

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 3 of 2005

BETWEEN

HUNG KWOK CHING

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 19 December 2006

Date of handing down Decision with Reasons : 16 February 2007

D E C I S I O N

1. In 1999, the appellant Hung Kwok-ching was registered as a student of the Second Degree in PRC Law Programme ("programme") offered by Tsinghua University in collaboration with the University of Hong Kong School of Professional and Continuing Education ("HKU SPACE"). He completed the programme in 2003.

2. On 18.7.2004, the appellant sent a data access request ("DAR") under section 18(1) of the Personal Data (Privacy) Ordinance ("the Ordinance") to the University of Hong Kong ("HKU") for the attention of

Mr C K Lai, the Acting Data Protection Officer of the HKU, requesting access to various personal data. The requested data were set out in a letter attached to the DAR. They are –

- (1) data related to the Graduation Ceremony and graduation activities of the Class of 1999 of the programme;
- (2) the written submissions by a Dr Tommy Ho of the Law Division of SPACE to the School Complaints Committee of SPACE (“Complaints Committee”) and the transcripts of the oral submissions of Dr Ho and the appellant in the meeting of the Complaints Committee;
- (3) the appellant’s application for extension of study;
- (4) the student’s consensus on the date of the graduation trip and transcript of a dinning gathering in July 2002; and
- (5) various correspondence between a Mr Simon Ng and members of the Tsinghua University.
- (6) Additional information provided by Dr Ho to the School Complaints Committee which is not included in Dr Ho’s submission.

3. On 6.8.2004, the School Secretary and Registrar of HKU SPACE, Mr John Cribbin, informed the appellant that Mr Lai had referred the DAR to him and he was responding to the DAR on behalf of HKU SPACE because HKU was not the data holder in respect of the requested data. Mr Cribbin told the appellant that except the written submission of Dr Tommy Ho which was attached to the letter, HKU SPACE did not have the

appellant's application for extension of study or the transcripts of the dinner gathering in July 2002 or the transcripts of the oral submissions of Dr Ho and the appellant. Mr Cribbin also told the appellant that there was no additional information provided by Dr Ho and the rest of the requested data were not personal data.

4. On 14.9.2004, the appellant wrote to Mr Lai and raised objections against HKU's refusal to comply with his DAR. His objections may be summarized as follows –

- (1) The appellant completed his study programme in 2003 instead of 2002; therefore there should be an application for extension of study.
- (2) Dr Ho in his submission to the School Complaints Committee mentioned that he was present at the gathering on 18.7.2002 where students reached consensus on the date of the graduation ceremony and the graduation trip; therefore there must be a record of the gathering.
- (3) The correspondences between Mr Simon Ng and the Tsinghua University and members of the 1999 class related to the graduation activities. The appellant was a member of the 1999 class and his name was on the seating arrangement list in the graduation reception of the Tsinghua University. The correspondences contained his personal data and he should be given access to them.

- (4) At the meeting in the School Complaints Committee, the appellant saw members of the committee take notes. He believed that Dr Ho made oral submissions at the meeting and notes were taken of his submission. The notes are transcripts of the oral submissions.
- (5) At the meeting in the School Complaints Committee, the Chairperson mentioned that there was no invitation from Tsinghua University to attend the graduation ceremony in Beijing and no reimbursement of taxi expenses should be made to graduates. Dr Ho's submission did not mention these points. Therefore it could be said that Dr Ho made additional submission.

5. On the same day, Mr Lai replied by e-mail to the appellant that he was unable to handle the objections as all the relevant data were held by HKU SPACE.

6. On 17.9.2004, the appellant wrote to the Office of the Commissioner for Privacy ("Commissioner") and complained against the HKU. In his letter, after referring to his DAR and the reply from HKU SPACE and his objections as set out above, the appellant said:

"I therefore lodge a complaint against the University of Hong Kong for not handling my objection against the refusal of my data access request of 18 July 2004."

7. It should be noted that the appellant's complaint was against HKU for not handling his objections and not for failure to comply with the DAR or for any act done or any practice engaged by HKU which may be a contravention of the requirements of the Ordinance.

