

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 18/2016

BETWEEN

A

Appellant

and

PRIVACY COMMISSIONER  
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr. Robert Pang Yiu-hung, S.C. (Deputy Chairman)
- Miss Angelina Agnes Kwan (Member)
- Ms. Fung Sau-yim (Member)

Date of Hearing: 13 October 2016

Date of Handing down Written Decision with Reasons: 21 February 2017

DECISION

**A. Introduction**

1. On 17 April 2015, the Appellant filed a complaint (the “**Complaint**”) with the Respondent’s Office, alleging that the Person Bound disclosed the Appellant’s personal data to the Appellant’s parents (“**Mr. D**”, “**Mrs. D**” or “**Mr. & Mrs. D**” as the case may be) without the Appellant’s consent, in

contravention of the Personal Data (Privacy) Ordinance (Cap. 486) (the “PDPO”).

2. On 11 March 2016, the Deputy Privacy Commissioner for Personal Data decided not to pursue the Complaint any further pursuant to s. 39(2)(d) of the PDPO (the “Decision”).

3. The Appellant now appeals to this Board against the Decision.

4. Before dealing with the substantive issues in this appeal, we will deal first with three preliminary applications made by the Appellant: (i) an application for a private hearing; (ii) an application for anonymity order; and (iii) an application for costs.

## **B. Factual Background**

### **B1. The Appellant & the Person Bound**

5. In November 2010, the Appellant was arrested for credit card fraud. It appears she was never charged and was unconditionally released in May 2011. Between March and June 2011, PathFinders Limited (“Pathfinders”), a registered charitable organization in Hong Kong that assists migrant mothers and their Hong Kong-born children, was engaged to assist the Appellant and her young son (then 2 years old) as a result of an incident involving her son. That engagement ended on 16 June 2011.

6. In February 2013, the Appellant was arrested again for credit card fraud. On this occasion she was charged (the “Fraud Charge”). The Appellant once again came into contact with Pathfinders and was introduced to the Person



Bound, one of Pathfinders' founders. The Person Bound was assigned to be the Appellant's caseworker. According to the Appellant's oral submissions at the hearing, the Person Bound assisted her with obtaining legal assistance in relation to the Fraud Charge; obtaining medical advice in relation to her mental health issues; finding housing for both her and her son; and helping with her son, including giving advice on how to educate him.

7. According to Pathfinders, it ended its engagement with the Appellant on 23 July 2013. The Person Bound, however, continued supporting and assisting the Appellant in her personal capacity, to the extent of allowing the Appellant and the Appellant's son to reside in her home with her family.

8. There also appears to have been occasions when the Person Bound cared for the Appellant's son whilst the Appellant was admitted into hospital. In a chronology submitted by the Appellant with her complaint form to the Respondent, the Appellant noted that she had been admitted to Pamela Youde Nethersole Eastern Hospital for four days in July 2013. In a letter dated 3 March 2015 from the Appellant to the Respondent's office, submitted to the Respondent during the Respondent's investigation into the Complaint, the Appellant stated that the Person Bound cared for her son when she was not well.

9. Other than providing shelter to the Appellant and her son, the Person Bound continued to provide moral support and the assistance referred to above.

#### *B2. The Appellant Supplied the Prosecution Bundle to the Person Bound*

10. In a series of emails on 25 March 2014, the Appellant supplied to the Person Bound via email the Prosecution Bundle in relation to the Fraud Charge (the "**Prosecution Bundle**"). Although these emails do not refer to the

Prosecution Bundle by name, Mr. Brown representing the Person Bound accepts in his written submissions that the Prosecution Bundle was supplied on this date. Mr. Brown further accepts that the Appellant gave a soft copy of the Prosecution Bundle to the Person Bound via a USB flash drive.

11. On 31 March 2014, the Person Bound sent an email to a group of individuals, including the Appellant, setting out her views on the Prosecution Bundle and on further evidence to be gathered that could potentially assist the Appellant in defending the Fraud Charge.

12. Based on the 31 March email referred to above, it appears that up until 31 March, the Person Bound believed the Appellant to be innocent in respect of the Fraud Charge.

*B3. The Change in Attitude & the Terms of Assistance*

13. By 12 April 2014, if not earlier, however, things had turned sour between the Appellant and the Person Bound, with the Person Bound accusing the Appellant of having indeed committed the fraud in question. Evidence of this is provided in an email dated 12 April 2014 from the Person Bound to the Appellant.

14. In a series of emails between the two women between 12 and 14 April 2014, the Person Bound mentioned twice that she had spoken to the Appellant's parents to help them understand the situation. In the Appellant's reply emails, the Appellant did not object on either occasion to the Person Bound having spoken to her parents.



15. Despite the downturn in the relationship between the Appellant and the Person Bound, the Person Bound continued to assist the Appellant in so far as, and only so far as, ensuring the Appellant's son's welfare and best interests were catered for. In an email dated 14 April 2014 from the Person Bound to the Appellant, the Person Bound said, "...I will only act for [your son] so he can get to a safe, stable home ASAP and live a life cleared of your deceits..."

16. However, the Person Bound agreed to do so only on a number of conditions, the gist of which required the Appellant to plead guilty to the Fraud Charge; to tell the Appellant's friends, family and supporters the truth in respect of the Fraud Charge and to apologise to these individuals; to ask for forgiveness from and agree to repay those whom the Appellant had defrauded over the years; and to agree to the transfer of guardianship of the Appellant's son to Mr. & Mrs. D. The Appellant agreed to these terms of assistance (the "**Terms of Assistance**"), as evidenced in an email dated 2 May 2014 from the Appellant to the Person Bound.

17. On 17 April 2014, the Appellant and Mr. & Mrs. D signed a Deed of Appointment of Guardians, appointing Mr. & Mrs. D as the guardians of the Appellant's son until such time as the Appellant would be in a position to provide a secure and stable home and to take care of her son herself. According to the Appellant, this was done in anticipation of the Appellant being sentenced to an immediate custodial sentence upon conviction for the Fraud Charge. Very soon thereafter, Mr. & Mrs. D, who reside in the United Kingdom, took the Appellant's son to the United Kingdom.

18. On 12 June 2014, the Appellant was convicted before Her Honour Judge Woodcock in the District Court of the Fraud Charge of her own guilty plea and sentenced to a term of imprisonment of 12 months, suspended for 24 months.

#### B4. The London Action

19. Shortly thereafter, either in June or July 2014, the date being unclear on the evidence but in any event being immaterial for present purposes, the Appellant instituted proceedings in the Family Division of the High Court of Justice in London, United Kingdom, under The Hague Convention on the Civil Aspects of International Child Abduction (which applies domestically to the United Kingdom pursuant to the Child Abduction & Custody Act 1985) against her parents seeking the return of her son to her care in Hong Kong (the “**London Action**”). The complete set of papers in relation to the London Action do not appear to have been before the Respondent prior to the Decision being made, and in any event have not been adduced into the evidence before this Board.

