The purpose of publishing AAB's decisions in PCPD's website is primarily to promote awareness and understanding of, and compliance with, the Personal Date (Privacy) Ordinance. The general practice of PCPD is to upload AAB's decisions on an "as is" basis. Use of any personal data contained in AAB's decisions for any other purpose may constitute a breach of the Personal Date (Privacy) Ordinance.

(Please read the FULL VERSION of the above on the webpage of AAB Decisions)

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 4/2023

BETWEEN

FUNG WAH KEUNG (馮華強) Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA Respondent

Coram: Administrative Appeals Board

- Mr Jenkin Suen, SC (Deputy Chairman)
- Mr Edwin Fong Yick-chung (Member)
- Dr Stella Kwok Sin-tung (Member)

Date of Hearing: 15 November 2023

Date of Handing down Written Decision with Reasons: 23 May 2025

DECISION

A. INTRODUCTION

1. This is an appeal ("the Appeal") by Mr Fung Wah Keung ("Mr Fung" or "the Appellant") against the decision ("Decision") of the Privacy Commissioner for Personal Data ("the Commissioner" or "the Respondent"), confirmed by the

Respondent's letter of 3 March 2023 ("Decision Letter") to issue a warning letter on 15 August 2022 ("Warning Letter") to, but without serving an enforcement notice on, the Sports Federation and Olympic Committee of Hong Kong, China ("SFOC") premised on SFOC's contravention of Data Protection Principle 3 ("DPP3") under the Personal Data (Privacy) Ordinance (Cap. 486) ("PDPO").

2. By way of background, in *Administrative Appeal No. 8/2020* lodged by Mr Fung ("2020 Appeal"), the Administrative Appeals Board ("Board") handed down its decision with reasons on 2 December 2021 ("2021 Decision") and determined that SFOC had contravened DPP3 under the PDPO ("Contravention") and asked the Commissioner to consider whether it was necessary to serve an enforcement notice on SFOC in accordance with section 50 of PDPO.

3. By the Decision, the Commissioner decided to issue the Warning Letter to SFOC without serving an enforcement notice on the same. The Appellant appeals against the Decision under section 47(4) of the PDPO.

4. The Appellant's stance and arguments are set out in (i) Appellant's Notice of Appeal dated 29 March 2023 ("NOA"), (ii) Appellant's Statement of Response dated 25 May 2023 ("A's Response") and (iii) Appellant's Skeleton Submissions dated 30 October 2023 together with English translation submitted on 7 November 2023 ("A's Skel").

5. Further, on behalf of the Appellant, the Appellant has filed his Affirmation on 13 November 2023 ("A's Aff") explaining the damage and distress he allegedly suffered as a result of the contravention of DPP3 under the PDPO by the SFOC as determined by the Board in the 2021 Decision.

6. On the other hand, the Respondent's stance and arguments are set out in (i) Respondent's Statement dated 2 May 2023 ("R's Statement") and (ii)

Respondent's Skeleton Submissions dated 7 November 2023 together with English translation submitted on 13 November 2023 ("R's Skel").

7. The substantive hearing for the Appeal took place on 15 November 2023. After hearing oral submissions, the Board has reserved its decision.

B. THE DECISION

8. The relevant facts pertaining to SFOC's contravention of DPP 3 were set out in the 2021 Decision. Among others, we highlight the following:

(1) The Appellant was dissatisfied that SFOC mentioned *inter alia* his full name, job title in another entity (which enables the Appellant to be identified) and complaint details in the documents ("Documents") pertaining to disciplinary actions against the Karatedo Federation of Hong Kong, China Limited ("Karatedo Federation") attached in two notices of general meeting of SFOC issued to members in 2018.

(2) The Appellant complained to the Commissioner in 2018 that SFOC disclosed *inter alia* his full name thereby contravening DPP 3. The Commissioner concluded that SFOC had not contravened DPP 3, and the Appellant lodged the 2020 Appeal.

(3) By the 2021 Decision, the Board held that Mr Fung's first complaint is substantiated, i.e. it was not necessary for SFOC to disclose the Appellant's name and SFOC had contravened DPP 3. In short:

(a) The focus of the general meeting of SFOC is whether there is administrative impropriety on the part of Karatedo Federation. SFOC did not have jurisdiction over the Appellant; and SFOC

was not pursuing disciplinary action against the Appellant personally. As such, the name of the Appellant is immaterial. What is required is the Appellant's position and administrative role in Karatedo Federation. (§§31-37).

(b) It is necessary to consider whether the data is directly relevant, and whether its disclosure is excessive. As it is not necessary to disclose the Appellant's name, SFOC contravened DPP 3 (§§38-39).

