

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 234/2013

BETWEEN

HONG KONG EXAMINATIONS
AND ASSESSMENT AUTHORITY

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr Horace WONG Yuk-lun, SC, JP (Chairman)
- Miss Wendy GAN Kim-see (Member)
- Miss HO Yuen-han (Member)

Date of Hearing: 24 June 2014

Date of Handing down Written Decision with Reasons: 1 April 2019

DECISION

Appeal

1. The Appellant in this appeal is the Hong Kong Examinations and Assessment Authority (“**HKEAA**”). In this Appeal, HKEAA appeals against an Enforcement Notice (the “**Enforcement Notice**”) issued by the

Privacy Commissioner for Personal Data (“PCPD”) and served on HKEAA on 13 December 2013.

Facts

2. The following facts of the case are not disputed.
3. The Complainant, Miss Chan Ying Zin, was a candidate in the Hong Kong Diploma of Secondary Education Examination (“HKDSE”) in 2012. Amongst other subjects, the Complainant took the examinations in the subjects of Chinese Language and Liberal Studies.
4. The results of the examinations were released on 20th July 2012. Being dissatisfied with her results, the Complainant applied for review of her results to the HKEAA through her school.
5. On 20th August 2012, the HKEAA dismissed her review and upheld the results which had previously been released to her.
6. On 27th August 2012, the Complainant lodged with the HKEAA a data access request (the “DAR”) requesting for a copy of her personal data as recorded in:-
 - (1) The Complainant’s examination scripts for the subject of Chinese Language (中國語文科試卷), HKDSE 2012; (“**Item #1**”)

- (2) The Complainant's examination scripts for the subject of Liberal Studies (通識教育科試卷), HKDSE 2012; (**"Item #2"**) and
- (3) Video clips of the Complainant's oral examinations for the subject of Chinese Language (中國語文科口試錄影片段), HKDSE 2012. (**"Item #3"**)

7. In accordance with HKEAA's Application Guide on Data Access Requests, on 27 August 2012 the Complainant paid to HKEAA HK\$1,485, being the amount charged by HKEAA for processing and handling the DAR (the **"Fees"**).

8. The said sum of HK\$1,485 comprised of the following:-

- (1) HK\$385 for Item #1, being the fees charged in respect of the first subject (i.e. Chinese Language);
- (2) HK\$100 for Item #2, being the fees charged in respect of an additional subject (i.e. Liberal Studies); and
- (3) HK\$1,000 for Item #3, being the fees charged in respect of the video clip.

9. Despite paying the Fees, the Complainant lodged a complaint with PCPD on the same day, complaining, amongst others, that the Fees charged by HKEAA were too high (收取過於高昂的查閱資料費用).

10. The PCPD carried out investigations on the matter resulting in a number of rounds of correspondences between the parties.

11. By an Investigation Report dated 13th December 2013 (the “**Investigation Report**”), the PCPD concluded that the Fees were excessive (超乎適度) under section 28 of the Personal Data (Privacy) Ordinance (the “**Ordinance**”), and that the HKEAA was only entitled to charge a sum not more than HK\$822.

12. Together with the Investigation Report, the PCPD also served on the HKEAA the Enforcement Notice, issued pursuant to section 50(1) of the Ordinance. The Enforcement Notice required the HKEAA to:-

- (1) refund HK\$663 to the Complainant;
- (2) confirm to PCPD the making of the refund; and
- (3) review the fee schedule of HKEAA for compliance with the Ordinance.

13. The HKEAA appeals to the Administrative Appeals Board (the “**Board**”) on 27th December 2013 “*against the decision of the Privacy Commissioner for Personal Data in serving an Enforcement Notice*”.

The Subject of the Appeal

14. The Enforcement Notice was served by PCPD pursuant to section 50(1) of the Ordinance.

15. Under section 50(1), the PCPD is empowered to serve an Enforcement Notice if he is “*of the opinion that the relevant data user is*

contravening or has contravened a requirement under the Ordinance". Section 50(2) of the Ordinance provides that in deciding whether to serve an enforcement notice the Commissioner shall consider whether the contravention to which the notice relates has caused or is likely to cause damage or distress to any individual who is the data subject of any personal data to which the contravention relates.

16. Section 50(7) of the Ordinance provides that "*[a]n appeal may be made to the Administrative Appeals Board against an enforcement notice by the relevant data user not later than 14 days after the notice was served*".

