

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 14 of 2006

BETWEEN

CHUNG AGNES

Appellant

and

THE PRIVACY COMMISSIONER FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing: 22 September 2006

Date of handing down Decision with Reasons : 13 October 2006

DECISION

1. This is an appeal by the Appellant against the decision of the Privacy Commissioner for Personal Data ("PCO") by letter dated 9 March 2006 refusing to carry out or continue an investigation initiated by a complaint lodged by the Appellant on 2 November 2005 on the ground that there was no *prima facie* case of contravention of the Personal Data (Privacy) Ordinance, Cap 486 ("the Ordinance").

Factual background

2. The relevant facts are not in dispute and are as follows.
3. The Appellant was formerly employed by the Hong Kong Academy of Medicine ("the Academy") as Conference Assistant in the Conference Department from 14 June 2004 to 6 November 2005.
4. The Appellant was given a workstation or desktop computer ("the desktop") for her use. The desktop was connected to the Academy's server but the Appellant was the only person who would use the computer in the ordinary course of work.
5. When she commenced her employment with the Academy, she was given a user name and a password to access the desktop. She was allowed to change the password to a personal one of her own choice, and she was not required to inform the Academy of the new password that she had so chosen.
6. There is no dispute that the Academy could access the information in the desktop, including personal data of the Appellant stored in the desktop, via the server.
7. The Appellant's immediate supervisor was a Mr Daniel Chok ("Mr Chok"). The Appellant complains that Mr Chok had since around end of November 2004 been asking the Appellant to provide him with her password. At first the Appellant was not willing to do so, but Mr Chok claimed that he needed the password to access to the Appellant's work files. The Appellant claims that Mr Chok did not give her any other reason for requiring her password. Since Mr Chok was her superior, the Appellant reluctantly acceded to his request and gave Mr Chok her password in around mid-December 2004.

8. Thereafter the Appellant did not notice anything unusual. On 7 October 2005 the Appellant tendered her resignation. On 14 October 2005, the Appellant discovered a file in the desktop which was not created by her and which she did not know existed. It recorded all the cookies from the Internet Explorer application on the desktop (ie, cookies received from the websites the Appellant had visited using the desktop).

9. The Appellant found that the cookies file was created on 7 October 2005 at 20:32 hrs. But she had left the office at 17:38 hrs that day. She also found that Mr Chok, who was the only other person in the office who had her password, did not leave the office until 20:43 hrs on the evening of 7 October 2005. She therefore concluded that it was Mr Chok who had accessed the desktop using her password after she had left the office that afternoon.

10. The Appellant made a complaint to the Academy on 17 October 2005. She was, however, told that there was no problem with Mr Chok accessing her desktop because the desktop was the Academy's property and there should not be any personal files in it.

11. Eventually, the Appellant lodged a complaint to the PCO on 2 November 2005.

12. The PCO in the usual way made enquiries with the Academy by letter dated 23 November 2005. By a letter dated 12 December 2005, the Academy replied to the PCO as follows:

"2) i) You refer to "the information in the complainant's computer file ..."
We would like to point out that the computer used by the complainant was the property of the Academy. The system in that computer was the system of the Academy. That computer was assigned to the complainant

for use in her work and her work only. It was not to be used for any personal purpose of hers. Therefore, any information which passed through that computer and which was stored in the computer was, or ought to be, information generated in the course of her work and was information which belonged to the Academy.

- ii) It follows from the above that the Academy was entitled to have access to all information in the computer assigned to the complainant because such information belonged to the Academy.*
- iii) Mr Chok was authorised to access the computer assigned to the complainant. The circumstances are that, on 26 September 2005, Mr Chok noticed that the complainant was using the workstation provided to her to play online games. Mr Chok sent the complainant an email to remind her not to do so, but she did not respond ... The concern was that the complainant might have been spending quite a lot of time doing other things rather than carrying out her duties and that cookies kept in her computer which were not related to her work might affect the security of the Academy's network system. [The General Secretary] agreed to Mr Chok's request to check whether the complainant had been doing unauthorized things with the computer assigned to her such as visiting websites not for the purpose of the [Academy's] work."*

13. The letter further referred to 2 matters:

- 13.1. It is said that the Academy's Staff Handbook section 11.2(k) made it clear that staff were not allowed to conduct any personal business during working hours; and

13.2. The Academy had a policy on proper computer usage, under which random checking could be done to ensure compliance. In relation to this point, the Academy referred to an Administrative Circular No 97 "to all staff" ("the Circular"). The Circular, which was addressed to all staff but undated, stated under the heading "Proper Computer Usage", as follows:

"I wish to inform you that our server will have record on details (time, URL of sites visited) of Internet browsing by individual workstation. Random checking will be done. Disciplinary action will be taken against staff breaking the rules. Our IT Manager will set password for individual PC. You should keep the password to yourself to prevent unauthorised use of your PC by others ..."

