

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 24 of 2001

BETWEEN

HONG KONG
POLYTECHNIC UNIVERSITY

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 29 April 2002

Date of Decision : 27 May 2002

D E C I S I O N

Introduction

This is an appeal by the Hong Kong Polytechnic University ("the University") against an enforcement notice issued on 29 March 2001 by the

Privacy Commissioner for Personal Data ("the Commissioner") pursuant to s.50 of the Personal Data (Privacy) Ordinance ("the Ordinance"). It arose from a complaint to the Commissioner on 2 June 1999 by Dr Li Miu-ling Alice ("the Complainant") alleging, among other things, that the University had not provided her with all her personal data as requested in her data access requests which the Commissioner found, after extensive investigations, to have been partially substantiated, and hence the enforcement notice.

The Statutory Scheme

With the exception of Part II, Schedule 2, s.30 and s.33, the main body of the Ordinance came into operation on 20 December 1996. It commences with the long title "an Ordinance to protect the privacy of individuals in relation to personal data, and to provide for matters incidental thereto or connected therewith. Section 2 defines some of the terms and words used in the Ordinance including personal data. "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.

The other provisions, in so far as relevant to this appeal are:-

s.18 (data access request); s.19 (compliance with data access request); s.20 (circumstances in which data user shall or may refuse to comply with the data access request); s.37 (complaints); s.38 (investigations by Commissioner); s.42

(power of entry on premises for the purposes of an inspection or investigation); s.47 (persons to be informed of result of inspection or investigation); s.48 (report by Commissioner); s.50 (enforcement notices); s.54 (employment - transitional provisions); s.55 (relevant process); s.58 (crime, etc.) and s.64 (offences).

The Complainant and the Complaint

The Complainant was first appointed as a Assistant Professor in the Nursing and Health Services Department of the University in September 1992. Her relationship with the University had never been harmonious. It further deteriorated at the end of 1998 when the acting head of her Department, Dr Thomas Wong, recommended that she should not be permitted to cross the efficiency bar. Dr Wong also recommended that the Complainant should not be offered further appointment. This sparked off this unpleasant incident and resulted in the Complainant making serious allegations against the University and in particular Dr Wong who was accused of sexual harassment. For present purposes, it is unnecessary to go into any details. To cut a long story short, the Complainant made two data access requests to the University by memoranda dated 10 February 1999 and 11 May 1999 respectively. Both requests were addressed to the Director of Personnel of the University. The first memorandum read:-

“I am writing to request for the access of my personal data both from the Personnel Office and the Department of Nursing and Health Services through the Personnel Office.”

In the second request, she said:-

“I now make a data access request in respect of all data as defined by the Personal Data (Privacy) Ordinance, which is now held by the data user, the Hong Kong Polytechnic University. For the avoidance of doubt, this data access request specifically includes for all additions to my personal data held by the data user, that has been added to the data held by the data user since my data access request of the 10 February 1999.”

Her requests were obviously treated seriously as immediately on receiving her first request, the President of the University personally authorised the access and that the access should be in accordance with the Ordinance. The Complainant was permitted to inspect and peruse her personal data at the Personnel Office on a number of occasions. Not being satisfied with what she got, she made a complaint to the Commissioner on 2 June 1999. By then, the University had provided something like 550 pages of documents to her.

Investigation and Report by the Commissioner

The Commissioner, without delay, conducted extensive and indepth investigations into the complaint which included many meetings with the Complainant and voluminous exchanges of correspondence with the Complainant and the University. The Complainant made persistent requests to the Commissioner to exercise his power of entry on the premises to conduct a search without first letting the University know, which the Commissioner refused. In the event, the University was notified and officers from the

Commissioner's Office visited the University on 19 April 2000 and 3 May 2000 when representatives of the University were interviewed and files inspected. Having completed his investigation, the Commissioner made certain findings and issued a report which was conveyed to the University in the form of a letter dated 24 October 2000. The Complainant was similarly informed of the result of the investigation by letter dated 28 October 2000.

