

ADMINISTRATIVE APPEALS BOARD
Administrative Appeal No. 8 of 2008

BETWEEN

CHEUNG MOON-HOI

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

AND BETWEEN

ADMINISTRATIVE APPEALS BOARD
Administrative Appeal No. 9 of 2008

YUNG MEI-CHUN, JESSIE

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram : Administrative Appeals Board

Date of Hearing : 8 December 2008

Date of handing down Written Decision with Reasons : 1 December 2010

DECISION

Background

1. The Appellant in Administrative Appeal No. 8/2008 (“**Mr Cheung**”) is the husband of the Appellant in Administrative Appeal No. 9/2008 (“**Ms Yung**”). The two appeals have been heard together and the present Decision is a Decision relating to both appeals. In this Decision, we shall refer to Mr Cheung and Ms Yung individually as such, and collectively as “**the Appellants**”. We will refer to the Privacy Commissioner for Personal Data, the Respondent to both appeals, as “**the Commissioner**”.
2. Mr Cheung was the plaintiff in a District Court Action, being DCCJ 4127/2007. Ms Yung was the plaintiff in another District Court Action, being DCCJ 4126/2007. In both District Court Actions (collectively as the “**DC Actions**”), Mr Chan Sing Chuen (“**Mr Chan**”) was named as the defendant. It would appear that Mr Chan had been in litigation with Ms Yung before, and according to the documents exhibited to, a certain affirmation filed in the DC Actions by the solicitors of Mr Chan, Messrs Kong & Chang, solicitors (“**K&C**”), there had been a judgment given by Deputy District Judge

W. Chan in DCCJ 15756/2000 (formerly HCA No. 7213/2000) against Ms Yung in favour of Mr Chan (**“the Judgment”**). It appears from the documents before us that DCCJ 4126/2007 and DCCJ 4127/2007 were related to the Judgment. However, in the two appeals before us, we are not directly concerned with either DCCJ 15756/2000 or the DC Judgment, and the same only features in the background, as can be seen below.

3. The Appellants were subscribers to a mail collection service provided by a company known as Jumpstart Business Centre (**“Jumpstart”**). Jumpstart operated a business at 1801 Wing On Central Building, 26 Des Voeux Road Central, Hong Kong (**“the Address”**).
4. According to the Appellants, on 10 December 2007, a messenger of K&C effected service of certain documents (**“the said documents”**) relating to the DC Actions at the Address. It is the case of the Appellants that in effecting service of these documents, K&C had failed to comply with the Data Protection Principle 4 (**“DPP4”**) as provided in Schedule 1 of the Personal Data (Privacy) Ordinance, Cap.486 (**“the Ordinance”**).
5. The Appellants themselves were not present at the time when the said documents were delivered by K&C to the Address. Accordingly, the Appellants themselves have no personal knowledge of the circumstances under which the said documents were delivered to the Address on 10 December 2007. At the hearing of the appeals, the

Appellants relied on two Incidents Reports produced by Jumpstart, both dated 27 December 2007, and respectively addressed to Mr Cheung and Ms Yung, in which Jumpstart reported to them the circumstances surrounding the delivery of the said documents. The Appellants also relied upon the evidence of one Michelle Leung (“**Ms Leung**”), a staff of Jumpstart, who gave evidence at the hearing of the appeals.

6. As the two Incidents Reports are important, we would set them out in full:

Incident Report relating to Mr Cheung

“To: Mr. CHEUNG Moon Hoi
By Hand

Re: Incident Report on December 10, 2007 on a mail delivery by hand

Particulars:

- A. On December 10, 2007, a representative of a solicitors firm (“the said representative”) delivered an open window envelope mail (“the said mail”) with details as below:

1. *Letter Head as shown on envelope:*

KONG & CHANG
SOLICITORS
Office No.601, 6th Floor,
China Insurance Group Building,
141 Des Voeux Road Central,
Hong Kong.

