

ADMINISTRATIVE APPEALS BOARD

APPEAL NO. 15/2000

BETWEEN

PRISCILLA SIT KA-YIN

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of hearing : 17 November 2000

Date of Decision : 7 December 2000

DECISION

The appeal

This is an appeal by the appellant Ms Priscilla Sit Ka-yin ("Ms Sit") against the decision of the Privacy Commissioner for Personal Data ("the Privacy Commissioner").

The employment

Ms Sit was a former employee of the Equal Opportunities Commission ("the EOC"). She was employed as the Director (Gender). She started her employment from 9 September 1996 on a trial basis for six months. In the appointment letter, it was stated that on satisfactory completion of the

trial period, her appointment was to be converted to agreement terms for three years. By a letter dated 10 March 1997, the Chairperson of the EOC informed Ms Sit that she had satisfactorily completed the trial period and her appointment was converted to agreement terms from 9 September 1996.

The structure of the EOC

The EOC consisted of 16 governing members. These members were responsible for the executive decisions of the EOC. They delegated their authorities to sub-committees. Among these sub-committees was the Administration and Finance Committee, the convenor of which was Mr Charles Lee ("Mr Lee"). The actual management of the EOC was run by a management team which consisted of the following persons : the Chairperson, who at the relevant time, was Dr Fanny Mui Ching Cheung ("Dr Cheung"). She was in charge of the policy decisions of the EOC. Below the Chairperson was the Chief Executive who was in charge of the operation of the EOC. The Chief Executive at the relevant time was Mrs Ho Choi Wai-yee, Angela ("Mrs Ho"). Below her, there were four directors : Director (Disability), Director (Gender), Director (Legal) and Director (Administration). The Chairperson, Chief Executive and the four Directors formed the management team of the EOC. Below this management team were the officers of the EOC.

The termination

On 24 September 1997, at a special meeting of the Administration and Finance Committee, a report was made by Dr Cheung to this Committee. According to the minutes of this special meeting, Dr Cheung gave a report to the members :

“... on the overall performance of Miss Sit in her capacity as Director (Gender). Miss Sit’s deficiencies in respect of the following performance areas were highlighted :

- 1) work performance
- 2) leadership, including
 - a) ability to command respect from subordinates
 - b) ability to lead a division
- 3) contribution to the EOC Management Team
- 4) public performance
- 5) job knowledge

2. Dr Cheung requested the Meeting to consider whether Miss Sit was suitable to continue in the post of Director (Gender).

3. After careful consideration, it was the unanimous opinion of Members present that Miss Sit was clearly inadequate for the post of a Divisional Director. Members also unanimously agreed that Miss Sit’s employment should be terminated immediately according to the terms of her contract in order not to affect staff morale and EOC’s operation.

4. Members also agreed that the employee concerned should be given two options in respect of her termination of employment with the EOC.”

The meeting then discussed the options to be given to Ms Sit, namely, termination of her employment by the EOC and termination by mutual agreement between Ms Sit and the EOC.

On 25 September 1997, the EOC held its Ninth Meeting. The minutes of this meeting stated, among other things, that :

“37. The Convenor of the Administration and Finance Committee (A&FC) presented a recommendation by the A&FC concerning the termination of the services of Director (Gender). The reasons for the recommendation were explained and the recommendation was approved unanimously by Members. It was also agreed by all Members that termination should be effected immediately. The Chairperson was authorised to execute the decision made. Members also agreed that a recruitment board be set up consisting of two Members of the Administration and Finance Committee, the Chairperson and the Chief Executive.”

On the evening of 25 September 1997, a meeting was held between Ms Sit and Dr Cheung in which Dr Cheung gave Ms Sit two letters, the first was a letter by the EOC terminating Ms Sit's employment and the second one was a letter indicating termination of employment by mutual agreement. According to Ms Sit, she indicated that she wished to take legal advice. On the next day, i.e. 26 September 1997, she received a letter from the EOC terminating her employment. The first paragraph of this letter stated that –

“Further to our discussions and for reasons explained to you yesterday, this serves to confirm that your contract of employment with the Equal Opportunities Commission (“Commission”) will be terminated with effect from 26 September 1997.”