20. In a series of emails on 1 August 2014 between Mr. D and the Person Bound, Mr. D stated that he and his wife had been accused by the Appellant of abducting the Appellant’s son. Mr. D also sought information and evidence from the Person Bound that could be used to rebut the abduction allegation; to show that it would be unsafe for the Appellant’s son to return to Hong Kong with the Appellant; and to contest the London Action generally.

21. According to the Appellant, however, she never accused her parents of child abduction in the London Action. The London Action was instead made on the basis that her parents had wrongfully retained her son in the United Kingdom.



B5. The Alleged Disclosure

22. In an undated email, but appearing to be in response to the 1 August emails from Mr. D, the Person Bound suggested, inter alia, showing the “Prosecution Bundle for [the Appellant’s] Criminal Fraud Case” to Mr. D’s lawyer, further stating that “[the Appellant] permitted me to send it to you and you have no obligation to keep it confidential”.

23. In an email dated 2 August 2014 from the Person Bound to Mr. D, the Person Bound mentioned, inter alia, that she had sent the “full police evidence files” to Mr. D a long time ago, implicitly suggesting that they be used in the London Action.

24. In another email dated 2 August 2014 from the Person Bound to Mr. D, the Person Bound said, inter alia,

“[the Appellant] gave me permission in my personal capacity to share the police evidence and anything else with you, to give you the full story. She has not since rescinded that permission. She has not asked you to keep this information confidential ... I urge you to review the previous emails I have sent you outlining why [the Appellant] is incapable of caring for [her son] from a purely financial perspective ...”

In that email, the Person Bound attached a timeline of key events relating to the Appellant (the “**Timeline of Events**”) that the Person Bound suggested using to contest the London Action.

25. The Prosecution Bundle was not attached to any of these emails.

26. It is not disputed by either Ms. Chan for the Respondent or Mr. Brown for the Person Bound that the Person Bound did send the Timeline of Events to Mr. & Mrs. D.

27. The Timeline of Events was adduced by Mr. & Mrs. D in the London Action. This is evident from Mr. & Mrs. D's reply to paragraph 34 of the Appellant's Statement in the London Action.

28. There is no evidence that the Prosecution Bundle was adduced into evidence in the London Action.

29. On 15 September 2014, the Honourable Mr. Justice Bodey of the Royal Courts of Justice in London ordered, inter alia, that the Appellant's son be released into the Appellant's care.

### **C. The Complaint**

30. On 17 April 2015, the Appellant filed the Complaint with the Respondent's office, alleging that the Person Bound disclosed the Appellant's personal data, as contained in the Prosecution Bundle and Timeline of Events, to the Appellant's parents and the Appellant's clients between June and September 2014 without the Appellant's consent.

31. The Appellant had filed a separate complaint in February 2015 against Pathfinders on the same grounds, alleging that Pathfinders was vicariously liable for the Person Bound's actions. The Respondent's office closed its investigation into that complaint on 30 April 2015 after finding that the Person Bound had been acting in her personal capacity in relation to the Appellant at all material times.



32. In a letter dated 22 April 2015 from the Respondent's office to the Appellant, the Respondent confirmed with the Appellant that the Appellant agreed there was insufficient information to pursue the Complaint in respect of the Appellant's clients. The Complaint therefore pertained and pertains only to the Person Bound's alleged disclosure to the Appellant's parents.

#### **D. Applications for Private Hearing & Anonymity Order**

33. On 29 July 2016, the Appellant by letter applied to this Board for the hearing to be held in private and for an anonymity order.

34. We sought and considered the written submissions of the Respondent and the Person Bound dated respectively 23 August 2016 and 8 September 2016, together with the Appellant's written response dated 20 September 2016. The parties did not make any oral submissions at the hearing.

35. Having considered the submissions of the parties, we gave our ruling at the hearing as follows:

- (1) the application for the hearing to take place in private is refused;
- (2) the application for an anonymity order is granted in the following terms:
  - (a) the name of the Appellant should appear as "A" in any report of the case and the titular page of this ruling and any judgment released to the public;
  - (b) this ruling and any judgment be redacted so that any part which may reveal the identity of the Appellant, the Appellant's parents and child and the Person Bound be redacted; and

- (c) the naming or other identification of the Appellant in the context of any report of the present appeal is prohibited.

36. At the hearing, we said we would hand down reasons for our ruling at a later date. This we now do.

#### D1. Relevant Legal Principles

37. The starting point is that by s. 17 of the Administrative Appeals Board Ordinance (Cap. 442) (“the AAB Ordinance”), the hearing of an appeal shall be in public. However, the same section of the ordinance provides that the Board may direct a hearing or part of a hearing to be in private, and may give directions prohibiting or restricting the publication of evidence before the Board, if the Board is satisfied that it is desirable to do so.

38. The AAB Ordinance, however, is silent as to what considerations that the Board should take into account in deciding whether it is desirable to have a hearing in private. Fortunately, this issue has been canvassed in various decisions by the courts.

39. In *Asia Television Ltd v Communications Authority*<sup>1</sup>, the Court of Appeal reviewed the authorities and summarized the basic principles and we can do no better than to quote from the judgment:

- (1) First and foremost, “justice should not only be done, but should manifestly and undoubtedly be seen to be done”: *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259, per Lord Hewart CJ. Open administration of justice is a fundamental principle of common

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<sup>1</sup> [2013] 2 HKLRD 354



law: *Scott v Scott* [1913] AC 417; *R v Chief Registrar of Friendly Societies, Ex parte New Cross Building Society* [1984] 1 QB 227; *Re BU* [2012] 4 HKLRD 417. It is of great importance, from the perspective of administration of justice, for a number of reasons. The public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. *R v Legal Aid Board, Ex parte Kaim Todner* [1999] QB 966, 977E/F-G.

- (2) *Second*, from the litigants' perspective, open justice also gives effect to their rights to a public hearing guaranteed in article 10 of the Hong Kong Bill of Rights.
- (3) *Third*, from the public's point of view, open justice, which carries with it the freedom to attend proceedings and to report on them, gives substance to the media's right to freedom of expression including the freedom to seek and impart knowledge, guaranteed under article 16(2) of the Hong Kong Bill of Rights. Likewise, it enables the public to enjoy their right to seek and be imparted with knowledge guaranteed under the same article.
- (4) *Fourth*, all this means that any restriction on open administration of justice necessarily represents a compromise of these important interests, rights and freedoms, and must be justified by considering

and balancing all pertinent interests, rights and freedoms, including in particular those mentioned above.

(5) *Fifth*, the case law has firmly established that the following considerations or matters do not by themselves justify any restriction on open administration of justice:

(a) Publicity of litigation leading to embarrassment and inconvenience: *Re Wong Tung kin* [1989] 1 HKLR 93; *Ex parte New Cross Building Society*, at p 235F.

