

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 50 OF 2011

BETWEEN

WU YIN-NEI, WENNY

Appellant

and

THE PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Date of Hearing: 18 January 2012

Date of handing down Written Decision with Reasons: 23 May 2012

REASONS FOR DECISION

The Complaint

1. On 4 May 2011, the Appellant made a complaint against one Mr Pong, her landlord, to the Respondent ("the Commissioner"). In the standard complaint form, the complaint is sketchy. The complaint is reproduced below:

“LINKWELL ASIA LTD. 最近經常進出本人居住單位門口及把本人的名字及租金明顯地透路（sic）出來，我不認識其他住客及訪客，陌生人，我曾經報過警，因為有人曾經跟踪我本人。”

2. After receiving the complaint, the Commissioner in order to fully understand the complaint and with a view to assist the Appellant to formulate her complaint properly, approached her to gather further information. As a result, the Commissioner has learned that there are four complaints against Mr Pong. These are:

- (1) Mr Pong persistently disclosed her personal data including her name and rental details to other occupants that she does not know, visitors and strangers near the front door of her residence;
- (2) Mr Pong disclosed her personal data to Mandy Chan, Rene Pong and other staff members of Linkwell (Asia) Limited and Wah Fu (Group) Holdings Limited;
- (3) Mr Pong attempted to take away some important letters issued by Parliament House, Australia from her residence;
- (4) Mr Pong requested the security guard of the building where she resides to monitor her departure from that building.

3. On 14 July 2011, the Commissioner wrote to the Appellant (see Appeal Bundle pp 182 to 185) asking her to confirm that the above four complaints against Mr Pong. In the same letter, the Commissioner requested for further details of the complaints in the form of a questionnaire.

4. On 21 July 2011, the Appellant gave her reply. The Commissioner considered the content of the reply and decided not to initiate an investigation.

The Appellant was then notified of the decision and is now appealing to the Board against the decision of the Commissioner.

Decision of the Commissioner

5. While the Appellant confirmed to the Commissioner of the four complaints, she did not provide sufficient information to substantiate her complaints. In the view of the Commissioner, there is no prima facie evidence that Mr Pong has contravened any of the requirements of data protection principles.

6. That being the case he followed the established policy and exercised his discretion under section 39(2)(d) of the Personal Data (Privacy) Ordinance (“the Ordinance”) not to initiate an investigation to the complaints against Mr Pong.

Grounds of Appeal

7. Two main grounds of appeal can be gathered from the Notice of Appeal. The Appellant was absent at the appeal hearing and therefore this Board was unable to assist her to elaborate on these grounds of appeal.

8. The first ground of appeal is that the Commissioner has not read and studied the documents and information provided by her. In particular, the Appellant alleged that the Commissioner did not check with the Australian Federal Police and Parliament House, Australia about her assertions with regard to the alleged theft by Mr Pong of her reference letter.

9. The second ground of appeal is that the Commissioner did not investigate Mr Pong, Mandy Chan and Rene Pong.

Merit of the Grounds of Appeal/Decision of the Board

10. The four aforementioned complaints have been identified by the Commissioner and the same have been confirmed by the Appellant. The Commissioner had rendered her the adequate assistance when he asked the Appellant for specific information in the form of questionnaire. The Appellant did not choose to answer point by point raised in the questionnaire. She cannot be criticised by that. It is understandable that some people prefer to tell their own version of events in a narrative form in the order or manner they feel more comfortable. The Commissioner did not criticise her for that but noted the information asked of her was not forthcoming. The materials supplied by the Appellant consist of her statement about the complaints and some documents. The statement contains her bare assertions without giving any details, as to dates, identity of persons etc. and the documents provided are considered by the Commissioner irrelevant or not lending any support to her allegations.

11. The Commissioner has denied the allegation that he has not read and studied the documents and information supplied. In his reasoning the Commissioner made references to the information in respect of the complaints. These references appear at first sight to be sketchy outlines and not details of the acts complained of. In fact they are not outlines and no other useful details can be extracted from the information given by the Appellant. Looking at these references in the reasoning in reaching his decision, the Board finds that the Commissioner has considered all the information and

materials supplied by the Appellant. Furthermore the Appellant has failed to point out what specific information has been omitted but which should have been considered by the Commissioner. There is no merit in the first ground of appeal. Whether the Commissioner's reasoning is sound or his conclusion correct is another matter.

