



complained by the resident (“the Lower Unit Resident”) of Flat 5, 32/F, Block B of the Building (“Lower Unit”) for an alleged suspected water seepage from the balcony of the Subject Unit. The Appellant alleged that the manager of the Building (“the Manager”) had, without giving prior notification to the Appellant, entered the Subject Unit and taken 14 photos of the Subject Unit, showing mainly the Property’s balcony (“Photos”), and further disclosed the Photos and the Appellant’s residential address to the Lower Unit Resident.

2. In addition, the Appellant alleged that he had recently received a letter from the Lower Unit Resident addressed to him personally. Since the Appellant had never provided his full name to the Lower Unit Resident, the Appellant suspected that in addition to disclosing his residential address and the Photos, the Manager had disclosed his name to the Lower Unit Resident. Against this background, the Appellant complained to the Respondent.

3. The Respondent considered that the matters complained by the Appellant did not involve his personal data on the basis that:-

(a) the Appellant had failed to provide the Respondent with sufficient information showing that the Manager had disclosed the Appellant’s name to the Lower Unit Resident; and

(b) the identity of the Appellant could not be ascertained from the Appellant’s residential address and the Photos.

4. The Respondent concluded that the matters reported by the Appellant did not qualify as a “complaint” under the requirements of s.37 of the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO) and hence the Respondent could not process the same.

5. By a letter dated 22 January 2016, the Respondent informed the Appellant of his decision not to investigate those matters (“Decision”). Dissatisfied with the Decision, the Appellant lodged the present appeal to the Administrative Appeals Board.

***Difference between s.37(1) and s.39(2)(d) of PDPO***

6. There is an important legal issue in this appeal, i.e. whether it is correct for the Respondent to base the Decision upon s.37(1) of PDPO, or the Respondent should rely upon s.39(2)(d) of PDPO.

7. Section 2 of PDPO provides:

“*complaint* (投訴) means a complaint under section 37”

8. Section 37(1) of PDPO reads as follows:-

“An individual, or a relevant person on behalf of an individual, may make a complaint to the Commissioner about an act or practice-

(a) specified in the complaint; and

(b) that-

(i) has been done or engaged in, or is being done or engaged in, as the case may be, by a data user specified in the complaint;

(ii) relates to personal data of which the individual is or, in any case in which the data user is relying upon an exemption under Part 8, may be, the data subject; and

(iii) may be a contravention of a requirement under this Ordinance (including section 28(4)).”

9. Section 39 of PDPO provides:

- “(2) 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-
- (a) the complaint, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Commissioner was of the opinion that there had been no contravention of a requirement under this Ordinance;
  - (b) the act or practice specified in the complaint is trivial;
  - (c) the complaint is frivolous or vexatious or is not made in good faith;
  - (ca) the primary subject matter of the complaint, as shown by the act or practice specified in it, is not related to privacy of individuals in relation to personal data; or
  - (d) any investigation or further investigation is for any other reason unnecessary.
- (3) Where the Commissioner refuses under this section to carry out an investigation initiated by a complaint, he shall, as soon as practicable but, in any case, not later than 45 days after receiving the complaint, by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant-
- (a) of the refusal; and
  - (b) of the reasons for the refusal.

- (3A) If the Commissioner decides to terminate an investigation initiated by a complaint before its completion, the Commissioner must, as soon as practicable by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant—
- (a) of the decision; and
  - (b) of the reasons for the decision.”

10. Accordingly, a person has to make a “complaint” as defined in s.37 of PDPO to the Respondent in the first place. If there is no complaint at the very beginning, the Respondent would have no need to carry out any investigation, for there is nothing to be investigated.

11. If there is a “complaint”, the Respondent may still refuse to carry out an investigation or decide to terminate an investigation for the reasons set out in s.39(2) of PDPO. The Respondent may make this decision and notify the complainant the same in accordance with s.39(3) or s.39(3A).

12. This Board has jurisdiction to hear an appeal against the Respondent’s decision made under s.39(3) or s.39(3A) of PDPO, but does not have jurisdiction to give the Appellant any relief if he has not made any “complaint” as defined in s.37(1) of PDPO in the first place. See Administrative Appeals Board Ordinance (“AABO”), Schedule, paragraph 29.

13. In respect of s.37(1) and s.39(2)(d) of PDPO, the Respondent submits:-

- (a) All the conditions in s.37(1) must be fulfilled before an allegation can be qualified as a complaint. If an allegation cannot meet the requirements set out in s.37, there is no basis for the Respondent to

make his determination under s.39.

