

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 46 of 2004

PRISCILLA SIT

Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 13 October 2005

Date of Decision : 27 October 2005

Date of handing down Reasons for Decision : 27 October 2005

DECISION

On 2 September 2004, the appellant by letter lodged a complaint to the Privacy Commissioner for Personal Data (“the Commissioner”) against the ex-chairperson, Ms Cheung, the ex-chief executive officer, Mrs Ho and Ms Papadopoulous of the Equal Opportunities Commission (“EOC”). The main areas of complaint are:

- (1) Ms Cheung and Ms Papadopoulous committed offences under s. 64(2) and (9) of the Personal Data (Privacy) Ordinance (Cap. 486) (“the Ordinance”) in supplying and making false and misleading information to the Commissioner, in relation to the appellant’s data access requests.

- (2) Ms Cheung and Papadopoulos failed to comply with the appellant's data access requests to supply to her the data listed in Annex C to her complaint letter, thereby committed a breach of s. 19(1) or in the alternative, s.19(2) (e) of the Ordinance.
- (3) Ms. Cheung and Ms Papadopoulos failed to keep a log book and maintain a record as required under s. 27 of the Ordinance.
- (4) Ms Cheung and Ms Ho failed to comply with the appellant's data access requests to supply to her data listed in Annex C to her complaint letter, thereby committed a breach of s. 19(1) or in the alternative, s. 19(2) of the Ordinance.
- (5) Ms Cheung and Mrs Ho failed to keep a log book and maintain a record as required under s. 27 of the Ordinance.
(It should be noted that items 4 and 5 are similar to items 2 and 3 except that the persons complained of are different).
- (6) Ms Cheung and Mrs Ho committed a breach of Data Protection Principles ("DPP") 1 and 3 in that the video recording of the seminar held on 6 May 1997 was excessive collection of personal data and its subsequent use in a performance appraisal unauthorized.
- (7) Ms Cheung and Mrs Ho committed a breach of DPP4 in failing to implement a data protection policy to ensure adequate protection of the 911 memo which was destroyed but later reappeared.
- (8) Ms Cheung and Mrs Ho committed a breach of DPP6 in failing to implement administrative arrangements for handling data access requests and to ensure that they are dealt with within the prescribed period.

2. The complaint was directed against these ex-principal officials of the EOC who were acting in their official capacity at the material time but in essence, it was against the EOC.

3. The complaint was the 4th one in a series of similar complaints against the EOC, the first of which started in March 1999 when the appellant alleged that the EOC failed to comply with her requests to the EOC in November 1997 for personal data. The background of the case has been fully set out in the decision of the Administrative Appeals Board (“the Board”) in Appeal No. 51 of 2003. In that appeal, the Board dismissed the appellant’s appeal against the decision of the Commissioner not to carry out an investigation of her 3rd complaint dated 12 July 2003 against the EOC. For the purpose of the present appeal, we need only briefly refer to the following.

4. The appellant was a director of the EOC. On 11 September 1997, the appellant’s subordinates in a jointly signed memo, complained to the Chief Executive of the EOC that the appellant was not fit to be their supervisor (the “911 memo”). The EOC held a members meeting on 25 September 1997. The following day, the EOC terminated the appellant’s employment. The appellant was not satisfied with the decision of the EOC. On 29 September 1997, the appellant, through her solicitors, asked the EOC for the reasons for termination of her employment. Later in November 1997, again through her solicitors, the appellant asked the EOC to provide her with the records and relevant documents of the meeting on 25 September 1997 (“the 1997 DAR”). The EOC’s response to the 1997 DAR was not considered by the appellant to have complied with her requests.

5. The appellant complained to the Commissioner that the EOC had failed to comply with her 1997 DAR (the 1st complaint). The Commissioner found that there was a breach of DPP5 but did not consider it necessary that an enforcement notice in that regard should be issued. The appellant appealed against the decision to the Board but the appeal was dismissed. The appellant then took out a discrimination action in the District Court against the EOC. During discovery process of the action, the appellant obtained a list of documents (the “List”). Based on the documents disclosed in the List, the appellant complained to the Commissioner that the EOC had failed to supply to her the documents in the List pursuant to her 1997 DAR (the 2nd complaint). The Commissioner found that the documents in the List did not contain personal data of the appellant falling within her 1997 DAR and refused to

carry out an investigation of her complaint. There was no appeal against the Commissioner's decision.

