

ADMINISTRATIVE APPEALS BOARD  
ADMINISTRATIVE APPEAL NO. 44/2009

BETWEEN

YUNG MEI-CHUN, JESSIE

Appellant

and

THE PRIVACY COMMISSIONER

Respondent

OF PERSONAL DATA

Coram: Administrative Appeals Board

Date of Hearing: 11 March 2013

Date of Handing down Written Decision with Reasons: 4 June 2013

DECISION

**Background**

1. The Appellant's then employer, by a letter dated 24 September 2007 to the Appellant ("the Letter"), informed the Appellant of the employer's certain decision concerning the Appellant's employment.

2. Quite reasonably, the Appellant regarded the letter as personal and confidential. Thus, the subsequent disclosure, without her consent, of the Letter in a subsequent litigation in the District Court, became the subject matter of her complaint ("the Complaint") to the Privacy Commissioner/Respondent (received by the latter on 22 July 2009), as a breach of the Personal Data (Privacy) Ordinance (the Ordinance).

3. The history of events leading to the disclosure of the Letter is as follows.

4. The Appellant by AAB No. 18/2008 (the 2008 Appeal) lodged an Appeal to the Board (constituted by different members) against the Respondent in respect of another decision of the Respondent. Amongst the relevant papers of the 2008 Appeal, there was the Letter. Mr. Chan, as the party bound by the decision of the Board in the 2008 Appeal, was served a bundle of the papers of the 2008 Appeal, including the Letter. That is the Appellant's case as to how her personal data contained in the Letter came to be "collected" (in the meaning of the Ordinance) by Mr. Chan.

5. Mr. Chan was sued as a defendant, by the Appellant in a District Court action DCCJ4126 of 2007 ("the 2007 DC action").

6. The Letter was included by Mr. Chan in the trial bundle submitted for the 2007 DC action. That is the Appellant's case as to the misuse of her personal data by Mr. Chan. However, the Respondent by a letter dated 2 November 2009 informed the Appellant that the Respondent decided that an investigation of the Complaint was unnecessary. Against that decision the Appellant lodged an appeal to this Appeals Board ("the Board") (dated 30 November 2009), the subject of this Appeal.

7. For the purpose of this Appeal, the Board will proceed on the assumption (as there is no need to decide this, the Appeal being disposed of on other grounds as set out below) that the contents of the Letter contain data of the Appellant collected by Mr. Chan, within the meaning and ambit of the Ordinance.

8. The Appellant authorized her husband Mr. Cheung to represent her and to argue her case at the hearing of the Appeal. Mr. Cheung presented the Appellant's case with admirable clarity.

### **The Appellant's case**

9. Mr. Cheung argued that Data Protection Principle 1 ("DPP 1") (of Schedule 1 of the Ordinance) restricted the use of personal data to a purpose for which it was collected, or a directly related purpose, relying on the words "necessary for or directly related to that purpose" in paragraph (1)(b) of DPP 1.

10. The Board disagrees. DPP 1 concerns the collection, not the use, of personal data, though the restriction on the collection is framed in terms of the scope of the intended use. In the present case, no doubt the collection is not in contravention of DPP 1, as it was sent to Mr. Chan for the 2008 Appeal, and the personal data was thus collected properly for the use, then, of the 2008 Appeal, and thus there is no improper collection for an unrelated purpose. Whether the subsequent other use of the previously properly collected data, is a misuse in contravention of the Ordinance, must be gauged by reference to DPP 3, not DPP 1.

11. Mr. Cheung then argued that DPP 3 is, on its literal reading, very narrow. It provides that "...shall not... be used for any purpose other than (a) the purpose for which the data were to be used at the time of the collection of the data; or (b) a purpose directly related to the purpose referred to in paragraph (a)." Thus, Mr. Cheung argued, once the use by Mr. Chan of the Letter in the 2007 DC action could not be regarded as "directly related" to the 2008 Appeal, then it was a contravention of DPP 3, and, as section 4 of the Ordinance was also couched in the restrictive language "A data user shall not do an act, or engage in a practice, that contravenes a data protection principle unless the act or

practice, as the case may be, is required or permitted under this Ordinance.”, the use in 2007 DC action was a contravention of the Ordinance requiring an enforcement notice from the Respondent.

12. Mr. Cheung further argued that such restrictive construction of the Ordinance would not unduly hamper Mr. Chan’s constitutional right to a fair trial, as Mr. Chan could in 2007 DC action seek specific discovery against the Appellant and compel the Appellant to disclose the Letter.

### **Analysis**

13. The legislative purpose of the Ordinance is to prevent misuse of personal data. Although a strict literal reading of section 4 and DPP 3 seems to restrict its use very narrowly only to the original purpose for which the data was collected and directly related purposes, and no other purpose, it cannot be right that data collected cannot be used to, e.g. prevent a serious crime such as to avoid a terrorist’s strike against the mass public. That such will be an unbearable, and surely unintended consequence if one follows the literal construction restrictly, means that a proper construction of the Ordinance is that it does not restrict use which are otherwise guaranteed by, in the present case, Article 10 of the Bills of Rights Ordinance. The right to a fair trial is so important that it should not be protected merely within the confines of discovery procedures provided by the Rules of the District Court (or the High Court). Adducing such data in a due process in a Court of Law of Hong Kong certainly is not misuse of personal data intended to be prevented by the Ordinance. Such conclusion is fortified by the fact that the relevant court proceedings are under the control and scrutiny of the relevant courts ensuring that there is no abuse by the data user of the process and procedures (including the question as to admissibility and confidentiality of the document or personal data in the relevant court proceedings) of the relevant courts.

14. The Board is further of the view that the subsequent amendment of the Ordinance by adding section 60B allowing the use of the data in legal proceedings in Hong Kong does not mean that, before the amendment, the Ordinance did not so allow such use. The amendment did not necessarily mean that there was a change in the legislative intent to allow a use previously prohibited.

15. Furthermore, in the factual context of present case, the Letter was clearly relevant to the litigation between Mr. Chan and the Appellant in the 2007 DC action. That action concerned a previous action under DCCJ 15756 of 2000 ("the 2000 DC action"). The Letter expressly referred to the 2000 DC action. The Board will not go into further unnecessary details to show the connection, but it suffices to say that, clearly, Mr. Chan was fully justified in believing that the Letter is relevant to his case in the 2007 DC action, and was clearly not abusing the data he obtained in the 2008 Appeal, nor disclosing the Letter for any ulterior purpose (such as to embarrass the Appellant or thereby to exert undue pressure on her).

16. For the aforesaid reasons, the Respondent was clearly correct in deciding pursuant to his power under section 39(2)(d) of the Ordinance not to continue investigating the Complaint.

17. A further ground for not remitting the matter to the Respondent to continue investigation of the case is that, subsequent to the decision by the Respondent, the Ordinance has been amended, clearly allowing the use by Mr. Chan of the data in the 2007 DC action. Therefore there is no point in continuing investigation, as clearly the Respondent should not issue any enforcement notice to stop the use of the data in the 2007 DC action (which proceedings had been concluded by now), and, in the aforesaid circumstances of this case, there is clearly no point in the Respondent in simply making a finding of breach or no breach with no further consequence, and simply informing the parties such finding as a matter of principle, which Mr. Cheung suggested.

**Conclusion**

18. For the aforesaid reasons, the Appeal is unanimously dismissed.

(signed)

(Mr Chan Chi-hung, SC)

Deputy Chairman

Administrative Appeals Board