

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 30 of 2005

BETWEEN

LEISURE AND CULTURAL SERVICES DEPARTMENT Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA Respondent

Coram : Administrative Appeals Board

Date of Hearing : 20 February 2006

Date of Decision : 3 April 2006

Date of handing down Reasons for Decision : 3 April 2006

D E C I S I O N

Mr Chow Kim fung ("Mr. Chow") was employed by the Leisure and Cultural Services Department ("LCSD") as a curator working in the Space Museum. He was investigated by the Independent Commission Against Corruption ("ICAC") for alleged corruption practices.

2. On 8 December 2003, the ICAC Operations Review Committee informed the Director of LCSD about the investigation against Mr. Chow. The relevant part of the memo is as follows:

“ This investigation is now complete, and a report has been laid before the Operations Review Committee. The Committee has advised that the allegation has not been substantiated and no further investigative action by ICAC is warranted. The Commissioner has accepted this advice.

There is no objection to you informing the above named of the terms of this advice since he is aware that he has been under investigation by this Commission, and a letter to him is attached for onward transmission.

A copy of the investigation report is attached for information.”

3. On 5 January 2004, the LCSD arranged Mr. Chow's supervisor, the Chief Curator (Science Museum), to interview him. During the interview, the Chief Curator, handed to Mr. Chow the letter from the ICAC and informed him that the allegations against him had not been substantiated. In order to allay Mr. Chow's anxiety, the Chief Curator showed him the investigation report by the ICAC ("Report"). Mr. Chow asked for a copy of the Report but his request was verbally turned down.

The LCSD said the Report contained “information revealed in the investigation, including the various persons involved in the allegation, the contract sum involved and the source of information, etc.”

4. Pausing here, we note that we have not been provided with a copy of the Report or a copy of the ICAC letter to Mr. Chow. We are not in a position to say whether the Report in fact contained the information the LCSD said it contained.

5. On 7 January 2004, the Report was passed to the Staff Management Unit of the LCSD to see if follow-up actions such as departmental investigation or administrative/disciplinary action should be taken against Mr. Chow.

6. On 9 January 2004, the Senior Executive Officer of the Staff Management Unit of the LCSD reported to the Assistant Director (Administration) of the department that no departmental action was required. On 13 January 2004, the Assistant Director (Administration) endorsed the decision and the case was closed.

7. On 4 February 2004, Mr. Chow asked the Chief Executive Officer (Personnel Services) of the LCSD for a copy of the Report.

8. On 5 February 2004, the LCSD informed the ICAC of Mr. Chow’s request and asked them whether they would agree to the LCSD disclosing the Report to Mr. Chow. In the memo, the LCSD also told the

ICAC the view of the Office of the Privacy Commissioner for Personal Data ("PCO") was that it might not be possible for the LCSD to claim exemption for crime prevention/detection purpose under s. 58 of the Personal Data (Privacy) Ordinance ("Ordinance"). The LCSD also asked the Department of Justice for their opinion on the matter.

9. On 15 March 2004, the ICAC replied that they were of the view that the personal data contained in the Report were exempted from the provisions of Data Protection Principle 6 by virtue of s. 58(1) of the Ordinance and that Mr. Chow's request should be declined. Nothing in the memo suggested that the ICAC still retained control over the use of the Report and that the LCSD was prohibited from disclosing it.

10. On 25 March 2004, the LCSD wrote to Mr. Chow declining his request. In the letter, the Director of LCSD said:

"...ICAC, the data provider, has advised against the disclosure of the document as it is exempt from disclosure by virtue of s.58 (1) of the Personal Data (Privacy) Ordinance. I therefore inform you that your request for disclosure cannot be pursued further."

11. On 29 March 2004, Mr. Chow filed a complaint with the PCO against the LCSD that his request for a copy of the Report had been refused. The PCO discussed the matter with Mr. Chow and brought to his notice the requirements of a data access request. As a result, Mr.

Chow agreed to close the case.

