

## ADMINISTRATIVE APPEALS BOARD

### ADMINISTRATIVE APPEAL NO. 15/2012

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BETWEEN

LEUNG TSAN CHUNG

Appellant

and

PRIVACY COMMISSIONER  
FOR PERSONAL DATA

Respondent

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Coram: Administrative Appeals Board

Date of Hearing: 7 November 2012

Date of handing down Written Decision with Reasons: 31 January 2013

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### DECISION

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#### Background

1. The Appellant lodged a complaint against his former employer, the Civil Aviation Department (“CAD”). As a result, the Respondent conducted an investigation. On completion of the investigation, the Respondent found that CAD had not contravened any of the requirements of **Personal Data (Privacy) Ordinance** (the “**the Ordinance**”) and decided not to issue an Enforcement Notice. The Appellant is now appealing against this decision.

## **Complaint against CAD**

2. The Appellant is an electronics engineer formerly employed by CAD. During his years of service, he had to attend performance appraisal interviews annually. If he made the request at the interview, he would be supplied with a copy free of charge. This has been the practice of CAD. In this way the Appellant obtained several appraisal reports. After his retirement, the Appellant lost some of these reports. On 10 May 2011, he submitted a Data Access Request Form ("the Request") pursuant to Section 18 of **the Ordinance** asking for copies of these lost reports. On 24 May 2011, in response to the Request, CAD provided the appellant with copies of these reports but the names, post titles and signatures of those appraising officers, reviewing officers and countersigning officers had been obliterated. The Appellant did not think that these redacted reports were of any use to him and he sent them back to CAD, claiming for refund of charges and incidental costs. CAD refused his claim.

3. As unedited copies of these reports were provided to him during his service with CAD, the Appellant does not understand why he should not be provided again with unedited copies of the reports this time. According to him, he was in urgent need of these unedited reports for seeking new jobs. For all these reasons he lodged a complaint to the Respondent.

## **Results of Investigation and Decision of the Respondent**

4. The Respondent mediated between the parties but to no avail. Despite that the Appellant was at one time in possession of the unedited copies, CAD maintained its position. CAD was merely following guidelines issued by the Civil Service Bureau ("CSB") and was of the view that the wording of the guidelines left no room for departmental discretion.

5. It is not disputed that the content of the redacted reports are the same as those lost copies except that the names, etc. of the officers are edited out. The Respondent found that those names, post titles, and signatures were not the personal particulars of the Appellant but were the personal particulars of the officers. The Respondent cited in support, the High Court case, *WU KIT PING V ADMINISTRATIVE APPEALS BOARD* (HCAL 60/2007). For this reason, the Respondent formed the view that CAD had fully complied with the Request and there had been no contravention of any requirements of **the Ordinance**. In the premises, the Respondent decided not to issue any Enforcement Notice.

### **Ground of Appeal**

6. The Appellant argued that the Respondent wrongly applied the case of *WU KIT PING*. In that case, the Applicant was not satisfied with the redaction of certain passages in her medical reports and appealed to the High Court. The Judge ordered that passages containing opinions relating to the Applicant be exposed. The Judge so ordered for the reason that those opinions related to the Applicant and therefore were her personal particulars. To that extent, the Applicant succeeded in her Appeal. The other passages naming and containing information explicitly identifying the authors of opinions remain redacted. The Appellant submitted that the case should be distinguished on three points. Firstly the Applicant of the case never had the documents she wanted access to while he was once given and kept unedited copies of the appraisal reports. Secondly, the Applicant did not know the identity of the persons she wanted to complain against. Therefore the privacy of these persons required protection. It was different in his case as he knew very well who those appraising, reviewing, and countersigning officers were. There was no need for the protection of their privacy. Thirdly the appraising reports were important as he needed them for finding jobs. The redaction of particulars in the case of *WU KIT PING* was not important at all and it did not affect the investigation

the Applicant was undertaking. Fourthly, he and all the officers signed the reports to agree on the content. That being the case, it is illegal to have the reports amended.

## **Decision**

7. In addition to the points he made in his Notice of Appeal, the Appellant raised a number of complaints about the investigation and its result. CSB guidelines specified two different ways of disclosing appraisal reports to the appraisees, one while the appraisees were still in service and the other when they were not. The Appellant was not satisfied with the claim by the Respondent that he had no jurisdiction to enquire into the reasonableness or otherwise of these guidelines. The reason given by him is that the Respondent has the powers to carry out inspections of personal data systems, including those of the government. One should not confuse the power of investigation with the jurisdiction of the Respondent. Once the Respondent decides to initiate a formal investigation, as he did in the case of the Appellant's complaint, he can exercise those powers. Those powers are only intended to facilitate the efficient investigation into the complaints in respect of matters and complaints within the jurisdiction of the Respondent. It would be an abuse of these powers if they were used otherwise.

8. In the instant case, the complaint relates only to the alleged failure to comply with the Request. It is unfair and inaccurate to allege that the Respondent failed to examine the reasonableness or otherwise of the CSB guidelines. He has so examined the guidelines but of course it was limited to the issue before him. Besides, the Respondent did not form the view that CSB guidelines exonerated CAD. CSB guidelines cannot override the statutory requirement for CAD to comply with the Request. The Respondent only found that despite the redaction of particulars of those officers, CAD had complied with the Request. The Appellant should know that with or without CSB guidelines, the Respondent's finding of no contravention by CAD of **the Ordinance** remains the same.

