ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 26 OF 2009 and NO. 7 OF 2010

BETWEEN

YUNG MEI-CHUN, JESSIE — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

AND

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PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board

Date of Hearing: 23 November 2011

Date of handing down Written Decision with Reasons: 9 May 2012

DECISION

Two Complaints to the Commissioner against the Commissioner

1. These two appeals arise from the two complaints made to the Privacy Commissioner for Personal Data ("the Commissioner"). The first one was made in June 2009 ("the JUNE COMPLAINT") and the other in January 2010 ("the JANUARY COMPLAINT"). Both complaints are against the Commissioner in his official capacity.

The JANUARY COMPLAINT (AAB NO. 7 of 2010)

2. Before the JANUARY COMPLAINT, the Commissioner received a complaint from the Appellant against Merrill Lynch (Asia Pacific) limited ("ML"). She alleged that the record kept of her by ML was not accurate, in that it was wrongly recorded that she was a party to four actions in the Small Claims Tribunal. Thereupon the Commissioner wrote to the Small Claims Tribunal asking for assistance with the enquiry. It was this letter that formed the basis of the JANUARY COMPLAINT.

3. According to the written response of the Small Claims Tribunal, of the four actions, the Appellant was named as a party in three, and as to the remaining one, no action was found to match the action number given by the Appellant. Upon the conclusion of the investigation, the Commissioner found that ML did not contravene any of the requirements of the **Personal Data (Privacy) Ordinance** ("the Ordinance"). The Appellant was notified of the decision on 2 December 2009 and she lodged an appeal against the decision of the Commissioner in AAB No. 50 of 2009. Not only was the Appellant not satisfied with the Commissioner's decision, she did not think it proper for the Commissioner to make the enquiry referred to in the last paragraph. On 12 January 2010, the Appellant made a formal complaint, the JANUARY COMPLAINT, against the Office of the Privacy Commissioner for

Personal Data. The ground of complaint is that she has not authorised or given consent to the Commissioner to disclose her information to the Small Claims Tribunal.

4. By letter of 1 March 2010, the Commissioner notified the Appellant his decision to refuse to carry out an investigation of the JANUARY COMPLAINT. In the letter he gave his reasons in paragraphs 3 and 4 in terms to the following effect:

> 3. Please note that pursuant to section 43 of the Ordinance, the Privacy Commissioner may, for the purpose of any investigation, be furnished with any information, document or thing, from such persons, and make such inquires, as he thinks fit. Your information was so obtained in the course of investigation of your complaint[1]. As such, we fail to see any reason or justification in support of your allegation made against this Office on breach of the Ordinance.
>
> 4. Also, it does not appear to me that Part VII of the Ordinance is intended to cover a complaint to the Privacy Commissioner against an act of his own Office, given the existence of potential conflict of interest under the fundamental principle that "*no man may be a judge in his own cause*". Accordingly, I decide under section 39(2)(d) of the Ordinance to refuse to carry out an investigation of your complaint. ---

5. The Appellant is now appealing against the decision of the Commissioner not to investigate into the JANUARY COMPLAINT. There are four grounds of

[1] the complaint against ML referred to in paragraph 2

appeal set out in her letter[2] to the Board. These grounds can be summarised as follows:

1. The Appellant never gives her consent to disclose her information to the Small Claims Tribunal;

2. Section 43 of the Ordinance does not confer the power on the Commissioner to disclose the complaint details to a third party, the Small Claims Tribunal as it is;

3. The Appellant does not agree with the principle cited by the Commissioner, namely, *no man may be a judge in his own cause*;

4. The Commissioner has abused his power to exercise the discretion under section 39(2)(d) to refuse to carry out an investigation in order to hide the facts that he has deliberately and intentionally breached the Ordinance by disclosing the Appellant's personal, private and confidential information to third parties without ground.

Merits of Appeal AAB No. 7 of 2010--- JANUARY COMPLAINT

6. As to ground 4, it is noted that the act complained of by the Appellant is disclosed to her by the Commissioner. Such act forms the basis of her complaint. There is no question that the Commissioner wants to hide this fact. Whether by this act, the Commissioner is in breach of the requirement of the Ordinance is quite another matter.