In his report, the Commissioner summarized the breaches alleged by the Complainant into seven headings:

- a. Failure to provide the one page of record of meeting on 29 March 1999.
- b. Failure to provide a number of documents in relation to the harassment complaint dated 23 January 1999.
- c. Supplied forged documents.
- d. Failure to supply:
 - i. Memo dated 4 May 1999 from Dr Thomas Wong to the Complainant; and
 - ii. 2 other memos.
- e. Missing documents including a memo dated 15 June 1999 from the Chairman of the Ethics Committee to the Complainant.
- f. Failure to provide 4 documents in relation to the Complainant's sick leave.
- g. Concealing or tampering with documents.

The Commissioner noted that in the course of his investigation he discovered that the University had not provided the Complainant with all data acquired before 20 December 1996; data related to the crossing of efficiency bar; data related to complaint about sexual harassment and data contained in interview record. He found that there was no contravention regarding allegations (a), (b), (c), (e) and (g) either due to insufficient evidence or that the allegations were covered by exemptions under s.55 and s.58(1) of the Ordinance. But he found that the memo dated 4 May 1999 did contain personal data of the Complainant and the failure on the part of the University to provide the Complainant with those data and the data of the Complainant collected before 20 December 1996 constituted a contravention of s.19(1) of the Ordinance.

Enforcement Notice

On the basis of his findings, the Commissioner, on 29 March 2001, issued and served on the University an enforcement notice pursuant to s.50 of the Ordinance. Its full context read:-

To: The Hong Kong Polytechnic University
Hung Hom
Hong Kong

Upon completion of my investigation of the complaint (Ref. No. 199906195) lodged with me on 3 June 1999 by Dr Alice Li Miu-ling ("the Complainant") against you, I am of the opinion that you have contravened section 19(1) of the Personal Data (Privacy) Ordinance ("the Ordinance") by

failing to comply fully with the Complainant's data access requests made to you as contained in her memos dated 10 February 1999 and 11 May 1999 within 40 days of receiving such requests.

AND I have formed the opinion that you are still contravening section 19(1) of the Ordinance that you have not yet fully complied with the said data access requests.

Pursuant to section 50 of the Ordinance, I HEREBY DIRECT YOU TO TAKE THE FOLLOWING STEPS TO REMEDY THE CONTRAVENTION:-

STEP ONE : Within 21 days after the date of service of this Enforcement Notice on you,

- (1) to conduct a thorough search amongst the Complainant's personal data that are in your possession or control; and
- (2) to compile and provide to the Complainant a Consolidated Documents List comprising the following:
 - (a) An index of any personal data of the Complainant acquired by you before 20 December 1996;
 - (b) The following item:
 - (i) a memo dated 4 May 1999 from the Complainant to Dr Thomas Wong, the Acting Head of the Department of Nursing and Health Sciences;

- (ii) an interview record entitled "Re: Complaint of Clinical Supervision, BSN(FT) year two student" from Dr Vera Yip to Dr Thomas Wong dated 25 March 1999;
- (c) A list of personal data of the Complainant discovered by you in the course of your search conducted above, other than those you have already provided to the Complainant in complying with her said requests.

The said Consolidated Documents List is to be sent by you to us within the said 21 days for our providing of the same to the Complainant, together with our request to her to give you the written notification referred to under STEP TWO below.

STEP TWO : Within 21 days upon receiving a written notification from the Complainant of her selection from the Consolidated Documents List ("the Selected Documents") and subject to the payment by the Complainant to you of the fee of HK\$5 per page (as previously charged by you), to release to the Complainant the said copy or such part thereof as the Complainant may have further chosen to pay for.

You are reminded that contravention of an enforcement notice is an offence under section 64(7) of the Ordinance and an offender is liable on conviction to a fine and to imprisonment, and in the case of a continuing offence, to a daily penalty. A copy of section 64(7) of the Ordinance is enclosed.

As required by the Ordinance, a copy of section 50 of the Ordinance is attached.

Dated this 29th day of March 2001.

It was signed by Mr Stephen Lau Ka-men, the Commissioner.