The letter stated that the EOC would pay Ms Sit her outstanding salary and cash allowance up to and including 25 September 1997, three months' salary and cash allowance in lieu of notice, salary in lieu of accumulated annual leave and gratuity for her actual service with the Commission.

The demands for reasons of termination

Ms Sit stated that on the evening of 25 September 1997 when she asked why her appointment was terminated, Dr Cheung said that her work was not up to the standard required. Ms Sit stated that despite request by her, she was given no particulars of this allegation.

On 29 September 1997, Ms Sit's solicitors AB Nasir & Co. ("Nasir") wrote to the EOC stating that the EOC had dismissed Ms Sit ".... for reasons. These reasons are not set out in your letter and we would therefore request that you provide us with the reasons for dismissal." The letter further stated that –

“ Your decision was no doubt made prior to the meeting with our client to enable you to present two alternative letters to our client. As such we request that you let us have your reasons for dismissal of our client, supported by facts, in writing, on or before 4.30 p.m. on 30 September 1997.

We make the above request on two grounds: (1) under the general principles of Common Law and (2) under The Personal Data (privacy) Ordinance.”

On 30 September 1997, the EOC wrote back stating that on the evening of 25 September, Ms Sit was informed that her services were no longer

required and her contract of employment would be terminated with immediate effect. The option for mutual resolution of her contract was offered as a gesture of goodwill and in consideration of her future career development. It further stated that –

“ Under the law, the Commission is not obliged to provide reasons for termination of your client’s employment contract.

Furthermore, under the law, the Commission is not required to provide your client with access to any information unless her request complies with the provisions of the Personal Data (Privacy) Ordinance. It does not.”

On 9 October 1997, Nasir wrote stating, among other things, that there had been no notices given to Ms Sit in relation to lateness, incompetence or any valid complaint in relation to unsatisfactory performance from 10 March 1997 (when Ms Sit’s contract was converted to agreement terms) until 24 September 1997. The letter stated that –

“... However, in the letter of termination the Chairperson mentioned that reasons were given during the discussion on 25 September 1997. Could you please now specify those reasons.”

“2. We have made a valid request under section 18(1) of the Ordinance. Compliance with that request is mandatory under section 19 unless exempted under section 20. The Commission is not exempt. Please specify how our request fails to comply with the Ordinance. Before we proceed with this matter please confirm that you refuse to comply with our request.”

On 30 October 1997, Nasir further wrote that Ms Sit had intended to apply for leave to judicially review the EOC’s decision to unilaterally

terminate her employment and the letter gave the basis of that application. The letter further demanded that the EOC should withdraw or suspend the termination with immediate effect.

On 3 November 1997, the EOC wrote to Nasir, referring to the data access request under section 18(1) of the Personal Data (Privacy) Ordinance (“the Ordinance”) and supplied two minutes, namely the minutes of the special meeting held on 24 September 1997 and the draft minutes of the EOC held on 25 September 1997. The letter stated that the EOC had lawfully terminated Ms Sit’s employment and considered the matter to be closed.

On 12 November 1997, Messrs Robin Bridge & John Liu (“Bridge & Liu”), a new firm of solicitors instructed by Ms Sit, wrote to the EOC. The letter referred to the minutes of 24 September 1997 and stated that –

“... The fact that the minutes did not condescend to any particulars vis-à-vis these serious allegations which eventually led to our client’s unlawful termination of employment must mean that details and particulars of such allegations must have been reduced into writing and distributed to the members of the A & FC. We hereby demand that you immediately disclose to us a copy of the document recording such details and particulars including but not limited to a copy of the report allegedly delivered by Dr. Cheung to the members.”

The letter also asked for a copy of the recommendation by the Administration and Finance Committee made to the EOC at the Ninth Meeting of 25 September 1997.

On 14 November 1997, the EOC wrote to Bridge & Liu stating that only an oral report was made by the Chairperson and that the recommendation by the Administration and Finance Committee was an oral summary of what was contained in the minutes. There was no recommendation in writing made to the EOC.