(c) The Board requested the Commissioner to consider whether to issue an enforcement notice to SFOC pursuant to section 50 of PDPO and/or take other appropriate follow-up actions on the basis that the first complaint is substantiated (§54).

9. Based on the 2021 Decision, the Commissioner decided to issue the Warning Letter to SFOC on 15 August 2022 (i.e. the Decision), warning SFOC that it must take the following actions in response to the 2020 Appeal, namely:

(1) formulate written policies and guidelines requiring staff to determine whether it is necessary to disclose the personal data of a relevant person with regard to the purpose of the notice and the target of disciplinary action when they encounter similar situations in the future. If the disclosure of the personal data is not necessary, that individual's personal data must be deleted from the document. The Written Decision of Administrative Appeal No. 8/2020 should be attached to the policies for reference; and

(2) delete Mr Fung's name from the documents involved in the case and the relevant copies kept by it.

10. Thereafter, upon the Appellant's inquiry, the Commissioner informed the Appellant of the Decision on 3 March 2023.

C. GROUNDS OF APPEAL

11. The nature of the Appeal is a *de novo* hearing by way of rehearing on the merits, and the appellant has to say why the decision below is wrong and the tribunal/board will address these grounds of appeal: see *Li Wai Hung Cesario v Administrative Appeals Board* (CACV 250/2015, 15 June 2016) per Cheung JA at §§6.1, 6.2, 7.6.

12. In gist, the Appellant relies on 3 grounds of appeal:

(1) The Respondent in making the Decision failed to comply with section 50(2) of the PDPO to consider whether the contravention had caused or was likely to cause damage or distress to the Appellant ("Ground 1");

(2) The Respondent in making the Decision took into account some irrelevant factors ("Ground 2"); and

(3) The Respondent's Decision had no deterrent effect and was inconsistent with the PDPO's objective of protecting the privacy of individuals in relation to personal data ("Ground 3").

D. ANALYSIS – GROUND 1

13. Under Ground 1, the Appellant contends that, in arriving at the Decision, the Commissioner had not considered whether the Contravention has caused or is likely to cause damage or distress to the Appellant, thus failing to comply with section 50(2) of PDPO which provides as follows:

"**50. Enforcement notices**

...

(2) 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."

14. It is not in dispute that section 50(2) of PDPO imposes a mandatory requirement on the Commissioner, when deciding whether to serve an enforcement notice, to consider whether the contravention 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 ("Mandatory Consideration"). The dispute here is a factual one, namely whether the Commissioner did, as a matter of fact, consider the Mandatory Consideration in arriving at the Decision.

15. According to the Commissioner, she had considered the Mandatory Consideration before arriving at the Decision: R's Statement §§19-20.

16. The Appellant submits that the Commissioner's assertion is not credible for the following reasons:

(1) The Commissioner's Decision Letter of 3 March 2023 lists in detail the factors that the Commissioner has considered, but did not mention the Mandatory Consideration at all.

(2) The Commissioner has not provided any evidence to prove that she has taken this into consideration.

(3) §§19-20 of R's Statement qualify the description of "the damage or distress that the Contravention may cause to the Appellant" by the

term "if any", which indicates the Commissioner is not clear as to whether such damage or distress exists or not. Logically, the Commissioner would not have considered matters the existence of which she was not sure.

(4) The Appellant has provided relevant information to the Commissioner in 2018 and 2020, but the Commissioner made the Decision on 15 August 2022 without enquiring with the Appellant to confirm whether the Appellant has any update or additional information on the damage or distress on top of those he has previously informed the Commissioner. The Commissioner has not contacted the Appellant at all in this regard.

17. At the hearing, Mr Chiang also relies on the decision of the Court of Final Appeal in *Oriental Daily Publisher Ltd v Commissioner for Television and Entertainment Licensing Authority* (1997-98) 1 HKCFAR 279 and contends that the Commissioner has a duty to give reasons for the Decision and that the reasons should be adequate. As the Board has clarified with Mr Chiang, it is not a ground of appeal that the Commissioner failed to give reasons for the Decision. Instead, Mr Chiang's point seems to be that, given the duty to give reasons, the Commissioner's claim, that she took into account the Mandatory Consideration without corroborating evidence, is not credible.

18. As to A's Aff, Mr Chiang says that it is not new information, and the information contained therein was already presented in the previous 2020 Appeal. In our view, whilst this could help justify the Appellant's belated reliance on A's Aff, it waters down the Appellant's complaint that the Commissioner should have contacted the Appellant to obtain update or additional information beforehand.