2. *View from Envelope window:*

BY HAND

Mr. Cheung Moon Hoi,
Room 1801,
Wing On Central Building,
26 Des Voeux Road Central,
Hong Kong

- B. The said representative then handed “the said mail” to our receptionist, Jumpstart. The envelope was sealed properly and Jumpstart received the said mail.
- C. At the same time, the said representative displayed a copy of a letter (“the said copy”) and showed to Jumpstart. It was claimed that the said copy was the same as that inside the sealed envelope addressed to Mr. Cheung. The said representative demanded Jumpstart to sign on the said copy as acknowledgment of the letter sealed inside the said mail.
- D. Jumpstart took a look at the said copy. The letter head was from “KONG & CHANG Solicitors” with some company details and the letter was addressed to Mr. Cheung Moon Hoi same as that shown on item A2 above.
- E. After taking a look Jumpstart considered that the contents of the said copy related to private and confidential personal information of Mr. Cheung Moon Hoi relating to a legal action. Jumpstart expressed to the said representative that she would not sign or chop receipt on the said copy because by no means she could prove that the said copy is the same as the one inside the sealed envelope.
- F. The said representative demanded to have the said copy signed as acknowledgement.
- G. Then a solution was arrived Jumpstart took a copy of the

envelope of the said mail by herself and signed on it for the receipt.

H. The said representative of the solicitor firm then departed the premise.

Yours Faithfully,

I certify that all information are true
[signed with chop]

Jumpstart”

(We note that in this Incident Report, the word Jumpstart had been mis-spelt as “Jumpstartt” in various places. However, since these are obvious typing errors, we have not reproduced the errors in setting out the contents of the Incident Report above.)

Incident Report relating to Ms Yung

“To: Ms Yung Mei Chun Jessie
By Hand

Re: Incident Report on December 10, 2007 on a mail delivery by hand

Particulars:

A. On December 10, 2007, a representative of a solicitors firm (“the said representative”) delivered an open window envelope mail (“the said mail”) with details as below:

1. *Letter Head as shown on envelope:*

KONG & CHANG
SOLICITORS
Office No.601, 6th Floor,
China Insurance Group Building,

141 Des Voeux Road Central,
Hong Kong.

2. *View from Envelope window:*

BY HAND

Madam Yung Mei Chun,
Room 1801,
Wing On Central Building,
26 Des Voeux Road Central,
Hong Kong

- B. The said representative then handed "the said mail" to our receptionist, Jumpstart. The envelope was sealed properly and Jumpstart received the said mail.
- C. At the same time, the said representative displayed a copy of a letter ("the said copy") and showed to Jumpstart. It was claimed that the said copy was the same as that inside the sealed envelope addressed to Ms Yung. The said representative demanded Jumpstart to sign on the said copy as acknowledgment of the letter sealed inside the said mail.
- D. Jumpstart took a look at the said copy. The letter head was from "KONG & CHANG Solicitors" with some company details and the letter was addressed to Madam Yung Mei Chun same as that shown on item A2 above.
- E. After taking a look Jumpstart considered that the contents of the said copy related to private and confidential personal information of Ms Yung Mei Chun relating to a legal action. Jumpstart expressed to the said representative that she would not sign or chop receipt on the said copy because by no means she could prove that the said copy is the same as the one inside the sealed envelope.
- F. The said representative demanded to have the said copy signed

as acknowledgement.

G. Then a solution was arrived Jumpstart took a copy of the envelope of the said mail by herself and signed on it for the receipt.

H. The said representative of the solicitor firm then departed the premise.

Yours Faithfully,

I certify that all information are true
[signed with chop]

Jumpstart”

7. It can be seen from the two Incident Reports mentioned above that their contents are similar and almost identical. No distinction was drawn by Jumpstart between the case of Mr Cheung and Ms Yung. In both cases a sealed open-window envelope was delivered, and the letter head of K&C was shown on the envelope. Through the open window, the names and address (which is the same as the Address) of Mr Cheung and Ms Yung could be seen. In each case, apart from the sealed envelopes, the representative effecting delivery of the sealed envelope also displayed a copy letter, said to be a copy of a similar letter contained in the sealed envelope, and requested Jumpstart to sign. The copy letter bore the letter head of K&C “with some company details”. In each case, Jumpstart refused to sign on the copy letter. Instead, Jumpstart took a copy of the

envelopes and signed on them as receipt.