12. The Appellant complained in her second ground of appeal that the Commissioner should have investigated Mr Pong, Mandy Chan and Rene Pong. The Commissioner contends that there is no prima facie evidence that Mr Pong has contravened any provisions of the data protection principles. If this contention is correct, the second ground of appeal must also fail.

13. The Commissioner has cited two decisions of this Board in support of his decision not to investigate. The first case is AAB No. 32 of 2004. In that case the Board said, "If there is no prima facie evidence of contraventions of the Ordinance by the complained practice or act, the Privacy Commissioner can exercise his discretion to refuse investigation under section 39. The Appellant should bear in mind that complaining contravention of the Ordinance by others is equivalent to accusations of committing an offence, which is a serious accusation. Therefore, the complaint should have basis, including evidence and justifications. The Privacy Commissioner has to consider if there is any basis for the complaint, i.e. prima facie evidence and justifications, before deciding to investigate." The second case relied on by the Commissioner is AAB No. 8 of 2007 in which the Board said, "the Privacy Commissioner does not have an absolute duty to enquire with the party being complained against on every detail of a complaint. According to section 37(1)(b) of the Ordinance, a complaint must be on act which may contravene the requirements under the Ordinance. Generally speaking, it is the complainant, but not the party being complained against, who should provide the relevant information. If the complainant is unable to provide prima facie

evidence to prove the alleged contravention, the complaint is not established.”

14. This Board has no reasons to disagree with the principles stated in these cases. The rationales behind these principles are obvious. Beside the duty to utilise limited sources efficiently, the Commissioner has to consider the right of those complained against. It is their right to freedom from being subject to unnecessary or baseless investigation that the Commissioner has to balance against the legitimate right under the Ordinance of the complainant to the assistance of the Commissioner to investigate the infringement of his or her right to privacy of personal data. When the complainant does not make out a case of prima facie evidence, it is reasonable for the Commissioner not to initiate a formal investigation. There is no absolute duty for him to make an enquiry of the parties complained against. To do so is tantamount to putting the cart before the horse.

15. Furthermore it is the stated policy of the Commissioner that in the case where there is no prima facie evidence, he may refuse to carry out a formal investigation (see para 8 (d) of the Complaint Handling Policy). A copy of this policy has been filed with this Board. By section 21(2) of the Administrative Appeals Board Ordinance this Board shall have regard to this policy in determining the appeal. The Commissioner has relied on this particular reason as stated in his policy to exercise his discretion under section 39(2) of the Ordinance to refuse to carry out an investigation. Section 39(2) provides, inter alia, that the Commissioner can refuse an investigation for any reason. The term ‘Any Reason’ is intended by the legislature to mean a reasonable one. In the instant case the Commissioner is purportedly following his publicly stated policy when making his decision and the reason given therefore amounts to a reasonable one. His decision can be faulted only if he was wrong in coming to the conclusion that there is no prima facie case in these complaints.

16. The remaining issue is whether the information provided by the Appellant amounts to prima facie evidence. In assessing the information, one must not lose sight of two matters. Firstly the function of the Commissioner should be noted. He is generally entrusted to enforce provisions of the Ordinance. Secondly, the subject-matter of complaint must be an act which may contravene the requirements of the Ordinance. Evidence must be assessed in the light of probability that the party complained against has contravened such requirements. In this particular case, and generally, it is the collection, handling and using the personal data that the Commissioner should focus his attention on.

17. Complaint (1): The Appellant heard Mr Pong telling some strangers about her name and rental details near her home and that she heard the strangers talking loudly on those matters during the period October 2010 to May 2011. It should not be disputed that as the landlord Mr Pong has collected her name and rental details. There is nothing unfair or unlawful in the way of collection of these personal data.