The Notice and Grounds of Appeal

Upon the receipt of the enforcement notice, there were communications between the University and the Commissioner in which the University asked for more time to consider and comply with the enforcement notice. This the Commissioner agreed but without waiting for further response from the Commissioner, the University lodged an appeal to this Board on 11 April 2001. The notice of appeal challenged everything that was contained in the enforcement notice. Broadly speaking, they were in these terms:-

- a. Some of the data sought by the Complainant do not fall within the definition of personal data under s.2 of the Ordinance.
- b. The advice from the Commissioner's office confirmed to the University that data held in unstructured files may fall outside the scope of definition of personal data.
- c. Given the large size of the organisations of the University it is not reasonably practicable for it to conduct an "extensive trawl through each and every department of the [University]".
- d. The 4 May 1999 memo and the 20 March 1999 transcript were not within the scope of data request made by the Complainant.

- e. Personal data collected before 20 December 1996 are exempted pursuant to s.54(1) of the Ordinance.
- f. It is not reasonably practicable to compile a Document List.
- g. The Commissioner himself held the view that the Complainant did not have a right to a Document List.

The Hearing of the Appeal

At the hearing, the Board heard representations from all the parties. Both in his oral and written submissions, Mr Paul Shieh, who appeared for the University, no longer objected to the entirety of the enforcement notice. The only objection or issue was the requirements of a thorough search to be conducted by the University and the compilation of a Consolidated List. Mr Shieh argued that the term "thorough search" was imprecise, vague and created great difficulty in complying without involving enormous manpower and financial resources. The Commissioner in effect placed a higher burden on the data user than the statutory duty to exercise all due diligence as required under s.64(8) of the Ordinance. As regards the Consolidated List, he submitted that the Commissioner acknowledged that the Complainant was not entitled to one and therefore the Commissioner had no power to make the order. In any event, as the University was now prepared to provide the actual documents, there was no need to have such a list. He submitted for the consideration of the Board a modified or amended enforcement notice and urged the Board to endorse it. We will return to this aspect at a later stage.

Mr Kwok Sui Hay, who appeared for the Commissioner, very sensibly, in our view, did not argue strongly in favour of a "thorough search" or

the consolidated list. He indicated that the amended enforcement notice proposed by the University was acceptable.

Both the Complainant (who is the party bound by the decision appealed against) and her friend, Mr Peter Reid (with our permission) addressed the Board. They asked the Board to confirm the enforcement notice in its original form. Mr Reid accused the University of obstructing the Commissioner's investigation and covered up further contraventions and that the University had been acting intentionally and deliberately in forging and falsifying documents and asked the Board to refer the matter to the police or the Department of Justice for investigation. He criticised the University of wasting money in litigation rather than use it to carry out the work as required by the enforcement notice.

The Board's Observations

Mr Reid's criticism regarding the money spent on litigation is totally beside the point. What is at stake is an important principle that affects not just this University but also many large organisations which may find themselves in the same or similar situation. The attacks which Mr Reid launched against the University are, in our view, unwarranted and to say the least, irrelevant. Whether the Complainant had been treated unfairly as an employee of the University and whether her allegations of criminal conduct or wrongdoing against the University or any individuals are true or not are not matters with which this appeal or the Board are concerned. If she has evidence that someone has committed a criminal act against her, it is her duty as a responsible and educated person to report the crime to the police. If the University have acted

in breach of contract or committed any tortious acts, her proper recourse is the law courts to claim for damages. The Board wish to make it known that we deprecate any attempt by persons to use the Board as a forum for the pursuit of personal vendetta or to vent their anger. The Ordinance must be interpreted and applied sensibly, reasonably and practicably so that it is not used as a tool of oppression or revenge.

Findings of the Board

The Board accept the submissions of Mr Shieh that the requirements imposed by the Commissioner for a "thorough search" and a Consolidated List are without statutory basis and legally incorrect. In so doing, the Commissioner exceeded his powers. The Ordinance s.64(8) only requires a data user to exercise all due diligence which is a lesser task than a "thorough search". In relation to the Consolidated List, even the Commissioner himself acknowledged that the Complainant had no right to such a list. It goes further than that, because the imposition of this requirement is contrary to s.20(3)(b) where it is stated:

"A data user may refuse to comply with a data access request if-

- (b) the data user is not supplied with such information as the data user may reasonably require to locate the personal data to which the request relates."