19. The Respondent's main responses are as follows:

(1) Save for section 47(3) of the PDPO, there is no provision in the PDPO requiring the Respondent to set out all the factors that it has considered or explain in detail the reasons for her decision on whether to serve an enforcement notice. Accordingly, the fact that the Respondent did not mention section 50(2) of PDPO in the letter informing the Appellant of the Decision does not mean that it had not considered the Mandatory Consideration.

(2) Whether the Respondent should have sought updated information from the Appellant is an internal management issue and should not be a matter for the Board to deal with, unless such issue affects the Commissioner's ability to make a correct decision.

(3) The Respondent already understood the facts and circumstances of the case during investigation and the Appellant has not provided any update or supplemental information in the course of the Appeal (except belatedly by A's Aff). Even if the Respondent had made enquiry with the Appellant, her decision would be maintained.

(4) The powers conferred on the Respondent under PDPO relate to the protection of the privacy of individuals in relation to the personal data, rather than the protection of personal reputation. Therefore, whether the Appellant's reputation has suffered damage does not fall within the scope of PDPO.

(5) Even taking into account the damage to the Appellant's reputation, under section 50(1) of PDPO, the Respondent may only direct the data user who has contravened the PDPO to remedy and, if appropriate, prevent any recurrence of the contravention by issuing an enforcement notice. The Respondent does not have the statutory

power to require SFOC to take any action with regard to the damage to the Appellant's reputation.

20. As a preliminary point, we wish to stress that, regardless of whether the Commissioner has a duty to give reasons for the Decision, it seems desirable for the Commissioner to do so, particularly given the Mandatory Consideration which the Commissioner must consider pursuant to section 50(2) of PDPO. Nevertheless, since it is not a ground of appeal that the Commissioner failed to give reasons, we would refrain from expressing any final view as to whether the Commissioner has a duty to give reasons in relation to her decision as to whether to issue an enforcement notice.

21. Subject to the foregoing and having considered the matter and the submissions from the parties, we come to the view that Ground 1 is made out.

22. *First of all*, as mentioned, it is not strictly necessary for us to decide whether the Respondent has to give reasons for the Decision. Assuming there is no such duty, we are prepared to accept the Respondent's submissions that she is not obliged to set out all the factors that she has considered or explain in detail the reasons for her decision on whether to serve an enforcement notice. However, this does not mean that the Board cannot take into account the absence of any mention of the Mandatory Consideration in the Decision Letter as *a* factor in assessing whether, as a matter of fact, the Respondent did take the Mandatory Consideration into account. In our view, whilst the absence of any mention is not conclusive, it does carry material weight coupled with the fact that there is no other contemporaneous document to corroborate the Respondent's version.

23. *Second*, despite claiming that she has considered the Mandatory Consideration, it seems to us that the Respondent has proceeded on the basis that there is no relevant damage or distress to be taken into account. This is reinforced

by the Respondent's submissions that the powers conferred on her under PDPO relate to the protection of the privacy of individuals in relation to the personal data rather than the protection of personal reputation, such that the question as to whether the Appellant's reputation has suffered damage does not fall within the scope of PDPO.

24. In our view, whilst it is not the purpose of PDPO to protect a data subject's personal reputation, it does not mean that the damage to a data subject's reputation is an irrelevant consideration. To the contrary, if a contravention has caused or is likely to cause damage to the personal reputation of a data subject or distress arising from the same, there is no apparent reason why this should not be taken into account as part of the Mandatory Consideration. For instance, if the identity of a data subject is wrongly disclosed to the public in breach of PDPO (e.g. by doxxing) and this results in damage to the reputation of the data subject or distress arising from the same, it is difficult to see why this is not a relevant factor which must be considered in deciding whether to issue an enforcement notice pursuant to section 50(2) of PDPO.

25. Therefore, we do not agree with the Respondent that damage to the personal reputation of a data subject is necessarily outside the scope of PDPO. Whilst a data subject may not be able to claim any compensation under PDPO, the fact that the data subject suffers damage or distress must remain a relevant factor in considering whether an enforcement notice is warranted. It follows that, given the different stance of the Respondent, it would appear that she would not have found any alleged damage of reputation of the Appellant to be relevant, and hence she did not take that into account.

