



Appellant with the Administrative Appeals Board (“**the Board**”) (“**the Notice of Appeal**”), the Appellant appealed against a decision of the Respondent dated 17<sup>th</sup> November 2016<sup>2</sup> (“**the Decision**”) whereby the Respondent decided to exercise his power under *section 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486)* (“**the PD(P)O**”) not to investigate the 3 of the 8 complaints lodged by the Appellant with the Respondent in late 2014 further. We shall refer to the 3 complaints hereinafter as “**the Complaints**”.

2. The present appeal can be said to be a sequel to the Appellant’s appeal against the decision of the Respondent made on 20<sup>th</sup> March 2015 (“**the 1<sup>st</sup> Decision**”) under Administrative Appeal No. 12/2015 (“**the 1<sup>st</sup> Appeal**”). The Respondent in fact had, in the 1<sup>st</sup> Decision, decided not to pursue the Complaints and the Appellant’s 5 other complaints. It was upon the Appellant’s appeal that on 2<sup>nd</sup> December 2015, the Board (presided over by Deputy Chairman Ms Cissy Lam King-sze), in the 1<sup>st</sup> Appeal, *inter alia*, reversed the Respondent’s decision not to pursue the Complaints and remit the Complaints to the Respondent for further investigation<sup>3</sup> (“**the 1<sup>st</sup> Appeal’s Decision**”), and hence after the Respondent’s further investigation into the Complaints, the Decision.

3. Before we begin to comprehend and analyze the issues ventilated in the present appeal, the pertinent background can be summarized as follows.

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<sup>2</sup> Hearing Bundle at pp.166-180, 384-398.

<sup>3</sup> Hearing Bundle at pp.420-433.

## The Relevant Background

4. The Appellant was an assistant inspector of the Non-attendance Cases Team (“**the NAC Team**”) of the Education Bureau (“**the EDB**”). Mr Yan Ming Leong, Vivid (“**Mr Yan**”) was the Deputy Section Head of the Placement and Support Section, and Mr Lai Chi Fai (“**Mr Lai**”) was the team leader of a sub-team of the NAC Team and the Appellant’s immediate supervisor.

5. On 7<sup>th</sup> November 2013, the Appellant had a telephone conversation with the mother of a suspected non-attendance student (“**Student A**”), and Mr Lai was sitting opposite to the Appellant during the telephone conversation. Subsequent to that telephone conversation, on the same day, the father of Student A complained to the EDB in an email about, *inter alia*, the Appellant’s attitude towards his wife in the telephone conversation. Mr Lai was then tasked by the Section Head, Mr Leung Kwok Yan, Albert (“**Mr Leung**”), to handle the complaint. Student A’s father having not been satisfied with Mr Lai’s reply dated 22<sup>nd</sup> November 2013 and complained further against the Appellant, Mr Leung subsequently appointed Mr Yan to further investigate the complaint. On 28<sup>th</sup> February 2014, the EDB issued a written reply to Student A’s father answering his complaint. (“**the EDB’s Reply**”)

6. On 21<sup>st</sup> March 2014, Mr Leung, together with Mr Yan and Mr Lai, met with the Appellant and informed her that the complaint was

unsubstantiated. (“**the 21/3/14 Meeting**”) The Appellant then requested “*to take a look*” at the EDB’s Reply to see (a) if her name had been mentioned therein, and (b) the response regarding her team’s handling of Student A’s father’s complaint for the sake of her improvement.

7. On 10<sup>th</sup> April 2014, Mr Lai handed to the Appellant an envelope (“**the Envelope**”)<sup>4</sup> which, according to the Appellant, was unsealed. The Appellant’s name and rank were printed on the Envelope. The Envelope contained one page of paper with one paragraph 4 printed thereon, which was a redacted copy of the EDB’s Reply (“**the Redacted Letter**”). The word “*Restricted*” was stamped twice on both the front of the Envelope and on the Redacted Letter. The Appellant stated that Mr Lai had “*unmindfully*” told her that he had opened the Envelope and read the Redacted Letter.