It is for the data requestor to identify the data he or she requires and not for the data user to prepare a full or consolidated list for the data requestor to pick and choose. For these reasons, the requirements of "thorough search" and a

"consolidated list" cannot be allowed to stand and must be struck out. This only leaves us to consider the amended enforcement notice proposed by the University. We are satisfied that the proposal is sensible, reasonable and practicable and adequately meets the situation. Not only that we endorse the proposal, we also adopt it in its entirety as an amended enforcement notice to replace the one issued by the Commissioner.

Amended Enforcement Notice

The enforcement notice, as amended, will now read:-

"To: The Hong Kong Polytechnic University
Hung Hom
Kowloon

Upon completion of my investigation of the complaint (Ref. No.199906195) lodged with me on 3 June 1999 by Dr Alice Li Miu-ling ("the Complainant") against you, I am of the opinion that you have contravened section 19(1) of the Personal Data (Privacy) Ordinance ("the Ordinance") by failing to comply fully with the Complainant's data access requests made to you as contained in her memos dated 10 February 1999 and 11 May 1999 within 40 days of receiving such requests.

AND I have formed the opinion that you are still contravening section 19(1) of the Ordinance that you have not yet fully complied with the said data access requests.

Pursuant to section 50 of the Ordinance, I HEREBY DIRECT YOU:

(a) Within 7 days, to provide to the Complainant the following items:-

- (1) A memo dated 4 May 1999 from her to Dr Thomas Wong, the Acting Head of the Department of Nursing and Health Services;
- (2) An interview record entitled "Re: Complaint of Clinical Supervision, BSN(FT) year two student" from Dr Vera Yip to Dr Thomas Wong dated 25 March 1999.

(b) Within 21 days, to provide to the Complaint:-

- (1) Her personal data from the Personnel Office and the Department of Nursing and Health Services through the Personnel Office; and
- (2) Her personal data as specifically identified in the second half of the Complainant's request dated 11 May 1999 and as clarified as appropriate in her memorandum of 31 May 1999 namely:

- All "Committee" meetings in which Alice Li was mentioned. Such "Committees" being confined to the Inquiry Panel, Investigation Committee, the Ethics Committee, the Appointments Committee, Committees dealing with complaint of a disciplinary or performance

nature, NHS Department Management Committee, the NHS Departmental Learning and Teaching Committee and the Faculty Research Committee;

- All "Official Complaints" made against Alice Li. Such "Official Complaints" being confined to complaints made to the President, the Chairman of the Ethics Committee, the Director of Personnel, the Dean of FHSS, the Acting Head of NHS, the Head of NHS and the Chairman of the Appointments Committee;
- All official investigations and inquiries in which Alice Li was mentioned;
- All communications (including e-mails) from the HOD (NHS) and Acting (HOD) in which Alice Li was mentioned;
- All breaches of the official Regulations referred to in the Conditions of Service and in the Staff Handbook, as defined in the contract between the University and Alice Li, in which she was mentioned.

acquired by the University prior to 20 December 1996, save for those data in respect of which the University claims exemption pursuant to the provisions of the Ordinance.

- (c) Within 21 days, to provide to the Commissioner all data falling within the scope of (b) above but which the University claims exemption pursuant to the provisions of the Ordinance with a view that the Commissioner can decide whether to accept the

University's claim for exemption."

The amended enforcement notice shall be signed by the Commissioner and served on the University within 3 days of receiving this decision.

Conclusion

The above replaces the enforcement notice issued on 29 March 2001.
It is so ordered.



(Mr Michael Wong)

Chairman

Administrative Appeals Board

Mr Paul Shieh, Counsel for Hong Kong Polytechnic University

Mr Kwok Sui-hay, Counsel for the Privacy Commissioner for Personal Data