

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 42/2024

BETWEEN

X

Appellant

and

PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

Ms Jay Ma Suk-lin (Deputy Chairman)

Mr Sy Ming-yiu (Member)

Mr Victor Wong Wai-keung (Member)

Date of Hearing: 30 April 2025

Date of Handing Down Written Decision with Reasons: 6 June 2025

DECISION

INTRODUCTION

1. This is an appeal lodged by the Appellant ("X") against the decision ("the Decision") of the Privacy Commissioner for Personal Data ("the Respondent"), dated 27 September 2024, not to carry out an investigation against the Hong Kong Metropolitan University ("HKMU") pursuant to

section 39(2)(d) of the Personal Data (Privacy) Ordinance Cap.486 (“PDPO”).

BACKGROUND

2. The Appellant, being a former Associate Professor of HKMU, made two (2) data access requests (“DAR”) on or about 19 April 2022 and on or about 13 April 2023 to HKMU. In respect of the first DAR, the Appellant was provided with the Appraisal Form, which covered the period between 1 September 2020 and 31 August 2021, and the Recommendation Form, which covered the period between 1 September 2019 and 31 August 2021. In respect of the second DAR, the Appellant was provided with 19-page Survey Results.

3. By a letter dated 21 December 2023¹, X made a data correction request (“DCR”) to HKMU. X stated that the four (4) statements (“Statements”) contained in the Appraisal Form and Recommendation Form were inaccurate and hence corrections needed to be made. These 4 Statements were as follows:

- “(a) “It was found that the feedback given to students’ assignments was minimal in ...courses such as...” (1st paragraph, 4th sentence in the “Appraiser’s Comment” section of the Appraisal Form)
- (b) “During the appraisal process for 2020-21, it was found that feedback to students’ assignments was minimal for ...” (3rd paragraph, 1st sentence in the “Justifications for the

¹ Appeal Bundle (“AB”) on P.449

Recommendation” section of the Recommendation Form)

- (c) “[X] also indicated that she did the course maintenance for ...and updated the PPT/teaching materials for ...during the appraisal period but she did not incorporate some of the latest development of ... (“Z”) during the updating.” (2nd paragraph, 2nd sentence in the “Appraiser’s Comment” section of the Appraisal Form)
- (d) “Again, it was further found that the course materials of these 2...courses were not updated with the latest Z.” (3rd paragraph, 2nd sentence in the “Justifications for the Recommendation” section of the Recommendation Form)”^{2,3}

4. By email dated 29 January 2024, HKMU replied to X stating:

“Your request for correction of personal data carried the 2020-21 Appraisal Form and Recommendation Form for Re-appointment/Re-employment dated 20 December 2021.

The parts of the statements concerned which you considered inaccurate are generally expressions of opinion by the Appraiser/Recommending Officer. I’m afraid your request is not justified for correction of such data and will not be proceeded.”⁴

5. By a letter dated 7 June 2024, the Appellant, via her legal representative, lodged a complaint with the Respondent. In summary, the Appellant stated that:

² AB from P.450 to P.451

³ Words replaced by dotted lines are done pursuant to this Board’s decision granting the anonymity order upon the Appellant’s application prior to the appeal hearing.

⁴ AB on P.420

- (1) she disagreed with HKMU's reply that they were "expressions of opinion". She contended that even if they were considered expressions of opinion, they were subject to data correction requests as they fell within the definition of "data" under section 2 of PDPO;
- (2) HKMU had failed to comply with section 25(2)(b) of PDPO whereby data user was required to make a note and attach a copy of such to the notice refusing a DCR, if the data user was not satisfied that the opinion was inaccurate; and
- (3) the 4 Statements were assertions of verifiable facts rather than expressions of opinion.

6. The Appellant cited the case of AAB No.22/2000 in support of her contention that HKMU did not have any factual support for the accuracy of the said Statements. *"[T]he University has failed to provide any factual basis to support their decision to refuse our client's data correction request."*⁵

7. By a letter dated 12 June 2024, the Respondent replied to X acknowledging receipt of her complaint and enclosing a copy of the "Complaint Handling Policy" ("CHP"), "Information required to establish a complaint under section 37 of the Ordinance - Flow Chart ("Flow Chart") and "Notes to Complainants".