12. On 1 April 2004, pursuant to s. 18 of the Ordinance, Mr. Chow lodged a formal Data Access Request (“DAR”) with the LCSD requesting a copy of the Report. The LCSD replied on 23 April 2004 refusing to comply with the request. In the letter, the Director said:

“...ICAC, the data provider, has advised against the disclosure of the document as it is exempt from disclosure by virtue of s.58 (1) of the Personal Data (Privacy) Ordinance. We have re-examined the case and consider that we have no reason to depart from ICAC’s objection in order to meet your request.”

13. These reasons were no different from those stated in their letter of 25 March 2004. On both occasions, the LCSD referred to the ICAC as “data provider” and the ICAC’s objection.

14. It should be noted that the DAR was directed by Mr. Chow at the LCSD as data user. As provided under section 18 of the Ordinance, the purpose of the request was twofold: (1) to enquire if the LCSD was holding any data of which Mr. Chow was the data subject; and (2) if the LCSD was holding such data, to supply Mr. Chow with a copy of it. The DAR did not concern the ICAC in any way. We do not know what the LCSD meant by stating that the ICAC was “the data provider”. Whatever that might mean, the ICAC was not a data user in relation to Mr. Chow’s DAR. We do not know why the LCSD should have to rely on the ICAC’s

objection as a ground for refusing to comply with the DAR.

15. On the same day, 23 April 2004, Mr. Chow complained to the PCO that the LCSD refused to comply with his DAR. As a result of initial enquiries by the PCO, the LCSD on 4 May 2004 wrote to the Department of Justice and the ICAC for their advice and comments on a draft reply to the PCO.

16. On 19 May 2004, the LCSD wrote to the ICAC for their views on the PCO's enquiry as to the justifications in relying on s. 58(1) of the Ordinance.

17. We are surprised that the LCSD would need to seek the views of the ICAC on their justifications to rely on s. 58(1). If the LCSD relied on s. 58(1) to refuse to comply with the DAR, they should provide their own justifications for so doing and not the justifications of the ICAC. The ICAC was, as we said before, not a party to the DAR or the complaint.

18. On 20 May 2004, the ICAC replied to the LCSD; the relevant part of the reply is as follows:

“3. The report is, in fact, a summary of our investigation containing personal data of other individuals, details of our investigation, and materials that might reveal our investigative methods and techniques. Therefore, we are of the view that the application of the provisions of Data

Protection Principle 6 would be likely to prejudice the purposes of the prevention or detection of crime; and the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons, for which the personal data are held; or directly or indirectly identify the person who is the source of the data”.

19. We note again that the above is a mere rephrased reproduction of s. 58(1) (a), (b), (d) and (ii) of the Ordinance. How the Report would likely to lead to these consequences and how the summary of facts and data would reveal their investigative methods and techniques, the ICAC made no mention of them in the letter.

20. Relying on the ICAC’s reply, the LCSD wrote to the PCO on 25 May 2004 as follows:

“...As requested, I wish to confirm the following –

(a) The ICAC is claiming exemption under s. 58(1) (a) and (d) of the Personal Data (Privacy) Ordinance in declining Mr. Sam Chow’s request for access to the ORC Report. A copy of their memo of 20 May 2004 is attached for reference.

(b) Our Department, being but one of the data users, finds no reasons to depart from the data provider’s objection to releasing a copy of the ORC Report to Mr. CHOW.”

21. Pausing here, we observe that the LCSD again failed to appreciate that the DAR was directed against them as the data user i.e. the person who controlled the collection, holding, processing or use of data of which Mr. Chow was the data subject, whether alone or jointly or in common with other persons (such as the ICAC). Before exemption under s. 58 (1) could be claimed, the LCSD should state why the Report was regarded as being held for the purposes stated in s. 58 (1) and complying with the DAR would have the consequences specified in paragraph (i) or (ii) thereof. No such reasons were provided by the LCSD. Again, the LCSD simply relied on the ICAC's objection.

22. On 28 September 2004, the LCSD wrote to the PCO and stated, inter alia, that they received the Report from the ICAC for information only and they had examined it to see if there were "any other irregularities or office malpractices as revealed by the ICAC's investigation that might warrant disciplinary investigation or follow up action." and that they did not control the collection or processing of it. The LCSD also stated they declined the DAR because the ICAC who controlled the use of the Report objected to the release. They relied on s. 20(3) of the Ordinance.