17.1. Those strangers as mentioned by the Appellant apparently cannot be identified by names. However at the very least, there should be some background materials provided so as to allow the Commissioner to follow up. There is nothing to show what these strangers are, neighbours, cleaners, or visitors. By the same token there is nothing to show what aspects about rental details have been allegedly disclosed, the monthly rental? Duration of tenancy period? The approximate dates, and locations of these alleged incidents are equally vague. Most importantly there is nothing to show for what purpose Mr Pong should have told them the rental details. The Commissioner rightly came to the conclusion that there is no concrete evidence about this complaint.

18. Complaint (2): Mr Pong allegedly has disclosed the personal data of the Appellant, to Rene Pong, her email address and her private life in Australia, and to Mandy Chan, her mobile phone number. She formed such belief because she received an email from Rene Pong and a telephone call from Mandy Chan, and she heard Mandy Chan gossip with strangers about her personal life in Australia. That is all that she could provide the Commissioner with.

18.1. Notably the content of the email and the telephone conversations were not given. As to her private life, no descriptions as to what aspects of it were disclosed by Mr Pong to the Commissioner. There is nothing to show that Mr Pong has collected her personal data about her life in Australia, or for what purpose. Again no details were given as to identities of parties and as to when these incidents were supposed to occur.

18.2. More importantly this Board notes that the Commissioner was not given any materials of the background or the purpose of the email and phone calls. The materials given to the Commissioners are insufficient and the Commissioner is justified in coming to the conclusion that no concrete evidence has been shown that Mr Pong has been in some way in breach of any requirements of the Data Protection Principles.

19. Complaint(3): The Appellant alleged that on one occasion when Mr Pong was repairing the kitchen lighting for her, saw a copy of her personal reference letter. He asked her what the letter was about and even attempted to take it away but failed. In this letter, there was information about her education in Australia. A copy of the letter was provided to the Commissioner. The Appellant alleged that she had also made a report of the incident to the Australian Federal Police on 26 May 2011. All the information has been considered by the Commissioner. His duty and

function relates to the enforcement of data protection principles. That Mr Pong might attempt to take away her letter is not within the power of the Commissioner to investigate. There is nothing from the information given to him to suggest there was a breach of the requirements of the data protection principles. The letter itself is irrelevant and equally is the fact that a report was made to Australian Federal Police.

20. Complaint(4): The evidence provided by the Appellant is again her own assertions. She heard on several occasions that Mr Pong enquired with the security guard about the direction that she went when leaving the building. These enquiries, she alleged, were to find out where she worked. Such inference by her is not justified at all. The Commissioner considered that there was no prima facie evidence as to how there was any contravention of the provisions of the data protection principles. His conclusion cannot be faulted.

21. Mr Pong, being a party bound to this appeal, inevitably came to the knowledge of the complaints against him in these appeal proceedings. He volunteers to file some background materials of his tenancy disputes with the Appellant. He categorically denied he has contravened any requirements of the Ordinance. Of all the allegations against him, he only admitted that he has provided email address and phone number to his staff Mandy Chan and Rene Pong. He maintains that this is for the purpose of entrusting them to deal with the tenancy matter. This is a legitimate purpose and consistent with the purpose of collecting the personal data.

22. For the above reasons, the Commissioner is right in deciding not to investigate. If contrary to the finding of this Board, the Commissioner should have made enquiry with Mr Pong, in view of the information he has given to this Board, there is still no prima facie evidence against Mr Pong and

the Commissioner should not have initiated a formal investigation. This appeal is therefore dismissed.

23. There are certain matters to clarify with the Appellant before this Board can be fully satisfied that this appeal is vexatious and frivolous. As the Appellant is absent, this Board is unable to do so and is prepared to give the benefit of the doubt to the Appellant and refuses the Commissioner's application for costs. With regard to the application for costs on behalf of Mr Pong, namely travelling expenses of \$30, different considerations apply under section 22(1)(b) of the Administrative Appeals Board Ordinance. It is our finding that it would be unjust and inequitable not to award costs to Mr Pong. This Board hereby orders that the Appellant do pay fixed costs of \$30 to Mr Pong.

(signed)

(Mr Yung Yiu-wing)

Deputy Chairman

Administrative Appeals Board