(b) Publicity leading to economic damage, even very severe economic damage: *R v Dover Justices, Ex parte Dover District Council and Wells* (1992) 156 JP 433.

(c) Professional embarrassment and possible damage to profession reputation: *Ex parte Kaim Todner*, at pp 975H 976C.

(d) The parties' agreement that the proceedings be held in private: *Ex parte Kaim Todner*, at p 977 C/D D/E.

(e) The mere fact that the subject proceedings etc which gave rise to a judicial review application were held in private: *Re The Takeovers & Mergers Panel* [1996] 3 HKC 379; *Sit Ka Yin Priscilla v Equal Opportunities Commission* [1998] 1 HKC 278.

(6) *Sixth*, however, open justice is, from the perspective of proper administration of justice, just a means, albeit an important one, to an end, that is, the doing of justice between the parties concerned: *Scott v Scott*, at p 437; *Ex parte New Cross Building Society*, at p 235E. It therefore follows that where open administration of justice in a case would frustrate that ultimate aim of doing justice, it is a most important if not decisive consideration to take into account when



balancing the relevant interests, rights and freedoms involved, to decide whether open justice should be restricted, and if so, by what means and to what extent.

- (7) *Seventh*, apart from the interests of justice, there are other similarly important considerations that may justify restriction on open justice. Thus article 10 of the Hong Kong Bill of Rights also mentions “reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of all parties so requires” as exceptions to the requirement of a public hearing. See, for instance, *In re Guardian News and Media Ltd* [2010] 2 AC 697 (right to respect for private and family life).
- (8) *Eighth*, where justice can be administered openly in the case itself, but to do so would or might jeopardise some right or interest of one or both of the parties outside of the case, whether open justice should be restricted and if so, the manner and extent of restriction, must be considered by conducting the balancing exercise already described. One common example is cases concerning refugees or torture claimants where it is said that the life, limb or liberty of the refugee or torture claimant or their family is or may be put at risk in the absence of some form of restriction on open justice: *R (on the application of Kambadzi) v Secretary of State for the Home Department* [2011] 4 All ER 975; *Re BU*.
- (9) *Ninth*, there are other miscellaneous but by no means insignificant considerations that, if relevant, should be taken into account in conducting the balancing exercise. For instance, the nature of the proceedings is relevant: *Ex parte Kaim Todner*, at p 978C D/E. In

particular, proceedings by way of judicial review relate to decisions made in the public field, and as a general rule, they must be held in public, as the public has a legitimate interest to be informed about them, unless justice would be denied: *Re The Takeovers & Mergers Panel*, at p 381I; *Sit Ka Yin Priscilla v Equal Opportunities Commission*, at p 281D. This is an additional consideration to the general consideration about the media's and the public's right to know based on article 16(2) of the Hong Kong Bill of Rights discussed in paragraph 21 above.

- (10) *Tenth*, where restriction on open justice is justified, it may take many forms, depending on how all pertinent interests, rights and freedoms should best be balanced. For instance, in the present case, the applicant asks for a blanket order for the hearing to be held in camera. Alternatively, it asks for a partial censor of the contents of the submissions to be ventilated in open court. Sometimes, a court may impose reporting restrictions on proceedings held in public. At other times, the court may simply restrict the identification of the parties involved in the proceedings: *In re Guardian News and Media Ltd* [2010] 2 AC 697; *Re BU*.

40. We would also refer to the Court of Appeal's judgment in *TCWF v. LKKS*,<sup>2</sup> where the Court of Appeal said in relation to an application for an appeal from an ancillary relief application (which was heard in chambers not open to public) to be heard in camera (private) in the Court of Appeal:

- (1) First, arguments in an appeal should be more focused and only submissions related to the grounds of appeal will be entertained.

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<sup>2</sup> [2013] HKFLR 456



Even in an appeal on facts, the Court of Appeal is not to assume the role of a first instance judge to revisit every aspect of the evidence. The question for the Court of Appeal is whether the primary judge was plainly wrong in his assessment of the evidence: whether because he misunderstood some evidence or failed to have regard to some material evidence or otherwise. Skeleton submissions are placed before the court beforehand and judges would have read them before the hearing. It is rarely necessary to have the evidence or documents' read *in extenso* in open court. The court usually exercises firm control over needless reading of materials which were already fully canvassed in skeleton submissions. In an appeal on laws, the public has an interest in following a debate on the legal issues decided by the Court of Appeal, which will be a binding precedent on lower courts.

- (2) Second, as submitted by Mr Howard QC on behalf of the wife, from the point of view of maintaining public confidence in the administration of justice, the public has an interest in following the appellate process in order to understand why a primary judge's decision is upheld or reversed. This is particularly so when, as in the present case, it is contended that the judge was prejudiced or biased and did not give a fair opportunity to some parties to present their case. One of the reasons why justice should be administered openly, as mentioned by the Chief Judge, is the public interest in deterring improper judicial behaviour. It is not conducive to the maintenance of public confidence in the judicial process if appeals based on serious allegations of judicial impropriety are heard in camera. The judge, as much as the aggrieved parties, has a right to open and public vindication of his professional reputation. As a matter of

convention, it is not appropriate for judges to make any extra-judicial statements to defend their decisions or refute allegations against their professional integrity advanced by a dis-satisfied litigant. An open hearing in the Court of Appeal is an important safeguard to facilitate the correction of any unfair and inaccurate allegations against a judge as a matter of public record. At the same time, if the complaints were found to be valid, a public vindication in open court provides the complainants with the best redress in terms of the clearing of the imputations cast against them by the errors in first instance judgments. To the question *quis custodiet ipsos custodes* – who will guard the guards themselves – the answer must lie in the transparency of the legal process, and ‘open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse.’ (*R (Guardian News & Media Ltd) v Westminster Magistrates’ Court* [2012] 3 WLR 1343 at para 1)

- (3) Third, and it may be a point related to the second, the judicial process, even if it is held in the first instance in private, is still very much the exercise of the power of the judicial arm of the government. Whilst the judiciary is independent from the other arms of the government, the exercise of judicial power is a public act. Unlike other modes of resolution of dispute by private process (like arbitration or mediation), the determination of a dispute by the court is coercive in the sense that it is enforceable by the public power of the government. A judgment derived its authority not from the agreement of the parties to submit a dispute for the court’s adjudication. Its authority stems from the judicial authority of the government. Hence, the public has an interest in the proper administration of justice which transcends the private interests of the



parties in the dispute. An appeal, even in the matrimonial context, invariably examines the correctness of a first instance judgment and it is an important element in our rule of law for such process to be conducted openly.

We are of the view that these sentiments apply (with necessary modifications) to the Administrative Appeals Board in the exercise of the Board's functions.

41. As part of the balancing exercise which the Board has to undertake, the Board also takes into account Article 14 of the Hong Kong Bill of Rights.