8. By a letter dated 10 July 2024, the Respondent invited the Appellant to clarify, inter-alia, the following:

⁵ AB on P.338 at para.8

- (i) whether the purpose of making the DAR and/or DCR was related to any employment decision made by HKMU against X;
- (ii) whether the alleged inaccurate parts of the first and second Statements referred to the interpretation of the word “minimal”; and
- (iii) whether the Respondent’s understanding is correct in respect of the alleged inaccurate parts of the third Statement namely “X did not incorporate some of the development of Z”, and whether the alleged inaccurate parts of the fourth Statement referred to “the course materials of these 2...courses were not updated with the latest Z.”⁶

9. By a letter dated 14 August 2024, X replied via her lawyer:

- (i) *“...the purpose of making the DARs was to request for all the objective, factual evidence held by the University in respect of the Concerned Statements. Having found that the University did not possess any objective, factual evidence, the purpose of making the DCR was to rectify the incorrect personal record held by the University in respect of our client.*
- (ii) *...our client is in complete disagreement with the entire sentences.*
- (iii) *...your understanding is correct.”*⁷

10. Pursuant to X’s reply, the Respondent conducted a preliminary

⁶ AB on P.401 at para(s) 7.2, 7.3 and 7.4

⁷ AB on P.406 at para(s) 4, 5 and 6

inquiry with HKMU. By a letter dated 19 August 2024, the Respondent invited HKMU to provide information in respect of X's complaint. On 4 September 2024, a telephone conversation was held between HKMU's Ms Lam and the Respondent, during which Ms Lam advised that X had lodged an internal complaint with HKMU. In response, HKMU had set up a Grievance Committee to address X's complaint.

11. By email dated 11 September 2024, HKMU advised the Respondent, inter-alia, the following:

- (i) *“The Statements are considered general expressions of opinion by the Appraiser. Appraisal comments and rating are not made solely based on Survey Results, which serves as one of the references. Subsequent to [X]’s request, we have attempted to check possible sources of relevant records (e.g. drafts of course materials), including with the Appraiser, and no additional records could be found. Henceforth, the Appraiser’s expressions of opinion are considered unverifiable, and there is no sufficient basis to doubt their accuracy.*
- (ii) *The DCR was rejected on the grounds stipulated in section 24(3)(b) and (c). We assumed that our previous reply has provided the reason for the rejection, and were not aware that reference to section 24(3) would be needed. A consolidated reply to [X] will be sent in one go...”⁸*

A copy of the relevant extract of the University Code of Practice on Personal

⁸ AB on P.423 at para(s) 13.2 and 13.3

Data Privacy (“the Code”) was attached in the email.

12. On 12 September 2024, having reviewed the materials provided by HKMU, the Respondent telephoned Ms Lam of HKMU informing her of the need to comply with PDPO. In particular there was a lack of information from the Code showing compliance with the PDPO in case of DCR. Ms Lam indicated that HKMU was in the process of seeking legal advice in respect of the necessary amendments of the Code; and that HKMU would send an email to the responsible staff members reminding them of the need to comply with PDPO.

13. Pursuant to the above telephone conversation, the Respondent, by email dated 12 September 2024, requested HKMU to provide the following information on or before 19 September 2024:

- “(i) Regarding the follow-up action in relation to the requirements specified under section 25(1) and (2) of the Ordinance, please provide the relevant updates of the actions taken by the University, and provide this office with the copies of the correspondence to the complainant (if any);*
- (ii) Please confirm whether the University would circulate a reminder to the staff to ensure the data correction requests are handled in accordance with the relevant requirements of the Ordinance, and/or with reference made to “Proper Handling of Data Correction Request by Data Users” published by this office.....; if “yes”, please provide the relevant copies of the correspondence; if “no”, please explain why.”⁹*

⁹ AB on P.434 at para.2

14. By email dated 19 September 2024, HKMU advised the Respondent that the above (i) and (ii) had been complied with. The corresponding documents were attached in the email.

