

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 29 of 2001

BETWEEN

KAM SEA HANG OSMAAN

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 30 January 2002

Date of Decision : 28 February 2002

D E C I S I O N

Introduction

This is an appeal against the decision of the Privacy Commissioner for Personal Data ("the Commissioner") refusing to carry out investigation into a complaint in respect of an article published in the Next Magazine on 30

July 2000. The complainant, Mr Kam Sea-hang, Osmaan, is and was at the material time, an Assistant Labour Officer II employed by the Government of the Hong Kong Special Administrative Region.

Events Leading to the Complaint

2. The reunion of a group of old boys of Queen's College should be a happy occasion to remember. For the Appellant, this was not going to be as subsequent events turned out. A gathering took place on 7 July 2000. It started with photograph taking outside the College which the Appellant did not take part, to be followed by a dinner which the Appellant took part. After the dinner, all the participants including the Appellant went to a nearby McDonald restaurant for drinks and to continue chatting. Besides the several old boys who had passed their School Leaving Certificate examinations at the top with distinctions in many subjects, a reporter from the magazine, Miss Liu who is the girlfriend of one of the former students and a photographer from the same magazine were also present. As early as May 2000, Miss Liu had spoken to the Appellant on the telephone that she intended to write an article on friendship between the members of the group of the former students that would include the Appellant who raised no objection. Miss Liu telephoned him on the following day, 8 July and tricked him into expressing views which are part of the complaint. This is termed the "Trick Interview" by Counsel for the Appellant in his argument before the Board.

The Complaint

3. The Appellant felt offended by the article after its publication and

sought a written apology from Miss Liu which was refused although she apologised verbally and told him that the article had been changed by someone, not by her, at some stage before publication. Having failed to obtain complete satisfaction, he made complaints to the Hong Kong Press Council and Hong Kong Journalists' Association and on 16 February 2001 he wrote to the Commissioner to lodge a complaint under the Personal Data (Privacy) Ordinance. His case was that he had specifically requested not to be photographed alone and the photograph at page 92 of the magazine showing him and two other persons with their backs towards the camera was taken covertly without his consent. His second point was that he was misquoted and in fact a large part of what was written about him was complete fabrication. Third, the wrong description of his job title and his complaints in 1 and 2 all constituted contraventions of the Ordinance. The article has adversely affected his personal life and career.

The Commissioner's Decision

4. The Commissioner gave his decision in a letter of reply to the Appellant dated 4 April 2001. The Commissioner informed the Appellant that having considered all the circumstances of the case, he formed the opinion that it was unnecessary to carry out an investigation in respect of the complaint pursuant to s.38 of the Ordinance. He relied on s.39(2)(d) and concluded that there was no sufficient prima facie evidence of any contravention of any requirements of the Ordinance to warrant an investigation. His reasons were as follows:-

- (a) the original collection and subsequent publication of the Appellant's personal data by Miss Liu was for the purpose of

reporting and it was not in contravention of DPP3;

- (b) the wrong description of the Appellant's job title could be due to a misunderstanding;
- (c) the alleged fabrication of the conversation appeared to be rather a question on the manner of reporting which was not meant to be monitored under the Ordinance ; and
- (d) the Appellant knew that the photographer was present at the scene and he should have known or foreseen that the photographer would take photographs during the gathering.

The Commissioner was further of the view that as the Appellant considered that his reputation had been affected, his remedy was to pursue an action in defamation in the courts or to make a complaint to a regulatory body of the press.

The Appeal

5. The decision of the Commissioner is attacked on appeal on two main fronts although there are a total of 7 grounds of appeal. The two main points are that (1) there had been procedural unfairness in the handling of the complaint and (2) the matters complained of by the Appellant all constituted contravention of the Ordinance. On the first point it was argued that contrary to the Complaint Procedure published on the website and the printed Handling Complaints Policy, nothing was done by the Commissioner after receipt of the Appellant's complaint letter except a telephone call from a Miss Chow of the Commissioner's Office to the Appellant. Section 38 imposes a duty on the Commissioner to carry out an investigation upon the receipt of a complaint or on his own initiative of matters relating to personal data, which

may involve the contravention of a requirement under the Ordinance. But this duty is subject to the overriding discretionary power of the Commissioner under s.39 under certain specified circumstances. Section 38 provides:-