8. It is not clear from the Incidents Report whether the envelopes addressed to Mr Cheung and Ms Yung were delivered at the same time. Nor is it clear from the Incidents Reports who was the receptionist of Jumpstart who handled the matter when the envelopes were delivered to the Address.
9. The Appellants made complaints to the Commissioner against K&C. They complained that K&C had “no right to display [their] private and personal legal documents to a third party without authorization and consent”. Ms Leung, a staff of Jumpstart, provided information to the Commissioner. A telephone attendance note (“**the Attendance Note**”) was prepared by a staff of the Commissioner, Norris Leung dated 4 March 2008, recording her conversation with Ms Leung on the same day as follows:

“Contacted Ms Michelle LEUNG, the receptionist of Jumpstart, at 2961 4888.

Ms. LEUNG confirmed that she was the person who received the mails from Kong & Cheung.

Ms. LEUNG refused to give any statement and would only discuss this case over the phone.

Ms. LEUNG stated that the messenger of Kong & Chang had bought her *two piles of documents* to both Ms. YUNG and Mr. CHEUNG with covering letters from a law firm. Ms. LEUNG had only glanced through the coverings but not the documents.

All Ms. LEUNG could say had already been stated in the letters of 27 December 2007 signed by her manager and Jumpstart's company chop. She could not see any difference if she gives another statement personally to this Office.

I thanked Ms. LEUNG for the information.

Conversation ended."

10. Contrary to what Ms Leung apparently alleged, what she told Norris Leung over the telephone was not exactly the same as "the letters of 27 December 2007 signed by her manager and Jumpstart's company chop" (which we understand to be a reference to the Incident Reports). In the Incident Reports, there was no reference at all to the existence of "two piles of documents". It is not clear from the Attendance Note whether, in referring to "two piles of documents" Ms Leung was referring to the documents contained in the sealed envelopes, or whether she was referring to two separate piles of documents in addition to the two sealed envelopes referred to in the Incidents Reports. As this may be an important point to the Appellants' case, we had allowed an application by the Appellants to summon Ms Leung to give oral evidence before us.
11. At the hearing, the Appellants produced to us the originals of the envelopes. We note that contrary to what was apparently stated in the Incident Report relating to Mr Cheung, the envelope that was addressed to him was not an open-window envelope. It was, in fact, a big envelope with no window. That envelope bore the letter-head of K&C, and Mr Cheung's name was typed onto the envelope with

an address which was in fact the same as the Address. On the other hand, the envelope relating to Ms Yung was an open-window envelope that was smaller in size, and was in line with the description set out in the Incident Report relating to her.

12. As to the contents inside the sealed envelopes, there is no dispute. In the case of Mr Cheung, inside the envelope were two inter-parte summonses and an Affirmation of Ip Ka Lun, with various exhibits (including the Judgment referred to above). The two summonses and affirmation relate to DCCJ 4127/2007. There was a cover letter of K&C dated 10 December 2007 addressed to Mr Cheung at the Address, the contents of which are as follows:

“Dear Sir,

Re: DCCJ 4127/2007

We refer to the above and send herewith by way of service the two Inter-Parte Summonses and Affirmation in support filed today.

Yours faithfully,

Kong & Chang

Encl. ”

In the case of Ms Yung, inside the sealed open-window envelope was an inter-parte summons with a cover letter of K&C dated 10 December 2007 addressed to Ms Yung, also at the address, the contents of which are as follows:

"Dear Madam,

Re: DCCJ 4126/2007

We refer to the above and send herewith by way of service the Inter-Parte Summons filed on 10th December 2007.