17. In this Appeal, it is not HKEAA's case that in issuing the Enforcement Notice PCPD was not entitled to consider that the contravention to which the Enforcement Notice relates had not caused or was likely to cause damage or distress to the Complainant. As will be noted below, HKEAA's case is that (subject to a small concession) PCPD had erred in concluding that HKEAA was in contravention of section 28 of the Ordinance (in that the Fees charged by it was excessive).

The Position of HKEAA

18. The case of HKEAA is that in charging the Fees, it was in fact charging a sum below their costs.

19. In relation to Item #1, the HKEAA alleged that their total costs amounted to HK\$405, which may be broken down as follows:-

- (1) Labour Costs of HK\$170;
- (2) Computer Operating Time Costs of HK\$220;

(3) Paper and Stationary Costs of HK\$15.

20. In relation to Item #2, the HKEAA alleged that their total costs amounted to HK\$340, broken down as follows:-

- (1) Labour Costs of HK\$105;
- (2) Computer Operating Time Costs of HK\$220;
- (3) Paper and Stationary Costs of HK\$15.

21. In relation to Item #3, the HKEAA alleged that their total costs amounted to HK\$1,026, broken down as follows:-

- (1) Labour Costs of HK\$285;
- (2) Outsourcing Costs of HK\$288;
- (3) Computer Operating Time Costs of HK\$440;
- (4) Media Costs of HK\$13.

22. The following table sets out the costs alleged to have been incurred by HKEAA and the actual amounts charged by the HKEAA for items #1, #2 and #3:

	Costs of HKEAA (HK\$)	Actual Charge (HK\$)
Item #1	405	385
Item #2	340	100
Item #3	1,026	1,000
Total:	1,771	1,485

The Findings in the Investigation Report

23. In the Investigation Report, PCPD found that only part of the Fees charged by HKEAA were directly related to and necessary for complying with the DAR.

24. PCPD considered the Fees to be excessive because:

- (1) For items #1 and #3, the work process of “collecting and verifying the application form; collecting the required fee; dispatching acknowledgment letter to the applicant [i.e. the applicant who makes the relevant DAR, hereinafter referred to as “**the applicant**”] was unnecessarily duplicated. Having charged for the costs (HK\$35) on the work against item #1, HKEAA should not have charged the same again against item #3 (“**Reason 1**”);
- (2) For items #1, #2 and #3, the Computer Operating Time Costs (in the amount of HK\$220, \$220 and \$440 respectively) were HKEAA’s normal operating costs and did not constitute costs “directly related to and necessary for” complying with the DAR (“**Reason 2**”); and
- (3) For items #1 and #3, the Labour Costs consisted of labour costs of managerial staff of HK\$17. PCPD considered that the DAR was not complicated and it was not necessary for HKEAA to involve staff of managerial level. Hence such labour costs of HK\$17 should be excluded from each of item #1 and item #3 (“**Reason 3**”).

25. For the reasons mentioned in the preceding paragraph, PCPD considered that the costs of HKEAA that were directly related to and necessary for complying with the DAR amounted to HK\$822.

26. The table below sets out the costs allegedly incurred by HKEAA, the actual fees charged by the HKEAA, and the amount of fees “allowed by” PCPD (i.e. after deduction of the amounts that PCPD considered as excessive):-

Items	Costs of HKEAA (HK\$)	Fees Actually Charged by HKEAA (HK\$)	Fees Allowed by PCPD (HK\$)
Item #1	405	385	168 (405-220-17)
Item #2	340	100	120 (340-220)
Item #3	1,026	1,000	534 (1,026-35-440-17)
Total:	1,771	1,485	822

The Present Appeal

27. In this Appeal, HKEAA accepts Reason 1 and concedes that HKEAA should not have charged for the costs of HK\$35 on item #3. For item #3, after deducting such costs from HKEAA’s actual costs for complying with the DAR (HK\$1,026 – HK\$35), HKEAA contends that it is entitled to charge HK\$991 for complying with the DAR in relation to item #3. As HKEAA has in fact only charged HK\$1,000 for item #3, it needs only make refund of HK\$9 to the Complainant.