6. On 12 July 2003, the appellant obtained in the discovery process a supplemental list of documents (the "Supplemental List"). The documents listed in the Supplemental List included the 911 memo. Based on the Supplemental List, the appellant complained to the Commissioner against the EOC alleging that the documents in the Supplemental List contained her personal data and at the time she made her 1997 DAR, these documents were in the possession of the EOC. The EOC not only had failed to supply these documents to her but also lied to her that the documents were not in their possession, thereby committed an offence under s.64 of the Personal Data (Privacy) Ordinance (the "Ordinance"). All the documents in the Supplemental List except the 911 memo were considered by the Commissioner. The Commissioner found that they did not fall within the scope of the 1997 DAR and refused to investigate the complaint. The appellant appealed to the Board. At the hearing of the appeal, counsel for the appellant conceded that the documents in the Supplemental List except the 911 memo which the appellant relied on to support her complaint were not relevant. The Board found that in the circumstances, the Commissioner was right in refusing to investigate the 3rd complaint and dismissed the appeal. The Board in the course of considering the appeal was concerned that the 911 memo was not put before the Commissioner for his consideration in relation to the 3rd complaint. This memo contained the personal data of the appellant and was certainly relevant to the appellant's termination of employment so that it would be within the scope of her 1997 DAR. If the EOC had been in possession this memo when the appellant made her 1997 DAR, and the EOC had failed to allow the appellant to have access to it, the appellant's complaint that the EOC failed to comply with her DAR would have been justified. The Board was of the opinion that the Commissioner might have concluded differently in respect of the appellant's 3rd complaint if the memo was there for the Commissioner to consider. The Board therefore indicated that there was nothing that could prevent the appellant from making this complaint. It would appear that the appellant's present complaint is a follow up of the Board's indication in that appeal.

7. The Commissioner having considered the present complaint, replied to the appellant on 30 September 2004 notifying her that he decided not to carry out an investigation of her complaint. The reasons for decision can be summarised as follows:

- (1) The video recording in Seminar in May 1997 related to a Q & A session on the Sex Discrimination Ordinance. This did not amount to a collection of her personal data. The matter had been previously dealt with by the Commissioner. References in the witness statements to the appellant's performance in the Seminar did not amount to use of the appellant's personal data.
- (2) The question of whether there was a breach of DPP4 by failing to implement arrangements ensuring protection of the appellant's personal data was considered by the Board in the appeal by the appellant against the Commissioner's decision on the appellant's 1st complaint. The Board had found that there was no breach of DPP4.
- (3) On the alleged breach of DPP6, the Commissioner will consider the current practice and procedure of the EOC regarding handling of data access requests.
- (4) The complaints that the EOC had breached s. 19(1) and (2) are similar to the previous complaints which had been thoroughly investigated by the Commissioner. All complaints relate to the appellant's data access requests over 7 years ago and any new investigation is not practicable in view of faded memories and relevant documents probably no longer exist.
- (5) In the High Court Case of Tsui Koon Wah v Privacy Commissioner for Personal Data, the court stated that as regards data access requests, if the person making the request was able to obtain what he wanted through other legal channels, a complaint to the Commissioner or any intervention by the court would become meaningless and unnecessary. The appellant having obtained the personal data she requested through discovery process in her court action, any investigation would become

unnecessary, even if the EOC had failed to comply with s. 19(1) or (2).

8. The appellant was not satisfied with this decision and hence the present appeal before us.

9. The appellant submits that the documents listed in Annex C contained her personal data. They also show the 911 memo existed at the time she made the 1997 DAR and the EOC had failed to supply them to her in compliance with her requests. They also show that the EOC committed a breach of s. 19(1) or (2) and offences under s. 64 of the Ordinance. In these circumstances, the Commissioner must investigate her complaint. Whether at the end of the investigation the outcome would be in her favour is another matter. The question is: the Commissioner was wrong not to investigate in the face of these materials.

10. Counsel for the Commissioner submits that the appellant's complaint on the EOC's non-compliance with her DAR happened almost 8 years ago. To re-investigate after such long lapse of time would be difficult and unsafe. As regards the 911 memo, Counsel submits that having gone through the statements of Mr. Li supplied by the appellant and the statement of Ms Ho, on what happened to the memo, no evidence could be found contrary to the assertion of the EOC that the 911 memo was destroyed subsequent to its withdrawal by the signatories upon termination of the appellant's employment. It was likely that the memo had resurfaced because one of the officers of the EOC who had kept a copy of it. The Commissioner would issue warnings to the EOC if any offence relating to the matter at issue is discovered but because of the limitation period, no prosecution would be possible.