15. By a telephone conversation dated 20 September 2024, the Respondent made further enquiries with HKMU. According to the telephone record, HKMU confirmed, inter-alia, that X had not provided any “drafts” to HKMU as claimed; and that HKMU had requested the relevant department to provide “relevant records, course materials, and draft course materials”. HKMU advised that they had been informed by the department that they were not in possession of the records, and hence HKMU could not confirm the inaccuracy of Statements 3 and 4. HKMU therefore refused the DCR under section 24(3)(c) of PDPO. In respect of Statements 1 and 2, HKMU advised that they were of the view that they were Appraiser’s subjective feedback. Upon further enquiries by the Respondent, HKMU confirmed that the enquiries they made with the relevant department related to records of course materials reviewed by the Appraiser during the Appraisal period. HKMU was, however, informed by the relevant department that the courses in question had been held 3 to 4 years ago, and they did not keep the related records. As such, they could not refer to the “course materials” as stated in those Statements.¹⁰

16. By a letter dated 27 September 2024, the Respondent informed the Appellant that, in accordance with paragraph 8(h) of the CHP, she decided not to carry out an investigation into the case under section 39(2)(d) of the PDPO. In addition, the Respondent informed X that a warning letter

¹⁰ AB on P.483

would be issued to HKMU reminding her of the importance of strict compliance with the requirements of the PDPO when handling DCR.

17. Subsequently, by a letter dated 3 October 2024, the Respondent informed HKMU that she had been in breach of section 25(2) of the PDPO. The Respondent further stated in the letter that:

“4. However, having considered the follow-up actions taken by the University, including but not limited to (i) adding the notes as required under section 25(2) to the Appraisal Form and the Recommendation Form; (ii) issuing the written notice as required under section 25(1) of the Ordinance by way of the Further Reply, and attaching to it a copy of the Appraisal Form and the Recommendation Form with the notes added; and (iii) reminding its staff to handle data correction requests in accordance with the relevant requirements of the Ordinance, we do not intend to take further actions in this matter at this stage.

5. The University is warned that it shall strictly comply with the relevant requirements of the Ordinance when handling data correction requests and recirculate the relevant guidelines/procedures regularly so as to ensure staff adherence.”¹¹

18. By a Notice of Appeal dated 24 October 2024, the Appellant lodged the appeal with the Administrative Appeals Board (“this Board”) enclosing her grounds of appeal.

¹¹ AB on P.508 at para(s) 4 and 5

GROUNDS OF APPEAL

19. In her Notice of Appeal, which was later supplemented by further written submissions, the Appellant, via her legal representative, set out the following two (2) grounds of appeal:

- (1) That HKMU, by the first two Statements (Statements 1 and 2)¹², did not invoke the application of s25(3) of the PDPO where “expression of opinion” is stated to include “*an assertion of fact which---(a) is unverifiable; or (b) in all the circumstances of the case, is not practicable to verify.*” The Respondent, however, raised such in her Decision for the first time, while during the period when she handled the Applicant’s complaint, she had not referred to it. Under those circumstances, the Applicant should have been given an opportunity to address the issue, without which the Respondent’s conduct amounted to a breach of fundamental principle of natural justice. The Appellant contends that had she been given a chance to address the issue, she would have been able to produce relevant documentary evidence which included the feedback forms that she provided to students. In other words, the first two Statements could be considered with verifiable facts.
- (2) That in respect of the third and fourth Statements (Statements 3 and 4)¹³, the Respondent failed to give due consideration to the assertion that the Appellant had already provided the necessary course materials, which X referred to as the “*final*

¹² Please refer to para.3(a) and (b)

¹³ Please refer to para.3(c) and (d)

product”¹⁴, to HKMU prior to the Appraiser’s making of Statements 3 and 4. The Appraiser, while making comments on X for not updating the course materials, did not require the Appellant to provide the said final product for review prior to making the comments. The Appellant therefore contends that the comments were made without basis.

20. The Appellant enclosed some of the assignment feedback forms¹⁵ in her Notice of Appeal.

21. The Appellant, via her legal representative, supplemented the above grounds with further written submissions.

Ground (1)

22. X contends that since the words “It was found that...” were used in the first 2 Statements, there must have been objective evidence in support of it. Her position was that there was no such objective evidence. She further contends that since there was no factual basis to support HKMU’s decision, reasonable justifications did not exist.