8. The Appellant therefore complained to the Respondent against Mr Lai, and the Appellant’s 8 complaints were neatly summarized by the Board in paragraph 26 of the 1<sup>st</sup> Appeal’s Decision<sup>5</sup>. The complaints itemized as (1), (2) and (5) in paragraph 26 of the 1<sup>st</sup> Appeal’s Decision were the Complaints which are as follows:-

- (a) Mr Lai had access to the Redacted Letter without the Appellant’s consent.

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<sup>4</sup> Hearing Bundle at pp.300-301.

<sup>5</sup> Hearing Bundle at pp.426-427.

- (b) The Envelope was unsealed, despite it was stamped “*Restricted*”.
- (c) Persons other than Mr Lai and Mr Yan might have access to the Redacted Letter, as the Envelope was unsealed.

9. By a letter dated 20<sup>th</sup> March 2015, the Respondent informed the Appellant of his decision not to pursue the Appellant’s complaint further and the reasons for his decision (viz. the 1<sup>st</sup> Decision). Dissatisfied with the 1<sup>st</sup> Decision, the Appellant lodged the 1<sup>st</sup> Appeal resulting in the 1<sup>st</sup> Appeal’s Decision.

### **The 1<sup>st</sup> Appeal’s Decision**

10. In the 1<sup>st</sup> Appeal Decision<sup>6</sup>, the Board, on the Complaints, agreed and found the following:-

- (a) There were direct conflicts of facts between the Appellant and the EDB on whether the Envelope was sealed.<sup>7</sup>
- (b) The original Envelope showed no physical signs of having been sealed.<sup>8</sup>
- (c) Mr Lai’s answers to how the Envelope was sealed and

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<sup>6</sup> Hearing Bundle at pp.420-433.

<sup>7</sup> Hearing Bundle at p.428, para.31.

<sup>8</sup> Hearing Bundle at p.429, para.33.

how the original Envelope showed no physical signs of having been sealed were far from satisfactory.<sup>9</sup>

(d) Mr Lai was conversant with the contents of the Redacted Letter.<sup>10</sup>

(e) Even if Mr Lai was conversant with the contents of the Redacted Letter, it did not mean he was at liberty to read the Redacted Letter. The EDB made it clear that no explicit authorization was given to Mr Lai to have access to the Redacted Letter. Once the Redacted Letter was put inside the Envelope, marked “*Restricted*” to the Appellant, it was a prima facie breach of *Data Protection Principle (“DPP”) 4(1)* if Mr Lai, the person charged with secure delivery of the Redacted Letter to the Appellant, had opened the Envelope and read the Redacted Letter, thus gaining unauthorized access to it.

(f) The Complaints required further investigation.

### **The Follow-up Steps taken by the Respondent after the 1<sup>st</sup> Appeal’s**

#### **Decision**

11. After the 1<sup>st</sup> Appeal’s Decision, the Appellant provided to the

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<sup>9</sup> Hearing Bundle at p.429, para.33.

<sup>10</sup> Hearing Bundle at pp.430-431, para.38.

Respondent, for the first time, with the Envelope and various tape recordings<sup>11</sup> including the tape recording of the 21/3/14 Meeting, which the Appellant had submitted to the Board in the course of the 1<sup>st</sup> Appeal, and the details of her colleague, Ms Fung Ma Ha, Ada (“**Ms Fung**”), who might be able to support the Complaints. Apart from the investigative actions already taken prior to the 1<sup>st</sup> Appeal, the Respondent had examined the Envelope, further interviewed Mr Yan<sup>12</sup> and Mr Lai<sup>13</sup>, and also obtained information from the EDB<sup>14</sup> and Ms Fung<sup>15</sup>.

12. In a nutshell, the EDB stated the following:-

- (a) The Redacted Letter was classified as a “*Restricted*” document<sup>16</sup> and had been handled in accordance with *the Security Regulations of the Government of the Hong Kong Special Administrative Region (“the Security Regulations”)*.
- (b) Insofar as “*Restricted*” documents are concerned, *Reg.213 of the Security Regulations*<sup>17</sup> provided that:-

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<sup>11</sup> Hearing Bundle at p.314.

<sup>12</sup> Hearing Bundle at pp.351-355.

<sup>13</sup> Hearing Bundle at pp.378-381.

<sup>14</sup> Hearing Bundle at pp.286-292, 306-311, 312, 334-335, 349, 356-377.