26. *Third*, the Respondent also submits that, even taking into account the damage to the Appellant's reputation, the Respondent does not have the statutory

power to require SFOC to take any action with regard to the damage to the Appellant's reputation. With respect, this seems to miss the point. We note that, in the *Report on Public Consultation on Review of the Personal Data (Privacy) Ordinance (October 2010)* ("2010 Report"), it was observed in paragraph 3.9.8 as follows:

> "3.9.8 That said, in some cases, although the contravening act has ceased, and it is unlikely that the contravention will be repeated, damage or distress to the data subject may have already been resulted and may be continuing. Under these circumstances, *the PCPD may need to issue an enforcement notice to direct the data user to take such steps as are specified in the notice to avoid further damage or distress to the data subject*." [Emphasis added]

27. Therefore, if damage to the personal reputation of a data subject or distress arising from the same have already been resulted and may be continuing, the Commissioner should consider whether there are any steps which may be directed to be taken pursuant to an enforcement notice to avoid further damage or distress to the data subject. For present purposes, we do not think it is appropriate for us to prejudge whether any such steps are available and/or should be ordered (particularly where we reach the view that the matter should be remitted to the Commissioner for re-consideration). Rather, the point is that, based on the materials before us, the Commissioner did not seem to have directed her mind to the same, apparently on the premise that damage to the personal reputation of a data subject is outside the purview of PDPO. This probably explains why, in §§19 and 20 of R's Statement, the term "if any" is used, as the Respondent's stance is that any damage to the personal reputation of the Appellant is not within the scope of PDPO. As such, whilst the use of the term "if any" is not itself fatal or conclusive, the use of such term coupled with the Respondent's stance does

suggest that the Respondent did not really consider there is any *relevant* damage or distress to begin with.

28. *Fourth*, it seems to us that the question as to whether it is necessary for the Respondent to make inquiry with the Appellant to confirm if there is any update or supplementary information is, ultimately, a fact-sensitive one. It will very much depend on the circumstances of a case. In the present case, given the lapse of time since the hearing of the 2020 Appeal, it is to say the least prudent for the Commissioner to approach and confirm with the Appellant as to whether there is any *further* damage or distress occasioned to the Appellant by the Contravention. For present purposes, it is not strictly necessary for us to determine whether the Commission is obliged or duty-bound to do so on the facts. Rather, what is important is that, given the rather substantial lapse of time, it would appear that the Commissioner would have made enquiry with the Appellant if, as a matter of fact, she did consider the damage or distress suffered by the Appellant (particularly in relation to personal reputation) to be relevant. The fact that the Commissioner did not do so is yet another factor in support of the inference or conclusion that the Commissioner did not really consider this to be relevant.

29. In this regard, we note the submissions of the Respondent that, if she had made enquiry with the Appellant, her decision would be maintained. In our view, this misses the point. It is a separate question whether, had inquiry been made by the Commissioner, there would be any update or supplemental information. However, even if there would be no further update, the point is that the failure to make any inquiry reinforces our view that the Commissioner did not in fact take into account the Mandatory Consideration.

30. For these reasons, Ground 1 is made out.

31. Notwithstanding the foregoing, we do have some reservation as to whether the matter might have become academic in the sense that, even if the Commissioner had taken into account the Mandatory Consideration, the outcome of the Decision might have been the same. In particular, it is unclear what further steps or additional measures might be directed to be taken under an enforcement notice to address the same, given the events which have unfolded since the issuance of the Warning Letter. Having said that, given that (i) the Mandatory Consideration is a factor which must be taken into account pursuant to statute and (ii) the Respondent has not made full or detailed submissions that relief should be refused on the basis that the same decision would have been reached, we are ultimately convinced that the more prudent and appropriate course is to remit the Decision to the Commissioner for reconsideration, with a direction that she do take into account the Mandatory Consideration pursuant to section 50(2) of PDPO.

E. ANALYSIS – GROUND 2

32. Under Ground 2, the Appellant contends that the Respondent has considered irrelevant factors when making the Decision.

33. To put the matter in context, the Appellant emphasises that the Decision was based on what SFOC told the Commissioner on 23 October 2019 in a written reply to the Respondent's pre-investigation inquiry that SFOC's staff concerned have been reminded by email of the matters that they should have regard to when disclosing personal data, and the fact that the Commissioner had already issued the Warning Letter to SFOC on 15 August 2022 directing SFOC to (i) formulate written policies and guidelines to require staff not to repeat the same mistakes when encountering situations similar to the appeal case in the future and (ii) delete

the Appellant's personal data from the subject documents (including copies) kept by SFOC.

34. As such, the Appellant says that the Commissioner's only consideration when making the Decision was that SFOC, through its own pledge and the Commissioner's warning, has already and is expected to take some corrective measures to prevent the recurrence of the Contravention.

35. In the light of the foregoing, the Appellant prays in aid the following:

(1) Before the legislative amendment in 2012, section 50 of the PDPO provided that, where, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user (a) is contravening a requirement under the PDPO; or (b) *has contravened such a requirement in circumstances that make it likely that the contravention will continue or be repeated*, then the Commissioner may serve on the relevant data user an enforcement notice in writing [Emphasis added].