The letter further stated that administrative circulars would be kept in files that were freely accessible after being noted by all staff.

14. It is therefore clear that it was indeed Mr Chok who had accessed the Appellant's desktop on 7 October 2005 using her password.

15. This is an appeal by the Appellant against the decision of the Privacy Commissioner for Personal Data ("PCO") by letter dated 9 March 2006 refusing to carry out or continue an investigation initiated by a complaint lodged by the Appellant on 2 November 2005 on the ground that there was no *prima facie* case of contravention of the Personal Data (Privacy) Ordinance, Cap 486 ("the Ordinance").

"Discussed this case with CPDO & AITO on 11/1/06. It appears that the "cookies" file was created by someone after logging into the desktop computer. We agreed that we might try to contact the Academy, asking them to cease the

practice. In case, they wish to monitor the computer, they may [do] so thru the server. Moreover, we may advise them to devise more detailed policy and consult and communicate with their staff in accordance with the monitoring code."

16. On 25 January 2006, the PCO sent a letter to the Academy requesting for the following further information:

16.1. In light of the fact that in the Circular it was stated that the Academy could monitor individual workstations via the server, why that was not done on this occasion; and

16.2. The date of the Circular.

17. By letter dated 1 February 2006, the Academy replied reiterating that the information in the desktop belonged to the Academy, that the Academy had the right to access such information, and it mattered not whether the Academy accessed such information via the server or using the password of the complainant. As to the Circular, the Academy advised that it was issued and circulated to staff in April 2000.

18. According to a file note of the PDO, on 8 February 2006 she made a telephone call to the Hon Secretary of the Academy's House Committee (who had signed the Academy's replies). The PDO asked the Hon Secretary the reason for checking the Appellant's internet browsing activities by her personal account instead of through the server, when the latter method was expressly mentioned in the Circular. The PDO further raised with the Hon Secretary the "skipping of using the less intrusive means" of obtaining the information, which "could limit the negative impact on the staff" concerned.

The Hon Secretary said he needed time to consider the query and would reply to the PDO later.

19. On 20 February 2006, the Hon Secretary telephoned the PDO. The PDO's file note recorded that the Hon Secretary stated that the Academy still considered that there was no difference between conducting the random checking via the server or by using the staff's password to access the desktop.

20. Based on the materials described above, the PCO accepted that no case of contravention of the Ordinance was established. However, it was recommended that an advisory letter would be issued to the Academy to remind it to use a less intrusive method to obtain the information.

21. As stated above, by letter dated 9 March 2006, the PCO informed the Appellant that he did not intend to or continue to carry out an investigation.

22. The Board notes that the Appellant did not accept the reasons given by the Academy to the PCO as to why it was considered necessary to have access to the cookies her desktop. She also denied having received the Circular or knowledge of its existence or content. For the purpose of this appeal, it is not necessary for this Board to resolve these disputes.

The relevant Data Protection Principles

23. The following Data Protection Principles under Schedule 1 to the Ordinance are relevant:

23.1. Principle 1 – purpose and manner of collection of personal data

“(2) Personal data shall be collected by means which are –

(a) *lawful; and*

(b) *fair in the circumstances of the case.*

(3) *Where the person from whom personal data are or are to be collected is the data subject, all practicable steps shall be taken to ensure that –*

(a) *he is explicitly or implicitly informed, on or before collecting the data, of –*

(i) *whether it is obligatory or voluntary for him to supply the data; and*

(ii) *where it is obligatory for him to supply the data, the consequences for him if he fails to supply the data; and*

(b) *he is explicitly informed –*

(i) *on or before collecting the data, of –*

(A) *the purpose (in general or specific terms) for which the data are to be used; and*

(B) *the classes of persons to whom the data may be transferred; and*

(ii) *on or before first use of the data for the purpose for which they were collected, of –*

(A) *his rights to request access to and to request the collection of the data; and*

(B) the name and address of the individual to whom any such request may be made ..."

23.2. Principle 5 – Information to be generally available

"All practicable steps shall be taken to ensure that a person can –

(a) ascertain a data user's policies and practices in relation to personal data ..."

Parties' contentions

24. In her grounds of appeal which she maintained at the hearing, the Appellant essentially complained of 3 main points:

24.1. Whether Mr Chok was in fact authorised by the Academy to collect personal data from her desktop;

24.2. The validity or applicability of the Circular, in as much as the Appellant never received it nor knew of its existence; and

24.3. The way Mr Chok collected personal data from the desktop was contrary to the Circular and unfair.

25. The PCO, represented by Ms Margaret Chiu and Miss Brenda Kwok, submitted that there was nothing unfair in the way Mr Chok obtained the data from the Appellant's desktop.