Yours faithfully,

Kong & Chang
Encl."

13. We are not surprised that different types of envelopes were used when K&C sent the said documents to Mr Cheung and Ms Yung respectively. Obviously, there were more contents inside Mr Cheung's envelope, as the Affirmation of Ip Ka Lun included quite a number of exhibits with many pages. On the other hand, there was only one summons inside Ms Yung's mail. A bigger envelope was obviously required for Mr Cheung's mail.
14. By a letter dated 1 February 2008 to Mr Cheung and Ms Yung respectively, the Commissioner notified them that he had decided not to carry out or continue an investigation into their complaints. The reasons given by the Commissioner for not carrying out or continue an investigation are as follows:

"You did not provide us with details of the personal data that had allegedly been disclosed to Jumpstart by Kong & Chang. Based on the incident report, it appears that only the Letter but not the Inter-Parte Summonses was shown to the receptionist during the process. Having considered that Jumpstart was appointed by you to receive mail on your behalf, I do not consider that there is a prima

facie case against Kong & Chang for failing to protect your personal data against unauthorized or accidental access by simply presenting a copy of the Letter containing your name and mailing address to the receptionist for the purpose of receipt acknowledgment. Furthermore, I do not find that any actual harm to you had been caused in the incident.

Having carefully considered all the relevant information available to me and by reason of the circumstances set out above, I decide that any investigation or further investigation is unnecessary under section 39(2)(d) of the Ordinance”.

The Law

15. DPP4 provides as follows:

“All practicable steps shall be taken to ensure that personal data... held by a data user are protected against unauthorised or accidental access, processing, erasure or other use having particular regard to-

- (a) the kind of data and the harm that could result if any of those things should occur;
- (b) the physical location where the data are stored;
- (c) any security measures incorporated (whether by automated means or otherwise) into any equipment in which the data are stored;
- (d) any measures taken for ensuring the integrity, prudence and competence of persons having access to the data; and
- (e) any measures taken for ensuring the secure transmission of the data”.

16. A data user accordingly has duty to take all practicable steps to ensure that the personal data held by him are protected against unauthorised or accidental access. The duty is not absolute but is one to take all practicable steps. Moreover, the duty is to ensure

that personal data shall not be protected against unauthorised or accidental access. Access that is expressly or impliedly authorised is not the subject of control under DPP4.

17. As regards the Commissioner's power to refuse to carry out or continue an investigation, section 39(2)(a) of the Ordinance provides as follows:

"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 –

...

(b) the act or practice specified in the complaint is trivial;

....

(d) any investigation or further investigation is for any other reason unnecessary."

18. Part (B) of the Commissioner's Complaint Handling Policy ("**the Policy**") contains the following provisions:

"Section 39(1) and (2) of the Ordinance contain various grounds on which the Commissioner may exercise his discretion to refuse to carry out or continue an investigation. In applying some of those grounds, the Commissioner's policy is as follows:

(a) the act or practice specified in a complaint may be considered to be trivial, if the damage (if any) or inconvenience caused to the complainant by such act or practice is seen to be small;

.....

In addition, an investigation or further investigation may be considered to be unnecessary if:

(d) after preliminary enquiry by the Commissioner, there is no

prima facie evidence of any contravention of the requirement of the Ordinance.”

19. By virtue of s.21(2) of the Administrative Appeals Board Ordinance (“**AAB Ordinance**”), this Board is required to “have regard to any statement of policy” lodged by the Commissioner with the Secretary of the Board under s.11(2)(a)(ii) of the AAB Ordinance, provided that the Board is satisfied that at the time of the making of its decision the appellant was or could reasonably have been expected to be aware of the policy.
20. In the present case, the statutory conditions stipulated under s.21(2) of the AAB Ordinance have been satisfied and we are satisfied that the Appellants “was or could reasonably have been expected to be aware of” the Policy before we make our decision in these appeals (a copy of the Policy was in fact enclosed with the Commissioner’s letter dated 1 February 2008 mentioned above). The Board is therefore required by law to “have regard to” the Policy, although that does not mean that provisions in the Policy are conclusive or binding on this Board. If, for example, this Board should take the view that the terms of the Policy are inconsistent with the provisions of the Ordinance, it may refuse to endorse the Policy after having regard to the same. Subject to this, however, it is the duty of this Board to have regard to the terms of the Policy.