<sup>15</sup> Hearing Bundle at p.281.

<sup>16</sup> Hearing Bundle at pp.357, 375-377.

<sup>17</sup> Hearing Bundle at pp.358-359.

*“213. [Restricted] documents for transmission other than by hand of an authorized officer must be sealed inside a single envelope securely stuck down and bearing the classification. The envelope should be made of sufficiently opaque paper to prevent the contents being read.”*  
*(Emphasis added)*

- (c) Mr Lai was an authorized officer in the context of *Reg. 213 of the Security Regulations* as he was the Appellant’s immediate supervisor and was conversant with the contents of the Redacted Letter.<sup>18</sup>
- (d) The EDB’s staff including Mr Lai and Mr Yan were made aware of the requirement on the transmission and carriage of classified documents set out in *Regs. 212 to 226 of the Security Regulations* through various channels<sup>19, 20</sup>
- (e) Reasonably practical measures had been taken by the officers involved to protect the Redacted Letter from any

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<sup>18</sup> Hearing Bundle at p.287, para.4.

<sup>19</sup> Firstly, through circulation of the latest version of *the Security Regulations* to all the EDB’s staff whenever there is an update; secondly, through regular re-circulation at yearly intervals by the Offices of the Chief Secretary for Administration of the “Manual of Office Practice” which provides an index of various subjects on office management and procedures, including “Control of Classified Documents” under *Regs. 190-235 of the Security Regulations*; and thirdly, through *the Security Regulations* uploaded on the EDB’s Portal under “Rules and Regulations”, which is available to all EDB’s staff at all time, see Hearing Bundle at pp.356-357.

<sup>20</sup> Hearing Bundle at p.356; Mr Yan and Mr Lai also confirmed they were made aware of *the Security Regulations*, see Hearing Bundle at pp.352 at para.2, 354 at para.7, 381 at para.8 & 382.

unauthorized or accidental access during the process of delivery to the Appellant.<sup>21</sup>

13. During the further investigation, Mr Leung stated the following<sup>22</sup>:-

- (a) At the request of the Appellant raised at the 21/3/14 Meeting, he prepared the Redacted Letter on 3<sup>rd</sup> April 2014 and sent it to Mr Yan *via* confidential email<sup>23</sup>.
- (b) He sent another email to Mr Yan on 9<sup>th</sup> April 2014<sup>24</sup> instructing him to pass the Redacted Letter to Mr Lai on 10<sup>th</sup> April 2014.<sup>25</sup>
- (c) He had not instructed Mr Yan to seal the Envelope, but explicitly instructed him to handle the Redacted Letter as “*Restricted*” document.
- (d) He expected Mr Yan would follow the procedure of handling “*Restricted*” documents, i.e. to seal the Envelope.
- (e) The Redacted Letter was classified as “*Restricted*”

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<sup>21</sup> Hearing Bundle at p.357.

<sup>22</sup> Hearing Bundle at pp.307-308; see also in particular the email of 3<sup>rd</sup> April 2014, Hearing Bundle at pp.289 & 309.

<sup>23</sup> Since Mr Lai did not have a confidential mail account at that time; see also Hearing Bundle at p.312.

<sup>24</sup> Email of 9<sup>th</sup> April 2014, see Hearing Bundle at pp.289 & 311.

<sup>25</sup> As to why the matter was put on hold for a few days, see Hearing Bundle at pp.334-335.

document to limit its access to those staff who were involved in the complaint of Student A's father.

- (f) Mr Lai, the immediate supervisor of the Appellant, was involved in the entire course of action in handling the complaint of Student A's father and was also the witness in the investigation of the complaint of Student A's father.
- (g) Since Mr Lai had the supervisory role to advise the Appellant regarding the ways to handle parents' enquiries/requests, he was entitled to read the Redacted Letter.

14. The Respondent has taken a witness statement from Mr Yan<sup>26</sup> who stated the following:-

- (a) Between 3<sup>rd</sup> and 10<sup>th</sup> April 2014, he printed the Redacted Letter, put the Redacted Letter inside the Envelope and stamped "*Restricted*" on the front of the Envelope<sup>27</sup> at his workplace in the presence of Mr Lai. He then handed the Envelope (with the Redacted Letter inside) over to Mr Lai for onward delivery to the Appellant.