7. It is noted that the Appellant has represented to the Commissioner when she complained against ML that she was not a party to the four actions in the Small

[2] see Appeal Bundle page 255

Claims Tribunal. That being the case, it would have been unreasonable or absurd for the Commissioner to ask for her consent to make such enquiry with the Small Claims Tribunal. Ground 1 defies logic and common sense and has no merit.

8. At one stage at the appeal hearing, the Appellant maintained that she was not a party to the three proceedings, making a point that name of the party is the name of her accountant firm. When it was pointed out to her that as she practised as a public accountant in her own name in a sole proprietorship, she was in fact and in law named as a party to those actions. Reluctantly she agreed on the record of the Small Claims Tribunal it appeared that she was a party to those actions. However she maintained that she had no knowledge of those actions and has not authorised her company chop to be used on the court papers concerned. Be that as it may, it would show it was reasonable for the Commissioner to make the enquiry as he did with the Small Claims Tribunal. The reason should be simple and clear. Without such enquiry and assistance from the Small Claims Tribunal, there was no other effective means to verify the factual basis for the complaint against ML.

9. The common thread which runs through Grounds 1, 2, and 4, is the allegation that the Appellant's personal data have been disclosed to the Small Claims Tribunal. The Commissioner has written two enquiry letters[3] to Small Claims Tribunal. They are the subject-matter of complaint against the Commissioner. The Appellant confirmed that it was the content of the letters that she was complaining about and did not suggest any other information that might have been given by the Commissioner to the Small Claims Tribunal. In these two letters, the complaint number, the actions numbers, and very brief reasons for making the enquiry were given. None of the Appellant's personal particulars were given, nor the identity of the party complained against alluded to in these letters. In these circumstances, the information disclosed to the Small Claims Tribunal does not amount to the Appellant's personal data within the definition of the Ordinance. This Board agrees with the submission of the Commissioner that section 43 of the

[3] see Appeal Bundle page 283-284 and 286

Ordinance empowers the Commissioner to do what is complained against him. It must be noted the information he gave in the two letters is the minimum necessary to achieve the purpose of enquiry.

10. For reasons given above, the Commissioner is empowered by the Ordinance and is fully justified to make the enquiry as he has done with the Small Claims Tribunal. There is no evidence to support the complaint against the Commissioner. Further investigation is most unlikely to produce a different result. In the premises, his exercise of discretion under section 39(2)(d) of the Ordinance to refuse to carry out an investigation is reasonable and proper. That being the case, it is not necessary to determine the merit of the other reason given by the Commissioner, nor the merit of ground 3 of the appeal. The appeal is therefore dismissed.

The JUNE COMPLAINT (AAB NO. 26 of 2009)

11. The Appellant has lodged a complaint against two persons, one named Chan, the other named Lo. The complaint is somehow related to ML, her former employer, against whom she has made quite a number of complaints. The Commissioner made a decision not to carry out an investigation of that complaint against Chan and Lo. The Appellant appealed against this decision in AAB No. 18 of 2008. In the course of the appeal proceedings, the Commissioner included two documents in List of Documents and sent copies to Chan and Lo. These two documents had been supplied to the Commissioner in respect of an earlier complaint against ML.

12. The Appellant did not think it proper that Chan and Lo should be given copies of the two documents and asked the Commissioner for an explanation. Two days later on 17 June 2009 the Commissioner wrote to the Appellant giving in effect two main reasons. Firstly, he had considered the two documents in reaching his decision not to investigate into the complaint against Chan and Lo. The

Commissioner therefore was of the view that the documents were related to the appeal AAB No. 18 of 2008 and was therefore bound by law to include these two documents in the appeal bundle for the consideration of the Board hearing the appeal. Secondly, it was on the specific request in her letter of 14 January 2008 that the Commissioner considered the documents in the previous complaint against ML when handling the complaint leading to the appeal AAB No. 18 of 2008.

13. Not satisfied with the Commissioner's reasons, the Appellant on 22 June 2009 lodged the JUNE COMPLAINT against the Commissioner alleging that the two documents were disclosed to Chan and Lo without her consent. On 22 July 2009 the Appellant wrote again to the Commissioner demanding him to order Chan and Lo to return and destroy all copies of the two documents. The Commissioner refused her demand and repeated the reason that he was only complying with the directions of the Chairman of the Board. Later correspondence between the Appellant and the Commissioner does not take the matter any further.