The Evidence of Ms Leung

21. As pointed out above, Ms Leung was summoned to give oral evidence before this Board. She was examined by both of the Appellants and by counsel acting for the Commissioner.
22. We have no doubt that Ms Leung was an honest witness. However, we regret to say that we do not find her evidence helpful as it is clear that she has very little memory of the matters relevant to the issues in these appeals.
23. In fact, Ms Leung told this Board expressly during her evidence that her memory of what happened on 10 December 2007 was very hazy. That this is so is clear from the evidence that she gave before us.
24. Ms Leung told us that she was not a receptionist of Jumpstart, but was a staff responsible for customer service. She worked inside a room near the reception counter but during the times when the receptionist was busy, she would come out of her room to help out. She remember that on 10 December 2007, a messenger from a solicitor firm ("**the messenger**") brought to Jumpstart one sealed envelope, together with one separate "pile of documents" (which was opened and not put inside any envelope). She was unable to tell how many pages were there in the pile of documents, or what documents the pile comprised of. She said that she had not read any of those documents at all and had no idea what documents were included in that pile. She was unable to remember how thick the pile was, and was not even able to tell us whether the pile of

documents consisted of one page or more than one page.

25. She told us that the messenger required her to sign on the document on the top of the pile as an acknowledgment of the receipt of the sealed envelope. She could not remember what was the document on the top of the pile, and was unable to tell us whether it was a letter or something else. She said that she glanced at the document on the top of the pile and saw that it was not a delivery note or receipt, and she told the messenger that she would not sign the same. Her company's practice was only to chop on a delivery note or receipt as an acknowledgement of receipt of a mail, but not on other documents. Eventually it was agreed that a copy of the envelope would be taken and her company would chop on the same as acknowledgment. This was agreed to by the messenger and was duly done. Although she could not remember actually seeing the messenger taking away the pile of documents, she had never seen that pile of documents again. The sealed envelope was left with Jumpstart by the messenger.

26. As pointed out above, the two Incidents Reports do not mention the existence of any pile of documents – be it one pile or two piles – that were brought by the messenger in addition to the sealed envelopes and the copy letter which Jumpstart was requested to sign. According to Ms Leung, before Jumpstart issued the two Incidents Reports, she had informed her manager what had happened according to her recollection. The two Incidents Reports were prepared by

Jumpstart based on the information she relayed to her manager. As noted above, the Incidents Reports were dated 27 December 2007. Ms Leung agreed that as the Incident Reports were closer in time (to 10 December 2007), her memory at that time should have been better or clearer than her memory of the incident at the time when she gave evidence before us. She told us that she had no reason to think that what was stated in the Incidents Report was incorrect. By the time Ms Leung gave evidence before us, her memory was, on her own admission, very hazy.

27. Ms Leung was cross-examined by Ms Yung on the contents of the Attendance Note. She was asked if she had told Norris Leung that the messenger had brought along two piles of documents. Ms Leung's answer was that she could not remember what she had told Norris Leung over the phone. In the Attendance Note, Norris Leung recorded that Ms Leung had told her that she was the person who received the mails from K&C. However, during her oral evidence, Ms Leung insisted that she had only been shown by the messenger one sealed envelope and one separate pile of documents. She could not remember that there was another sealed envelope, nor could she explain why the Attendance Note purported to record that she had mentioned two piles of documents. The telephone conversation subject of the Attendance Note took place, as noted above, on 4 March 2008. That was already quite a few months after 10 December 2007.