(2) After the legislative amendment in 2012, section 50 of the PDPO now stipulates that if, following the completion of an investigation, the Commissioner is of the opinion that *the relevant data user is contravening or has contravened a requirement under the Ordinance*, the Commissioner may serve on the data user an enforcement notice in writing, directing the data user to remedy and, if appropriate, prevent any recurrence of the contravention [Emphasis added].

36. The Appellant argues that, due to the above legislative change in 2012, it is no longer a relevant factor to consider whether the Contravention will continue or be repeated. As elaborated by Mr Chiang:

(1) According to the pre-amendment provisions, if the data user has ceased the contravening act, the Respondent cannot serve an enforcement notice unless he has sufficient grounds to believe that the contravening act will likely continue or be repeated.

(2) Such requirement is removed in 2012 by legislative amendments. The revised provisions give the Respondent greater power to serve an enforcement notice: if the data user is confirmed to have contravened a requirement under the Ordinance, the Respondent can serve an enforcement notice on the data user regardless of whether there is evidence of repeated contravention in the future.

(3) To reflect the above-mentioned amendments to section 50(1) - (2) of PDPO, the Respondent has also changed her policy on serving enforcement notices. Under the new policy, the question of whether a data user's contravention is likely to be repeated has now been removed from consideration.

(4) Accordingly, the Commissioner has taken into account irrelevant factor into consideration, namely whether the circumstances make it likely that the Contravention will continue or be repeated.

37. The Commissioner disagrees. In short, her arguments are as follows:

(1) A distinction must be drawn between (1) matters which are clearly identified in the relevant legislation (whether express or implied) as

considerations to which regard must be had; (2) matters clearly identified by the relevant legislation as considerations to which regard must not be had; (3) matters to which the decision-maker may have regard in its judgment and discretion. The third category of factors is "discretionary considerations", where it is for the decision-maker to decide the relevant discretionary considerations and the weight that should be given to those discretionary considerations, and such decision is subject only to a *Wednesbury* unreasonableness challenge.

(2) With reference to *Administrative Appeal No. 4/2017*, in section 50 of the PDPO, the word "may" confers a discretion on the Commissioner to issue an enforcement notice triggered by a contravention and direct the relevant data user to remedy and, if appropriate, prevent any recurrence of the contravention.

(3) As a result of the legislative amendment in 2012, it is no longer a "prerequisite" for the Commissioner, in deciding whether to issue an enforcement notice to the relevant data user, to be satisfied that the contravention is likely to continue or be repeated. In other words, they are not considerations to which regard must be had (i.e. first category). However, this does not mean that the Commissioner cannot consider whether the contravention is likely to continue or be repeated *as a factor* when deciding whether to issue an enforcement notice (i.e. third category).

(4) Instead, when exercising the discretion in deciding whether to serve an enforcement notice, the Respondent may reasonably consider other relevant discretionary considerations that are not specified in

the provisions as factors that must not be considered, which includes whether the contravention of the PDPO will continue or be repeated.

(5) In particular, given that the purpose of issuing an enforcement notice is to direct a data user who has contravened the PDPO to take steps (including ceasing any act or practice) to remedy *and, if appropriate, to prevent any recurrence of the contravention*, whether the contravention will continue or be repeated will certainly be a factor to be considered by the Respondent when exercising the discretion [Emphasis added].

(6) Currently, in deciding whether to serve an enforcement notice, section 50(2) of the PDPO requires that 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 (being considerations to which regard must be had, i.e. first category). Apart from this, there are no other provisions in the PDPO that expressly specify other factors that must be considered, or expressly specify factors that must not be considered.

(7) Unless we are of the view that the Respondent's consideration of whether the contravention of the PDPO will continue or be repeated is *Wednesbury* unreasonable, we should not intervene.

38. Having considered the matter, we agree with the Respondent.

39. *First*, we agree with the Respondent that a distinction must be drawn between the three categories of considerations, i.e. (1) matters which are clearly identified in the relevant legislation (whether express or implied) as

considerations to which regard must be had; (2) matters clearly identified by the relevant legislation as considerations to which regard must not be had; (3) matters to which the decision-maker may have regard in its judgment and discretion. In fact, the distinction goes further than that, because the first category only goes so far to suggest that those considerations must be taken into account, without saying that they must be established. In contrast, there should be a further category which goes to a matter of jurisdiction, i.e. those considerations must not only be considered but must also be established.