28. HKEAA further contends that in disallowing the fees relating to Computer Operating Time Costs and Labour Costs of managerial staff, the

PCPD failed to take into account the complexity of handling and complying with the data access requests (collectively as “**DARs**”, and individually as “**a DAR**” or “**the relevant DAR**”), and the necessity of developing and maintaining computer modules and systems for the handling of DARs.

29. In opposing the Appeal, PCPD basically adopts its position as set out in the Investigation Report. Further, PCPD submits that the Board should not consider evidence adduced by HKEAA which had not been put before PCPD prior to this Appeal.

The Complainant’s Submissions

30. The Complainant was represented by her mother at the hearing of the Appeal. She has made certain submissions to the Board on what she considers to be the reasonable costs (合理成本) of HKEAA. Some of her submissions may be regarded as going beyond the issues raised in this Appeal (for example, she has made certain submissions regarding the costs of the outside contractor responsible for carrying out certain work on the video clip subject of item #3). Counsel representing HKEAA (Ms Lisa Wong, SC) takes objection to this and submits that the Board should not allow new issues to be opened up in this manner.

31. The Board has heard arguments from counsel (acting for HKEAA and PCPD respectively) on whether the Complainant is entitled to make submissions to the Board and if so, the extent to which she is entitled to make submissions.

32. There is no dispute that the Complainant is a person bound by the decision appealed against (the “**person bound**”). Pursuant to section

11(1)(a) of the Administrative Appeals Board Ordinance (“**AAB Ordinance**”), PCPD had, by his letter dated 9 January 2014, identified the Complainant as the person bound. By virtue of section 2 of the AAB Ordinance, the Complainant is a party to the present Appeal.

33. That being the case, not only is the Complainant entitled to be served with the notice of appeal under section 10 of the AAB Ordinance, she is also entitled to be served with the statement and list of documents filed by PCPD pursuant to section 11(2) of the AAB Ordinance. Moreover, section 18 of the AAB Ordinance expressly provides that the parties to an appeal “*may appear and be present at the hearing of the appeal and may make representations or be represented either by a barrister or a solicitor or, with the approval of the Secretary, by any other person authorized by any of the parties in writing*”.

34. It is accordingly clear that the Complainant is entitled to attend the hearing of the Appeal and make representations or submissions thereon. This is so even though the Complainant herself is not an appellant, and does not have the *locus* to appeal against the issuance of the Enforcement Notice.¹

35. That however does not mean that the Complainant can, through making representations or submissions to the Board, expand or alter the scope of the Appeal by adding new issues that are not raised by either HKEAA or PCPD.

¹ A complainant may have the right to appeal under section 47(4) of the Ordinance in certain circumstances where PCPD refused to issue an enforcement notice. He does not have any right to lodge an appeal against an enforcement notice even if he is not satisfied with the contents or effect of the enforcement notice. Only the data user has the right to appeal against an enforcement notice: see section 50(7) of the Ordinance.

36. Section 21(1)(b) of the AAB Ordinance provides that the Board may “*receive and consider any material, whether by way of oral evidence, written statements, documents or otherwise, whether or not such material would be admissible in evidence in civil or criminal proceedings*”. The Board therefore has wide powers in receiving and considering materials (including statements and submissions) put before it for the purposes of the appeal. The power clearly must include the power not to receive or consider materials that are not relevant to the issues raised in the appeal.

37. The issues raised in an appeal before the Board are generally defined by reference to the notice of appeal (which requires the appellant to set out his grounds of appeal) and the statement submitted by the respondent in response, as required by section 11(2) of the AAB Ordinance. The person bound, although he is a party to the appeal, has no part to play in defining the issues in the appeal. He is neither the appellant nor the respondent. Indeed in a case such as present, the person bound has no right to appeal against an enforcement notice issued by PCPD. The person bound is entitled to be served with the notice of appeal, the respondent’s statement, the documents disclosed in the appeal, and to attend the hearing and make representation on the issues in the appeal. But he cannot by his submissions expand or alter the scope of the appeal.

38. Submissions made by the person bound on matters that go beyond or are outside the scope of the appeal issues are thus irrelevant, and the Board is entitled not to receive and consider the same.