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<sup>26</sup> Hearing Bundle at pp.351-355.

<sup>27</sup> Hearing Bundle at p.352, para.2, the 4<sup>th</sup> line; see also the scanned copy of the Envelope, Hearing Bundle at pp.459 and 460.

- (b) It was his general practice to put “*Restricted*” document inside a sealed envelope. But he could not confirm by memory whether the Redacted Letter was put inside a sealed envelope.

15. Likewise, the Respondent has taken a witness statement from Mr Lai<sup>28</sup> who stated the following:-

- (a) On 9<sup>th</sup> April 2014’s evening after 6:00 pm, Mr Yan asked him to come to the former’s workplace to handle the Redacted Letter. At that time, all other staff had already left the workplace.
- (b) Mr Yan printed the Redacted Letter by his desk-top printer, and asked him to check whether the document printed out was the relevant letter to be passed to the Appellant. Mr Lai had not read the Redacted Letter, but only seen the Appellant’s name in the Redacted Letter.
- (c) He could not recall whether Mr Yan put the Redacted Letter inside the Envelope, sealed the Envelope and stamped the Envelope with “*Restricted*”. He himself did not seal the Envelope containing the Redacted Letter.

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<sup>28</sup> Hearing Bundle at pp.378-381.

- (d) He could not recall how the Envelope was sealed. But he had checked the Envelope to see whether it had been sealed.<sup>29</sup>
- (e) He kept the Envelope containing the Redacted Letter in his locked cabinet near his workplace before giving it to the Appellant on 10<sup>th</sup> April 2014.
- (f) He had not told the Appellant that he had opened the Envelope or that he had read the Redacted Letter. He simply stated that it was about the part of the EDB's Reply that related to her when she asked him what it was about.

16. In a telephone enquiry with Ms Fung<sup>30</sup>, Ms Fung stated the following:-

- (a) She worked in the same unit with the Appellant.
- (b) She overheard the Appellant's mentioning the Envelope during the latter's conversation with Mr Lai.
- (c) After the conversation, the Appellant asked Ms Fung to come to her seat, and asked whether "*Restricted*"

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<sup>29</sup> Mr Lai checked it by folding the two lengths of the Envelope (length-wise) and the flap did not become unstuck – a sign which indicated to him that the Envelope was sealed – when he was on his way back to his workstation, see Hearing Bundle at p.380 para.5.

<sup>30</sup> Hearing Bundle at p.281.

envelopes would not be sealed.

- (d) She noticed that the Envelope was not sealed and no document was inside the Envelope when the Appellant passed her the Envelope.

17. The Respondent had inspected the Envelope provided by the Appellant. The Envelope did not have any obvious signs of it having been sealed before, e.g. stapled hole, glue mark or traces of cello tape. The Respondent had also listened to the CD-ROM containing various recordings, but none of them contained any relevant evidence.

18. Having carefully considered all the information available and circumstances of the case, the Respondent reached the Decision<sup>31</sup> whereby he decided not to investigate the Complaints further pursuant to *section 39(2)(d) of the PD(P)O* and paragraphs 8(e) and (h) of the Respondent's "*Complaint Handling Policy*"<sup>32</sup> ("**the Policy**"). By a letter dated 17 November 2016<sup>33</sup>, the Respondent informed the Appellant of the Decision and attached thereto the Reasons for the Decision. Dissatisfied with the Decision, the Appellant lodged the present appeal to the Board.

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<sup>31</sup> Hearing Bundle at pp.167-180, 385-398.

<sup>32</sup> Hearing Bundle at pp.246-259, a copy of English and Chinese "Complaint Handling Policy" enclosed with the letter by the Respondent to the Appellant dated 29<sup>th</sup> January 2016, see Hearing Bundle at pp.244-245.

<sup>33</sup> Hearing Bundle at pp.166, 384.