D2. Grounds for Private Hearing and/or Anonymization

42. In the Appellant's letter of 29 July 2016, she states that the reasons for her application are "*as it involves confidential and highly sensitive data regarding my mental health issues about myself as well information (sic) regarding my son. I would also like to request as well on the grounds of serious accusation of Child abduction which are totally unfounded and untrue yet very detrimental to myself and my young child*".

43. In the Appellant's written response to the Person Bound's written submission on this issue dated 20 September 2016, the Appellant expands on her reasons:

- (1) the accusations of child abduction are fictitious and seriously defamatory;
- (2) they include unfounded accusations of defrauding the High Court of England and Wales;

- (3) in the hearing bundle are documents regarding sensitive private health issues;
- (4) it is necessary to discuss the facts and background of the case which includes the unlawful disclosure of the Appellant's and her child's personal data and private matters;
- (5) the events discussed in the "Timeline" include matters which are not in the public domain and should be kept private; and
- (6) any publication of the background would have a detrimental effect on the Appellant and her child.

### D3. Position of the Respondent & the Person Bound

44. The Respondent objects to a private hearing. A private hearing is a restriction to and departure from open administration of justice, justified only in wholly exceptional circumstances where justice would be frustrated if open administration of justice is not restricted in a particular case, that there is nothing exceptional in the circumstances of this case to justify a departure from the general principle, and that the Appellant has failed to demonstrate that a public hearing is likely to lead to a denial of justice. The Respondent further submits that the appeal does not only concern the personal data and privacy interest of the Appellant, but also the Respondent's conduct, as a statutory body set up to oversee enforcement of the PDPO, in exercising his power under the PDPO. Further, that the appeal decision will offer practical guidance to the public in the interpretation of the provisions of the PDPO.



45. On the question of an anonymity order, the Respondent maintains a neutral position as regards the Appellant's application for an anonymity order for the Appellant and her son, but agrees that the identity of the Appellant is of no relevance to members of the public, and has no objection to any anonymity order being extended to cover the Appellant's son who is a minor of 7 years of age.

46. The Person Bound objects to a private hearing. Her solicitors by way of their written submissions dated 8 September 2016 take issue with each of the reasons relied on by the Appellant, and say that the appeal itself and the appeal grounds do not require a discussion of the Appellant's mental health, that the appeal does not depend on a discussion of alleged child abduction, and that there is nothing to justify a departure from the normal rule requiring a public hearing.

47. As to an anonymity order, the Person Bound is neutral on whether an anonymity order should be granted in respect of the Appellant's child, but objects to one for the Appellant herself. The Person Bound repeats the reasoning relied upon in objecting to the application for a private hearing.

#### D4. Private Hearing

48. We accept that a private hearing is an exceptional measure which should only be granted where justice cannot be done without a hearing in private.

49. We consider that the Appellant has not shown that justice cannot be achieved without a private hearing. The issues before the Board are issues which are fairly separate from the confidential matters which the Appellant urges and relies on, namely her mental health issues and other information

about the Appellant's child. We consider that the confidential information would merely form part of the background and there would be no necessity for that background to be gone into in-depth in the course of oral submissions.

50. The serious accusations of abduction are not accusations directed against the Appellant, and in any event, those accusations appear to have been resolved after the proceedings in the Family Court in England, without any prejudice to the Appellant. They again form part of the background, and we do not see that they need to be canvassed in detail at the hearing.

51. We have considered the fact that the Appellant brings this appeal to enforce the protection of privacy and confidentiality granted by the PDPO, and that conducting this appeal in public may, to a greater or lesser extent, compromise the very protections which the PDPO was enacted to deal with. We have also considered the protections which are enshrined in Article 14 of the Bill of Rights. Nevertheless, we do not consider that these matters are sufficient to justify a departure from the well-established principles in favour of open justice.

52. In the circumstances, we refuse the application for a private hearing.

#### D5. Anonymization

53. We consider that anonymization is a far lesser intrusion into the principle of open justice than a private hearing, and anonymization is often the rule when dealing with matters relating to children.



54. We consider that the identity of the persons involved in this appeal involves no great public interest and is not an issue which will affect the appeal itself.

55. Given the protections under Article 14 of the Bill of Rights, and considering that the present appeal is brought to enforce protections to privacy under the PDPO, we consider it proportionate and appropriate to grant an anonymity order in favour of the Appellant and her child.

56. We have considered the Person Bound's submissions that an anonymity order could be granted in favour of the Appellant's child but not the Appellant herself. We consider that this is impractical since the identification of the Appellant will inevitably lead to the identification of the Appellant's child. Indeed, this could be said for the identity of any of the persons involved including the Person Bound. In any event, for the reasons we have set out above, we consider it appropriate to grant the Anonymization order in favour of both the Appellant and her child.

#### D6. Conclusion

57. We grant the order as set out at the beginning of section D above.

#### E. The Appellant's Application for Costs

58. The deadline set by this Board for the filing of skeleton submissions, if any, by the two parties to these proceedings and by the Person Bound was 29 September 2016.

59. Ms. Cindy Chan, Legal Counsel for the Respondent, filed skeleton submissions on behalf of the Respondent on 28 September 2016.

60. The Appellant, acting in person, filed her undated skeleton submissions by post on 29 September 2016.

61. By a letter dated 3 October 2016 from Oldham, Li & Nie (“OLN”), the Person Bound’s solicitors, to the Board’s Secretary, OLN informed this Board that Counsel, Mr. Toby Brown, had been recently instructed to act for the Person Bound at the hearing of this appeal; that Mr. Brown needed time to settle the skeleton submissions to be filed on behalf of the Person Bound; and that therefore a short extension of time to file the same would be required. OLN requested that Mr. Brown be given until 4 October 2016 to file his skeleton submissions.

62. Given the shortness of the time extension sought, the request was granted, subject to any application (if any) that the other parties may make as to costs or adjournment of the hearing caused by such extension.

63. Mr. Brown’s skeleton submissions were duly filed on 4 October 2016.

64. At the start of the hearing of this appeal on 13 October 2016, the Appellant made an application for costs, such costs in her submission being the cost of having to cancel two days’ worth of employment, which in turn occurred because of the late filing of Mr. Brown’s skeleton submissions.

65. The Appellant submitted that she had spent the weekend of 1 – 2 October going through Ms. Chan’s skeleton submissions and preparing speaking notes in reply to be used at the hearing of this appeal. In her



submission, she did not expect to receive any further documents and/or written submissions, whether from the Respondent or the Person Bound, after 29 September 2016 as that date had been the deadline stipulated by this Board for the filing of written submissions. She was therefore shocked to first receive OLN's letter dated 3 October and then secondly Mr. Brown's skeleton submissions on 4 October. The Appellant submitted that as a result of receiving Mr. Brown's belatedly filed skeleton submissions, she had to cancel two days' of previously arranged work so as to amend the speaking notes she was to use at the hearing. She therefore claimed compensation for those two days of cancelled prospective employment.