39. Grave consequences may result if the person bound can, by his submissions, expand or alter the appeal issues (defined by reference to the notice of appeal and the respondent’s statement as aforesaid). If he is

allowed to do so, he would be able, simply through his submissions to the Board, alter the entire course of the appeal. His submissions may effectively amount to another notice of appeal. This may have serious consequences to the appellant and – depending on how the issues are being added to or changed – to the respondent too. In an extreme case, a person bound may be able to “hijack” an appeal by significantly expanding and changing the appeal issues, e.g. by opening substantially new grounds or raising new issues that neither the appellant nor the respondent wishes to take. That is certainly not conducive, to say the least, to the fair and orderly disposal of the appeal proceedings. We do not consider that the AAB Ordinance could be construed as having the effect of allowing the person bound to appeal through the back door. This is particularly so in the context of an appeal against the issuance of an enforcement notice. It is plain from section 50(7) of the Ordinance that the complainant does not have any *locus* to appeal against an enforcement notice issued by PCPD.

40. We accordingly hold that while the Complainant is entitled to make representations and submissions to the Board, her submissions must be confined to the existing issues raised in the Appeal (which are to be identified by reference to the Notice of Appeal and the statement submitted by PCPD under section 11(2) of the AAB Ordinance). She has no right to open up new issues which are not raised by the HKEAA or PCPD, nor to add to or make changes to the existing issues.

41. Accordingly, insofar as the Complainant’s submissions seek to raise new issues, we hold that this is not permissible and we would refuse to receive or consider the same. That said, this may not have any practical consequences in the present case. This is because the Complainant has expressly made clear in paragraph 36 of her written submissions dated 16

September 2014 that her position is that not only does she support the Enforcement Notice, she also associates herself with the submissions of PCPD made in this Appeal regarding the alleged excessiveness of the Fees, and that in making her submissions she merely expressed some personal views on what she considered to be the reasonable costs of HKEAA. Accordingly, the Board does not regard the Complainant as having adopted a position different from that of PCPD.

The Issues

42. The substantive issues raised in this Appeal are as follows:-

- (1) Whether HKEAA is entitled to charge the Computer Operating Time Costs (for items #1, #2 and #3) as part of the Fees; and
- (2) In relation to items #1 and #3, whether HKEAA is entitled to charge the labour costs (of HK\$17) incurred by the managerial staff.

43. Regarding the evidence, PCPD further argues that the Administrative Appeals Board is not entitled to take into account matters which had not been put before the PCPD prior to this Appeal.

The Law

44. This appeal centers upon section 28 of the Ordinance, which provides that:-

“(1) A data user shall not impose a fee for complying or refusing to comply with a data access request or data correction request unless the imposition of the fee is expressly permitted by this section.

(2) Subject to subsections (3) and (4), a data user may impose a fee for complying with a data access request.

(3) No fee imposed for complying with a data access request shall be excessive.

(4) Where pursuant to section 19(3)(c)(iv) or (v) or (4)(ii)(B)(II) a data user may comply with a data access request by supplying a copy of the personal data to which the request relates in one of 2 or more forms, the data user shall not, and irrespective of the form in which the data user complies with the request, impose a fee for complying with the request which is higher than the lowest fee the data user imposes for complying with the request in any of those forms.

...”

45. In the case of ***Commissioner of Correctional Services v Privacy Commissioner of Personal Data***, AAB 37 of 2009 (“**the Decision**”), the Administrative Appeals Board considered section 28 of the Ordinance and held as follows:-

(1) A purposive approach should be adopted in construing the section; see: §37 of the Decision;

- (2) Section 28 should be construed in a way consistent with the legislative purpose of protecting the privacy of individuals in relation to personal data; see: §38 of the Decision;
- (3) Generally, the costs for complying with a statutory obligation should be borne by the person having the obligation unless the statute allows him to charge a fee. The relevant provision which allows him to charge a fee for complying with his statutory obligation should be strictly construed; see: §39 of the Decision;
- (4) The fees imposed by the data user must be related to his complying with the DAR in question, and the only thing that may rationally relate a fee to the compliance must be the costs of the compliance; see: §40 of the Decision;
- (5) By not specifying the fees, the legislature must have recognized that the costs for complying with DARs may vary. Therefore, whether the fee imposed is excessive or not is to be considered according to the circumstances of each case, including the scope and complexity of the DAR in question, and the circumstances of the data users; see: §41 of the Decision;
- (6) The intention of the Legislature was to protect the interest of a data user who may have to incur costs to comply with DARs; see: §42 of the Decision;