40. In our view, prior to the legislative amendment in 2012, section 50 of PDPO contains such a jurisdiction requirement, in the sense that the Commissioner may only issue an enforcement notice *if and only if* the Commissioner is of the opinion that a data user either (a) is contravening a requirement under the PDPO or (b) has contravened such a requirement *"in circumstances that make it likely that the contravention will continue or be repeated"*. In other words, the italicised words are not merely a factor which has to be considered, but a prerequisite or precondition for which the Commissioner must be satisfied before she may invoke the jurisdiction to issue an enforcement notice. This finds support from paragraph 3.9.7 of the 2010 Report which observed as follows in relation to the pre-2012 legislation:

> "3.9.7 According to section 50 of the PDPO, currently the PCPD [i.e. the Commissioner] *cannot serve an enforcement notice* on a data user if the contravening act has ceased, *unless there is sufficient evidence for him to form the opinion that the contravention will likely be repeated* ..." [Emphasis added]

41. Therefore, the effect of the legislative amendment in 2012 is to remove such jurisdiction requirement, so that an enforcement order may still be issued even without satisfying the former jurisdiction hurdle. Nevertheless, the mere

fact that it is no longer necessary to establish such matter by way of jurisdiction does not mean that the matter becomes irrelevant altogether as a factor, which the Commissioner could not (or should not) take into account. Yet, that is precisely the position erroneously advanced by the Appellant (which cannot be right).

42. *Second*, we agree with the Respondent's submissions that the word "may" in section 50 of the PDPO confers a discretion on the Commissioner to issue an enforcement notice, and the Commissioner may take into account a wide range of factors in arriving at her decision. In this regard, given that an enforcement notice may direct a data user to *inter alia* take steps to prevent any recurrence of the contravention, as a matter of logic and principle, the question as to whether the contravention will continue or be repeated will no doubt be a relevant factor which the Commissioner may consider in assessing the utility, necessity and/or propriety in issuing an enforcement notice.

43. *Third*, the 2010 Report also sheds light on the intended effect of the legislative amendments in 2012. Specifically, paragraphs 3.9.8 (already quoted above), 3.9.9 and 3.9.10 provide as follows:

> "3.9.8 That said, *in some cases, although the contravening act has ceased, and it is unlikely that the contravention will be repeated, damage or distress to the data subject may have already been resulted and may be continuing*. Under these circumstances, *the PCPD may need to issue an enforcement notice to direct the data user to take such steps as are specified in the notice to avoid further damage or distress to the data subject*.
>
> 3.9.9 The UK Data Protection Act provides that if the Information Commissioner of the UK is satisfied that a data controller has contravened or is contravening any of the data protection principles, the Commissioner may serve

on him an enforcement notice. *The Act does not require the Commissioner to consider whether the contravention will likely continue or be repeated.*

3.9.10 *To enhance the effectiveness of the PDPO* in the protection of personal data privacy, we propose to model on the provisions of the UK Data Protection Act *and empower the PCPD to*, following the completion of an investigation, where he is of the opinion that a data user: (a) is contravening a requirement under the PDPO; or (b) has contravened such a requirement, *issue an enforcement notice* ..." [Emphasis added]

44. It is plain from the above that the purpose of the legislative amendment is to *enhance the effectiveness of the PDPO* and also to *empower the Commissioner to issue an enforcement notice* where the contravening act has ceased and will unlikely be repeated, as there may still be a need to deal with the damage or distress caused to the data subject. In other words, there was previously a lacuna in the statute which is rectified by the legislative amendment. It is however not the purpose or intention of the legislative amendment that the Commissioner should consider whether the contravention has caused or is likely to cause damage or distress to the data subject *as the only factor to the exclusion of other factors*. Plainly, even in circumstances where an enforcement notice is not warranted by reason of the damage or distress caused to the data subject, the Commissioner must still be at liberty to decide whether an enforcement notice is still warranted having regard to other factors, including whether the contravention will likely be repeated. It cannot be seriously suggested in the latter case that the Commissioner could not, or should not, take into account such matter in reaching her decision.

45. *Fourth*, we do not think the Appellant can derive much assistance from the Commissioner's policy. Whilst such policy no longer makes explicit reference to the likelihood of a contravention being repeated, it is a different thing to

suggest that, as a matter of policy, the Commissioner could not take into account such matter as a factor. There is no policy prohibiting or disallowing the Commissioner from taking such relevant factor into account.

46. *Fifth*, Mr Chiang further argues on behalf of the Appellant that, since 2012, the Commissioner must proceed on the basis that the data user would definitely repeat the incident, and hence it is not relevant to take into account the likelihood of a contravention being repeated. With respect, we do not accept such sweeping proposition. There is no sound basis for the Commissioner to proceed on such basis. The fact that it is no longer necessary for the Commissioner to be satisfied that a contravention will likely be repeated before invoking the jurisdiction to issue an enforcement notice does not mean that the Commission should simply presume that a contravention will necessarily be repeated. Indeed, if the Commissioner is to proceed on such basis without considering the individual circumstances of a case, she would have abdicated her duty in the exercise of her discretion under section 50 of PDPO.