On 25 November 1997, Bridge & Liu wrote to the EOC stating that –

“ We find it difficult to accept that there can be no documentation alleging deficiencies in our client which ultimately led to her dismissal. Afterall, we are talking about the dismissal of a director of the EOC, and not a junior staff member. If a written record does not exist, we demand that the secretary to the Committee do forthwith prepare, and disclose to us, a detailed record of what was allegedly said by Dr. Fanny Cheung in her report to the members of A & FC at the Special Meeting on 24th September, 1997.

Even if the report made by Dr. Fanny Cheung was only verbal, which we are unable to accept, she presumably referred to specific files or incidents and/or senior staff's appraisal or memoranda concerning our client's work performance prepared with/without our client's knowledge and which directly or indirectly resulted in the purported dismissal. These documents must be disclosed. We fail to see how the disclosure of the minutes of the Special Meeting of AFC held on 24 September 1997 which contains no more than bare and generic allegations can cure a blatant breach of natural justice.”

The two letters of Bridge & Liu repeated the demands made by Nasir that the EOC should rescind its decision on the termination of Ms Sit's contract.

On 27 November 1997, the EOC wrote to Bridge & Liu stating that –

“ I refer to your letter dated 25 November 1997 and repeat that an oral report was made by the Chairperson to the members of the Administration and Finance Committee.

Miss Sit's employment was lawfully terminated under the terms of her contract.

It is a matter for you whether you think judicial review proceedings are available in the circumstances. As far as the Commission is concerned, this matter is closed.”

On 20 December 1997, Bridge & Liu also wrote to Mr Lee referring, among other things, to the history of the matter and the fact that Ms Sit intended to apply for judicial review to quash the decision to terminate her employment with the EOC. The letter asked Mr Lee :

“to withdraw or suspend the effect of the decision with immediate effect and to provide copies of documents pertaining to the five areas of alleged ‘deficiencies’ above mentioned.”

On 23 December 1997, Mr Lee replied stating that he had forwarded the letter to the Chairperson of the EOC and since the matter concerned the Commission in its official capacity and not members personally, he suggested Bridge & Liu should write to the Commission's office.

On 9 February 1998, Ms Sit wrote personally to Mr Charles Lee, setting out the details of her grievances and complaints and asked for these issues to be considered by the EOC in accordance with its published procedures for the investigation of grievances and complaints.

On 26 March 1998, Messrs Baker & McKenzie, solicitors for the EOC wrote to Messrs Chui & Lau, who then became the solicitors for Ms Sit, stating that the EOC had already written to Ms Sit's former lawyers advising them that the EOC had considered Ms Sit's employment was validly terminated and that the matter was therefore closed. For the same reason, the EOC did not intend to respond to Ms Sit's letter.

The complaint to the Privacy Commissioner

On 15 March 1999, Ms Sit made the complaint to the Privacy Commissioner. The complaints of Ms Sit are as follows :

1. Breach of section 19(1) and (2) of the Ordinance by Dr Cheung and the legal adviser Ms Alexandra Papadopoulos ("Ms Papadopoulos") for failing to comply with her request for personal data.
2. Breach of section 27 of the Ordinance by Dr Cheung and Mrs Ho for failing to keep a log book and record in the log book details of reasons for refusal to the data access.
3. Breach of the data protection principles by Dr Cheung and Mrs Ho.

The Privacy Commissioner carried out an investigation and concluded that the only breach by the EOC was in respect of Data Protection Principle No.5 in not having a privacy policy and practice in writing prior to 8 September 1999. However, he decided not to issue any enforcement notice in respect of this breach. Ms Sit appealed against the decision of the Privacy

Commissioner. After the hearing, Ms Sit on 20 November 2000 informed the Secretary to the Administrative Appeals Board (“the Board”) that she would not ask for a reinvestigation of her complaints by the Privacy Commissioner.

Litigation between Ms Sit and the EOC

Ms Sit had commenced judicial review proceedings against the EOC which was dismissed on the basis that the subject matter was not under the purview of public law, but rather private law. Ms Sit had also commenced an action in the District Court against the EOC for damages under the anti-discriminatory legislation. This action is still pending.

