

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO.1 OF 2007

BETWEEN

何明遠

Appellant

and

THE PRIVACY COMMISSIONER FOR
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 23 April 2007 and 16 July 2007

Date of Written Decision with Reasons: 24 October 2007

DECISION

Background facts

1. On 31 March 2006, the Appellant was arrested by the Hong Kong Police Force ("Police") for the offence of causing wasteful employment of the police. After the arrest, the Police obtained certain personal data from the Appellant, including his name, telephone number, address and identity card number. In addition, the Police took a copy of his identity card, a number of photographs of the Appellant and his finger prints. Police bail was granted to the Appellant.
2. Subsequently, the Police decided not to prosecute the Appellant for the said offence. On or about 15 May 2006, the Police returned to the Appellant one

photograph as well as a form containing the finger prints of the Appellant taken by the Police as aforesaid. According to the Appellant, the Police also destroyed, in his presence, 3 pieces of paper apparently containing some personal information of the Appellant. The Appellant does not know, however, the precise nature or contents of the 3 pieces of paper.

3. The Appellant says that at the time when the Police returned the photograph and the finger print form to him, the Police told him that:-

- (1) they did not need his finger prints because they already had his finger prints, in view of the fact that the Appellant had a previous criminal conviction;
- (2) however, his other personal data, including some photographs and the copy of his identity card, could not be returned to him.

4. On 16 May 2006, the Appellant made a written complaint to the Respondent against the Police. His complaints were:-

- (1) the Police should destroy all personal information or data that they had collected from him in the circumstances of this case;
- (2) the Police, under the pretext of arresting him, obtained his personal information (including his finger prints) in order to carry out other investigation;
- (3) there were many "loopholes" in the procedures of the Police in handling cases similar to his case, and he wished to know the complete police procedures;
- (4) he had no criminal conviction record (in the sense that the sentencing judge did not pronounce that there should be a record kept of his conviction), but the Police used his personal data to search their records and found that he had a criminal conviction

back in 1991. Moreover, his criminal conviction record should have been destroyed after 10 years.

5. At this juncture, it should be noted that in respect of the complaint in (2) above, the Appellant has no evidence whatsoever to substantiate his allegation against the Police. In any event, it would fall outside the scope of the Respondent's functions to investigate into an allegation of this nature against the Police.

6. By letter dated 2 January 2007, the Respondent informed the Appellant that, having considered all the relevant circumstances of his case, the Respondent had decided not to carry out or continue with the investigation of the Appellant's complaint, in accordance with s.39(2)(d) of the Personal Data (Privacy) Ordinance, Cap.486 ("**Ordinance**"), which provides as follows –

"The Commissioner may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case – (d) any investigation or further investigation is for any other reason unnecessary."

7. By a Notice of Appeal dated 9 January 2007, the Appellant appealed to this Board the said decision of the Respondent. In the Notice of Appeal, the Appellant maintained, inter alia, the following major grounds of complaint against the Police, namely, that:-

- (1) the Police should not retain any part of his personal data that they had collected from him in connection with his arrest in March 2006;
- (2) the police had no valid basis to retain part of his personal data for a further period of 12 months, but should have destroyed all such data as soon as the Police knew that they had arrested the wrong

- person (which the Appellant, at the hearing of the appeal, clarified to mean that as soon as the Police decided not to prosecute him);
- (3) the Police should not have disclosed to the Respondent the facts that (i) the Appellant had been arrested for the offence of causing wasteful employment of the police, and (ii) he had a previous criminal conviction;
 - (4) the Police wrongfully retained some photographs that they had taken of him in connection with his arrest in March 2006;
 - (5) lastly, the Police should return to him all the personal data that they collected from him.

8. At the hearing of the appeal on 23 April 2007, the Appellant told the Board that his main complaint was in relation to the photographs still retained by the Police. He considered that those photographs should either be destroyed or returned to him, in view of the fact that the Police had decided not to bring any prosecution against him.

The Police's response to the Appellant's complaint

9. The Police did not appear at the hearing of the appeal on 23 April 2007. However, in a letter dated 22 August 2006 in answer to the Respondent's inquiries by letter of 2 August 2006, the Police stated, inter alia, as follows:-

- (1) the retention of the Appellant's personal data, including the copy of his identity card, his telephone number and address, was for possible use in future investigation of offences or internal investigation;
- (2) the Police would retain the copy of the Appellant's identity card, and his telephone number and address in the Police file for a period of 12 months, after which they would be destroyed;

- (3) the Police would retain the Appellant's photographs and finger prints in accordance with the provisions of s.59 of the Police Force Ordinance.

The Respondent's reasons for his decision

10. Broadly stated, the Respondent's reasons for his decision, as set out in an annex to his letter of 2nd January 2007 to the Appellant, were as follows:-

- (1) the retention of the Appellant's photographs by the Police was justified by virtue of s.59(3) of the Police Force Ordinance;
- (2) it was not unlawful of the Police to search its records to find out about the Appellant's previous criminal conviction in 1991.