14. On 29 July 2009 the Commissioner notified the Appellant of his decision to refuse to carry out an investigation of the complaint. Paragraph 2 of the notification letter sets out the reason in the following terms: "Having regard to the fundamental principle that "*no man may be a judge in his own cause*", I am of the view that my Office must disqualify ourselves from investigating your complaint. Accordingly, I exercise the discretion under section 39(2)(d) of the Ordinance to refuse to carry out an investigation of your complaint." The Appellant does not agree with the view of the Commissioner and is appealing to the Board.

15. Seeing that the JUNE COMPLAINT was getting no where, the Appellant made an application to the Board constituted to hear the appeal AAB No. 18 of 2008 to exclude the two documents from the appeal bundle. The application was heard by the learned Chairman who refused the application on 29 December 2009. Notwithstanding the ruling, the Appellant continues to pursue the present appeal AAB No. 26 of 2009 which was lodged on 7 August 2009.

16. There are two grounds of appeal:

1. I do not agree with the Commissioner's principle "*no man may be a judge in his own cause*";

2. The Commissioner has abused its power to exercise the discretion under section 39(2)(d) to refuse to carry out an investigation in order to hide the facts that it's deliberately and intentionally breached the Ordinance by disclosing my personal, private and confidential information to third parties without grounds.

Merits of Ground 2 of Appeal (AAB No. 26 of 2009)

17. Ground 2 of the appeal is an allegation of improper motive which impugns on the integrity of the Commissioner. Not only that there is no evidence to support such allegation, the Appellant has not even suggested what facts or improper motives the Commissioner is supposed to be hiding. The act complained of is clearly within the knowledge of the Appellant, and the Commissioner never attempts to hide it. It is never the case for the Commissioner that it is by accident, or momentary slip that the two documents were included in the Appeal Bundle of AAB No. 18 of 2008. He offered his reasons and grounds to the Appellant and to this Board in this appeal to justify his act. The two documents were included in the Appeal Bundle after the Commissioner's careful deliberation having regard to the legal requirements. If it is a breach of the Ordinance by the Commissioner, it must be 'intentional' and 'deliberate'. His refusal to carry out a formal investigation serves no useful purpose of hiding this fact. If by Ground 2 the Appellant means that the Commissioner was wrong in the interpretation of legal requirements, this Board can well understand that. However this Board would be at a loss, if the Appellant alleges the

Commissioner could have hidden his intentional and deliberate breach. His act might nor might not be in breach of the Ordinance. It would be and could be judged on its own with reference to the law. For these reasons ground 2 has no merit at all.

Merit of Ground 1 of Appeal and the Maxim *no man may be a judge in his own cause*

18. Ground 1 of Appeal is the same as Ground 3 in Appeal No. 7 of 2010. The argument presented by the Appellant is understandable. Such argument would have readily come to the mind of anyone who learns that the Commissioner who is empowered to investigate complaints of breaches of the Ordinance chooses to refuse to investigate simply because he himself is the party complained against.

19. In her argument the Appellant draws an analogy between her complaint against the Commissioner with complaints against police, the ICAC or the Chief Justice of the Court of Final Appeal in the following situations:

1. The ICAC Commissioner committing a corruption offence should be investigated by other ICAC staff;

2. The Commissioner of Police committing a traffic offence should be investigated by the Traffic Police Section;

3. The Chief Justice of the Court of Final Appeal committing an offence in law should be judged by another judge or group of judges depending on the circumstances.

The complaints mentioned in the above three examples all relate to the administration of the criminal justice system. The Appellant can rest assured that no man is above the law. If those incidents ever happen, they can be dealt with, though it may not be

in the exact way postulated by the Appellant, but in a fair and just manner according to law within the legal framework of the administration of justice.