28. As pointed out above, the originals of the envelopes were produced by the Appellants at the hearing, and they were shown to Ms Leung. Each of the two envelopes bears a label of Jumpstart indicating that both of them were received on 10 December 2007. According to Ms Leung, it was the practice of Jumpstart to affix such a label on the envelope of all mails received. Apart from the date, the label also bears a barcode. In the case of Mr Cheung's envelope, the label bears a barcode number 00000656991. In the case of Ms Yung, the barcode number on the label affixed to her envelope is 00000656993. The closeness of the barcode numbers appears to suggest that the two envelopes may have been received at around the same time, but when Ms Leung was asked by the Board if that was likely to be the case, her answer was to the effect that she had no idea whether the barcode numbers bore any relation to the time when the mails were received. In any event, she was insistent that she had only saw one sealed envelope and one pile of documents. She was not able to explain the discrepancies between her oral evidence and the contents of the Incidents Reports and the Attendance Note.

29. While we have no doubt that Ms Leung was trying her best to tell us what she could remember, we regret that we do not find her evidence reliable. Her memory was too hazy and her recollection of the events too obscure for us to give much weight to her evidence, particularly when the same differs from or conflicts with the contents of the Incident Report. We hasten to add that in taking this view, we do not in any way mean to criticise Ms Leung for being unhelpful.

We quite understand that as it was her routine duties to help out the receptionist in taking delivery of mails, she must have handled many mail deliveries day in and day out, and it is not surprising at all that what happened on 10 December 2007 might not leave any special impression in her memory. Ms Leung was an honest witness, but we are unable to rely on her oral evidence to override the contents of the Incidents Reports. Her own evidence was that the Incidents Reports were prepared by Jumpstart based on the information provided by her at the time when she had a much better recollection of the events. Given the fact that the Incidents Reports were issued by Jumpstart on 27 December 2007 – only about half a month after 10 December 2007 – we are of the view that the Incident Reports are much more reliable than Ms Leung's oral evidence given at the appeal hearing.

No Breach of DPP4

30. On the evidence before us, we find that (subject to one caveat mentioned in the next paragraph) what were stated in the two Incidents Reports were correct and represented the truth of the matter. Insofar as the Attendance Note suggested that Ms Leung was shown by the messenger two piles of documents, it was inconsistent with the Incidents Reports. As pointed out above, Ms Leung's own evidence before us does not support this part of the Attendance Note, and she was unable to explain the discrepancies. She simply could not remember what she had told Norris Leung. In any event, the

telephone conversation that she had with Norris Leung took place quite a few months after 10 December 2007, and insofar as the same conflicted with the contents of the Incidents Reports, we prefer the Incidents Reports and find, subject to the caveat mentioned in the next paragraph, that the facts stated in the Incidents Reports are true. Accordingly, we find that on 10 December 2007, only the sealed envelopes and the copy letters mentioned in the Incident Reports had been shown to Jumpstart by the messenger of K&C.

31. There is one caveat which we must add to our finding that the contents of the Incidents Reports are true. In one respect the Incident Report relating to Mr Cheung is clearly incorrect. The Incident Report relating to Mr Cheung described the envelope as an “open window envelope mail”. This is plainly not correct, as the original envelope produced by the Appellants shows. We have considered carefully whether this error might have casted such doubt on the overall correctness of the Incident Reports in general. Having considered all the evidence, and the circumstances upon which the Incident Reports were prepared, we are of the view that the error does not affect the overall correctness of the contents of the Incident Reports. Subject to this caveat, therefore, we are of the view that the facts stated in the Incident Reports are true and correct.
32. We would add this: even if, contrary to our view above (and contrary to Ms Leung’s own evidence before us), we were to find that two piles of documents were in fact shown by the messenger to Ms

Leung on 10 December 2007, there is no evidence to show what those two piles of documents consisted of. Even if we were to assume further that those two piles of documents were copies of the same documents contained in the sealed envelopes (i.e. that they were copies of the inter parte summonses and affirmation mentioned above), the clear evidence of Ms Leung was that she had not read the documents shown to her and did not know the contents of the same. Accordingly, even if the said documents did contain personal data of the Appellants, the fact remains that Ms Leung did not read the documents and had not availed herself of the opportunity of obtaining access to the personal data of the Appellants contained in those documents. We shall return to this point when we addressed the question of harm in the latter part of this Decision.