- (7) However, a balance has to be struck between the interest of the data user and the interest of the data requester. The costs to be charged by the data user must not be excessive; see: §43 of the Decision;
- (8) There may be situations where it may not be just to allow a data user to recover the full costs actually incurred by him in complying with a DAR; see: §44 and 45 of the Decision;
- (9) Construing the whole section in its context, and drawing the threads from the special provisions in the various subsections together, the word “excessive” in section 28 should be construed as confining the fee only to cover those costs which are directly related to and necessary for complying with a DAR; see: §46 of the Decision;
- (10) The evidentiary onus is on the data user to show that the fee imposed is not excessive; see: §48 of the Decision; and
- (11) Section 28(3) only restricts a data user from imposing a fee that is excessive. It does not prevent a data user from imposing a fee that is less, or to waive a fee that he may otherwise be entitled to charge; see: §50 of the Decision.

46. These principles were adopted and followed by the Board in *L v Privacy Commissioner for Personal Data*, AAB 52 of 2011. We agree. In this Appeal we will also adopt these principles in the determination of the appeal.

Evidence to be Considered

47. Before proceeding to consider the substantial merits of the case, we would first deal with an argument made by PCPD regarding the evidence adduced by HKEAA. In this Appeal, HKEAA has put before us substantial evidence and documents. PCPD submits that as some of the evidence provided by the HKEAA had not previously been made available to the PCPD (before he issued the Investigation Report), the Board should not take such evidence into consideration.

48. We are unable to agree to this submission. As pointed out above, under section 21(1)(b) of the AAB Ordinance, wide powers are given to the Board for receiving and considering **any material** “for the purposes of an appeal”. The Board is not bound by the strict rules of evidence applicable to court proceedings.

49. In *Tso Yuen Shui v Privacy Commissioner for Personal Data*, AAB 24 of 1999, the Board held that it is a quasi-judicial body and is empowered to take evidence and hear appeals *de novo*.

50. We respectfully agree. The Board has very wide power to receive and consider any material for the purposes of any appeal before it, which it hears and determines *de novo*. Subject always to giving PCPD a fair opportunity to comment on the new evidence, and the question of weight to be attached to the evidence, we are of the view that the Board is entitled to consider all the evidence presently put before it, including those which were not previously made available to PCPD.

The Computer Operating Time Costs

51. We will now turn to consider the two issues set out in paragraph 42 above.

52. We have carefully considered the evidence relating to the Computer Operating Time Costs. The factual matters set out in the paragraphs below are well supported by the evidence and we find them as facts.

53. HKEAA is an independent, self-financing statutory body responsible for planning and conducting public examinations including the HKDSE.

54. HKEAA maintains a set of computer systems (collectively as **“HKEAA Computer Systems”**).

55. Since 2007 HKEAA has adopted the Onscreen Marking System (**“OSM”**) to improve the security, quality, reliability and efficiency of marking. For HKDSE, the vast majority of answer scripts of HKDSE are marked using OSM. For examination papers marked by OSM, different questions or sections in an examination paper would be distributed to different markers for marking (instead of the traditional way of having the whole of the examination paper marked by one marker). The markers would therefore be able to focus only on the questions or sections for which they are responsible for marking. This is considered to be a better system in facilitating the standardization of marking and improving the quality and reliability of the marking standard. Under the OSM, the answer scripts of candidates are scanned and saved in a secure central database, and the scanned images would then be distributed to markers (or to multiple markers

for simultaneous markings on the same script or question) via a secure intranet system. The marks and annotations made by markers would be captured in the system.

56. Further, due to the volume and complexity of handling DARs, it is impracticable for HKEAA to handle DARs only manually. As a matter of technical necessity and with a view to saving human labour costs which may otherwise be involved, HKEAA has the need to install, develop and/or upgrade computer software and hardware for handling DARs. The HKEAA Computer Systems include a DAR Module (which involves both hardware and softwares) for handling DARs.

57. The HKEAA Computer Systems comprise of 3 separate major systems, namely:

- (1) Data processing system (which stores data including applicant's name, ID number, date of birth, address, telephone number and examination result data etc.) ("**Main System**");
- (2) Scanned image data processing system (which stores data including images of entire answer scripts, images of multiple-choice answer sheets and images of oral examination score sheets) ("**Image System**"); and
- (3) OSM information processing system (which stores data including marks in each question and images of marked answer scripts) ("**OSM System**").