Focus of the appeal

In considering this appeal, it is necessary to focus on the following issues –

1. The Board is not concerned with disputes between Ms Sit and the EOC on whether there were grounds for the EOC to terminate Ms Sit’s contract of employment, or whether the EOC had observed its own policy and practice on termination of an employee’s contract before Ms Sit’s contract was terminated.
2. Despite the use of the words “summary dismissal” by Mr Ross, counsel for the Privacy Commissioner, in his written submission, Ms Sit was not summarily dismissed. Mr Ross stated that these were his own words only. Although her termination was of immediate effect, payment of her contractual entitlements in lieu of notice of termination had been made.

3. The Privacy Commissioner had conducted an investigation on 10 June 1999 in the office of the EOC. Files concerning Ms Sit's personal data were inspected. They included general personal file, leave record file and confidential personal file. Apart from documents which had been provided to Ms Sit in relation to her data access request, no other recorded information relating to Ms Sit's termination of employment was found.
4. The Privacy Commissioner had also enquired with the EOC as to whether there was any other files/information concerning Ms Sit's personal data including appraisal reports on her. The EOC's answer was in the negative. The EOC explained to the Privacy Commissioner that Ms Sit's employment was terminated before any appraisal report on her was due for preparation. The EOC on 21 May 1999, in response to the Privacy Commissioner's enquiry, had stated that, among other things, it had provided the two minutes to Ms Sit; there were no documents or files for the EOC to disclose; there was no record or notes made of the oral report made on 24 September 1997 to the Committee; there were no notes, internal memorandum, records, etc. in relation to the special meeting; Ms Sit was not denied the personal data which she requested and her legal advisers were informed that there was no other recorded information relating to the termination of her employment.
5. The Privacy Commissioner had also inquired with Mr Lee about the existence of documents relating to Ms Sit's termination. The answer was in the negative.

In considering this appeal, the focus must be whether the Privacy Commissioner had discharged his duty of investigation which was imposed upon him by the Ordinance following a complaint.

Conflict of interest

The first ground of appeal by Ms Sit is that a conflict of interest had occurred in the investigation by the Privacy Commissioner. The basis for the complaint is this. Following the receipt of the first letter from Nasir, Ms Papadopoulos, who was the Director (Legal) of the EOC enquired with a staff of the Privacy Commissioner whether the EOC was required to provide the information requested by Nasir. That person was either Mr Tony Lam ("Mr Lam") or another staff. Ms Papadopoulos was under the impression then that Nasir was requesting her to create a personal data of Ms Sit and supply the personal data. She was told by the staff that it was not necessary to do so and she responded accordingly. When Nasir wrote again on 9 October 1997, Ms Papadopoulos asked Mr Lam again on this issue. Following the discussion, she supplied the two minutes to Nasir. When Ms Papadopoulos discussed with Mr Lam, she did not reveal the facts of the case to him. Subsequent to the complaint by Ms Sit, the investigation was carried out by Mr Lam himself, who was the Assistant Privacy Commissioner for Personal Data. The facts also revealed that the offices of the EOC and the Privacy Commissioner were located on the same floor of a building. There were contacts between the staff of these two Commissions.

Overview

In considering the question of conflict of interest, it is necessary to take an overview of the matter. First, the data access request formed the

backbone of Ms Sit's complaint to the Privacy Commissioner. Looking at the available evidence objectively, namely, the finding of the non-existence of other documents relating to the termination of Ms Sit's employment, the result of any investigation would only point towards only one conclusion, namely, there had been no breach in relation to the compliance with the data access request.

Second, as to whether the enforcement notice should have been issued or not, it was clearly within the discretion of the Privacy Commissioner to decide whether to do so or not. The real issue is whether there were material upon which the Commissioner could decide not to issue the enforcement notice.