- (b) Where the requirements for a complaint under section 37 are met, the Respondent will notify the complainant in writing of the acceptance of his complaint. The Respondent will then conduct a preliminary enquiry which may include seeking response from the party complained against and obtaining evidence from the witnesses where appropriate. If the Respondent considers that there is no prima facie evidence of contravention of the requirements of the Ordinance after the preliminary enquiry, the Respondent would exercise his discretion not to carry out investigation of the complaint pursuant to section 39(2)(d) of PDPO and paragraph 8(e) of the Respondent's Complaint Handling Policy ("CHP").
- (c) In respect of s.37(1)(b)(iii), the threshold is a low one. Generally, if the complainant's allegation touches upon the data protection principles, the Respondent is prepared to accept that section 37(1)(b)(iii) has been satisfied by the complainant unless the allegation is clearly based on mere speculation.

14. The Respondent relies on CHP in support of his position. According to the CHP:

- "4. In practice, the following information has to be provided to the PCPD in making a complaint under section 37:-
- d) the complainant should produce sufficient information (including witness in some cases) in support of his/her allegation. Mere speculation is insufficient to substantiate a complaint ...

5. The PCPD will provide appropriate assistance to an individual to formulate his/her complaint and seek further information where necessary. Once the criteria for a complaint under section 37 are met, the PCPD will notify the complainant in writing of the acceptance of his/her complaint and specify the date on which the PCPD has received sufficient information from the complainant for satisfying those criteria. Where the criteria for a complaint under section 37 are not satisfied, no investigation will be carried out and the individual will be informed accordingly.” (underline added by the Respondent)

15. The Respondent says that by the operation of s.21(2) of AABO, this Board shall have regard to CHP when considering exercising our powers under s.21(1)(j) of AABO.

16. We are of the view that the core issue is the construction of s.37(1) of PDPO, in particular, the true meaning of each requirement in the section. The construction of s.37(1) would not depend upon CHP, for the policy issued by the Respondent would not have the effect of dictating the true meaning of a statutory provision. The true meaning of a statutory provision depends upon the plain and ordinary meaning of the words therein with the purpose of the provision in mind.

17. We are unaware of any authority on the true meaning of s.37(1) of PDPO. Neither the Appellant nor the Respondent is able to refer us to any authority on this issue. In the circumstances, we have to approach the matter by applying the first principle.

18. In our judgment, the meaning of s.37(1) is plain. In considering whether a complaint made by the complainant constitutes a “complaint” as defined in s.37(1), one is going to look at the act or practice specified in the complaint (s.37(1)(a)) to see whether the act or practice specified therein is by a “data user” (s.37(1)(b)(i)), relating to “personal data” (s.37(1)(b)(ii)), and may contravene PDPO (s.37(1)(b)(iii)).

19. In determining whether the complaint meets the requirements set out in s.37(1)(b), one is only going to look at the act or practice specified in the complaint. There is no requirement in s.37(1) requiring the complainant to adduce any evidence to show that his or her complaint meets the requirements in s.37(1)(b). In other words, the consideration at this stage is taking the complainant’s case at its highest (i.e. assuming all the allegations in the complaint are true), whether there is a case meeting the criteria in s.37(1)(b). The question is to be determined by looking at the act or practice specified in the complaint *solely*.

20. If the answer is “No”, no “complaint” (as defined in s.37(1)) has been made. The Respondent would have nothing to investigate, and this Board would not be able to give the complainant any relief.

21. If the answer is “Yes”, that only means that the complainant has made a “complaint” to the Respondent. That does not mean that the complainant has proved anything, even on a *prima facie* basis. That also does not mean that the Respondent must carry out an investigation. The complainant has to adduce evidence to show that he has a *prima facie* case. If the complainant cannot show a *prima facie* case, the Respondent may refuse to carry out an investigation pursuant to s.39(2)(d) and make a decision accordingly under

s.39(3) of PDPO. The complainant may appeal from that decision to this Board, and this Board may confirm, vary or reverse the decision.

22. We are of the view that the above is consistent with the plain and natural meaning of ss.37 and 39 of PDPO. We are also of the view that the above is consistent with the purposes of these respective sections.

(a) The purpose of s.37 is for defining a “complaint” and not for laying down any requirement as to proof of the allegations made by the complainant.

(b) The purpose of s.39 is for conferring discretion on the Respondent to refuse to carry out or to terminate an investigation initiated by a complaint in certain circumstances.