58. In order to generate complete records in compliance with DARs, the following information has to be retrieved from the different systems:

- (1) The personal data, the results of the subjects and the results of the papers of the applicant have to be retrieved from the Main System;
- (2) The marks scored in each question, the marker's remarks and the separate images provided for each marking team have to be retrieved from the OSM System; and
- (3) The scanned image of the entire original answer script, the scanned image of the multiple-choice answer sheet and the scanned image of the oral examination score sheets have to be retrieved from the Image System.

The data retrieved from the different systems are then consolidated and formatted in a manner comprehensible and meaningful to the applicant who makes the DAR.

59. We have considered the specifications of the DAR Module and the detailed operations and workflows relating to the DAR submitted by HKEAA.

60. It is clear to us that compliance with a DAR by HKEAA would necessitate the carrying out of a number of work processes to retrieve the relevant data or information from the different computer servers within the HKEAA Computer Systems. These work processes include accessing the answer scripts database, searching for the relevant personal data, inputting

internal references and report dates, generating reports and transmitting to workstations for printing. For oral examination video clips, additional processes are required to enable the reviewing of the video clips, verifying the applicant's image and the quality of the clips. Clips would have to be sent to contractors for editing out the personal data of other candidates (the video recordings would typically record group discussions that involve other candidates) and the edited clips would be reviewed again on the HKEAA Computer Systems for quality checking.

61. We accept that handling these working processes would involve significant processing time for the HKEAA Computer Systems. If these working processes were to be handled manually, huge amount of labour costs would have to be incurred.

62. In order to comply with a DAR, the working processes mentioned above are necessary and they would have to be carried out by the HKEAA Computer Systems. To enable these necessary processes to be completed, HKEAA would obviously have to incur costs in maintaining the operation of the HKEAA Computer Systems.

63. According to HKEAA, the Computer Operating Time Costs are *“calculated with reference to such time necessary for the HKEAA Computer Systems to process a DAR. Such costs have taken into account the operating and maintenance costs for the HKEAA Computer Systems, servers and printers, upgrading costs, database operating costs etc.”*

64. We note, however, that there is no detailed breakdown of the costs figures in respect of the different items that the HKEAA took into account.

65. Instead HKEAA has adopted a broad-brush approach. On the basis that the time costs per hour for the operation of the HKEAA Computer Systems is HK\$1,300, the Computer Operating Time Costs charged by HKEAA for complying with a DAR is as follows:

- (1) For the first subject: HK\$220;
- (2) For any additional subject: HK\$220;
- (3) For oral examination video clip: HK\$440.

66. This translates to about 10 minutes processing time for complying with a DAR for one subject, and 20 minutes processing time for complying a DAR that involves a handling of a video clip. Having regard to the various work processes that are required to be carried out (as mentioned above) within the different computer systems, we are satisfied that the amount of processing time (based upon which the Computer Operating Time Costs are calculated) are reasonable.

67. We are satisfied that in order for HKEAA to comply with a DAR, the work processes mentioned above and the processing time required for completing the same are necessary. The Computer Operating Time Costs, being the time costs directly referable to such work processes, are costs directly related to and necessary for the compliance with the relevant DAR. As we are of the view that the amount of processing time required for the said work processes are reasonable – indeed necessary – it follows that we are satisfied that the Computer Operating Time Costs are not excessive.

68. As pointed out above, if these work processes were to be undertaken manually, huge amount of labour costs would be incurred. PCPD accepts that labour costs are chargeable by HKEAA for complying

with DARs. That being the case, it is difficult to see why the Computer Operating Time Costs are not chargeable when computers are used to replace labour to comply with the same statutory obligations.

69. We accordingly hold that PCPD is wrong in taking the view that the HKEAA was not entitled to charge for the Computer Operating Time Costs.

Costs relating to the managerial staff

70. It is not HKEAA's case that staff of managerial level is required or involved in the whole process for handling DARs. According to HKEAA, the managerial staff acts as important "gatekeepers" at the **first and final stage** of complying with DARs by undertaking the following duties:-

- (1) Verifying DAR applications, including the applicant's identity and what personal data are requested;
- (2) Verifying the initial checking, and endorsing letters of acceptance of the DAR applications; and
- (3) Endorsing the covering letters for the issuance of DAR records, making sure the deadline for submitting appeal review applications (i.e. 10 calendar days after the provision of the DAR records) is correctly stated in the letter.