66. On this issue, Mr. Brown first apologized for the late filing of his skeleton submissions and secondly made the following submissions:

- (i) Costs ought to be granted only if it were unjust and/or inequitable to not do so;
- (ii) No new matters were raised in his skeleton submissions that had not previously been raised by the Respondent either in its skeleton submissions or prior to that;
- (iii) Therefore, no significant work would have been needed on the Appellant's part after she received his skeleton submissions; and
- (iv) In any event, the Appellant has not produced any evidence of such prospective employment and its cancellation.

67. Mr. Brown's skeleton submissions did not raise any new matters and/or arguments that the Appellant would not have already been aware of, especially

if she had already prepared speaking notes in reply to Ms. Chan's skeleton submissions. Nor do we consider that it was necessary for the Appellant to have turned away work to prepare for the hearing, since there was a 7 day gap between the time Mr. Brown's submissions were filed and the hearing itself, with a weekend in the middle.

68. In any event, there is no evidence before us to demonstrate that the Appellant had indeed arranged employment in the days following 4 October, much less that she had to cancel employment arranged for two of those days. It is up to the Appellant to justify any application for costs and the Appellant has failed to do so.

69. The Appellant's application for costs is therefore refused.

#### **F. The Relevant Provisions of the PDPO**

70. Before moving onto the substantive issues in this appeal, it would be appropriate to first highlight the provisions of the PDPO that are engaged in this matter.

71. Data Protection Principle 3 ("DPP 3") of Schedule 1 of the PDPO stipulates that "personal data shall not, without the prescribed consent of the data subject, be used for a new purpose".

72. "Personal data" is defined under s. 2(1) of the PDPO as meaning "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".



73. Under s. 2(3) of the PDPO, “prescribed consent” (a) means the express consent of the person given voluntarily; (b) does not include any consent which has been withdrawn by notice in writing served on the person to whom the consent has been given (but without prejudice to so much of that act that has been done pursuant to the consent at any time before the notice is so served).

74. DPP 3 defines new purpose as “any purpose other than (a) the purpose for which the data was to be used at the time of the collection of the data; or (b) a purpose directly related to the purpose referred to in paragraph (a)”.

75. Section 58(2) of the PDPO states:

“Personal data is exempt from the provisions of data protection principle 3 in any case in which-

- (a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data is held for any of those purposes); and
- (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection,

and in any proceedings against any person for a contravention of any of those provisions it shall be a defence to show that he had reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of those matters.”

76. The purposes listed under s. 58(1) of the PDPO are:

- “(a) the prevention or detection of crime;
- (b) the apprehension, prosecution or detention of offenders;
- (c) the assessment or collection of any tax or duty;

- (d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;
- (e) the prevention or preclusion of significant financial loss arising from:
  - (i) any imprudent business practices or activities of persons; or
  - (ii) unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;
- (f) ascertaining whether the character or activities of the data subject are likely to have a significantly adverse impact on any thing-
  - (i) to which the discharge of statutory functions by the data user relates; or
  - (ii) which relates to the discharge of functions to which this paragraph applies by virtue of subsection (3); or
- (g) discharging functions to which this paragraph applies by virtue of subsection (3)”

### **G. The Issues**

77. As is clear, the issues before the Respondent when handling the Complaint, and on this appeal are:

- (i) Did the Person Bound disclose the Prosecution Bundle and the Timeline of Events (both of which contain the Appellant’s personal data) to Mr. & Mrs. D? If there is no disclosure, then the matter ends there.
- (ii) But if there was, was the disclosure for a new purpose? If the disclosure was for the original purpose for which the data was collected, the matter ends there.



- (iii) If it was for a new purpose, did the Appellant give prescribed consent to such disclosure? If the Appellant did do so, the matter ends there.
- (iv) If no consent was given, are there any exemptions that exempt the applicability of DPP 3? If there are, the matter ends there. However, if there are none, then the Person Bound would be liable for breaching DPP 3.

#### **H. The Respondent's Investigation**

78. During the Respondent's investigation into the Complaint, the Respondent contacted and obtained the views of both the Person Bound and Mr. D.

79. In three letters dated 22 May 2015, 25 August 2015 and 10 December 2015 from OLN to the Respondent's office, OLN set out the Person Bound's position, the material parts of which are as follows:

- (i) After Pathfinders ended its engagement with the Appellant in July 2013, the Person Bound continued in her personal capacity to assist the Appellant resolve a range of "domestic matters", which included and came to include, inter alia, seeking legal representation for the Appellant in respect of the Fraud Charge and helping the Appellant to provide a safe and stable home for the Appellant's son. This latter form of assistance ultimately resulted in the placement of the Appellant's son with Mr. & Mrs. D, as detailed above;

- (ii) It was in such circumstances that the Appellant disclosed the Prosecution Bundle to the Person Bound;
- (iii) The Person Bound did not disclose the Prosecution Bundle to Mr. & Mrs. D, in part because the Prosecution Bundle was too large to send by email;
- (iv) The Appellant herself had disclosed the Prosecution Bundle to her parents;
- (v) The Person Bound did disclose the Timeline of Events to Mr. & Mrs. D;
- (vi) The Appellant had given written permission (by agreeing to the Terms of Assistance), which had yet to be rescinded, to the Person Bound to disclose anything relating to her to her parents;
- (vii) Disclosure of the Timeline of Events was therefore within the scope of such permission;
- (viii) Disclosure of the Prosecution Bundle, if it had occurred, would have also been within the scope of such permission;
- (ix) The Appellant in any event had herself told her parents the truth of the matter in relation to the Fraud Charge and had herself disclosed the Prosecution Bundle to her parents; and
- (x) Even if the Person Bound had disclosed the Appellant's personal data without consent, such personal data would be exempt from



DPP 3 of the PDPO under ss. 58(1)(a), 58(1)(d), 58(1)(e)(i) and 58(2) of the PDPO.

80. In an email dated 3 June 2015 from Mr. D to the Person Bound, Mr. D confirmed that he never received from the Person Bound “any actual police records relating to [the Appellant]” and that he “believed that [the Appellant] was in agreement to [the Person Bound] sharing information with [him] relating to [the Appellant’s] life and [the Appellant’s] difficulties at that time.” Mr. D went on to say that the Appellant admitted her wrongdoing in a letter to Mr. D. He ended the email by apologizing for what the Appellant was trying to do to the Person Bound.

81. In a series of emails on 12 August 2015 between Mr. D and the Respondent’s investigating officer, in response to the investigating officer’s query as to whether Mr. D ever received from the Person Bound “any copies of documents that were complied [sic] by the Department of Justice of Hong Kong for the prosecution made in 2014 against [the Appellant] for using false instruments and/or credit card fraud”, Mr. D replied that he and his wife “did not receive any copies of documents from the department of justice, Hong Kong. [sic]”.

