update its record. By updating this Board means by collecting further data about the case so as to put the tenor of data about the case in better perspective. TransUnion's contention may not be generally true, say judgments handed down in writing should be public record. However in this particular case, it is true that the settlement was not public record. TransUnion had no means of access to the settlement agreement.

31. On second thought, this Board is of the view, it is all a question of what correct data should or should not be included in credit reports. That being the case it was a question of proper writing of credit reports. Such matters fall outside the purview of the Commissioner when he is acting in his investigative role.

32. For all these reasons, this Board also finds that Mr. Lam has not shown a prima facie case of breach by TransUnion of any provisions of the Ordinance. The Commissioner's decision is correct and the appeal is dismissed.



(Mr Yung Yiu-wing)

Deputy Chairman

Administrative Appeals Board