## The Decision

19. In the Reasons for the Decision, it was held the following:-
- (a) The Envelope containing the Redacted Letter was unsealed when it was passed to the Appellant. However, the unsealing of the Envelope did not amount to any breach of *the Security Regulations*, as sealing required by *Reg. 213 of the Security Regulations* applied only to transmission other than by hand of an authorized officer, and Mr Lai in this case was an authorized officer since he was the Appellant's immediate supervisor and was all along fully involved in handling the complaint of Student A's father.<sup>34</sup>
  - (b) Mr Yan passed the Redacted Letter inside the Envelope stamped with the word "*Restricted*" thereon, and sealing of the Envelope was not part of Mr Leung's instructions. There was no breach of *DPP 4 of PD(P)O*, despite the fact that the Envelope was not sealed.<sup>35</sup>
  - (c) Since Mr Lai was the Appellant's immediate supervisor at the time and was part of the investigation team into the complaint of Student A's father, Mr Lai was an authorized

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<sup>34</sup> Hearing Bundle at pp.176-177, para.26.

<sup>35</sup> Hearing Bundle at pp.176-177, para.26.

officer who could read the Redacted Letter, despite the lack of express instructions from Mr Leung to Mr Yan to ask Mr Lai to read the contents of the Redacted Letter. The reading of the Redacted Letter by Mr Lai, if any, without such an express instruction, would not be indicative of any failure by the EDB in safeguarding the Appellant's personal data in the Redacted Letter.<sup>36</sup>

- (d) Even if Mr Lai had not been an authorized officer and Mr Yan had not sealed the Envelope in accordance with *Reg. 213 of the Security Regulations*, the breach was an isolated incident rather than a systemic problem involving personal data protection.<sup>37</sup>
- (e) There was a reasonable awareness among the officers concerned of the security risks associated with personal data.<sup>38</sup>
- (f) In view of the implementation, updating, regular re-circulation and ready availability of *the Security Regulations*, the EDB had taken all reasonably practicable steps to ensure effective implementation of its supervision and monitoring system to safeguard the security of

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<sup>36</sup> Hearing Bundle at pp.177-178, para.27.

<sup>37</sup> Hearing Bundle at p.178, para.28.

<sup>38</sup> Hearing Bundle at pp.178-179, para.29.

“*Restricted*” documents containing personal data.<sup>39</sup>

- (g) The Respondent had taken the opportunity to issue an advisory letter to the EDB to remind its obligations under *PD(P)O* in relation to the security of personal data.<sup>40</sup>
  
- (h) According to Mr Lai’s un-contradicted evidence, he had received the Redacted Letter directly from Mr Yan at a time when others had all left the office and thereafter kept it in his locked cabinet until it was taken out and given to the Appellant soon after 9:15 am on the next day. There was no evidence that the Redacted Letter had been accessed by anybody other than Mr Lai and Mr Yan as authorized officers.<sup>41</sup>

### **The Parameters of the Present Appeal**

20. The Appellant has formulated 4 grounds of appeal in the Notice of Appeal. They are as follows:-

- (a) Mr Leung divulged the personal data of the Appellant without her consent despite he had issued a reminder to his staff on 13<sup>th</sup> May 2013 which stated that “*All personal*

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<sup>39</sup> Hearing Bundle at p.179, paras.30 & 31.

<sup>40</sup> Hearing Bundle at p.179, para.31.

<sup>41</sup> Hearing Bundle at p.180, para.32.

*data should not be divulged to [the] third party without consent of the client/parents concerned*".<sup>42</sup> [Ground 1]

(b) Mr Leung did not appropriately handle the Appellant's data access request as Mr Leung did not follow the EDB's Guideline on Compliance with *PD(P)O* (the EDB's Internal Circular 7/2000) ("**the 7/2000 Guideline**"). Mr Leung could have emailed the Redacted Letter to the Appellant directly without having passed it to the Appellant through Mr Yan and Mr Lai, and the EDB's contention that "*the Section Head would have emailed the Redacted Letter directly to Mr Lai's confidential email account if Mr Lai had one*" was only an excuse.<sup>43</sup> [Ground 2]

(c) The Appellant had never made a formal data access request, and therefore Mr Leung had no right to authorize anyone to handle the Appellant's personal data. Although Mr Lai was the Appellant's immediate supervisor and was conversant with the details of complaint made by Student A's father, Mr Lai had no right to read the Redacted Letter without her consent.<sup>44</sup> [Ground 3]

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<sup>42</sup> Hearing Bundle at p.164, para.1.