23. Because the LCSD stated they relied on s. 20(3), the PCO wrote to the ICAC on 18 October 2004 and asked them if they had indicated or imposed any prohibition on the LCSD from complying with the DAR and if so, how their control of the Report would prohibit LCSD from complying with the DAR.

24. The ICAC replied on 26 October 2004 that they did not impose a prohibition on LCSD under s. 20(3) of the Ordinance and they had no justification in law to do so.

25. On 2 November 2004, the LCSD asked the ICAC if their claim of exemption under s. 58(1) still stood since the investigation had concluded and Mr. Chow had already had sight of the Report and whether they would object to a partial disclosure. Further the LCSD asked the ICAC what consequences would follow if they comply with the DAR, given the fact that they did not prohibit its disclosure by the LCSD.

26. The matter as it stood on 2 November 2004 was this. The Report was received by the LCSD from ICAC for information. No prohibition or other conditions for its use had been imposed by the ICAC. The ICAC had stated they no longer control its use by the LCSD. Since collection of personal data is not limited to active collection and a person is said to have collected the personal data of another if he comes by them whether by receiving or by a positive act of collecting, the LCSD had collected the Report from the ICAC free from any restriction as to its use. The LCSD was able to use the Report in any manner they deemed fit subject to the procedure in the Procedural Manual for Discipline for civil servants.

27. On 19 November, 2004, the LCSD wrote to the ICAC for comments on the matter again. The following extract from the letter is interesting:

“ ...The Assistant Director of the subject Division has re-visited the case and reviewed the ORC Report in question. He is of the view that since the contents of the Report **are mainly facts already known to Mr. CHOW and there is no sensitive information relating to a third party or any other operation of ICAC/LCSD**, it may be appropriate to give a copy of it to Mr. Chow on the understanding that it is purely for his own perusal and record and no part of it should be disclosed or reproduced to a third party without the consent of ICAC.”

28. In the letter, the Assistant Director also suggested to give the Report to Mr. Chow with those parts which concerned third party's data blanked.

29. The ICAC replied on 24 November 2004 that they maintained their objection on the ground that the Report was exempted under s. 58 of the Ordinance. It should be noted that the ICAC did not in this letter or elsewhere dispute or disagree with the views of the Assistant Director that the contents of the Report were as he had described.

30. We say the above extract is interesting because earlier the LCSD told us that the reason for non-compliance with the DAR was the Report contained information involving various parties and source of information, and because the ICAC said it contained their detailed investigations and

materials that might reveal their investigative methods and techniques, but in this letter, the LCSD said the report was mainly facts already known to Mr. Chow and there was no sensitive information relating to the operation of the ICAC. It even suggested that Mr. Chow should have a copy of the Report. The position the LCSD on 19 November 2004 was obvious; they considered withholding the Report from Mr. Chow served no purpose. Indeed, all the investigations relating the allegations of corrupt practices against Mr. Chow, criminal or administrative/disciplinary or otherwise, had already been completed in early January 2004. The LCSD was aware of s.58(1), but they did not think it necessary to seek an exemption there under. It would appear that but for the objection of the ICAC, the LCSD would have complied with the DAR. That being the case, we do not know how the Report could be said now by the LCSD to be held by them for any of the purposes in s. 58(1) and disclosure of it to Mr. Chow in the manner suggested by the Assistant Director would lead to the consequences in paragraph (i) or (ii) therein.

31. On 26 April 2005, the PCO informed the LCSD that based on all the information and evidence available to him and having regard to all the circumstances of the case, the Privacy Commissioner (“Commissioner”) was of the view that the LCSD had contravened section 19(1) of the Ordinance. The Commissioner was also of the opinion that LCSD had contravened the section in circumstances that made it likely that the contravention would continue or be repeated. Pursuant to section 50 of the Ordinance, the Commissioner served an enforcement notice on the

LCSD directing the LCSD to take the steps specified in the notice to remedy the contravention.