23. In addition, X contends that the Respondent “*should have further inquired with the University what other references did the Appraiser consult while making the appraisal comments and ratings. This is necessary in order for the Respondent to ascertain whether the University’s decision was based on its subjective understanding or had factual basis in support, ...AAB*”

¹⁴ AB on P.252 at para.9(i)

¹⁵ AB from P.262 to P.286

No.22/2000.”¹⁶

24. The Appellant argues that the appraisal comments and ratings must have been based on “*something else*”¹⁷ which HKMU failed to produce. That was, in the view of the Appellant, a valid reason for the Respondent to doubt the veracity of the information provided by HKMU. X invites this Board to consider the first 2 Statements by reference to the feedback forms provided in her Notice of Appeal, albeit she stated that she was not inviting this Board to “*assess the feedback forms*”.¹⁸

25. The Appellant further argues that after the change-of-stance reply by HKMU on 19 September 2024, and before the Respondent issued her Decision, X was not invited to address the issue on section 25(3) of the PDPO which was considered by the Respondent in her Decision. X was, therefore, deprived of an opportunity to provide further information which might include providing the feedback forms to the Respondent.

Ground (2)

26. In respect of the “updated/lack of updated course materials”, the Appellant argues that it was unreasonable for HKMU to reply that they did not possess records of the course materials, if any, provided by X even in April 2022 when an internal investigation had just been concluded. X therefore contends that “*the only irresistible inference is that such records never existed.*”¹⁹

¹⁶ AB on P.709 at para. 7(b)(ii)

¹⁷ Supra, at para. 7(b)(iii)

¹⁸ AB on P.711 at para.8(c)(i) and (ii)

¹⁹ AB on P.715 at para. 11(a)(vi)

27. The Appellant argues that “[t]he Respondent should have further inquired with the University as to why no such documents were produced, at least in relation to the data access request made in April 2023, ...”²⁰

28. X further argues that HKMU should have stated clearly the specific parts of the course materials which were allegedly not updated. To require X to produce the course materials again would place undue burden on her, and would give HKMU a second opportunity to examine the materials in order to justify their stance.

29. The Appellant concluded that HKMU was not justified by relying on section 24(3)(c) of the PDPO to refuse the DCR of Statements 3 and 4.

REPLY BY THE RESPONDENT

30. The Respondent submitted that as a general principle in approaching a DCR, her interpretation of the case *AAB No.22/2000* differed from the Appellant’s in that : “in cases where a factual dispute is involved, the only thing the Commissioner can do is to consider whether the data user has reasonable justifications not to accept that the data for which a correction is requested is inaccurate. The Board considers that this does not only depend on the subjective understanding of the data user, but also requires factual basis to support the data users’ decision....” [English translation with emphasis added]”²¹

31. By citing some of the decisions by the Administrative Appeals Board, the Respondent invited this Board not to enter into the arena by

²⁰ Supra, at para. 11(b)(ii)

²¹ AB on P.756 at para. 8

finding whether there was a factual basis in support of the Statements made by HKMU, as such would amount to re-assessing the job performance of the Appellant which this Board should refrain from doing.

Ground (1)

32. The Respondent submitted that whether the first 2 Statements were made groundlessly was an internal personnel matter of HKMU. She stated that it was particularly important to consider that the Appellant's complaint had been lodged with HKMU which had been dealt with by the Grievance Committee. In addition, the Respondent argues that without cogent evidence, it would be a serious allegation made against HKMU, who would be held criminally liable, for knowingly misleading the Respondent.

33. In respect of the argument advanced by the Appellant that she was deprived of the right to be heard, the Respondent submitted that the method, and the associated procedures and policies, in which she conducted the investigation belonged to her internal administration. In addition, she argued that no practical value would be obtained by inviting the Appellant to make representations, as the Appellant had been well aware of HKMU's position and that her position was already made clear by her representations to the Respondent.

Ground (2)

34. The Respondent submitted that whether there was a specified period for HKMU or her relevant department to keep records pertaining to personal data after the conclusion reached by the Grievance Committee was a matter of her internal governance.