82. In the same series of emails on 12 August 2015, the investigating officer asked Mr. D if the Person Bound had sent the Prosecution Bundle to Mr. D. Mr. D responded, “I do not understand what is being referred to. What is a bundle? I have limited records of these exchanges and at the moment we are in the process of moving house. I do not have a access to what paper records I have and internet only via my phone [sic]”. After the investigating officer’s clarification on what the Prosecution Bundle referred to, Mr. D’s response was “Sorry, I do not remember.”

## **I. The Decision**

83. On 11 March 2016, the Respondent's Deputy made the Decision. Written reasons for the Decision were given to the Appellant.

84. The reasons and findings of fact behind the Decision were as follows:

- (i) The Appellant's personal data, as contained in the Prosecution Bundle, was supplied to the Person Bound for the purpose of providing assistance to the Appellant, including the purpose of ensuring the Appellant's son's best interests were catered for. Catering for the son's best interests included, inter alia, providing a safe and stable home for the Appellant's son;
- (ii) The Person Bound disclosed the Timeline of Events to Mr. & Mrs. D to give them information to defend the London Action, which the Person Bound considered was in the best interest of the Appellant's son and therefore within the original purpose for which the personal data was collected;
- (iii) There is no evidence that the Prosecution Bundle was transmitted to Mr. & Mrs. D; both the Person Bound and Mr. D denied sending and receiving the Bundle; and there is no evidence that the Bundle was adduced as evidence in the London Action. There was therefore insufficient evidence on which to find the Person Bound had disclosed the Prosecution Bundle to Mr. & Mrs. D;



- (iv) Even if the Person Bound had disclosed the Prosecution Bundle to Mr. & Mrs. D, such disclosure would have also been in the best interest of the Appellant's son and therefore within the original purpose for which the Prosecution Bundle was supplied to the Person Bound; and
- (v) In any event, the act of child abduction itself is seriously improper conduct and therefore the exemption provided for under ss. 58(1)(d) and 58(2) of the PDPO (the "Exemption") applies to exempt the Timeline of Events and the Prosecution Bundle (if it was disclosed) from the provisions of DPP 3.

#### **J. The Grounds of Appeal**

85. The Appellant's grounds of appeal, as stated in her Notice of Appeal dated 6 April 2016, are as follows:

- (i) The Person Bound's opinion is not a valid exemption under s. 64 of the PDPO;
- (ii) The Respondent erred by failing to take into account ss. 33 and 64 of the PDPO;
- (iii) The Respondent erred by misinterpreting s. 58 of the PDPO, which relates purely to crime prevention and not child custody disputes; and
- (iv) The Respondent misinterpreted the facts of this case and the exemption(s) provided for under s. 58 do not apply in this case.

86. As for the Appellant's skeleton and oral submissions, we have considered them in full. In gist, they are as follows:

- (i) The Appellant supplied the Prosecution Bundle to the Person Bound in the Person Bound's capacity as a representative/case officer of Pathfinders, for the sole purpose of obtaining legal assistance in relation to the Fraud Charge;
- (ii) The information referred to in the Timeline of Events was collected for the same purpose;
- (iii) The Person Bound disclosed both the Prosecution Bundle and the Timeline of Events to the Appellant's parents;
- (iv) The Appellant never consented to the disclosure to her parents. On this issue, the Appellant relied on pages 7 and 8 of the Respondent's "Statement relating to the decision" dated 28 July 2015 filed in AAB 17/2015, which dealt with the Appellant's complaint against Pathfinders. In paragraph 23 of page 7, the Respondent stated "There is no evidence suggesting the Appellant has ever consented to [the Person Bound's] disclosure of the Prosecution Bundle and Summary of Events to her parents...";
- (v) The Appellant had not made a claim of child abduction against her parents in the London Action;



- (vi) The claim in the London Action was instead a claim of wrongful retention of her son by her parents, a claim which was ultimately successfully made out;
- (vii) There was therefore no “seriously improper conduct” and therefore the Exemption was and is not applicable in this case;
- (viii) S. 58 of the PDPO cannot be interpreted widely;
- (ix) The Respondent was unfairly biased against the Appellant when coming to the Decision because of her conviction for the Fraud Charge;
- (x) The Respondent wrongly relied on the Person Bound’s false and defamatory statements against the Appellant without fully investigating whether such allegations and statements were true, whether by asking for supporting evidence from the Person Bound or otherwise; and
- (xi) The Respondent was negligent in failing to read and assess the documents before him before coming to the Decision.

## **K. The Other Parties’ Submissions**

### **K1. The Respondent**

87. Ms. Chan, for the Respondent, largely adopted the reasoning behind the Decision in her written and oral submissions. She, however, did expand on the applicability of the Exemption in this case.

88. Ms. Chan submitted that:

- (i) s. 58(1)(d) is wide in nature in that it allows personal data to be exempt from DPP 3 if it would “remedy...seriously improper conduct...by persons”, not just by the data subject;
- (ii) “remedying seriously improper conduct” includes defending an allegation of seriously improper conduct;
- (iii) wrongful retention, as alleged by the Appellant in the London Action against her parents, ought to be and indeed must be considered as “seriously improper conduct”;
- (iv) the disclosure of the Timeline of Events and the Prosecution Bundle (if it had been disclosed) by the Person Bound to Mr. & Mrs. D would have helped them remedy the wrongful retention allegation against them by defending it; and
- (v) therefore the Exemption ought to apply in this case.

89. On the issue of disclosure, when asked by this Board as to how the Respondent dealt with the 2 August 2014 email from the Person Bound to Mr. & Mrs. D in which she said “I sent you the full police evidence files a long time ago”, Ms. Chan submitted that there was conflicting evidence as to whether there indeed had been disclosure and that therefore there was insufficient evidence on which to find such disclosure had been made.



90. Ms. Chan further submitted that “police evidence files” could have other meanings too, such as immigration records, and therefore did not necessarily refer to the Prosecution Bundle.

91. As for the issue of prescribed consent, Ms. Chan submitted in her written arguments that the Respondent did not find that the Appellant had given such consent. The Respondent simply found that disclosure of the Timeline of Events and Prosecution Bundle (if any) had not been made for a new purpose.

92. In relation to the Appellant’s submission that the Person Bound had been acting in her capacity as a case officer for Pathfinders, Ms. Chan submitted that that is not in issue in this appeal and is being dealt with in a separate appeal to this Board. We agree and therefore will not make any finding or comment on this issue.

## K2. The Person Bound

93. Mr. Brown, for the Person Bound, began his oral submissions on the scope of the Exemption and in turn, its applicability in this case. He submitted that ascertaining the scope of the Exemption is a matter of statutory construction. The words “seriously improper conduct” must, in his submission, be read in the context of the other scenarios under s. 58(1)(d) that would also create an exception to DPP 3, namely unlawful conduct, dishonesty or malpractice, and must not be construed as importing a higher threshold than these other scenarios.