47. Accordingly, Ground 2 fails.

F. ANALYSIS – GROUND 3

48. Under Ground 3, the Appellant contends that the Commissioner's choice of not serving an enforcement notice on SFOC (i) fails to provide an effective remedy to contravention, (ii) is out of line with the legislative intent of the PDPO and (iii) violates the *Padfield* principle, i.e. the Commissioner's discretion in considering whether to serve an enforcement notice on SFOC should comply with the legislative intent of the PDPO in accordance with the principles in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

49. The Appellant argues that the legislature gave the Commissioner the law enforcement power to direct the data user to remedy contravention, and reliance on an "advisory" or "persuasive" approach and/or the adoption of a non-legally binding "warning" as a follow-up measure to remedy a substantiated complaint would be contrary to the legislative intent of PDPO. Further, one of the purposes of the amendments to PDPO in 2012 is to increase the impact and effectiveness of enforcement notices, and this applies in particular to the amendments to section 50 of PDPO which gives the Commissioner greater power to serve enforcement notices.

50. Mr Chiang stresses that there is a huge difference between the Commissioner serving an enforcement notice and issuing a warning letter, as the latter is not legally binding. In contrast, a data user who contravenes an enforcement notice commits an offence and is subject to criminal liability.

51. In our view, the Appellant's challenge under Ground 3 is premised on an overly-sweeping and rigid proposition which we do not consider to be correct.

52. *First of all*, whilst there can be little dispute that the legislature intended by the legislative amendment in 2012 to enhance the effectiveness of the PDPO and to empower the Commissioner to issue enforcement notices under wider circumstances, the fact remains that the Commissioner has a discretion in deciding whether to issue an enforcement notice on the facts of a particular case. Moreover, as explained above, the Commissioner may take into account various relevant factors on the facts of a particular case, including whether contravention will likely continue or be repeated in future. Therefore, we do not think it is correct to suggest that the Commissioner must necessarily come to a view that an enforcement notice is to be issued, failing which the Commissioner would have failed to pay heed to the legislative intention or otherwise violated the *Padfield*

principle. As the Board has pointed out to Mr Chiang, if the Appellant's argument on Ground 3 is correct, that is tantamount to suggesting that the Commissioner should invariably decide to issue an enforcement notice irrespective of the individual circumstances of a case (which cannot be right).

53. In this regard, as pointed out by the Respondent, the effect of the Appellant's submission is that the Respondent must issue an enforcement notice to every data user who has contravened the requirements; otherwise there would be no deterrent effect, and the Respondent would be defeating the legislative intent of the PDPO. We agree with the Respondent that such proposition goes against the legislative intent of section 50 of the PDPO, which confers on the Respondent a discretion to issue enforcement notices.

54. *Second*, section 50(1A)(c) of the PDPO provides as follows:

> "**50. Enforcement notices**
>
> ...
>
> (1A) An enforcement notice under subsection (1) must—
>
> ...
>
> (c) specify the steps that the data user must take (including ceasing any act or practice) to remedy and, if appropriate, prevent any recurrence of the contravention ..."

55. In our view, given the need for an enforcement notice to specify the steps that the data user must take to remedy and (if appropriate) prevent any recurrence of the contravention, it should be open to the Commissioner to take into account the necessity or utility of the foregoing in the light of the circumstances of a particular case. For instance, if the Commissioner considers that there were already measures put in place and the contravention will not likely recur, there is no sound reason why the Commissioner could not reasonably come to a view that

an enforcement notice is not warranted, or otherwise consider the adoption of less draconian measures (such as a warning) in appropriate circumstances. It appears to us that the Appellant's stance is not that the Commissioner has erred on the facts of the present case but that the Commissioner should, as a rule, issue an enforcement notice rather than adopting non-legally binding measures such as a warning. We are afraid we do not accept such sweeping proposition.

56. *Third*, whilst the matter is no doubt fact-sensitive, we agree with the Respondent that, even in the event where the Respondent has decided to issue a warning letter instead of an enforcement notice, it does not mean that the Respondent will have no control or further recourse over the matter. For instance, in the present case, whilst SFOC would not be held criminally liable if it did not comply with the recommendations in the warning letter, if the Commissioner is of the view that SFOC has not remedied the contravention of the PDPO, she will be at liberty to issue an enforcement notice to SFOC, directing it to remedy and prevent any recurrence of the contravention.