35. The Respondent further argued that be it under section 24(3)(b) or 24(3)(c), *“the fact remains that there is no “information” to establish any inaccuracy, despite the Appellant’s purported willingness to provide the Course Materials.”*²² The Respondent concluded that the Appellant’s concern had been sufficiently addressed and it was reasonable and justifiable for her to come up with her Decision.

THE APPEAL HEARING

36. In the hearing, the Appellant, via her legal representative Mr Lai, argued further on the application of the case AAB No.22/2000 by providing this Board with a copy of an extract from the book “Personal Data (Privacy) Law in Hong Kong”. Mr Lai pointed out, by reference to paragraph 11.30 on page 247 of the extract, that *“[i]n contrast, if the dispute is about a fact, it is easier to gather evidence to ascertain whether the data is inaccurate. In refusing to comply with a data correction request, a data user must have reasonable justifications.”*

37. When asked about the alleged change-of-stance of HKMU by a letter dated 19 September 2024, as opposed to her first reply dated on 29 January 2024, Mr Lai submitted that the wording changed from “generally expressions of opinion” from her first reply to merely “expressions of opinion” in her reply on 19 September 2024. He further submitted that without the word “generally”, the Statement(s) became factual statements. Factual basis is, therefore, required to support those Statements.

²² AB on P.767 at para.33(a)

38. Mr Lai submitted that HKMU did not identify which parts of the course materials were allegedly not updated. In this context, Mr Lai contends that even though Statements 3 and 4 did mention the latest development of Z not being updated, it was, however, not specific enough for the Appellant to address the issue, as Z itself comprised of a lot of chapters. In the hearing, both the Appellant and the Respondent agreed that Z mainly covered the methodology for the relevant courses.

39. Mr Lai confirmed that in the Appellant's Notice of Appeal where she mentioned (1) "*It is submitted that the University has no reasonable basis to reject our client's data correction request because they do not have any factual support for the accuracy of the concerned statements.*"²³; and (2) "*...the University has failed to provide any factual basis to support their decision to refuse our client's data correction request.*"²⁴, it is the Appellant's position that both (1) and (2) are inter-related. He further submitted that in order for this Board to be satisfied with (2), it would need to be satisfied with (1) in the first place. Mr Lai confirmed that that was how the case AAB No.22/2000 applied to the present appeal.

40. In reply, the Respondent reiterated the stance stated in the written submissions. In gist, the Respondent submitted that she had discretion in deciding whether she should carry out an investigation. In addition, the Respondent invited this Board not to enter into the arena of re-assessing the job performance of the Appellant. The Respondent further submitted that the proper application of the case AAB No.22/2000 was restricted to whether HKMU had reasonable justifications not to accept that there was an inaccuracy, rather than in support of those Statements.

²³ AB on P.338 at para.7(c)

²⁴ Supra, at para.8

THE RELEVANT LAW AND POLICY

Principles to be applied

41. Under the Administrative Appeals Board Ordinance, Cap.442 (“AAB Ordinance”), the Board is given wide powers in the determination and disposal of the appeals before it. In particular, section 21(1)(j) provides that the Board may “*subject to subsection (2), confirm, vary or reverse the decision... or make such other order as it may think fit.*”

42. Section 21(2) of the AAB Ordinance provides that “[t]he 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 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.”

43. Since the Respondent, upon receiving the complaint from the Appellant, provided the Appellant with the information concerning her “Complaint Handling Policy”, “Information required to establish a complaint under section 37 of the Ordinance - Flow Chart” and “Notes to Complainants”,²⁵ the Appellant was or could reasonably have been expected to be aware of the policy. Section 21(2) of the AAB Ordinance was satisfied.