Ms Sit argued that if Mr Lam had given the wrong advice and later involved in the investigation, there is a danger that the decision would be manipulated to cover up the wrong advice that had been given. The logic of this argument is difficult to follow because Mr Lam actually advised the EOC to disclose the data to Ms Sit. The real issue is whether a staff of the Privacy Commissioner who had previously given advice to the EOC should actually be involved in an investigation. The Privacy Commissioner stated that Mr Lam had no recollection of the incidence of advice given to Ms Papadopoulos. Although Ms Papadopoulos had talked to Mr Lam, she did not reveal the facts of the case to him. We accept the evidence of Ms Papadopoulos on her discussion with Mr Lam. From this brief discussion, one just cannot make out

a case that Mr Lam was someone who with full knowledge of the disputes between the EOC and Ms Sit had chosen to conduct the investigations later on and was therefore bias in his approach either in substance or in appearance.

It is an extremely serious allegation that the Privacy Commissioner who conducted the investigation was bias and was involved in a conflict of interest situation. If this is substantiated, the Board should not hesitate to take the appropriate action, including an order requiring a fresh investigation despite the fact that events had occurred as long ago as 1996. However, this is not such a case. We find that Ms Sit had not made out a case on conflict of interest.

Other complaints

There is also an allegation of impropriety in the Privacy Commissioner writing to the EOC first on the result of its investigation before informing Ms Sit of the same eight days later. The explanation being given by the Privacy Commissioner is that the Privacy Commissioner usually wrote to the party that was being complained against first when the Privacy Commissioner wished to obtain certain undertakings from that party. Although this was not such a case, somehow, the same administrative steps had been taken by sending the letter to the EOC first. There is no evidence that the Privacy Commissioner's letter to Ms Sit was modified as a result of the earlier

letter to the EOC. In our view, this is not a point of substance which may assist Ms Sit.

The second complaint is that the Privacy Commissioner had shown favouritism to the EOC by granting indulgence on time. The response of the Privacy Commissioner was that both sides had been granted extension of time in complying with the request by the Privacy Commissioner. In our view, this is not a matter of substance and certainly not capable of showing that the integrity of the investigation had been compromised.

There is also allegation that Mr Eric Pun, the legal director who was acquainted with Ms Sit was present at the hearing of the appeal and assisting counsel. Mr Pun had declared his interest during the investigation and had not taken part in it. In our view, his presence at the hearing of the appeal which is an open hearing cannot be faulted. As the issue before the Board is on the decision of the Privacy Commissioner, Mr Pun's presence could have no bearing at all on the outcome of the appeal.

Ms Sit complained that the Privacy Commissioner had, despite her request, failed to provide her the EOC response dated 21 May 1999 to the Privacy Commissioner's inquiry. The Privacy Commissioner had on 6 July 1999 asked the EOC whether they would object to its response being supplied to Ms Sit. The reply from the EOC on 9 July 1999 was that the response was

provided to the Privacy Commissioner solely for the purpose of answering the allegations made by Ms Sit and it did not consent to release the information to her. The Privacy Commissioner informed Ms Sit by letter dated 16 August 1999 that the information would not be released. Section 46(1) of the Ordinance clearly imposes on the Privacy Commissioner the duty of secrecy in respect of all matters that come to his knowledge in the performance of his function and exercise of the power under the Ordinance. In our view, the Privacy Commissioner was justified in his decision.

Ms Sit also complained that the Commissioner had failed to carry out the site inspection quickly after her complaint. Ms Sit's complaint to the Privacy Commissioner was lodged one and a half year after her termination of employment. It was only on 11 May 1999 that Ms Sit had confirmed with the Privacy Commissioner on matters relating to his enquiry with her. Thereafter, on 17 May 1999, the Privacy Commissioner wrote to the EOC who responded on 21 May 1999. The site inspection was carried out on 10 June 1999. We cannot see how the Privacy Commissioner can be criticized of any delay in conducting the site investigation. How the Privacy Commissioner should carry out the investigation was clearly a matter for him.

Data access request

Personal data means any data –

- (a) relating directly or indirectly to a living individual;

- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- (c) in a form in which access to or processing of the data is practicable (section 2 of the Ordinance).

An individual may make a request for his personal data. This is provided by section 18 of the Ordinance –

- “ (1) An individual, or a relevant person on behalf of 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.”

Section 19(1) provides that a data user shall comply with a data access request not later than 40 days after receiving the request. Under section 19(2), extension of time to comply with the request can be made. Under section 20, a data user may refuse to comply with the request if, for example, the request is not in writing. Section 28 allows the data user to impose fees for complying with a data access request and a data user may refuse to comply with the request unless fee had been paid.