32. In his reasons for decision, the Commissioner stated :

“ LCSD, being the data user in relation to the Report held by it, and to whom the DAR was made, has failed to put forward any grounds or justifications for claiming exemption under section 58(1) of the Ordinance, apart from repeating that they followed ICAC’s position. ...As explained above, the LCSD and ICAC are separate data users in respect of the Report held by them individually, and ... the LCSD cannot simply ‘follow the views of the ICAC and claim exemption’. I have not been given any information as to why and how LCSD is entitled to rely on section 58(1) to refuse compliance with Mr. CHOW’s DAR made to them.”

33. It is against this decision of the Commissioner that the LCSD lodged the present appeal. The grounds of appeal, in short, are:

(1) The Commissioner erred in law in holding that LCSD has not established a case which justifies refusal to comply with the data access request on the grounds under section 58(1) of the Ordinance because the Report contained personal data of other individuals and materials that

might reveal the ICAC's investigative methods and techniques and the release of the Report would have the consequences specified in paragraph (i) or (ii) of the subsection.

- (2) The Commissioner erred in law in holding that each government department is treated as separate data user in request of personal data held by it because the Commissioner failed to appreciate that the disclosure of the Report would prejudice the effective investigation of the ICAC and in the name of the Government of HKSAR and the exemption which may apply by ICAC in dealing with a data access request of a document is equally applicable to the LCSD in respect of the same document.

34. In the statement relating to the decision filed by the Commissioner pursuant to section 11 of the Administrative Appeals Board Ordinance, the Commissioner submits his arguments in support of his decision. These may be summarized as follows:

- (1) A data user is only entitled to claim exemption under section 58 if the purposes of that data user in holding the personal data match one of the grounds listed therein. Different data user may hold the same piece of information simultaneously for different purposes. The fact that ICAC held the Report for the purposes stated in

the section does not entitle LCSD to invoke the same exemption. This is regarded as the most important privacy protection safeguard. This safeguard cannot be circumvented by adopting a purpose listed in the section for which the data is being held by someone, regardless of for what purpose the DAR recipient holds the data... A data user may under section 20(3) of the Ordinance retain its control over disclosure of personal data by a person to whom the data have been transferred. The recipient of the data to whom a data access request has been made may rely on this section to refuse to comply with the request. In that case, the data subject may lodge a request directly to the data user who has retained control of the data. It would then be for the latter to consider whether to claim an exemption. This is what the ICAC should have done if they wished to prevent the disclosure of the Report.

- (2) Each government department holds data that are not to be shared by other departments. Each government department is expected to use the data for and in accordance with the purposes for which they are collected. If it were otherwise, the Ordinance would be of no value in protecting personal data in the hands of government departments.

35. Counsel for the PCO submits that the allegations against Mr Chow were unsubstantiated. It would be for the ICAC or the LCSD to explain why the Report is held for the purposes of s. 58(1)(a) and so far they have not given any particulars of their reasons for holding on to the Report and there is no information that the LCSD held the data for the purposes stated in s. 58(1)(a) & (d). Counsel also submits that the DAR is directed at the data user who is required under the Ordinance to comply with it within 40 days and if he is unable to do so to notify the data requester of the reasons for the refusal. The data user is also required to log a refusal to comply with a DAR and the reasons for it. That being the case, it is the purpose for which the data are held by the data user and whether compliance with the DAR would be likely to prejudice that purpose that is relevant to a claim for exemption under s. 58(1).

36. Counsel further submits that the PCO have had sight of the Report. It contained no more than factual matters and nothing in it if disclosed to Mr. Chow would lead to the consequences of which the ICAC were so apprehensive.

37. The question before us involves the application of several provisions of the Ordinance and before we go further, we think it may be convenient to set out at this stage these relevant provisions of the Ordinance:

- (1) Section 18 (1) requires a data user to whom a data access request is made, if he holds such data, to supply the person

making the request with a copy of the data.

- (2) Section 19 relates to compliance by the data user with data access request and the period within which it has to be complied.
- (3) Section 20 (3)(d) provides that a data user to whom a data access request has been made may refuse to comply with it where any other data user controls the use of the data in a way as to prohibit compliance with the data access request.
- (4) Section 58(1) provides that where personal data are held for the purposes specified therein, the personal data are exempt from the application of Data Protection Principle 6 and section s. 18 (1) if compliance with them would be likely to prejudice those purpose or identify the person who is the source of the data.
- (5) Section 27 requires the data user to keep and maintain a log book and enter into the log book, inter alia, his refusal to comply with a data access request and the reason why.