8. Section 37 of the Ordinance provides that an individual may complain to the Commissioner about an act or practice by a data user which may be a contravention of a requirement under the Ordinance. Under section 38 of the Ordinance, the Commissioner is to carry out an investigation when he received a complaint made under section 37. Where a complaint does not allege contravention of the requirements of the Ordinance, the Commissioner is not bound to carry out an investigation nor has he the power to do so.

9. The appellant's complaint therefore does not fall within section 37 and the Commissioner could have, for this reason alone, refused to carry out an investigation of the complaint. The Commissioner nevertheless made some preliminary enquiry in respect of the appellant's complaint.

10. On 6.10.2004, HKU SPACE in reply to the Commissioner's enquiry, explained that HKU SPACE is a company limited by guarantee established in 1999 and has 5 members who are members of the HKU. The members appoint the directors of HKU SPACE. While policy matters are effectively controlled by HKU, HKU SPACE is a separate legal entity and the Chief Executive Officer is responsible for the management of its affairs. Academic programmes of institutions with whom HKU SPACE collaborates

are matters between HKU SPACE and the collaborating institutions. In the appellant's case, the matter is between HKU SPACE and Tsinghua University.

11. On 6.1.2006, the Commissioner informed the appellant that he would not proceed to investigate the complaint. He concluded that HKU was not the holder of the requested data under the DAR. The data were held by HKU SPACE which was a separate legal entity independent of HKU and its management operations were independent of HKU. HKU was not a data user in relation to the requested data and not bound to comply with the DAR.

12. The appellant appealed against the Commissioner's decision. He stated the following grounds of appeal:

- (1) All his personal data related to his study programme were collected by HKU and his fees were paid into HKU account. This established a contractual relationship between him and HKU. Although the programme was administered by SPACE and his personal data were physically held by it, it is not sufficient to say that HKU is not the data user.
- (2) It is admitted SPACE is a limited company but this does not support that HKU is not a data user in this case. The Commissioner cannot accept this fact as conclusive evidence that HKU is not a data user in this case.
- (3) HKU and SPACE although separate legal entities, they have

not claimed they are independent of each other. The prospectus, university calendar, and website of HKU show that SPACE is a constituent and a dependant of HKU or at least an agent of HKU. The extensive use of the name, visual identities and acronyms of HKU by SPACE shows a strong connection with HKU.

- (4) The status of SPACE is a management board of an academic unit of HKU SPACE cannot stand alone to deliver formal curriculum, it is not registered as a school under the Education Ordinance.
- (5) In the Application for Enrolment of SPACE it is made clear that the personal data of the applicant can be transferred to HKU for providing related services. There is a possibility of transferring personal data between HKU and SPACE.
- (6) The names of all academic staff and administrative staff at supervisory level or above of SPACE can be found in his staff directory of HKU. The staff of SPACE are all included by HKU as their staff and there was sharing of staf between them.
- (7) The use of the description HKU SPACE by HKU implies that it is part of HKU.
- (8) HKU forwarded his DAR to SPACE that means HKU had responded to his DAR. HKU cannot argue that they did not hold his personal data.
- (9) The Commissioner cannot without any inquiry accept that SPACE but not HKU as the data user in this case.

(10) The Commissioner accepted the views of HKU and SPACE without asking his view and came to his decision after he heard one side of the case.

13. As we said earlier, the appellant's complaint to the Commissioner is not within section 37 of the Ordinance and the Commissioner is not bound to carry out an investigation. That being the case, the Commissioner's decision not to proceed further with the complaint, although based on different reasons, cannot be said to be wrong. But the Commissioner treated the complaint as one against HKU for failing to comply with the appellant's DAR. He concluded that HKU was not a data user in respect of the data requested and decided not to proceed with the investigation of the complaint. In these circumstances, we think we need also consider whether HKU was the data user in relation to the requested data.

14. The law on data access request is this. An individual may request a data user to inform by him whether the data user holds any of his personal data and if the data user holds such data, to supply by him with a copy of such data (Section 18(1) of the Ordinance). A data user to whom a request under section 18(1) is made is required to comply with it not later than 40 days after receiving the request. (Section 19(1) of the Ordinance.) A person who either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data is data user. (Section 2 of the Ordinance). Accordingly, if a DAR is made to a person who does not control the collection, holding, processing or use of the data, the DAR has not been made to a data user and he is not bound to comply with it.