11. At the hearing of the appeal on 23 April 2007, it was also submitted on behalf of the Respondent that the retention by the Police of the Appellant's data, including the copy of the Appellant's identity card, and his telephone number and address in the Police file, for a period of 12 months was not unreasonable, having regard to (i) the duration of retention, (ii) the nature of the data being retained, and (iii) the purpose for which the data were collected and retained, namely, for prevention and/or detection of crimes.

Discussion

12. Retention of photographs:-

- (1) Section 59 of the Police Force Ordinance provides as follows –

“(1) Where a person has been arrested under the powers conferred by this or any other law, any police officer may

take, or cause to be taken under the supervision of a police officer –

- (a) photographs, finger-prints, palm-prints and the weight and height measurements of that person; and
- (b) [not material].

(2) The identifying particulars of a person taken under subsection (1) may be retained by the Commissioner, except that if –

- (a) a decision is taken not to charge the person with any offence; or
- (b) the person is charged with an offence but discharged by a court before conviction or acquitted at his trial or on appeal,

the identifying particulars, together with any negatives or copies thereof, shall as soon as reasonably practicable be destroyed or, if the person prefers, delivered to that person.

(3) Notwithstanding subsection (2), the Commissioner may retain the identifying particulars of a person who -

- (a) has been previously convicted of any offence; or
- (b) is the subject of a removal order under the Immigration Ordinance (Cap 115).

(4) [Not material].

(5) [Not material].

(6) In this section, "identifying particulars" in relation to a person means photographs, finger-prints, palm-prints, sole-prints, toe-prints and the weight and height measurements of that person".

(2) The Appellant accepts that he was convicted of the offence of theft or burglary in 1991 upon his own guilty plea. He says that he was only 18 years of age at that time, and he was in fact innocent of the offence but had been improperly induced by some police officer(s) to plead guilty to the offence.

(3) It is not for this Board to decide whether the Appellant was, or was not, innocent of the offence for which he was convicted in 1991. The fact is that he has previously been convicted of an offence within the meaning of s.59(3)(a) of the Police Force Ordinance.

(4) That being the position, the Commissioner of Police is entitled, under that subsection, to retain the identifying particulars of the Appellant, including his photographs.

(5) Accordingly, the Appellant's complaint regarding the Police's retention of his photographs cannot be substantiated, and the Respondent cannot be faulted for not carrying out or continuing an investigation in respect of this ground complaint.

13. Use of the Appellant's data obtained in 2006 to search for his criminal conviction record in 1991:-

(1) The Appellant submits that his conviction in 1991 falls within s.2(1) of the Rehabilitation of Offenders Ordinance, and hence he is

entitled to the protection of that Ordinance in respect of his said conviction.

- (2) For the purpose of the present appeal, the Board will assume that the Appellant's submission in (1) is correct.
- (3) However, there is nothing in the Rehabilitation of Offenders Ordinance which prohibits the Police from searching its records to determine whether an arrested person has any previous criminal conviction in Hong Kong.
- (4) There is also nothing in the Ordinance which prohibits the Police from using the Appellant's data obtained in connection with his arrest in 2006 to search for his criminal conviction record in 1991.
- (5) On the contrary, s.58(2)(a) of the Ordinance provides that personal data are exempt from the provisions of Data Protection Principle 3 (relating to the use of personal data) in any case in which the use of the data is for any of the purposes referred to in Section 58(1) (and whether or not the data are held for any of those purposes). The purposes referred to in that subsection includes:-
 - (a) the prevention or detection of crime; and
 - (b) the apprehension, prosecution or detention of offenders.
- (6) This Board considers that the Police's use of the Appellant's data obtained in connection with his arrest in 2006 to search for his criminal conviction record in 1991 is protected by the exemption under s.58(2) of the Ordinance.
- (7) Accordingly, the Respondent was entitled not to carry out or continue an investigation in respect of this ground complaint.

14. Retention of the Appellant's data, including the copy of his identity card, his telephone number and address for a period of 12 months:-

- (1) As earlier mentioned, the Respondent took the view that the retention by the Police of the Appellant's personal data, including a

copy of the Appellant's identity card, and his telephone number and address in the Police file, for a period of 12 months was not unreasonable, having regard to (i) the duration of retention, (ii) the nature of the data being retained, and (iii) the purpose for which the data were collected and retained, namely, for prevention and/or detection of crimes.

- (2) However, the Respondent had not, apparently, asked the Police to identify any particular regulations or guidelines which supported the Police's action in retaining the said data for a further period of 12 months.
- (3) This Board considered that it would assist its deliberation of the Appellant's appeal to receive evidence or information from the Police on the following issues:-
 - (a) the regulations or guidelines (if any) in accordance with which the Police decided to retain the copy of the Appellant's identity card and information relating to his telephone number and address in the Police file for a further period of 12 months after the Police had decided not to prosecute the Appellant for the offence for which he was arrested on 31 March 2006;
 - (b) the purpose of retaining the copy of the Appellant's identity card and information relating to his telephone number and address in the Police file for a further period of 12 months, having regard to the Police's decision not to prosecute the Appellant for the offence for which he was arrested on 31 March 2006;
 - (c) whether the copy of the Appellant's identity card and information relating to his telephone number and address have now been destroyed or erased or removed from the Police file.