9. It is not the function of the Respondent to review and examine the reasonableness or otherwise of the guidelines in the light of good relationship of CAD with current or former employees, or freedom of information. The Respondent's function in the instant case is restricted to the entitlement to data access of a data subject. The Respondent remarked in para. 31 of the Result of Investigation (p. 174 of the Appeal Bundle) that: "even if providing unedited copies of the appraisal reports would not be a contravention of **the Ordinance** on the part of CAD, CAD is not obligated to do so under **the Ordinance**. Appellant alleged that it was self-contradictory. There is no contradiction in the remarks. The relevant issue is whether the redaction would have constituted a failure and not that by providing the redacted material would or would not have contravened the requirements of **the Ordinance**. The Respondent used the words "not obligated to do so", because he was clearly of the view that the deleted words are not the personal particulars of the Appellant and he was not entitled to have access to it.

10. The facts of the instant case of course are different from that of *WU KIT PING*, but it is the legal principles enunciated in the judgment of the case that the Respondent relied on. The names, post-titles, signatures etc. of the officers are their personal particulars and not the personal particulars of the Appellant. They are no different in nature from those particulars held to be personal particulars of the authors of opinions in *WU KIT PING*. The Appellant is entitled to access to his own personal particulars but not those of others. In this respect, the present case cannot be distinguished from *WU KIT PING*.

11. In *WU KIT PING*, the Applicant succeeded partially to have certain redacted passages in the reports exposed. One thing should be noted. The passages were exposed despite that the identities of the authors would be disclosed indirectly by them. Though those passages did not explicitly identify the individuals, by inference or deduction from the knowledge of the Applicant the identities of the persons involved could be ascertained from these redacted passages.

However, the Judge made it clear that this fact was no excuse for redacting the passages<sup>1</sup> and he ordered their exposure well knowing the Applicant would learn from these passages by deduction or inference the identities of those involved. The Judge so ordered because the passages did not explicitly name or identify the persons. Incidentally, contrary to the understanding of the Appellant, the Judge did not offer protection to the authors of those passages, persons according to the Appellant required protection.

12. In *WU KIT PING*, it was held that a data subject was only entitled to access his personal particulars and not to every document in which a reference was made of him. The Appellant submitted it was not legal or lawful to amend these reports to which he and the other officers had signed to acknowledge agreement on their content. He did not elaborate on this point. This Board fails to see any infringement of the law in redacting the particulars of signatories to the appraisal reports. The issue before the Respondent and the Board is simply whether by providing such redacted copies CAD has complied with his Request according to the provisions of **the Ordinance**.

13. As aforementioned, the Appellant is only entitled to access his own personal particulars. The redacted matters are personal particulars of those officers. Section 20 of **the Ordinance**, envisages a common situation when complying the request, personal particulars of others may have to be disclosed. Subsection (1)(b) has the effect of cautioning the data user that prior consent must be obtained from those others. It does not follow that it is incumbent upon the data user to obtain the requisite consent or in the case it has already been obtained, obliged to supply those particulars in order to comply with the data access request. The refusal to supply the personal particulars is subject to the limitation set out in subsection (2)(b). If ways can be found to avoid disclosing the identity of the other individual such as redacting names or other information which explicitly identifies the individual, the

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<sup>1</sup> para 42 of the judgment

personal particulars must be supplied. All these have been discussed and made clear in *WU KIT PING*. It was pointed out in that case, the purpose was to allow the data subject to examine his own data without disclosing the individual who supplied the information or expressed an opinion.

14. In the instant case, the content of appraisal report must have contained information and opinions supplied by those officers. They are the personal particulars of the officers as well as the personal particulars of the Appellant as the information and opinions related to him. In this respect there is no difference between the present case and *WU KIT PING*. These information and opinions were not redacted and CAD had no ground to suppress it as ways could be found to withhold their identities. However the redacted particulars of them can be legitimately redacted. Firstly they are not personal particulars of the Appellant. The Appellant has no right of access to them under **the Ordinance**. Secondly section 20(2)(b) applies as those are names and information explicitly identifies the officers. We do not quite understand why the Appellant claimed that these reports were of no use. If the Appellant cares to explain the full picture to his future and potential employers, the redacted appraisal reports can still have their proper use. It might also be better if the potential employer can directly obtain references from the CAD or CSB. In any event the usefulness or otherwise of these reports is irrelevant to the issue whether CAD has complied with the Request as none of his personal particulars had been withheld.

15. The Appellant criticised CAD for adopting the data access request procedure for applying a replacement copies of appraisal report. He said it was an abuse of **the Ordinance**. This is a self-defeating argument. The Appellant is relying on **the Ordinance** to obtain copies of the report. **The Ordinance** does not prohibit other means of obtaining reports. If there is an abuse, it might have an abuse of good employer-employee relationship. There is nothing the Respondent and this Board can do to compel CAD to provide the reports applying **the Ordinance**.

16. For the reasons given above, this Board agrees with the results of the investigation and upholds the Respondent's decision not to issue an enforcement notice. With the same sympathy the Respondent has long expressed to the Appellant, this Board dismisses the appeal.

(signed)

(Yung Yiu-wing)

Deputy Chairman

Administrative Appeals Board