94. Mr. Brown further submitted that there is a public interest in not allowing people to hide behind their right to privacy while another wrong occurs; that the PDPO seeks to uphold this public interest via the exemptions

catered for in the PDPO; and that therefore section 58 must be construed widely so as to capture the many scenarios in which such mischief might occur.

95. When asked by this Board as to whether the Exemption would apply to both the party making and the party defending an allegation of seriously improper conduct, Mr. Brown submitted that it would.

96. As for the applicability of the Exemption in this case, Mr. Brown submitted that the material events must be seen from the Person Bound's perspective. She had received an email from Mr. & Mrs. D in which Mr. D said they had been accused of "abducting" the Appellant's son; the Person Bound knew this was not true; Mr. & Mrs. D were and are elderly persons of limited resources who did not have legal assistance at the time; and the Person Bound was trying to help Mr. & Mrs. D within a short time frame. In such circumstances, Mr. Brown submitted, the Person Bound could not have seen the London Action in any way other than an action in which child abduction, which is seriously improper conduct, had been alleged, and that therefore the Exemption ought to apply.

97. Mr. Brown also submitted that the London Action was a child custody battle and in such proceedings, the court ought to have all relevant information before it. Such information would include whether one of the parties seeking custody had a conviction or lacked a permanent address; failure to disclose such information would be seriously improper conduct. Disclosure of the Timeline of Events and the Prosecution Bundle (if so disclosed) would have remedied such improper conduct. This, Mr. Brown submitted, is another reason the Exemption ought to apply in this present case.



98. On the issue of consent, Mr. Brown admitted that there was no express consent in the evidence, at least certainly not in the form of “I hereby consent to the Prosecution Bundle being disclosed” or words to similar effect.

99. Mr. Brown, however, pointed to the Terms of Assistance as being evidence of the Appellant’s consent to allowing the disclosure of the Timeline of Events and the Prosecution Bundle to her parents. Mr. Brown submitted that the Terms of Assistance set the Person Bound’s brief from that point onwards, which was to find a safe and stable home for the Appellant’s son, and that it was up to the Person Bound how that was to be accomplished, whether by disclosing the Prosecution Bundle or otherwise. If the Bundle were to be disclosed, so long as such disclosure would be relevant, the Person Bound, in Mr. Brown’s submission, had permission to disclose.

100. He further submitted that the Appellant knew that the Person Bound had the Prosecution Bundle in her possession, yet did not ask the Person Bound not to disclose the Bundle to others upon or after the Terms of Assistance were made and agreed to. It was therefore clear, according to Mr. Brown, that by agreeing to the Terms of Assistance the Appellant consented to the disclosure of the Prosecution Bundle for the purpose of ensuring her son found a safe home.

101. Regarding the issues of disclosure and whether the Appellant’s personal data was disclosed for a new purpose, Mr. Brown largely adopted the same stance as the Respondent, namely that the Timeline of Events had been disclosed; the Prosecution Bundle had not been disclosed; and disclosure was done with the original purpose (safeguarding the interests of the Appellant’s son) in mind.

## **L. Our Views**

### **L1. Disclosure**

102. Disclosure of the Timeline of Events by the Person Bound to Mr. & Mrs. D is undisputed. It is also undisputed that the Timeline of Events constituted personal data for the purposes of the PDPO.

103. As for whether the Prosecution Bundle had been disclosed to the Appellant's parents, the Person Bound's wording in the three emails sent by her in August 2014 to Mr. D is clear. The Person Bound said she had previously sent the police files to Mr. D and that the Appellant permitted her to send them to him.

104. The question is how is the conflicting evidence to be dealt with, as this was, according to Ms. Chan in her oral submissions, one of the reasons the Respondent found that there had been no disclosure of the Prosecution Bundle. The conflicting evidence is and was the Person Bound's denials of such disclosure during the course of the Respondent's investigation; the 3 June 2015 email from Mr. D confirming that he never received any police records relating to the Appellant from the Person Bound; and the series of emails on 12 August 2015 in which Mr. D's final answer as to whether the Prosecution Bundle had been sent to him was "Sorry, I do not remember".

105. This "conflicting" evidence all came into existence after the Appellant filed the Complaint and indeed in response to the Complaint. They are to a large extent self-serving in nature and must therefore, in our judgment, be taken with a pinch of salt.



106. The Person Bound's three emails in August 2014, on the other hand, came into existence at a time contemporaneous with the period when the Prosecution Bundle was alleged to have been unlawfully disclosed. Therefore, in our judgment, when deciding whether disclosure occurred, more weight ought to have been placed on these contemporaneous emails. In particular, a fair reading of the email of 2 August 2014 can only be consistent with the Person Bound having already sent the Prosecution Bundle to Mr. & Mrs. D.

107. The lack of evidence showing (i) the transmission of the Prosecution Bundle from the Person Bound to Mr. & Mrs. D; and (ii) that the Prosecution Bundle had been adduced into evidence in the London Action, does not necessarily mean that the Prosecution Bundle had not been disclosed to Mr. & Mrs. D. It may well have been transmitted via another email or other means, the evidence of which is not before this Board.

108. In such circumstances, it was, in our judgment, more likely than not that the Person Bound disclosed the Prosecution Bundle to Mr. & Mrs. D. We therefore find that such disclosure did occur.

### L2. Purpose & Consent

109. The next issue to consider is whether the disclosure was for a new purpose, and if so, whether the Appellant gave prescribed consent to disclose for this new purpose.

110. The term "new", however, is relative; to determine whether a purpose is new, the original purpose must be ascertained.

111. The Prosecution Bundle was supplied by the Appellant to the Person Bound on 25 March 2014. Mr. Brown accepted this in his written submissions. At the hearing, the Appellant confirmed that she supplied the Bundle to the Person Bound in March 2014.

112. There is no direct evidence on the purpose for which the Prosecution Bundle was supplied to the Person Bound. It was no doubt supplied to the Person Bound for the purpose of obtaining legal assistance, as demonstrated by the Person Bound's 31 March 2014 email. But, in our judgment, obtaining legal assistance was not the sole purpose for which the Bundle was supplied to the Person Bound.

113. At or around this time and in the months preceding it, the Person Bound was, in the Appellant's own words, assisting the Appellant with a number of other issues as well, such as obtaining medical assistance in relation to the Appellant's mental health issues; finding housing for the Appellant and her son; and caring for her son, including how to educate him. In our judgment, it is apparent that the Bundle was supplied in the context of the Appellant seeking assistance generally from the Person Bound, and was not limited to any specific issue. The assistance the Appellant sought from the Person Bound extended to general livelihood issues, including that of raising her son and ensuring her son's welfare and interests were safeguarded. Indeed, the Person Bound's decision to personally shelter the Appellant and her son, and not merely to arrange *pro bono* legal services for the Appellant, was and is demonstrative of the type of assistance that was provided and the kind of relationship that existed between them at the time.