- (4) Hence, the Board decided to convene a further hearing of the appeal to consider the above issues. The Police was invited to provide evidence and information on the above issues in writing prior to the adjourned hearing, which it did on 9 May 2007. The Appellant was also asked to comment on the Police's response and he did so in writing on 20 May 2007.
- (5) At the adjourned hearing on 16 July 2007, both the Respondent and the Police appeared by their respective representatives. However, the Appellant was absent, although due notice of the adjourned hearing had been given to the Appellant and he had been informed, prior to the adjourned hearing, that the Board might decide to continue with the adjourned hearing notwithstanding his absence.
- (6) In the Police's letter dated 9 May 2007 and at the adjourned hearing, the following evidence or information was provided by the Police:-
 - (a) The retention of the Appellant's data in the present case for a further period of 12 months from the date that the case was classified as being one where all "pursuable lines of inquiries have been exhausted" was in accordance with paragraph 1(e) and 3(a) of Chapter 21-32 of the Force Procedure Manual.
 - (b) The period of retention of the data, i.e. 12 months, took into account the following factors: (i) possibility of the need to retrieve information relating to the case due to discovery of new evidence or as a result of complaints which might be lodged by the arrested person, (ii) the capacity of the Police to keep records of its investigation, and (iii) the protection of personal data of the arrested person.

- (c) The Appellant's said personal data would have been destroyed in May 2007 but for the current appeal, which is still pending determination.
- (7) At the adjourned hearing, the Respondent also made the point that it had no power under the Ordinance to order the Police to return the Appellant's said data to him.
- (8) This Board considers that the Police's aforesaid explanation for the retention of the Appellant's said personal data is reasonable and consistent with Paragraph 2(2) of the Data Protection Principle, which states as follows: "Personal data shall not be kept longer than is necessary for the fulfilment of the purpose (including any directly related purpose) for which the data are or are to be used".
- (9) In passing, this Board wishes to take the opportunity to mention that it considers that the Respondent ought to have pursue further inquiries with the Police in respect of the matters mentioned in sub-paragraph (3) above as part of the investigation into the Appellant's complaint. Nevertheless, since the relevant answers have now been provided by the Police in a manner which this Board considers to be satisfactory, no point can usefully be served by making any order which would require the Respondent to carry out further investigation on those issues.

15. Disclosure of the Appellant's data to the Respondent

- (1) In his Notice of Appeal, the Appellant complained that the Police should not have disclosed his personal data, namely (a) his arrest in March 2006 for the offence of causing wasteful employment of the police, and (b) his criminal conviction in 1991, to the Respondent. The relevant disclosure was made by the Police in answer to the Respondent's inquiries, which were carried out in the

course of the Respondent's investigation of the Appellant's complaint against the Police.

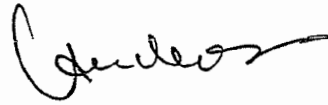
- (2) This ground of complaint was not expressly raised by the Appellant at the hearing of the appeal.
- (3) This Board is not satisfied that the Appellant is entitled to pursue this ground of complaint in the present appeal, because the disclosure obviously did not form part of the Appellant's original complaint to the Respondent, it having occurred subsequent to the date of his complaint on 16 May 2006. This matter was therefore not considered by the Respondent in his decision the subject matter of the present appeal.
- (4) In any event, this Board has considerable reservation about the validity of this ground of complaint. First, in his letter to the Respondent dated 16 May 2006, the Appellant himself disclosed the fact that he had recently been arrested by the Police, albeit that he alleged that the Police had arrested the wrong person. He also disclosed the fact that in 1991, he had been prosecuted by the Police for what he described as a "small matter" and the clear inference was that he had been convicted of an offence in 1991, although he said that his criminal record should have been destroyed after 10 years. Second, the Police made the disclosure in answer to inquiries by the Respondent, which were carried out in discharge of his duties under the Ordinance, and ought, in respect of such disclosure, to be protected by s.44(8)(a) of the Ordinance, which provides as follows –

"It is hereby declared that – (a) no obligation to maintain secrecy or other restriction, imposed by law, upon the disclosure of any information, document or other thing, that is or has been in the possession or under the control of any

person referred to in subsection (1), shall apply to its disclosure for the purposes of an investigation".

Conclusion

16. This Board has considered all the oral and written materials submitted by the Appellant in support of his appeal, but does not find that there is any sufficient basis to disturb the Respondent's decision. Accordingly, the appeal is dismissed, with no order as to costs.



(Anderson CHOW Ka-ming, SC)

Deputy Chairman
Administrative Appeals Board