57. In this regard, as pointed out by the Respondent, she has written to the SFOC to see if it has taken the relevant actions in accordance with the Warning Letter issued by the Respondent on 15 August 2022 to ensure that SFOC has remedied the contravention and prevented any recurrence of the same. On 5 May 2023, SFOC confirmed in writing to the Respondent that it had:

(1) issued "*Reminders on Points to Note When Distributing Personal Data*" to all staff members on 18 October 2019;

(2) revised the Privacy Policy Statement of SFOC; and

(3) deleted the Appellant's name from the relevant records or copies of the documents involved in the case.

58. On top of that, upon the Respondent's further recommendation to SFOC to amend its Privacy Policy Statement and Code of Practice on Data Protection, SFOC later confirmed that the Respondent's suggested amendments had been adopted, and its Privacy Policy Statement and Code of Practice on Data Protection had been revised.

59. We agree with the Respondent that, as seen from the above, she can still ensure that the relevant data user takes remedial measures by issuing a warning letter and subsequent follow-up work, thereby achieving the objective of protecting the privacy of individuals in relation to personal data, even if she decides not to issue an enforcement notice in a particular case.

60. *Fourth*, the question as to whether the Commissioner should decide to issue an enforcement notice or consider other alternatives such as a warning letter would very much depend on the facts and circumstances of a case. We do not accept that the Commissioner must issue an enforcement notice without considering other alternatives or options, whether as a rule or by default. In our view, this is supported by the decision in *Administrative Appeals No. 23/2020 (楊國榮 v Privacy Commissioner for Personal Data)*:

> "15. The Appellant lodged the present appeal on one single primary ground, that is, despite making a finding that the Person Bound violated Principle 3, the Respondent did not impose any penalty on the Person Bound so as to act as deterrence. Hence, the Decision of the Respondent was wrong.
>
> ...
>
> 42. In the premises, had the Respondent continued to investigate into the Complaint, no better result would have been yielded than what the Person Bound had already voluntarily undertaken in writing in terms of remedial measures, which in any event would have been what an enforcement notice would have been intended and achieved.

43. In any event, the Respondent took a concrete follow-up action, namely, issuing a written warning to the Person Bound and referring the case to the eHR Office (paragraphs 15-16 of the Decision). *It is within the power of the Respondent to decide whether an enforcement notice under section 50 of the Ordinance would be necessary given the nature, extent and seriousness of the violation.*

...

46. This Board is therefore of the view that it is reasonable and within the Respondent's discretion to decide that after finding a breach, issuing a written warning to the Person Bound and referring the matter to eHR Office, further investigation is unnecessary under the framework and legislative intent of the relevant sections of the Ordinance." [Emphasis added]

61. Hence, the Commissioner is entitled to take into account the nature, extent and seriousness of the violation or contravention in deciding whether to issue an enforcement notice. We would add that, on top of this, the Commissioner should also be entitled to take into account other relevant factors including, for instance, whether the contravention will likely be repeated, whether follow-up actions have already been taken, the likelihood of the data user complying with further recommendations in a warning letter, as well as the Mandatory Consideration (i.e. whether the contravention has caused or is likely to cause damage or distress to the data subject), in deciding whether an enforcement notice would be necessary or appropriate on the facts.

62. For these reasons, Ground 3 fails.

G. CONCLUSION

63. For the reasons stated above, the Appeal is allowed on Ground 1, whilst Grounds 2 and 3 are dismissed.

64. Accordingly, we order the Commissioner, in accordance with section 21(3) of the Administrative Appeals Board Ordinance, to re-consider the Decision by taking into account the Mandatory Consideration in accordance with section 50 of the PDPO. Instead of imposing a specified time limit, we would simply urge the Respondent to reconsider the matter as soon as practicable.

65. As to the question of costs, having regard to the fact that the Appellant succeeds in Ground 1 but fails in Grounds 2 and 3, we consider that a just and equitable order is for the parties to bear their own legal costs. In any case, we do not consider it just and equitable to order the Respondent to pay costs to the Appellant, as each party has succeeded to some extent in its respective arguments.

66. Lastly, we thank Mr Allan YW Chiang for the Appellant and Ms Ines Lee for the Commissioner for their assistance to the Board.

(signed)
(Mr Jenkin Suen, SC)
Deputy Chairman
Administrative Appeals Board

Appellant: Represented by Mr Allan YW Chiang, Counsel instructed by Messrs. Joseph P.K. Pang & Co.

Respondent: Represented by Ms Ines Lee, Senior Legal Counsel

Person Bound by the decision appealed against: Acted in person (absent from the hearing)