38. Counsel for the LCSD argues that s. 58 is centered on data and it is the data in question that are exempt from the access provisions, not a particular data user. He also submits that where the data are being held by several persons, it is not the intention of the legislature behind s. 58 that only the data user who holds the data for the purposes of crime prevention or detection can rely on the exemption and the other user must disclose the information even though disclosure would severely prejudice those purposes.

39. As we see it, different persons may hold the same personal data at the same time for different purposes. Personal data such as personal identification may be held for prevention of crime or detection of crime by a law enforcing agency but at the same time held by a company for commercial purposes or by a hospital for medical purposes or other institutions for their particular purposes. We do not think it right to say that once the personal data of a person are held by a law enforcing agency for the prevention or detection of crime, the data subject could not have access to the same personal data held by the other institutions for innocuous purposes.

40. In our opinion, the exemption under s.58 (1) is linked to section 18(1) and Data Protection Principle 6. These provisions are applicable to the data user who holds the data for one or more of the purposes in section 58(1) in respect of which a data access request has been made by the data subject. The question of exemption does not arise for consideration until a data access request is made and until the data user holding the data seeks an exemption from complying with the request. In order to succeed, the data user must show the purposes for which he holds the data is one or more of the specified purposes and allowing the data subject to have access to them would likely prejudice the purposes for which the data are being held. The exemption is inseparable from the purpose for which the data are being held. The nature of data by itself does not give rise to a denial from access by the data subject under this section.

41. In *R v Lewes Justices ex parte Secretary of State for Home Department* [1973] AC 388, an authority that counsel for LCSD has referred us to, it was held that “likely” does not mean more likely than not; there must be more than a fanciful risk and it is sufficient if there is a serious or real and substantial risk. The assertion by the ICAC that disclosure of the Report might reveal their investigative methods and techniques and the source of information, without more, does not demonstrate that there is a serious or substantial risk that prevention and detection of crime, etc. would be prejudiced by the disclosure.

42. As we have said, the LCSD received the Report for information. Following the procedure for dealing with such Report set down by the Government, the LCSD had studied it for their administrative purposes. Their conclusion was, as they stated in their memo to the ICAC, that there was nothing in the Report sensitive to the operation of the ICAC or the LCSD and there was nothing in the Report which was not known to Mr. Chow. We have been further told by counsel for LCSD that any person without the knowledge of the case background reading the Report would not be able to make out the source of the information which led to the ICAC investigation. In these circumstances, we fail to see how compliance with the DAR by the LCSD would be likely to prejudice the investigation, prevention or detection of crime by the ICAC or there is a real and substantial risk that compliance with the DAR by the LCSD would have such prejudicial effect.

43. Counsel for LCSD then refers us to paragraph 15.11 and 15.52 of the Report of the Law Relating to the Protection of Personal Data issued in August 1994. These paragraphs recommended that there should be an exemption from the right of the individual to access and correct data relating to him where the release of the data would be likely to prejudice inter alia the prevention or detection of crime or the apprehension, prosecution or detention of offenders, etc. Counsel submits that the mischief that the exemption was intended to deal with was the possible prejudice to the prevention or detection of crime caused by the release of the data and this must apply irrespective of the source from which they are released. There was no suggestion in the report that the exemption was intended to apply only to the release of the data by a body responsible for the prevention or detection of crime, etc.

44. However, we note that paragraph 15.53 of the report has put a qualification to this recommendation:

“We wish to emphasize that although these are similar to the public interest categories we identified for exemption from the Use Limitation Principle, it does not follow from the limited sanctioning of passing on of data for a different purpose that access should be denied...”