“Where the Commissioner

- (a) receives a complaint; or
- (b) has reasonable grounds to believe that an act or practice-
 - (i) has been done or engaged in, or is being done or engaged in, as the case may be, by a data user;
 - (ii) relates to personal data; and
 - (iii) may be a contravention of a requirement under this Ordinance,

then

- (i) where paragraph (a) is applicable, the Commissioner shall, subject to section 39, carry out an investigation in relation to the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a requirement under this Ordinance;
- (ii) where paragraph (b) is applicable, the Commissioner may carry out an investigation in relation to the relevant data user to ascertain whether the act or practice referred to in that paragraph is a contravention of a requirement under this Ordinance.”

Section 39(2) reads:-

- “(2) The Commissioner may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case-
 - (a) the complaint, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Commissioner was of the opinion that there had been no contravention of a requirement under this

- Ordinance;
- (b) the act or practice specified in the complaint is trivial;
 - (c) the complaint is frivolous or vexatious or is not made in good faith; or
 - (d) any investigation or further investigation is for any other reason unnecessary.”

We will mention briefly the decision of the Court of Appeal in *Eastweek Publisher Limited and Eastweek Limited v The Privacy Commissioner for Personal Data HCAL 98 of 1998* because our attention has been drawn to it. In so far as its relevancy is concerned, it does not assist the Appellant in the slightest. The photograph of the complainant in that case was taken without her knowledge or consent. It was submitted by Mr McLeish, Counsel for the Appellant, that his client took exceptional objection to the fabricated part of the article which constituted by far the worst violation of the Ordinance.

The Findings of the Board

6. Having considered all the arguments, the written submissions, the witness statement of the Appellant, the case law and the relevant provisions of the Ordinance, the Board unanimously upholds the decision of the Commissioner. There is no merit in the suggestion of any procedural unfairness. The Appellant had not been misled or prejudiced in any way. The procedure would only be followed in full if there is any substance in the complaint amounting to a contravention of the Ordinance. Section 38 is to be read with and subject to s.39. The Commissioner found that there was no prima facie evidence to initiate an investigation and we cannot agree more with him. The strongest objection taken by the Appellant, we were told, was the fabrication in the article. It has to be clearly understood that the

Ordinance protects the personal data of an individual and not fabrication. Personal data is defined in s.2 of the Ordinance as meaning any data:-

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of the individual to be directly or indirectly to be ascertained; and
- (c) in a form in which access to or processing of the data is practicable.

The wordings of the definition are clear enough to exclude any fabrication or lies told about a person by another person. It is the personal data that this Ordinance protects. The Appellant himself willingly agreed to be interviewed by a reporter and voluntarily disclosed his personal data. We utterly fail to understand what he complains about. Anyone who is mature enough must realize, and one often reads from newspapers, the danger of giving interviews or talking to reporters of newspapers or magazines. Experience tells us that you cannot always have good things say about you. One has to accept the consequence. If he is misquoted or misreported, it is just too bad unless it is bad enough that would justify an action in defamation and he has the money to do it. We do not think we need say any more. We hope the Appellant has learned his lesson to be careful whenever he talks to the press and if at all possible, he should avoid it. The remaining matter about the wrong description of his job title could have been a misunderstanding as the Commissioner thought and in any event it is so trivial that the Commissioner could have totally ignored it. It cannot be a contravention of a requirement under the Ordinance. A lie or a fabrication always remains a lie or a fabrication and can never convert into "personal data".

7. It follows that the appeal must be dismissed. The Board decides,

on balance, not to make an award of costs against the Appellant under s.22 of the Administrative Appeals Board Ordinance. He might think that he had grievances but has chosen the wrong venue to redress it. For these reasons, we are prepared to take a favourable view that the appeal is not to be regarded as frivolous or vexatious. It is misconceived. So was the complaint.



(Michael Wong)

Chairman

Administrative Appeals Board