Ms Sit in her complaint dated 15 March 1999 stated that she had made five requests for data access.

The first request

The first request was made on the evening of 25 September 1996 when Ms Sit asked Dr Cheung for the reasons of the termination of contract. In our view, this could not be a request under section 18 of the Ordinance in the sense of the Chairperson being asked by Ms Sit whether the EOC was holding her personal data. This was simply a request for particulars of the termination. In our view, the Privacy Commissioner was correct when he concluded that the manner under which the request was made could not be regarded as a data access request.

The second request

The second request for data access was by the letter dated 12 November 1997 from Bridge & Liu which requested a copy of the report by Dr Cheung and also the recommendation by Mr Lee at the Ninth Meeting held on 25 September 1997. By that time, the EOC had already on 3 November 1997 provided Nasir with the minutes of the two meetings in response to the letter of 12 November 1997. In response to this second request, the EOC by letter dated 14 November 1997 informed Bridge & Liu that there was only an oral presentation and the recommendation was also made orally. In our view, the only conclusion that the Privacy Commissioner could have reached on the second request is that this request had been complied with by the EOC.

The third request

The third request was by the letter dated 25 November 1997. That letter seemed to make two requests : first, a detailed record of what was said by Dr Cheung on 24 September 1997; and second, documents concerning Ms Sit's work performance which directly or indirectly resulted in terminating Ms Sit's contract. Ms Papadopoulos who gave evidence at the hearing stated that her understanding of this letter at that time and also at the hearing of the appeal was that Bridge & Liu required data to be created and supplied to Ms Sit. The second part of the letter was related to the request which she considered to be a request to create new data.

Although Ms Papadopoulos' understanding can be supported by the words of the letter which stated that "if a written record does not exist, we demand that the Secretary to the Committee do forthwith prepare, and disclose to us a detailed record ...", the second part of the letter do suggest a demand for existing documents. It, however, is not necessary for us to dwell on this matter because the real issue is whether the third request had been met or not. Bearing in mind that the EOC had already disclosed the two minutes of the meetings and informed Bridge & Liu that the report by Dr Cheung was oral, its short response on 27 November 1997 by repeating that an oral report was made was not a refusal to comply with the request. There was no more document to be disclosed and the letter restated the position. Although the EOC did not specifically inform Bridge & Liu that the documents that they required to be

disclosed in fact were not in existence, the answer given on 27 November 1997 was a sufficient compliance in the light of the circumstances of the case.

Construction of section 18

There is argument whether the second part of the letter dated 25 November 1997 amounted to a data request because it asked for the disclosure of the documents without first asking the EOC whether such documents were held by the EOC. Section 18(3) of the Ordinance provides that the data access request under section 18(1)(a) (i.e. a request to be informed whether the data user holds personal data of the individual) may, in the absence of evidence to the contrary, be treated as being a request under both paragraphs of section 18(1). The intent of this subsection clearly is that if the individual merely asked whether his personal data is held by the data user, in the absence of contrary evidence, this is to be construed as a request for such data to be supplied by the data user as well. There is, however, no provision relating to the reversed situation where the individual asks the data user to supply the personal data without first asking the data user to state whether such data exists or not.

In our view, even if the individual did not make such an express request, to give any meaning to section 18(1), the request for document by the individual must be construed as including a request for information on whether the data user holds the personal data or not. This being the case, the data user

must comply with such a request pursuant to section 19. Our construction of these two sections, however, does not mean that the EOC had not complied with the request in the light of what we have said earlier.

The fourth and fifth requests

The fourth and the fifth requests were made by the letters dated 20 December 1997 and 9 February 1998 written to Mr Lee. The EOC did not consider the letter dated 20 December 1997 to be a request made under section 18, but rather a matter arising from the judicial review proceedings which had been initiated by Ms Sit. As to the letter dated 9 February 1998, the EOC did not consider this to be a section 18 request but a request by Ms Sit for her complaints and grievances to be considered by the EOC in accordance with its policy for dealing with such matters.