44. Section 21(3) of the AAB Ordinance further provides that “[t]he Board, on the determination of any appeal, may order that the case being

²⁵ Please refer to para. 7

the subject of the appeal as so determined be sent back to the respondent for the consideration by the respondent of such matter as the Board may order.” As commented by Stock J, this subsection (3) “appears to be unusual, and is a power not available to a number of statutory appeal boards....”,²⁶ and that “the Board can do more than this court ----it can substitute its own view on the merits.”²⁷

45. The appeal before the Board is a hearing *de novo*. The Board is entitled to determine the merits of the decision appealed against and exercise its discretion afresh if, upon consideration of the case under appeal, it is satisfied that the decision appealed against is “*either wrong in principle or in any way excessive*”. (*Jen Co Men v Commissioner of Police* AAB28/2007). “*A decision that involves the exercise of a discretion may be found to be wrong or excessive if the discretion is found to have been exercised unreasonably or disproportionately.*” (*Chan Wing Sang v Commissioner of Police* AAB220/2013)

The Relevant Legislation

46. The present appeal is mainly concerned with the following provisions of the PDPO:

Section 24(3)(b) and (c) states that:

A data user may refuse to comply with section 23(1) in relation to a data correction request if—

(a)

(b) the data user is not satisfied that the personal data to which the

²⁶ *Happy Pacific Limited and another v Commissioner of Police*, unreported, HCAL 115/1999, judgement dated 11 November 1999 at p.12

²⁷ *Supra*, p.14

request relates is inaccurate;

- (c) the data user is not supplied with such information as the data user may reasonably require to ascertain in what way the personal data to which the request relates is inaccurate;

Section 25 states as follows:

Notification of refusal to comply with data correction request, etc.

- (1) A data user who pursuant to section 24 refuses to comply with section 23(1) in relation to a data correction request shall, as soon as practicable but, in any case, not later than 40 days after receiving the request, by notice in writing inform the requestor—

- (a) of the refusal and the reasons for the refusal; and
 - (b) where section 24(3)(e) is applicable, of the name and address of the other data user concerned.

- (2) Without prejudice to the generality of subsection (1), where—

- (a) the personal data to which a data correction request relates is an expression of opinion; and
 - (b) the data user concerned is not satisfied that the opinion is inaccurate,

then the data user shall—

- (i) make a note, whether annexed to that data or elsewhere—

- (A) of the matters in respect of which the opinion is considered by the requestor to be inaccurate; and
 - (B) in such a way that that data cannot be used by a person (including the data user and a third party) without the note being drawn to the attention of, and being available for inspection by, that person;

and

- (ii) attach a copy of the note to the notice referred to in subsection (1) which relates to that request.

(3) In this section, expression of opinion (意見表達) includes an assertion of fact which—

- (a) is unverifiable; or
- (b) in all the circumstances of the case, is not practicable to verify.

Section 39(2)(d) states that:

The Commissioner 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— (Amended 18 of 2012 s. 22)

- (a);
- (b);
- (c);
- (ca); or
- (d) any investigation or further investigation is for any other reason unnecessary.

DISCUSSION

Ground (1)

47. It is not in dispute that Statements 1 and 2 were in respect of the comments and ratings contained in the Appraisal Form and Recommendation Form. The Appellant contends that since HKMU was

unable to provide objective evidence in support of the accuracy of these Statements, it was unreasonable for HKMU not to accept the DCR made by her. The Respondent acted unreasonably in not making further enquiries as to what documentary evidence was relied upon by HKMU.

48. Mr Lai, on behalf of X, argues that when the first DAR was made in April 2022, no “objective evidence/documentary evidence” was provided to the Appellant, despite the fact that X requested “*All documents, including but not limited to emails, forms, letters, memos, reports and minutes of meetings, relating to the investigation of online examination irregularity for 2020 Autumn Term and the delivery of the verbal warning to [X] on 16 March 2021.*”²⁸

49. Mr Lai further argues that had there been any documentary evidence or “something else”²⁹ in support of those Statements, they would have been provided to X by HKMU when she made the first DAR. In this context, Saunders J in *Wu Kit Ping v Administrative Appeals Board* [2007] 4 HKLRD 849 said that: “*The entitlement is a copy of the data, it is not an entitlement to see every document which refers to a data subject...*”³⁰.