(c) The above is supported by s.39(1)(b) and (c) – a complaint can be made anonymously, or the complainant may be unidentified or untraceable. In these circumstances, it is likely that there would be no or no sufficient evidence supporting the complaint (as the complainant is not contactable). Notwithstanding this, there is still a “complaint” as defined in s.37, but the Respondent may refuse to carry out an investigation of the complaint pursuant to s.39(1).

23. We have said in the above that the policy issued by the Respondent would not have the effect of dictating the true meaning of a statutory provision. In any event, we have taken CHP into account in construing s.37 and s.39 of PDPO. In our view, there is nothing in CHP that contradicts the analysis set out above.

24. It is entirely proper for the Respondent to require a complainant to produce sufficient information (including witness in some cases) in support of his allegation when making a complaint under s.37 (CHP, paragraph 4). As we have already said, if the complainant is unable to produce *prima facie* evidence in support of his complaint, the Respondent is entitled to refuse to carry out an investigation of the complaint pursuant to s.39(2)(d).

25. However, we do not see anything in paragraphs 4 and 5 of CHP, or in any other paragraphs of CHP, suggesting that in order to constitute a “complaint” under s.37 of PDPO, the complainant has to adduce evidence to show a *prima facie* case.

26. With the aforesaid analysis in mind, we now turn to the facts of this case.

### ***The Photos***

27. As per s.2 of PDPO:-

“personal data” means any data —

- (a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- (c) in a form in which access to or processing of the data is practicable”.

28. We have seen the Photos. None of the Photos show the appearance of the Appellant. The Photos were taken for the purpose of investigation the water

seepage problems and the Photos captured images such as slipper, rack and unidentifiable objects. The Appellant can not be identified from the Photos.

29. In our view, the Photos cannot be said as something from which it is practicable for the identity of the Appellant to be directly or indirectly ascertained, and the Photos are not “personal data” for the purposes of PDPO.

30. In the circumstances, insofar as the Photos are concerned, even taking the Appellant’s case as its highest, the requirement in s.37(1)(b)(ii) cannot be satisfied. Accordingly, in relation to the Photos, there is no “complaint” as defined in s.37(1).

#### ***Appellant’s Residential Address***

31. The Respondent submits that a residential address, by itself, does not constitute “personal data” as it does not fulfil paragraph (b) in the definition of “personal data” in that an individual’s identity cannot be ascertained directly or indirectly from the address alone. However, the Respondent has not referred us to any authority on the point.

32. We are of the view that in the context of this case, the Respondent may not be correct on this point. As we all know, one may through a search in the Land Registry finding out the identity of the owner of a property. So through a residential address, the owner’s identity can be ascertained directly or indirectly.

33. However, the Appellant’s case is that the Manager has disclosed the Appellant’s residential address to the Lower Unit Resident without the Appellant’s consent. The Appellant has adduced no evidence in support of this allegation. As the Lower Unit is the unit immediately below the Appellant’s

unit, it would not be a surprise that the Lower Unit Resident knows the Appellant's residential address. There is no evidence showing that the Manager has ever disclosed the Appellant's residential address to the Lower Unit Resident.

### ***The Appellant's Name***

34. The Appellant's name is personal data. However, there is no evidence showing that the Manager has disclosed the Appellant's name to the Lower Unit Resident. The Lower Unit Resident can simply find out the Appellant's name by conducting a search in the Land Registry.

### ***Conclusion***

35. For the reasons above:-

- (a) In respect of the Photos, we agree with the Respondent that the Photos do not constitute "personal data" and hence there is no complaint as defined in s.37(1) of PDPO. Accordingly, the Respondent cannot process the matter and this Board cannot give the Appellant any relief.
- (b) In respect of the Appellant's Residential Address and the Appellant's name, we differ from the Respondent and hold that a complaint (as defined in s.37(1) of PDPO) has been made. However, the Appellant has not adduced any evidence to show a *prima facie* case. Accordingly, the Respondent's decision of not carrying out an investigation in relation to these is correct, but the basis of the decision should be s.39(2)(d) and not s.37(1) of PDPO.

36. Accordingly, the appeal is dismissed. The Decision is affirmed, save and except that in relation to the Appellant's residential address and the Appellant's name, the basis of the Decision should be s.39(2) of PDPO. There be no order as to costs.

(signed)

(Liu Man-kin)

Deputy Chairman

Administrative Appeals Board