20. The analogy drawn by the Appellant is inept for various reasons. Firstly the present appeal has nothing to do with the administration of criminal justice. The Commissioner has not committed any criminal offence. Secondly, while the general rule is that every offender should be prosecuted, the Appellant is wrong in thinking that there should be no exceptions. The Secretary for Justice has a constitutional power not to prosecute offenders on ground of public interest. One who has not too short a memory should remember a quite unnecessary controversy generated around a high profile case in which the then Secretary for Justice exercised this discretionary power not to prosecute a prominent member of the society. At a lower level, a police superintendent can exercise his discretion not to prosecute young offenders in appropriate cases, administering a superintendent caution instead. In trivial cases, offenders sometimes are brought to court to be bound over to keep the peace instead of being prosecuted for the offences they have committed. Thirdly, the establishment of the Privacy Commissioner is not the same as respective heads of the police force and the ICAC. It is not necessary to go into details of these differences. It suffices to compare the status of the Privacy Commissioner with that of the Commissioner of the Police and the ICAC Commissioner to demonstrate that the argument by analogy that the Appellant advances is inappropriate.

21. The structure of the police force can be seen from the following sections of the **Police Force Ordinance** Cap 232.

> Section 11: -
>
> The police force of Hong Kong shall consist of such gazetted police officers, inspectors, non-commissioned officers and constables.

Section 3: -

"police officer" (警務人員) includes any member of the police force.

Section 10: -

The duties of the police force shall be to take lawful measures for-

(a) preserving the public peace;

(b) preventing and detecting crimes and offences;

(c) preventing injury to life and property;

(d) apprehending all persons whom it is lawful to apprehend and for whose apprehension sufficient grounds exists;

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(r) executing such other duties as may by law be imposed on a police officer.

Section 30: -

Every police officer shall obey all lawful orders of his superior officers whether given verbally or in writing and shall obey and conform to police regulations and orders made under this Ordinance.

Section 4: -

> The Commissioner, subject to the orders and control of the Chief Executive, shall be charged with the supreme direction and administration of the police force.

It can be seen from the above provisions that the Commissioner of Police is a police officer, just like a constable, though by virtue of section 4 and section 30 he is the commander of the force. These duties enumerated in section 10 are imposed on all police officers by law as their own duties and not as duties personal to the office of the Commissioner of the Police. When a constable investigates a traffic offence allegedly committed by the Commissioner of Police, he is performing his own public duty, and not the duty of the Commissioner of Police. That being the case, it is not an investigation by the Commissioner of Police into a complaint against the Commissioner of Police. The principle that *no one may be a judge in his own cause* is not offended in any way.

22. The establishment of the ICAC can be seen from the following sections of **Independent Commission Against Corruption Ordinance** Cap 204.

Section 3: -

> There is hereby established the Independent Commission Against Corruption which shall consist of the Commissioner, the Deputy Commissioner and such officers as may be appointed.

Section 5(1): -

> The Commissioner, subject to the orders and control of the Chief Executive, shall be responsible for the direction and administration of the Commission.

Section 8(1): -

The Commissioner may appoint such officers as the Chief Executive thinks necessary to assist the Commissioner in the performance of his functions under this Ordinance.

Section 12: -

It shall be the duty of the Commissioner, on behalf of the Chief Executive, to-

(a) receive and consider complaints alleging corrupt practices and investigate such of those complaints as he considers practicable;

(b) investigate any alleged or suspected offence under this Ordinance;

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Section 13: -

For the purpose of the performance of his functions under this Ordinance the Commissioner may-

(a) authorize in writing any officer to conduct an inquiry or examination;

(b) enter any Government premises and require any prescribed officer to answer questions concerning the duties of any prescribed officer or public servant and

require the production of any standing orders, directions, office manuals or instructions relating thereto;

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The ICAC Commissioner is fighting and preventing corruption on behalf of the Chief Executive. Other ICAC officers are appointed only to assist the Commissioner to perform his function. Certain powers of investigation are vested in the ICAC Commissioner. Section 13 empowers him to authorise other officers to exercise these power of investigation. If in fact a serving ICAC Commissioner has to be investigated for corruption offences, it would be an embarrassing situation, quite similar to the Privacy Commissioner in the instant case. If, as suggested by the Appellant, another ICAC officer is to conduct such an enquiry and investigation, it is tantamount to the ICAC Commissioner investigating himself. This cannot be right or satisfactory. However it is not difficult to resolve the problem. One simple way is to engage the police force to conduct the necessary enquiry and investigation. After all the police force has a general duty to detect and prevent crimes and offences. Of course there are other ways to deal with the situation, but it is not necessary to go into any of these.