50. This Board is, therefore, of the view that whether X was provided with “something else” in both DARs was irrelevant to the issue of the present appeal. In addition, this Board finds that when HKMU advised the Respondent that those Statements were the “*subjective feedback of the Appraiser*”³¹, it is evident that those Statements were not factual statements but expressions of opinion. We are not satisfied that there was a change of

²⁸ AB on P.722 under Part IV

²⁹ Please refer to footnote 17

³⁰ *Wu Kit Ping v Administrative Appeals Board* [2007] 4 HKLRD 849 at para.32

³¹ AB on P.483 at para.3

stance from HKMU by taking out the word “generally” in front of “expressions of opinion”, as contended by Mr Lai.

51. In respect of the Appellant’s argument that she should have been consulted after the alleged change-of-stance of HKMU, which, as argued by X, led to the Respondent’s Decision having to refer to section 25(3) for the meaning of “expression of opinion”, this Board finds that the Appellant’s invitation to this Board to “*take note that Statements 1 and 2 may be verified with reference to the feedback forms (a task, which if performed, will be done by the University)*”³² is no different from inviting this Board to assess the feedback forms.

52. This Board agrees with the view expressed by the Board in AAB No.14/2018 that “*it was not for the Respondent to carry out a full investigation into the Appellant’s job performance.*” By taking note of the feedback forms provided by the Appellant, this Board is of the view that it inevitably leads to (re-)assessment of the Appellant’s job performance, which is not for this Board to commit.

53. In addition, it should be noted that in the “Notes to Complainants”, which was enclosed in the letter dated 12 June 2024 from the Respondent to the Appellant, it is stated that:³³

Can I request your Office to handle my complaint according to my request or specified approach?	This Office has to exercise ownership and control over the procedure and approach in handling complaint cases, so as to
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³² AB on P.711 at para. 8(c)(i)

³³ AB from P.395 to P.396

	reach an outcome that this Office considers reasonable and just in the circumstances. It also ensures equity and fairness in the allocation of resources across all complaints.
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54. It is clear from the above that the Respondent has “*“control” over the procedure and approach in handling complaint cases,...*”. Insofar as the Respondent did not go beyond the ambit of her discretion in handling complaints in accordance with the relevant legal principles and policies, this Board should not intervene.

55. Since this Board is not satisfied that there was a change of stance from “generally expressions of opinion” to “expressions of opinion” on the part of HKMU, we find that the Respondent has not acted unreasonably by referring to section 25(3) in her Decision.

Ground (2)

56. As mentioned above, it is not the role of the Respondent to (re-)assess the Appellant’s job performance. As advised by previous decisions, which include the often cited case of AAB No.22/2000, and in accordance with the enforcement of section 24(3)(c) of the PDPO, the Respondent’s role was to inquire with HKMU to ascertain whether HKMU “*is not supplied with such information as the data user may reasonably require to ascertain in what way the personal data to which the request relates is inaccurate.*”

57. In this context, the Respondent, upon receiving and reviewing the

materials provided by X, made a preliminary inquiry with HKMU. HKMU advised the Respondent, inter-alia, that she had attempted to check possible sources of records, but no records could be found. It is noteworthy that the Respondent further requested HKMU to take remedial action in respect of her failure to comply with the requirements as set out under section 25(2) of the PDPO.³⁴ This Board finds that the Respondent could not be said to be blindly accepting the reply from HKMU. In this regard, this Board shares the view expressed by the Board in *AAB No.30 of 2011* “10.1 ..「專員」已向「獨立監警會」作出有關查詢，得知他們的記錄顯示並沒有收過所指的文件。...沒有任何合理原因可使「專員」質疑這個解釋。「專員」不可以貿貿然對該會說：「我不相信你的解釋，因為投訴者指你們說謊，我要親自檢視記錄，要你們所有成員和職員作出交待。」或類似的話。” This Board is, therefore, of the view that whether the Appellant would be or will still be prepared to provide relevant updated course materials is irrelevant to the approach taken by the Respondent in handling her complaint.

58. The Appellant argues that HKMU did not specifically identify the allegedly not updated methodology in Statements 3 and 4, which led to X being unable to address the issue properly. This Board finds that it is not the role of this Board to set a standard for HKMU's Appraiser in filling out the contents of the relevant Appraisal Form and Recommendation Form. It belongs to the internal administration of HKMU, with which neither the Respondent nor this Board is in a position to intervene.