26. At the forefront of Ms Chiu's submission is the undisputed fact that the desktop was the property of the Academy and that the Academy was entitled to have access to such information. The Circular did not limit the use of the

server to obtain information from staff's desktops. The general purport of the Circular was that the Academy would be monitoring the staff's use of their desktops and the staff knew that.

27. Ms Chiu further submitted that there was no evidence of any inappropriate or unlawful means to obtain the Appellant's password because the Appellant voluntarily provided her password to Mr Chok. It is contended that the fact that she might be reluctant to provide her password was neither here nor there because she was legally obliged to do so.

28. Moreover, Ms Chiu pointed out that in this case, the data obtained was only the cookies, rather than the contents of the websites visited by the Appellant. There was no other personal data accessed.

29. Accordingly, Ms Chiu submitted that the method of obtaining the data was not unfair in all the circumstances of the case. The PCO was therefore right not to carry out any or any further investigation.

Discussion

Principle 1 (2)

30. In view of the confirmation by the Academy that Mr Chok was authorised to obtain the password of the Appellant and to access her desktop, the Board is satisfied that no issue arises under Principle 1 (2)(a).

31. However, in the opinion of the Board, there seems to be at least a prima facie case that the method of obtaining personal data was unfair in the circumstances of this case, contrary to Principle 1(2)(b), which warrant further investigation.

32. Even assuming for present purposes that the Academy and Mr Chok had legitimate reasons to access the Appellant's desktop, it does not follow that they could use whatever method to pursue that purpose. The Academy acknowledged that it was able to access information on the Appellant's desktop via the server. It is also plain that it would be less intrusive to access information in the Appellant's desktop via the server. The Academy did not, however, provide any explanation why it did not adopt that self-evidently less intrusive method on this occasion.

33. When queried by the PCO on this point, the Academy relied on the fact that the desktop was the property of the Academy, and that the Appellant should not have done any person work with her desktop. That may be so, but it does not necessarily follow that all the data inside the desktop necessarily belonged to the Academy. As was pointed out by a Member of the Board at the hearing, the fact that the Academy allowed the Appellant to have her personal password, which she did not have to provide to the Academy, may suggest that there could be private and personal data in the desktop.

34. In any case, the fact that the desktop and the information contained in it belonged to the Academy is no answer to the question why a less intrusive method was not employed. The Academy never directly or satisfactorily addressed that question despite having been asked three times by the PCO.

35. The Board notes that the officers of the PCO appeared to be concerned about this issue as well, which led to the PCO twice following up with the Academy on this point. Yet, despite the Academy's failure to address the question, the PCO's officers accepted the explanation given by the Academy without considering the points mentioned above.

Principle 1 (3)

36. Furthermore, even if the Academy had legitimate reasons to access the Appellant's desktop rather than via the server, there was no reason why the Appellant should not have been told why she was required to disclose her password to Mr Chok, and what personal data was required to be collected from her desktop. And if access via her desktop was required, there was no reason why she should not be informed beforehand so that, if she wished, it could be done in her presence. The Appellant was also not informed of what data had been collected from her desktop after the collection had been carried out.

37. There would appear to be questions as to whether Principle 1 (3)(a), 1 (3)(b)(i) and 1 (3)(b) (ii) had been complied with.

Principle 5

38. In relation to the Circular, the Academy confirmed that it was distributed to its staff in April 2000. The Appellant commenced her employment in June 2004. The Academy has not suggested that a copy of the Circular had been given to the Appellant when she started employment, or that she was told that such a Circular existed or how to access it. As noted above, the Appellant denied knowledge of the existence or content of the Circular.

39. In the circumstances, in so far as the Academy seeks to justify the action of Mr Chok by reference to this Circular, there may be reasons to think that Principle 5(a) might not have been complied with.

Decision

40. For the reasons stated above, this Board is of the view that there are potential non-compliances with the Ordinance which appear to warrant proper investigation.

41. The Board is therefore unable to agree with the PCO's decision not to carry out or to continue an investigation.

42. The appeal is accordingly allowed. Having considered the circumstances of this case, the Board considers it appropriate to exercise its power under section 21(3) of the Administrative Appeals Board Ordinance to send this case back to the PCO for his further consideration whether any and if so what investigation ought to be carried out or continued in light of the matters mention in this Decision.



(JAT Sew-tong, SC)

Deputy Chairman

Administrative Appeals Board

Corrigendum

The first six lines of paragraph 15 on page 5 of the Decision with Reasons dated 13 October 2006 in respect of the appeal AAB No. 14/2006 by Madam Agnes CHUNG should be replaced by the following:

“ 15. From the documents provided by the PCO, there is an internal file note dated 11 January 2006, in which the PCO recorded as follows: ”



(Ms Anna Chan)
Secretary
Administrative Appeals Board
6 November 2006