71. The HKEAA further submits that these tasks cannot be adequately performed by junior staff (such as clerical staff) as any error may jeopardise the sensitivity of the personal data in question. In any event, the junior staff

would require supervision from the managers if they were to undertake these duties.

72. PCPD argued that unless there are good reasons, managerial staff need not be involved in handling a DAR application. The test proposed by the PCPD is that the Board should only allow such costs to be charged to the Complainant if the involvement of managerial staff is strictly necessary. In this connection PCPD relied on the Decision.

73. In the present case, the amount of time spent by managerial staff on duties (1) and (2) is 1.44 minutes (0.3 hour x 8%) and for duty (3), 1.32 minutes (0.2 hour x 11%) only. The total amount of time spent by managerial staff on all 3 duties is less than 3 minutes. The hourly rate of the managerial staff is HK\$358. Accordingly, the costs incurred on account of the time spent by the managerial staff for each of item #1 and #3 is HK\$17 only.

74. We have no doubt that the fees charged in respect of the time spent by managerial staff are not excessive.

- (1) Firstly, this is plainly not a case of managerial staff being deployed to work on the whole DAR process. As pointed out rightly by senior counsel acting for HKEAA, the managerial staff was acting merely as gatekeepers and had only spent a few minutes on the checking and endorsing of documents to ensure that they are in good order. The time spent is plainly not excessive. In the view of the Board, the hourly rate of the managerial staff (HK\$358) is also not excessive.

- (2) Secondly, we agree with the submission of HKEAA that the involvement of the managerial staff as gatekeepers is necessary for compliance of the DARs. Proper handling of DARs and the discharge of its statutory obligation therefor is a serious matter for HKEAA. Deploying more senior and experienced staff to carry out the duties of verification, checking and endorsement (as set out in paragraph 70 above) is not only eminently sensible but necessary to ensure that correct information is provided to the applicants within the time period allowed by law. As pointed out above, the procedures for compiling the necessary information required for compliance with DARs involve many steps and collation of data and information retrieved from different computer systems. In these circumstances the Board is satisfied that the “gatekeeping” function performed by the managerial staff is necessary to ensure the integrity of compliance. The costs incurred therefore are costs directly related to and necessary for the compliance with the DARs.

75. For these reasons, we hold that the costs in respect of the managerial staff are not excessive and are properly chargeable as part of the Fees.

Disposition

76. As pointed out in paragraph 27 above, HKEAA accepts that the costs of HK\$35 for item #3 is a duplication. A refund of HK\$9 should be made to the Complainant. Save for this amount, the Board is of the view

that the rest of the Fees is not excessive and is properly chargeable by HKEAA.

77. We would therefore partly allow the appeal and vary the terms of the Enforcement Notice as follows:

- (1) The amount of HK\$663 (being the amount of refund to be made to the Complainant) referred to in paragraph (1) of the Enforcement Notice is reduced to HK\$9;
- (2) Similarly, the reference to HK\$663 in paragraph (2) of the Enforcement Notice be reduced to HK\$9; and
- (3) Paragraph (3) of the Enforcement Notice is set aside.

Costs

78. The appeal has been partly allowed.

79. Under section 22 of the AAB Ordinance, the Board shall only make an award as to the costs of the appeal:

- (a) against an appellant, if it is satisfied that he has conducted his case in a frivolous or vexatious manner; and
- (b) against any other party to the appeal, if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.

80. There is obviously no reason to make an order of costs against the Appellant, who is largely successful in this Appeal. Moreover, there is no question of the Appellant conducting its case in a frivolous or vexatious manner. Quite to the contrary. Senior counsel acting for the Appellant has rendered much valuable assistance to the Board through her helpful submissions.

81. We are also not satisfied that in all the circumstances of the case it would be unjust and inequitable not to order either PCPD or the Complainant to pay costs. Both PCPD and the Complainant have conducted themselves responsibly and reasonably in this Appeal. In particular the Board has derived much assistance from the submissions of PCPD, and is grateful for the same.

82. We consider that in all the circumstances of this case, the fair order to be made for the costs of this Appeal is to make no order as to costs.

(signed)

(Mr Horace WONG Yuk-lun, SC, JP)

Chairman

Administrative Appeals Board