<sup>43</sup> Hearing Bundle at p.165, para.2.

<sup>44</sup> Hearing Bundle at p.165, para.3.

- (d) The evidence of Mr Lai was inconsistent and incredible, and why Mr Lai had not provided the relevant details when he attended the hearing on 15<sup>th</sup> September 2015.<sup>45</sup>  
[Ground 4]

21. For the purpose of the present appeal, the Respondent filed his Statement dated 22<sup>nd</sup> February 2017 relating to the Decision<sup>46</sup> (“**the Respondent’s Statement**”) and the Secretary for Education (i.e. one of the three Persons bound by the Decision appealed against<sup>47</sup>) filed his Statement on 15<sup>th</sup> March 2017<sup>48</sup> (“**the SE’s Statement**”). In reply, the Appellant filed her Response dated 30<sup>th</sup> March 2017<sup>49</sup> (“**the Appellant’s Response**”).

22. On 24<sup>th</sup> and 25<sup>th</sup> May 2017, the Secretary for Education and the Respondent respectively filed with this Board their Skeleton Submissions for the present appeal (respectively “**the SE’s Skeleton**”<sup>50</sup> and “**the Respondent’s Skeleton**”<sup>51</sup>).

### **The Relevant Law & Policy**

23. *DPP4 of PD(P)O* provides, *inter alia*, that:-

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<sup>45</sup> Hearing Bundle at p.165, para.4.

<sup>46</sup> Hearing Bundle at pp.209-223.

<sup>47</sup> See the letter by the Secretary to the Board to the Appellant dated 5<sup>th</sup> January 2017, Hearing Bundle at p.194.

<sup>48</sup> Hearing Bundle at pp.435-442.

<sup>49</sup> Hearing Bundle at pp.443-453.

<sup>50</sup> Hearing Bundle at pp.472-477.

<sup>51</sup> Hearing Bundle at pp.480-489.

*“(1) All practicable steps shall be taken to ensure that personal data (including data in a form in which access to or processing of the data is not practicable) held by a data user are protected against unauthorized or accidental access, processing, erasure, loss or 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 is stored;*
- (c) any security measures incorporated (whether by automated means or otherwise) into any equipment in which the data is 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.”*

24. The word “*practicable*” means “*reasonably practicable*” under section 2(1) of PD(P)O.

25. Section 39(2) of PD(P)O provides that the Respondent may refuse to carry out or decide to terminate an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the

case :-

...

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

26. Paragraph 8(e) of the Policy provides that an investigation or further investigation may be considered unnecessary if “*after preliminary enquiry by the [Respondent], there is no prima facie evidence of any contravention of the requirements under the Ordinance*”.

27. Paragraph 8(h) of the Policy further provides that an investigation or further investigation may be considered unnecessary if “*given the conciliation by the [Respondent], remedial action taken by the party complained against or other practical circumstances, the investigation or further investigation of the case cannot reasonably be expected to bring about a more satisfactory result*”.

28. Section 21(1) of the Administrative Appeals Board Ordinance (Cap.442) provides that for the purposes of an appeal, the Board may: (j) subject to subsection (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit. Subsection (2) provides that the Board, in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the Respondent with the Secretary to the

Board under *section 11(2)(a)(ii)*, if it is satisfied that, at the time of the making of the decision being the subject of the appeal, the appellant was or could reasonably have been expected to be aware of the policy.

## Our Views

### Ground 1

29. As submitted by the Secretary for Education, the email referred to by the Appellant under Ground 1 should be dated 3<sup>rd</sup> May 2013 (“**the 3/5/13 Reminder**”) instead of 13<sup>th</sup> May 2013.

30. We agree with the submissions of the Respondent and the Secretary for Education that the 3/5/13 Reminder is irrelevant to the present appeal as the 3/5/13 Reminder was about the personal data of client/parents, not that of the Appellant *qua* an employee of the EDB, and “third party” was referring to the parties other than the EDB and the client/parents.

31. Ground 1 is a non-point.

### Ground 2

32. The 7/2000 Guideline was not a matter before the Respondent when he came to the Decision. That said, this does not debar us from

looking at the merits of this ground of appeal, since the nature of the present appeal is a rehearing.<sup>52</sup>

33. According to the 7/2000 Guideline, all data access requests should be made in writing in either Chinese or English. Verbal requests should not be entertained.