15. In the present case, the appellant made the DAR to HKU and the requested data related to his study programme for the Second Degree in PRC Laws offered by Tsinghua University in collaboration with HKU SPACE. To require HKU to comply with his request, the appellant must show that HKU either alone or jointly or in common with other persons control the collection, holding, processing or use of the requested data.

16. The appellant in his grounds of appeal and statements as well as his submissions, does not dispute that his study programme was administered by HKU SPACE and his personal data were physically held by HKU SPACE. He also does not deny that HKU SPACE is a corporation registered under the Company Ordinance and is a legal entity in its own right. But he says that there are two institutions of the same name HKU SPACE: one is an academic unit – a School of HKU and the other is the Corporation of HKU SPACE. The School administered his study programme and held his personal data, whereas the Corporation does not control his personal data. HKU therefore directly or indirectly controlled his personal data and that made HKU a data user. The appellant says that the Commissioner was wrong not to draw a distinction between these two institutions.

17. The appellant argues that because four members of HKU SPACE are officers of HKU and the remaining member was appointed by the Vice Chancellor of HKU pursuant to the Statute of the University of Hong Kong and these members appointed the Board of Directors of HKU SPACE, HKU effectively controls HKU SPACE. The appellant submits that this makes

HKU SPACE an integral part of HKU or an agent of HKU. Also, since HKU has effective control on the policy of HKU SPACE, HKU could have control on the collection of personal data by HKU SPACE and it is not necessary for HKU to physically control the data collection procedure to make HKU a data user in relation to the requested data.

18. Pausing here, we need to point out that control on the policy of HKU SPACE is not the same as control on the personal data collected by HKU SPACE and having control on the general policy of HKU SPACE does not make a person a data user in relation to the requested data.

19. The appellant then submits that he was attracted to the study programme by a pamphlet published by HKU SPACE before its incorporation. The letter which offered him a place in the study programme bore the letterhead of HKU, and his fees were paid into the account of HKU. On these facts, it would be reasonable for him to regard that a binding contract existed between him and HKU in respect of the study programme and his personal data relating to the programme were under the control of HKU.

20. The appellant tries hard to show that in so far as he was a student in the study programme, he was a student of HKU and his relationship was with HKU. He refers to the statements in the Students Handbook made by the Director of HKU SPACE, the Head of the Law Division of HKU SPACE and the Vice Chancellor of HKU. He also refers to the correspondences he received during the course of study where various references to HKU had

been made, the awards of Postgraduate Certificate in Chinese Law and Postgraduate Diploma in Chinese Law jointly conferred by HKU SPACE and HKU and a reply by Mr Cribbin in the capacity of Secretary and Registrar of HKU SPACE to a complaint he made in the course of his study. He argues that all these show that his relationship during the study programme was with HKU and not HKU SPACE.

21. The appellant refers to the Organization Section of the 05 Spring Prospectus published by HKU SPACE where it is stated that HKU SPACE is an integral part and an extension arm of HKU and academic programmes of HKU SPACE are monitored by HKU through the one of the committees of HKU. The appellant submits that the academic affairs of HKU SPACE are affairs of HKU.

22. In addition to the above, the appellant submits that the sharing of staff between HKU and HKU SPACE as show in the Staff Directory of HKU, the use of the names and other visual identities of HKU such as the shield of HKU, photographs of HKU buildings by HKU SPACE in its correspondences and publications, show that HKU SPACE is part of HKU. The appellant says the Commissioner has made no attempt to understand the organization of HKU and his relationship with HKU in the study programme.

23. Mr Chris Cheng, Counsel for the Commissioner submits that the Commissioner reached the following findings of fact after his preliminary inquiry into the complaint of the appellant –

- (1) The appellant's study programme is offered by Tsinghua University through SPACE which is a separate legal entity from HKU.
- (2) HKU can only exercise control over SPACE in policy matters. Management of the affairs of SPACE is the responsibility of the Director acting as Chief Executive Officer of SPACE.
- (3) HKU did not hold or store or control any files of SPACE and HKU did not physically hold the requested data.
- (4) There was no sharing of staff between HKU and SPACE although some staff of SPACE might still be in employment of HKU.

24. These findings, Mr Cheng submits, support the Commissioner's decision that HKU was not the data user in relation to the requested data under the appellant's DAR. The data were held by HKU SPACE. HKU should have no duty to comply with the DAR.