33. It is clear that apart from the Appellants' names and address, no other information concerning the Appellants were shown on the sealed envelopes (in the case of Mr Cheung, his name and address were typed on the envelope itself; in the case of Ms Yung, her name and address was shown through the envelope's window). The address shown on the envelopes was in fact the Address of Jumpstart.
34. We agree with the Commissioner that as Jumpstart was appointed by the Appellants at the material time to receive correspondence for the Appellants, the Appellants must have authorised it to verify the addressee's name and address as shown on any correspondence sent to Jumpstart and addressed to them. In effecting service of the said

documents, K&C would need to show the Appellants' names and address to Jumpstart's staff for verification. Otherwise there would be no way that Jumpstart, as a mail collector, could check if the mails delivered to it were truly mails for its clients. In our judgment, K&C had not acted in breach of DPP4 by not taking any steps to prevent the disclosure of the Appellants' names and addresses. Insofar as the Appellants' names and address were concerned, there was no question of unauthorised access to their personal data.

35. As to the copy letters which were shown by the messenger to Jumpstart, we find that they are copies of the covering letters, contents of which have been set out in paragraph 12 above. Although the said letters did make reference to the action numbers of the DC Actions, the letters made no reference at all to any part played by the Appellants in the DC Actions. The letters merely stated that the documents referred to therein were sent to the Appellants by way of service. In these circumstances we fail to see what personal data of the Appellants had been disclosed by the said copy letters, other than the Appellants' names and addresses.

36. As we pointed out in paragraph 16 above, the duty on the part of the data user under DPP4 is not absolute. The data user is only required to take all practicable steps in the circumstances to protect personal data from unauthorised or accidental access. The steps that a data user is required to take must be practicable for him to take. In construing DPP4 and in determining what steps a data user should

take to protect personal data, particular regard need to be given to, inter alia, “the kind of data and the harm that could result” (see para. (a) of DPP4). The Commissioner is accordingly correct in submitting that the steps required to be taken must be “proportionate to the degree of sensitivity of the data and harm that will result from accidental or unauthorized access to such data”.

37. In the present case, given the contents of the copy letters, we are of the view that there was no breach of DPP4 by K&C in allowing their messenger to show the same to Jumpstart.

No harm caused

38. In any event, even if we are wrong on our findings or conclusion above, we are of the view, in agreement with the Commissioner, that no actual harm has been caused to the Appellants.
39. We repeat what we said in paragraph 32 above. Ms Leung’s clear evidence was that she had not read the pile of documents shown to her by the messenger and did not know what the pile of documents consisted of, let alone their contents. Whatever personal data might be contained in those documents, Ms Leung did not read or in any way access the same. Accordingly even if there had been a breach of DPP4 by K&C, the breach was inconsequential. The Appellants submitted to us that the messenger of K&C might have read the two piles of documents (assuming that they existed), but that is simply

speculation without any evidentiary basis. There is nothing before us to show that the Appellants have suffered any harm at all, even if there had been a breach by K&C of DPP4.

40. The fact that even if there had been a breach, the same was inconsequential and did not result in any actual harm to the Appellants is a good reason for the Commissioner to exercise its discretionary power under s.39(2) of the Ordinance. It is also in line with the terms of the Policy in respect of which this Board is bound to have regard.

41. In these circumstances, we are of the view that the Commissioner is right in exercising his power under s.39(2) of the Ordinance to refuse to carry out or continue an investigation into the Appellants' complaints.

Decision

42. For reasons mentioned above, we dismissed both of the appeals in Administrative Appeal No. 8 and 9 of 2008.



(Mr Horace Wong Yuk-lun, SC)
Chairman
Administrative Appeals Board