45. In our view, personal data are by themselves entirely innocuous and whether the release of the data would be likely to prejudice the prevention or detection of crime, etc. must depend on the purpose for which they are held. Where data held by a body responsible for the

prevention or detection of crime, etc. for the purpose of prevention or detection of crime, etc. are released without qualification to another person for a different purpose, the latter does not hold the data for the same purpose as the former. In that case, the body responsible for prevention or detection of crime etc must have regarded it safe to release the data, otherwise they would not have done so in the first place, particularly when they did not retain control of the use of the data by the person to whom the data have been released. That being so, we do not think the report and s. 58 intended that access to the data held by the latter by the data subject should be denied on the ground that the release would be likely to prejudice the prevention or detection of crime, etc.

46. Much has been said by counsel for LCSD on the need by ICAC to preserve the confidentiality of their investigation and on the statutory provisions that prohibit the disclosure of their investigation. Reference is made to the judgment of Hunter J. in *Y. Khan v P.G. O'Dea* [1987] HKLR 150 on the reasons why confidentiality was essential to the proper conduct of affairs by the ICAC. Counsel also refers us to the judgment of Hartmann J in *Yu Chee Yin v Commissioner of ICAC* HCAL 97/2000 where he said : "...the public interest preserving the confidentiality of certain acts of our law enforcement agencies must be weighed against the public interest that information which might assist the Court should not be kept from it." In the judgment, Hartmann quoted the words of Kaplan J in *In re Au Shui Yuen, Alick v Sir David Ford Deputy to the Governor and others* that "... It is essential that materials relating to ongoing criminal investigations should not be disclosed."

47. These principles are all well and appropriate for consideration in relation to a claim for disclosure by the ICAC of information held by them in the course of their investigation. The ICAC may in an appropriate case, rely on these principles to justify their refusal to disclose on the ground of public interest. But we are dealing with a very different matter. Indeed, counsel for LCSD has indicated that the LCSD does not rely on public interest in their refusal to comply with the DAR. As we have said before, the Report has been released to the LCSD for a different purpose by the ICAC without retaining their control over the use of the data. The question is no more than whether LCSD could rely on s. 58(1) for exemption from complying with the DAR. These principles therefore provide little assistance to the LCSD.

48. From what has transpired between the LCSD and the ICAC as well as the PCO over this matter, we do not find any information, let alone evidence, that would indicate that compliance with the DAR by the LCSD would likely lead to the consequences set out in s.58(1)(i) or (ii).

49. Counsel for LCSD urged us to consider that upholding the decision of the PCO, will set a precedent obliging the LCSD and other Government Departments to disclose the report of the Operations Review Committee and similar criminal investigation reports to data subjects in future. He submits that the result would be any one may ask the ICAC for information regarding ICAC's investigation once the investigation and connected proceedings are over and this would be a startling proposition.

50. We are indeed startled that counsel of LCSD should seek to put us into a position that we must accede to their appeal or otherwise we would be upsetting the process of investigation of law enforcing agencies especially the ICAC and would create chaos that would hamper prevention and detection of crime. Counsel has failed to remember that we are dealing with the LCSD's refusal to comply with the statutory data access request of Mr. Chow, the data being those contained in the Report of which Mr. Chow is the data subject. The contents of the Report were, acknowledged by the LCSD in their letter of 19 November 2004, to be “.. **mainly facts already known to Mr. CHOW and there is no sensitive information relating to a third party or any other operation of ICAC/LCSD**” and this was not disputed by the ICAC. It must be clearly remembered that this is not a claim against the ICAC for disclosure of their investigation materials. We have said this many times in the course of this judgment. This is a matter relating to personal data. Every case is decided according to its own circumstances and one should not start generalizing simply because this is a matter which arose from a report from the ICAC. How our decision based on the particular circumstances of this case would create a flood, so to speak, of requests for access to sensitive materials held by law enforcing agencies, we are at sea.

51. The decision of the PCO on 26 April 2005 was based on the evidence and information before the PCO at the time. There was no information before the PCO as to why the LCSD was entitled to rely on s.58(1) to refuse to comply with the DAR. The PCO under the

circumstances was entitled to regard the LCSD as having contravened s. 19 (1) of the Ordinance and that the contravention would likely be continued unless an enforcement notice was issued.

52. For these reasons, the appeal is dismissed.

A handwritten signature in black ink, appearing to read 'A. Leong', with a stylized flourish at the end.

(Arthur Leong)

Chairman

Administrative Appeals Board