34. The Respondent submitted that, provided that the requirements under *PD(P)O* were observed, the Respondent should be slow in interfering with the way in which the Redacted Letter was delivered to the Appellant, and that there was not any contravention of *PD(P)O* in the present case.<sup>53</sup>

35. There is nothing in *PD(P)O* to mandate a data user to deliver/email a copy of the data requested to a data subject directly. However, if a data user chooses to take a roundabout way of delivering a copy of the data requested by the data subject, it may naturally be more difficult for the data user to establish that all practicable steps have been taken to ensure that personal data held by a data user are protected against unauthorized or accidental access, processing, erasure, loss or use.

36. We shall come back to the point whether Mr Lai and/or the EDB

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<sup>52</sup> See *Chan Wing Sang v Commissioner of Police* (AAB No. 220/2013, 17 April 2014) §23; *Happy Pacific Limited v Commissioner of Police* (Unreported, HCAL 115/1999) §36 (Stock J); *Li Wai Hung Cesario v Public Officer Appointed by The Secretary for Home Affairs* (AAB No. 27/2014, 24 December 2014) §11; *Li Wai Hung Cesario v Administrative Appeals Board* (Unreported, HCAL 18/2015) §§95, 98-101.

<sup>53</sup> See para.21 of the Respondent's Statement, Hearing Bundle at p.219.

has/have contravened *DPP4 of PD(P)O* later in our decision<sup>54</sup>. But, this ground of appeal *per se* is bound to fail.

### Ground 3

37. It is not in dispute that the Appellant made an oral request for the EDB's Reply (if the EDB's Reply mentioned about her) at the 21/3/14 Meeting.<sup>55</sup>

38. The Appellant has raised a similar point in the 1<sup>st</sup> Appeal.<sup>56</sup> In the 1<sup>st</sup> Appeal's Decision, the Board dealt with and dismissed this similar point in the following way:-

*“29. Complaint 6 is a non-complaint because there is nothing in the Privacy Ordinance to prohibit or inhibit a data user from supplying a data subject with a copy of her data upon the data subject's oral request. We do not understand what is the Appellant's complaint when she got the Redacted Letter without having to go through any formal procedure of a DAR. If the Appellant's complaint is that this was done in breach of the internal circular of the EDB, then again, it is a matter that she should take up with the EDB, not the PCPD.”*

39. It is clear from the finding of the Board in the 1<sup>st</sup> Appeal's Decision, which we agree, that there is nothing in the *PD(P)O* to prohibit or inhibit a data user from supplying a data subject with a copy of her

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<sup>54</sup> Although Mr Lai was the only person whom the Appellant complained against, Ms Chan representing the Respondent at the appeal hearing nevertheless agreed that the Board could deal with the responsibility of the EDB in this appeal as well.

<sup>55</sup> See transcript of the audio recording of the 21/3/14 Meeting, Hearing Bundle at pp.320 & 332.

<sup>56</sup> See Complaint (6) mentioned in the 1<sup>st</sup> Appeal's Decision, Hearing Bundle at pp.426-427.

data upon the data subject's oral request.

40. There is nothing in Ground 3 when the Appellant seeks to argue that the Section Head (i.e. Mr Leung) had no right to authorize anyone to handle her personal data because she had never made a formal data access request. In our view, there is no casual connection between Mr Leung's right to authorize anyone to handle the Appellant's personal data and the question whether the Appellant had made a formal data access request. Ultimately, the question is whether the EDB, in delivering the Redacted Letter to the Appellant at her request, have taken all reasonably practicable steps to ensure that the Appellant's personal data held by and delivered by it were protected against unauthorized or accidental access, processing, erasure, loss or use.

41. On the 2<sup>nd</sup> limb of Ground 3, the Appellant argues that although Mr Lai was the Appellant's immediate supervisor and was conversant with the details of complaint made by Student A's father, Mr Lai had no right to read the Redacted Letter without her consent.