114. We are therefore of the view that the Person Bound's subsequent disclosure of the Timeline of Events and the Prosecution Bundle to Mr. & Mrs.



D was in the name of safeguarding the Appellant's son's welfare and was not done with a new purpose in mind, but within the scope of the original purpose. The contemporaneous emails demonstrate a clear concern for the Appellant's son, and, rightly or wrongly, the view that return of the Appellant's son to the Appellant's care and control was not in his best interests.

115. There being no new purpose for which the Prosecution Bundle and Timeline of Events were disclosed, the issue of prescribed consent does not arise and the matter, in our judgment, ends there.

116. That should be sufficient to dispose of this appeal, but as parties have made submissions on the remaining issues and as the remaining issues were dealt with in the Decision, we will set out our views on the remaining issues as well.

117. Regarding Mr. Brown's submissions on the issue of *consent*, not *prescribed consent* as defined under the PDPO, we do not agree that it was clear the Appellant had consented to disclosure of the *Prosecution Bundle* to Mr. & Mrs. D. Whilst one of the terms of the Terms of Assistance was to agree to allow the Person Bound to contact, inter alia, the Appellant's parents to ask for forgiveness and to convert the Appellant's fraud on them into a binding loan agreement, this was far too general a term to cover disclosure of original source materials *i.e.* the Prosecution Bundle.

118. The Prosecution Bundle was not placed before us, but it would have contained material not relating to the Appellant's fraud on her parents (if any), but fraud on others in Hong Kong. The terms relied on permit the Person Bound to contact certain persons for certain purposes. It would have permitted the Person Bound to contact Mr. & Mrs. D and provide information about the

Appellant's fraud on them (if any) for the purpose of making binding agreements to repay Mr. & Mrs. D or for seeking their forgiveness. It would not have permitted the Person Bound to contact Mr. & Mrs. D and provide details of any fraud not involving them and in respect of which no agreement to repay or forgiveness could be sought.

119. In any event, *prescribed consent* must be **express**. Even if we were wrong about the ambit of the consent, it would at most be an implied consent for the Person Bound to disclose the contents of the prosecution file for purposes which do not fall within the strict literal meaning of the Terms of Agreement. Since it is not an express consent, it is therefore not prescribed consent and would still fall under the prohibition of DPP 3.

### L3. Applicable Exemptions

120. We agree with Mr. Brown that this issue is a matter of statutory construction. The modern approach is to adopt a purposive interpretation. The statutory language is construed, having regard to its context and purpose. Words are given their natural and ordinary meaning unless the context or purpose points to a different meaning. Context and purpose are considered when interpreting the words used and not only when an ambiguity may be thought to arise: see *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568, §12.

121. In the present case, the words used under s. 58(1)(d) are "the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons". In *Tse Lai Yin v Incorporated Owners of Albert House* [1999] 1 HKC 386 at 393D-E, Suffiad J held that 'unlawful or seriously improper conduct' extended beyond criminal conduct to include civil wrongs. With this, we would agree.



122. As for context and purpose, we would agree with Mr. Brown's submission that the exemptions catered for in the PDPO, including the Exemption, seek to prevent people from hiding behind their right to privacy whilst another wrong occurs. In other words, the PDPO's exemptions ensure the right to privacy does not override the interests of justice.

123. On this basis, therefore, the Exemption in our judgment is engaged not only where there has been unlawful or seriously improper conduct on the part of a data subject, but also where a party seeks to defend an allegation of unlawful or seriously improper conduct. If a party has been charged with a criminal offence or accused of a civil wrong, that party ought to have at its disposal all relevant information, including personal data that may be protected by DPP 3, to conduct its defence and to remedy the situation. That is what the interests of justice would demand and require. To have it otherwise would be to elevate a data subject's right to privacy above all other considerations, a situation which we do not think the PDPO intended for.

124. In the present case, Mr. & Mrs. D had been accused of wrongful retention, a civil wrong. They therefore ought to have had and indeed did have at their disposal all relevant information to conduct their defence, which would have included the Prosecution Bundle and the Timeline of Events. Such information would have been relevant to justifying and/or explaining their retention of the Appellant's son in the United Kingdom.

125. In our judgment, therefore, the Exemption applies in the present case in any event so as to relieve the Person Bound of any potential liability under the PDPO.

L4. The Appellant's Remaining Submissions

126. As a matter of fairness to the Appellant, we will also deal with the parts of her submissions and grounds of appeal that have not been addressed above.

127. On the applicability of ss. 33 and 64 of the PDPO, s. 33 is not in operation yet and s. 64 is not applicable on the facts. S. 64 makes it an offence for someone to disclose personal data that had been obtained from the *data user* without the *data user's* consent. The data user in the present case is the Person Bound, but the Complaint is directed at the Person Bound, not a third party that has obtained the Appellant's personal data from the Person Bound without the Person Bound's consent.

128. On the Appellant's reliance on the Respondent's "Statement relating to the decision" filed in AAB 17/2015, we would place little weight on this document as there is no evidence before this Board as to what evidence was before the Board in AAB 17/2015.

129. On the Appellant's submission of unfair bias, there is no suggestion on the evidence that the Respondent was unfairly biased against the Appellant for any reason.

130. On the Appellant's submission that the Respondent failed to fully investigate the Person Bound's statements by failing to ask for supporting evidence, the cruces of the Appellant's complaints in this regard has been resolved by this judgment.



131. First, the Appellant submits in her written submissions that the Respondent should have sought more information on whether disclosure had been made. This Board has found that there was disclosure.

132. Secondly, the Appellant submits in her written submissions that the Respondent ought to have investigated whether child abduction claims had indeed been made in the London Action. Whether or not the Respondent should have investigated it further is neither here nor there because the Exemption is engaged even on the Respondent's own case that wrongful retention formed the basis for the London Action.

133. Thirdly, the Appellant submits in her written submissions that the Respondent was wrong to rely on the Person Bound's claim that the Appellant gave written consent for disclosure. The Respondent in fact found that there was no consent, as mentioned above.

134. Fourthly, the Appellant submits in her written submissions that the Respondent ought not to have relied on the Person Bound's allegations that the Appellant was involved in drug smuggling, counterfeiting and human trafficking. There is no evidence to suggest that the Respondent relied on such allegations.

135. Finally, on the Appellant's submission that the Respondent was negligent in failing to read and assess documents before him, we would disagree. Although the Respondent failed to accord proper weight to the emails from the Person Bound to Mr. D in August 2014, as discussed above, we see no basis to hold that the Respondent was negligent.

**M. Conclusion**

136. For the reasons stated above, this appeal is dismissed.

137. As no application for costs was made at the end of the hearing, no order as to costs will be made.

138. Lastly, we thank all parties and Counsel for their assistance.

(signed)

(Robert PANG Yiu-hung, S.C.)

Deputy Chairman

Administrative Appeals Board