INVESTIGATION BY THE RESPONDENT

³⁴ Please refer to para. 13

59. As seen from section 39(2)(d) of the PDPO, the Respondent *may* refuse to carry out an investigation if she is of the opinion, that, having regard to all the circumstances of the case, any investigation or further investigation is for any other reason unnecessary. In exercising her discretion not to carry out an investigation against HKMU, the Respondent relied on paragraph 8(h) of the CHP:

*“given the conciliation by the PCPD, 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;”*³⁵

60. In view of the follow-up remedial action taken by HKMU, followed by a warning letter issued by the Respondent, this Board is satisfied that any investigation cannot reasonably be expected to bring about a more satisfactory result.

APPLICABILITY OF PDPO

61. This Board does not agree with the Appellant’s submission that we need to be satisfied with (1) in order to be satisfied with (2).³⁶ Such argument, in our view, is not the correct interpretation of the case of AAB No.22/2000. As stated in AAB No.22/2000, “張先生要求更改的個人資料，並不是一般常見的個人資料，例如姓名、年齡、地址、學歷、經驗和身分證號碼等等，他現在要求更改的個人資料是一份解僱通知書的內容。通知書說明解僱張先生的理由，雖然在內容上，該份通知書

³⁵ AB on P.387

³⁶ Please refer to para. 39

是有涉及個人資料的，但就一份解僱通知書而要求修改其內容，本上訴委員會認為並不是條例第 22、23 及 24 條的立法原意，因為這類形的文件，肯定是涉及僱主對僱員在工作表現上的評估，雙方對這些評估的內容亦會各持己見， ...”³⁷

62. Despite the Appellant’s attempt to distinguish between “generally expressions of opinion” and “expressions of opinion” with which we disagree, the relevant data pursuant to X’s DCR is not in the nature of common personal data such as a data subject’s name, age and address and so on. This Board does not see any reasonable justification for the Respondent to doubt the meaning and veracity of the reply provided by HKMU as to the subjective feedback of the Appraiser. Under those circumstances, the data requested by the Appellant to be corrected could legitimately be seen as comments held by the Appraiser concerning the Appellant’s job performance. This Board is, therefore, of the view that it is not the legislative intent of the PDPO for the Respondent to adjudicate the employment disputes between the Appellant and HKMU.

EXERCISE OF DISCRETION

63. Pursuant to section 39(2)(d) of the PDPO, the Respondent “may refuse to carry out an investigation...”. The word “may” suggests that the Respondent has a discretion as to whether to carry out an investigation. In exercising her discretion, it should be considered that:

“(1) There is no absolute or unfettered discretion in law;

(2) The question is whether the discretion is wide or narrow. For

³⁷ AAB No.22/2000 from P.7 to P.8

this purpose, everything depends upon the true intent and meaning of the empowering statute;

- (3) The discretion can only be validly exercised for reasons relevant to the achievement of the purpose of the statute; and*
(4) The discretion must be exercised reasonably, i.e. to take account of relevant considerations and exclude irrelevant considerations in the decision making.”³⁸

64. In arriving at her Decision, we are satisfied that the Respondent had considered whether HKMU had reasonable justification not to accept that the data, which was requested to be corrected, was inaccurate. In other words, whether HKMU had reasonable justification to refuse the Appellant’s DCR had been fully considered by the Respondent.

CONCLUSION

65. For the above reasons, we are not satisfied that the Respondent was either wrong or unreasonable in arriving at her Decision not to carry out an investigation against HKMU. Accordingly, the Appellant’s appeal is unanimously dismissed with no order as to costs.

(signed)

(Ms Jay Ma Suk-lin)

Deputy Chairman

Administrative Appeals Board

³⁸ *The Incorporated Management Committee of SKH Tsing Yi Estate Ho Chak Wan Primary School v Privacy Commissioner For Personal Data* (AAB No.4/2017 at para.68)

Appellant: Represented by Mr David T W Lai, Counsel instructed by Messrs.
STN Law Office

Respondent: Represented by Mr Kevin Chan, Legal Counsel

Person(s) bound by the decision: The Hong Kong Metropolitan University
(Absent)