25. Mr Cheng further submits that the Application for Enrolment of HKU SPACE has made it clear that the data collected would only be handled by HKU SPACE for the purpose of the programme. Even if the appellant's study programme were offered by Tsinghua University in collaboration with HKU through HKU SPACE, it does not mean that HKU controlled the personal data collected from applicants. The question of contractual relationship between the appellant and HKU is irrelevant to the question of whether HKU controlled the requested data. HKU does not control the

daily operation of HKU SPACE albeit HKU may exercise influence over HKU SPACE through Director appointments.

26. The relationship between HKU and HKU SPACE is a complex one. The appellant has dealt with this question at length, referring to various documents and materials purporting to show that SPACE is part of HKU or is an agent acting for HKU. We do not think we need to deal with these matters in detail. Suffice for us to say that we have considered all his arguments and the evidence he referred to and we think whatever that relationship may be during his time with the programme, the fact remains that HKU and HKU SPACE are two separate legal entities and they are independent of each other in their daily operations and management in admission of students and administration of the programmes offered by them. It may well be that HKU have authority to control or influence HKU SPACE on matters of policy and academic awards, but such authority does not give HKU control over the collection, holding, processing and use of personal data belonged to students in study programmes. Such authority, if any, does not make HKU a data user in relation to the requested data under the appellant's DAR.

27. In our opinion, the statement that HKU SPACE is an integral part of HKU in the Organization Section of the 05 HKU SPACE Prospectus, the staff directory that shows both the staff of HKU and HKU SPACE and the use of the HKU logo in various publications and correspondences of HKU SPACE, may well be evidence to show a close connection between HKU and HKU SPACE, and indeed both institutions are closely related in that

HKU indirectly controls the policy of HKU SPACE, they do not displace the admitted fact that HKU SPACE held the personal data of the appellant and administered his study programme whereas HKU did not. That being so, how can HKU be said to be a data user in relation to the requested data?

28. Even if HKU SPACE were, as suggested by the appellant, a School of HKU and therefore an integral part of HKU (a proposition that we find insufficient evidence to support), the fact that HKU SPACE held or controlled the collection of the appellant's personal data does not necessarily mean that such personal data were also held or controlled by HKU.

29. The appellant relies on a message to him by Mr Lai dated 2.11.2004. In that message, Mr Lai said that a copy of the report of the Director of HKU SPACE would be made available to appellant at the counter of the Examination Unit of HKU. The appellant submits that this shows that HKU was complying with his DAR and was holding the requested data. That being the case, HKU was a data user thereof.

30. On this question, firstly, we wish to point out that the appellant's contention (as set out above) that HKU was holding the requested data is inconsistent with his admission that his personal data were physically held by HKU SPACE. Secondly, we note that Mr Lai in his message made it clear that the appellant's request was not regarded as a DAR. The document was made available to the appellant by agreement of the Registrar of HKU SPACE and not by HKU, to comply with the appellant's request. The evidence therefore does not support the appellant's contention that HKU

was holding the requested data and a data user thereof.

31. Lastly, we agree with Mr Cheng that the Application for Enrolment Form has made it clear that the personal data collected thereby would be used by HKU SPACE solely for the purpose of the appellant's study programme and may be used for associated purposes. Their use was confined to HKU SPACE. There is no evidence to show that HKU SPACE had transfer the data to HKU for other purposes or HKU controlled such data. We also agree that any contractual relationship between the appellant and HKU is not relevant to the issue under consideration.

32. The history of the case shows that the appellant felt aggrieved that he missed the graduation ceremony for his Degree on PRC Law at the Tsinghua University because it was held on a day he was unable to attend. He was not happy with the result of his complaint to HKU in that regard. He sought to obtain all the information from HKU about the case and he did it by way of a DAR. We do not know for what purpose the appellant sought such information. But it was certainly not a case of him seeking protection for his personal data. This was one of the reasons for the Commissioner to consider exercising his discretion under s.39 of the Ordinance not to proceed with his complaint.

33. For the reasons given above, our conclusion is that the appeal must be dismissed.

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

(Mr Arthur LEONG Shiu-chung)

Chairman

Administrative Appeals Board