11. Counsel for the EOC submits that there is no evidence to show that at the material time, Ms Papadopoulos who dealt with the 1997 DAR had any knowledge of the 911 memo. There was no basis for the appellant's insinuation that the EOC had deliberately withheld the 911 memo from her when she made her requests. Counsel also submits that the appellant had not identified any specific document which she had requested but had not been supplied to her. The Commissioner had made his decision in the light of all these materials. The decision was

reasonable in the circumstances.

12. We note that the documents listed in Annex C to the appellant's complaint letter are the same as those in the List and the Supplemental List. These documents were the basis of the appellant's 2nd and 3rd complaints. Except the 911 memo, these documents were considered by the Commissioner when he dealt with both complaints with the result that he found they do not support the appellant's complaints. It was in these circumstances that the Commissioner exercised his discretion under s. 39 of the Ordinance not to investigate both complaints. It must be remembered that there was no appeal against the Commissioner's decision on the appellant's 2nd complaint. That was the end of the matter involved in the 2nd complaint. The Board had confirmed the Commissioner's decision on the 3rd complaint when the appellant appealed against that decision. The only matter the Board considered that might need further consideration was, as has been mentioned earlier in this judgment, whether the 911 memo was in the possession of the EOC at the time the appellant made her 1997 DAR. The appellant sought in the present complaint to reopen what had already been decided by the Commissioner and confirmed by the Board. We see no justification for such course. The appellant's present complaint should have been confined to the question of the 911 memo.

13. We agree with the Commissioner that whether there was a breach of DPP1 and 3 was decided by the Board in the appeal against the Commissioner's decision on the 1st complaint. The Board found only a breach of DPP5 and not otherwise. The decision of the Board was final. The video recording was one of the documents in the Supplemental List. It was considered by the Commissioner in the 3rd complaint as outside the scope of the 1997 DAR. This decision was confirmed by the Board on appeal. In these circumstances, we cannot have agreed more with the Commissioner that except the 911 memo, all the matters raised in the present complaint had been previously considered and decided.

14. On the question of the 911 memo, the Commissioner had considered the statements of the relevant witnesses and considered that there was no prima facie case to show that when the EOC received the 1997 DAR, the EOC had the memo and had withheld it from the

appellant which would otherwise have constituted a non-compliance with the appellant's DAR. On the materials before us, we do not find anything capable of undermining such findings. On the other hand, in our opinion, by reviewing all the relevant witness statements, the Commissioner had in fact carried out some investigation of the complaint before he concluded that no investigation need to be carried out.

15. Section 39(2)(d) of the Ordinance gives a wide discretion to the Commissioner to decide whether not to carry out an investigation. It states as follows:

“(2) The Commissioner may refuse to carry out or continue to carry out 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.”

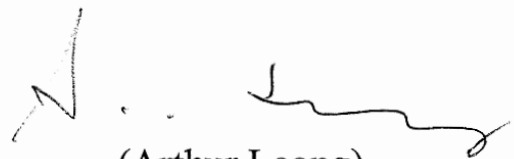
16. In the case of Tsui Koon Wah, the court stated that if through other legal channels, the person making the data access request is able to have access to the personal data in question, it would be meaningless to make a complaint. In our opinion, that statement was obiter and applicable only to the particular circumstances of that case and, with respect, should not be viewed as the general rule. The Ordinance has made it a requirement that the data user should comply with a data access request otherwise he commits an offence under s. 64 of the Ordinance. That being so, the fact that the person making the request is able to have access to the data in question through other channels appears to be irrelevant to the non-compliance of the data access request and a complaint that there has been non-compliance with the statutory requirement.

17. Be that as it may, we think that where access to the data in question had been obtained through other channel by the complainant, it is a factor to be taken into consideration by the Commissioner in deciding whether to carry out an investigation of the complaint.

18. In our view, the Commissioner before making his decision had taken into consideration the following factors:

- (1) the matters complained of in the present complaint have all been considered and decided in the previous similar complaints,
- (2) no justification exists to reopen the complaints,
- (3) the evidence does not show that there is prima facie case of the 911 memo being deliberately withheld by the EOC from the appellant despite her 1997 DAR, and
- (4) the appellant had obtained the documents she required through her civil action.

19. In the circumstances, the Commissioner's decision not to carry out an investigation of the present complaint is neither wrong nor unreasonable. Our conclusion is that the appeal should be dismissed and we dismiss the appeal.



(Arthur Leong)

Chairman

Administrative Appeals Board