The Privacy Commissioner was of the view that these two letters were related to Ms Sit's previous request and could not be considered as new data access request. The Privacy Commissioner had, on 11 June 1999, enquired with Mr Lee on matters relating to the Dr Cheung's report and the recommendation made by him for the termination of Ms Sit's contract. He specifically asked Mr Lee :

“(3) Please confirm whether there were any files, notes, notices, internal memoranda, records etc. concerning Ms. Sit's employment which directly or indirectly resulted in the termination of her contract has been referred to your goodself at all the material times.”

Mr Lee's response by letter dated 23 June 1999 stated, among other things, that,

“ I have reviewed the letter to the EOC dated 17 May 1999 and the EOC's response given by its Chairperson Dr Fanny Mui-ching Cheung of 21 May. I confirm that as far as I am aware the response given on behalf of the EOC is complete and accurate; I do not have in my possession or control any further data, reports or other documents relating to Ms Sit, and the report made in the meeting was oral and not to my knowledge committed to writing. I have no recollection of any document of the nature of those to which you refer to in paragraph (3) of your questions being produced at the said Special Meeting.”

The letter of 20 December 1997 specifically stated that it was written to Mr Lee in his capacity as the Convenor of the EOC “pursuant to the ‘Procedures for Handling Complaints and Grievances from EOC Staff’ endorsed by the Administration and Finance Committee’ under Section 64(2)(a) of the Sex Discrimination Ordinance”. Mr Lee was not the subject matter of a complaint by Ms Sit. Although Mr Lee had referred the letter to the Chairperson of the EOC, he did inform Bridge & Liu that as the matter concerned the Commission in its official capacity and not members personally, he suggested that they should write to the EOC office. No further letter was written by Bridge and Liu to the EOC on this topic. In our view, the letter of 20 December 1997 cannot be treated as a data access request to the EOC.

Although in her complaint to the Privacy Commissioner dated 15 March 1999, Ms Sit stated that her complaint was directed against the individual members of the EOC, it is clear that it was the decisions of the EOC as an entity that were the subject matter of her complaint. While letters may

be addressed to the attention of individual members of the EOC and these persons had signed their names on the letters from EOC, clearly they were responding on behalf of the EOC. Furthermore, the data user in this case must be the EOC and not the individual members of the EOC.

The letter of 9 February 1998 clearly cannot be considered as a data access request in view of its nature.

In our view, the Privacy Commissioner was correct in finding that there was no contravention of section 19(1) of the Ordinance.

Log book

Section 27(1) of the Ordinance requires a data user to keep and maintain a log book for the purpose of that part of the Ordinance. Section 27(2) provides that a data user shall enter into the log book where pursuant to section 20, the data user refuses to comply with a data access request, the particulars of the reasons for the refusal.

In our view, it is clear that the provision of section 27 is to keep a log book for the purpose of recording refusals to data access requests. We agree with the Privacy Commissioner's decision that there was no breach of section 27 though not entirely on the same reasons given by the Privacy Commissioner.

1. The first request was not a data access request, hence there was no question of any refusal which required to be recorded.
2. The second request had been complied with by the EOC's letter of 14 November 1997. It had responded and informed Bridge & Liu the position on the oral report and the oral recommendation. Again the question of recording the refusal did not arise.
3. As to the third request, the EOC had complied with the request by informing Bridge & Liu again that only an oral report was made. It was not a refusal which needed to be recorded
4. The fourth request was not a data access request to the EOC.
5. The fifth request was not a data access request at all.

Hence there was no breach of section 27 by failing to enter entries of refusal in the log book.

Breach of data protection principles

Section 4 of the Ordinance provides that a data user shall not contravene the six data protection principles listed in the Ordinance. The first deals with the purpose and manner of collection of personal data. The second is on the accuracy and duration of retention of personal data. The third one is on the use of personal data. The fourth is on the security of the personal data. The fifth is on the information to be available on the data user's policies and

practice in relation to person data. The sixth is in relation to access to personal data.