42. The Respondent submitted that the fact that the Redacted Letter contained personal data of the Appellant did not mean that the Section Head (i.e. Mr Leung) was not allowed to ask anyone to render him assistance in handling the Appellant's request to "*take a look*" at the EDB's Reply. The Respondent further submitted that Mr Lai was the Appellant's immediate supervisor at the time and was part of the

investigation team of the complaint lodged by Student A's father and therefore, Mr Lai was an authorized officer and the Appellant's consent was not required before the Redacted Letter could be read by Mr Lai.<sup>57</sup>

43. We agree. Furthermore, we have not lost sight of Mr Lai's statement that he was asked by Mr Yan to check whether the document printed out was the Redacted Letter to be passed to the Appellant, and had not read the Redacted Letter.

44. Accordingly, we reject Ground 3.

#### Ground 4

45. The question of the credibility of Mr Lai is beside the point.

46. This question is relevant in the 1<sup>st</sup> Appeal's Decision when the question whether or not the Envelope was sealed loomed large. Not so, however, in the present appeal. In the Decision, the Respondent considered that there was no breach of *the Security Regulations* or DPP4 of PD(P)O even if the Envelope was unsealed.

47. Ground 4 must fail *in limine*.

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<sup>57</sup> See para.22(b)-(d) of the Respondent's Statement, Hearing Bundle at pp.219-220; see also similar argument by the Secretary for Education in para.9 of the SE's Statement, Hearing Bundle at pp.437-438.

## Conclusion

48. As we have said, ultimately, it is a question whether Mr Lai and/or the EDB has/have contravened *DPP4 of PD(P)O*.

49. It is plain that Mr Lai was acting in the course of his employment with EDB when he delivered by hand the Envelope containing the Redacted Letter to the Appellant. No doubt, Mr Lai was instructed by Mr Yan to do so. This being the case, Mr Lai's act should be treated for the purpose of *PD(P)O* as done or engaged in by the EDB.<sup>58</sup> Furthermore, Mr Lai cannot possibly be said to be a data user in relation to the Appellant's personal data (contained in the Redacted Letter) which he must have held on behalf of the EDB and not for any of his own purposes when he was asked by Mr Yan to deliver the Envelope containing the Redacted Letter to the Appellant.<sup>59</sup>

50. The Appellant has no case against Mr Lai.

51. In resolving whether the EDB has contravened *DPP4 of PD(P)O*, we need to explore whether the EDB, in delivering the Redacted Letter to the Appellant at her request, has taken all reasonably practicable steps to ensure that the Appellant's personal data in the Redacted Letter were protected against unauthorized or accidental access, processing, erasure,

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<sup>58</sup> See *section 65(1) of PD(P)O*; Ms Cheung representing the Secretary for Education agreed at the hearing of the present appeal that even if Mr Lai had acted in excess of his authority to read the Redacted Letter, the Mr Lai's act should still be treated as done or engaged in by the EDB.

<sup>59</sup> See *section 2(12) of PD(P)O*.

loss or use. On the materials emerged during further investigation<sup>60</sup>, we are driven to answer this question in the affirmative. The legal requirement under *DPP4 of PD(P)O* is fulfilled by the data users' taking all reasonably practicable steps to ensure that the data subjects' personal data are protected. All reasonably practicable steps are not intended to be the perfect or watertight risk-proof way of handling data subjects' personal data. Every system/step taken may have some known or unknown shortcomings. Provided it is the reasonably practicable step in all the circumstances of the case, such step is not amenable to any challenge under *DPP4 of PD(P)O*. Of course, there is much to be said for the Redacted Letter to be emailed directly and confidentially to the Appellant. But, this does not mean that to do otherwise would be in breach of *DPP4 of PD(P)O*. In some cases, there may be many reasons why this easy course is not open to the data users.

52. Having so opined, the Respondent is amply justified for not pursuing the Complaints further.

53. In light of the aforesaid reasons, the Appeal should be dismissed and we so order.

54. At the end of the hearing of the present appeal, no party applied for any particular costs order despite enquiry made by the Board. Accordingly and in all the circumstances of this case, we shall order that

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<sup>60</sup> Please refer to paras.12-15 hereinabove.

there be no order as to costs.

(signed)

(Mr Ng Man Sang Alan)

Deputy Chairman

Administrative Appeals Board