Ms Sit complained that all six principles had been breached by the EOC. The Privacy Commissioner in his letter of 30 March 2000 accepted that Principle No.5 had been breached. It is not necessary for us to go through the decision of the Privacy Commissioner on each of the other principles. We are satisfied that the Privacy Commissioner's decision on these matters was correct. There clearly was no breach on the collection, use and security of the personal data held by the EOC. The data access request had been specifically covered by the earlier part of this decision.

Principle No.5

The real issue is on the breach of Principle No.5 and its consequence. The Ordinance was implemented in 1996. The written policy on matters relating to personal data was only completed by the EOC on 8 September 1999, although it stated that its policy on personal data was implemented 12 months earlier. Ms Papadopoulos explained that the reason for not having the policy implemented earlier was because the EOC wished to consider the policy both in terms of its internal organization, namely in respect of the personal data of its staff, and also externally in relation to those of the public who lodged complaints to the EOC. The EOC itself was a new organization and at the initial stages, efforts were put in setting up the

organization so that it could carry out its public function as soon as possible. The Ordinance itself was a new one which need to be understood. When it came to the actual writing of the policy, she was taken ill and was hospitalized and was unable to carry out the work quickly.

The Privacy Commissioner found that there was a breach of Principal No.5 but decided not to issue the enforcement notice because the EOC had then in place a written policy and repeated contravention is unlikely. The Privacy Commissioner is given the discretion to decide whether to issue the enforcement notice even when there is a contravention of the Ordinance. This is clear from the wording of section 50(1) which states that the Commissioner **may** serve the enforcement notice. In our view, the reasons given by the Privacy Commissioner in not issuing the enforcement notice are clearly proper ones.

Under section 50(8), before the completion of an investigation, the Commissioner may serve the enforcement notice if by reason of special circumstances, the enforcement notice should be served as a matter of urgency. Ms Sit had outlined the various special circumstances in her submission as to why the notice should be issued on the complaints.

The Privacy Commissioner received the complaint on 17 March 1999, thereafter he carried out the investigation. On 6 July 1999, the Privacy

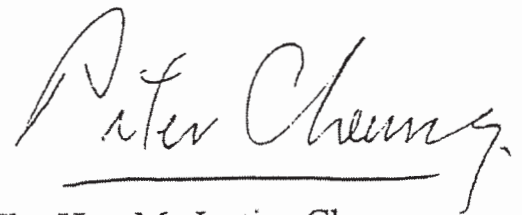
Commissioner requested the EOC to provide the written policy. The response on 9 July 1999 was that a detailed response in this matter would be provided in due course. Considering the investigation that the Privacy Commissioner had been conducting at the meantime, there really is no basis for us to come to a view that the Privacy Commissioner should have issued an enforcement notice at that stage. Again, the discretion lies with the Privacy Commissioner.

Conclusion

Ms Sit had raised numerous points in her submissions which we had considered but find it unnecessary to deal with each of them in this decision as we have attempted to focus on the real disputes that are germane to this appeal. Ms Sit's grievance is that before the expiration of her three year contract, her employment was terminated after one year. Although an employer was entitled to terminate the agreement by payment in lieu of notice, obviously, Ms Sit is aggrieved that her appointment should be terminated in the first place. However, the Privacy Commissioner was not concerned with the contractual disputes between Ms Sit and the EOC. His task was to see whether the terms of the Ordinance had been breached by the EOC. He had carried out the investigation to a standard that was expected of him by the Ordinance. The gist of Ms Sit's complaint is that there must be in existence some documents relating to her termination of employment. The assessment of the job performance of Ms Sit was a task for the EOC and clearly such assessment could be made by various means available to the EOC. While, as a matter of

natural reaction, one would expect some form of document dealing with such reasons that comes within the definition of a personal data, there really is no contrary evidence which may cast doubt on the EOC's statement that there was no such documents. To require the Privacy Commissioner to carry out another investigation in the light of such an assertion would have produced the same result again. In any event Ms Sit does not wish to have a reinvestigation. Based on the existing evidence the decision of the Privacy Commissioner cannot be faulted.

We agree with the decision of the Privacy Commissioner and would dismiss this appeal.

A handwritten signature in black ink, appearing to read "Peter Cheung", with a horizontal line underneath it.

The Hon Mr Justice Cheung
Chairman,
Administrative Appeals Board