23. The Office of the Privacy Commissioner and the Privacy Commissioner is one and the same thing and is established by section 5(1) of the Ordinance which provides that:

> "For the purposes of this Ordinance, there is hereby established an office by the name of the Privacy Commissioner for Personal Data"

and the Privacy Commissioner for Personal Data is appointed by the Chief Executive by notice in the Gazette: section 5(3). Clearly the Commissioner cannot perform all his functions alone without support and assistance. Section 9 therefore empowers the Commissioner to employ his own staff, including technical and professional, and to engage other persons other than by way of employment. By section 10 the Commissioner can delegate his functions and powers (subject to certain exceptions which this Appeal is not concerned with) to his staff members, be they employees or persons engaged other than by employment. These persons are delegates of the Commissioner. Their status is clearly provided by section 10(3) as follows:

> A delegate of the Commissioner---
>
> (a) shall perform the delegated functions and may exercise the delegated powers as if the delegate were the Commissioner; and
> (b) shall be presumed to be acting in accordance with the relevant delegation in the absence of evidence to the contrary.

When his officers who are his delegates, investigate into a complaint against the Commissioner, it is an investigation as a matter of law and fact by one into his own self. The Ordinance does not impose any duty on the officers employed or engaged by the Commissioner apart from the duty to provide appropriate assistance to the complainants if so required by them to formulate their complaint. The duty and power to investigate complaints is performed in the name of the Commissioner. Though the Commissioner and Mr Lau has not elaborated on it, it must be for this reason that the Commissioner has basic concern that he may become a judge in his own cause. As it is shown later in this judgment, once the Commissioner starts to exercise the statutory power of investigation, his role as a judge and complainant at the same time makes it impossible to conform to the maxim that *no man may be a judge in his own cause.*

24. For the reasons expounded in the preceding paragraphs, the analogy argument of the Appellant serves no useful purpose in rebutting the ground given by

the Commissioner for refusing to investigate the complaint against him as the Privacy Commissioner for Personal Data.

No Man May Be A Judge In His Own Cause And the Intent of the Legislature

25. In the letter[4] notifying the Appellant of his decision, and in his statement lodged with the Board, the Commissioner seeks to justify his decision relying on the legal maxim: "*no man may be a judge in his own cause*". The Commissioner's argument is simple enough. He contends that he is a regulator and the party complained against. There is obvious conflict of interest if the Commissioner is to embark on an investigation onto himself. Counsel for the Commissioner, Mr Lau, correctly cited the leading authorities to explain the rationale behind the maxim and pointed out the undesirable consequences of not following the maxim. In any event the maxim is too well established that it would be difficult, if at all possible, to make an exception to it.

26. While the maxim by itself, is not to be doubted, neither the Commissioner nor Mr Lau has omitted to give details of this argument. It has not been shown clearly in what way the Commissioner would become a judge in his own cause with reference to the Ordinance.

27. One of the details has been dealt with in the above paragraphs. It has been shown by referring to the provisions of the Ordinance that the Commissioner's concern that he would be *a judge in his own cause* is real. As to other details, reference again to provisions of the Ordinance is necessary. As has been said, Mr Lau correctly cited those legal authorities in support of the maxim. However all these cases can be distinguished. In those cases, all the courts or tribunals concerned would have readily available a replacement for the judge who should have recused himself. Another distinction is present in the present case. The Appellant

[4] Appeal Bundle page 158

herself has insisted that the Commissioner should embark on an investigation even though there must be an apparent bias. Not even that, the Appellant makes known her view that the Commissioner would be biased in his investigation. Despite her view, she insisted that the Commissioner should make a decision to investigate. It is difficult to understand the rationale behind the Appellant. The best way to justify the Appellant's argument is her choice between two evils. Justice attempted is better than justice not attempted at all. The Appellant chooses the former, the lesser of the two evils.

28. In the JANUARY COMPLAINT, the Commissioner in his letter notifying the Appellant his refusal to investigate, alluded to an argument, namely, "Also, it does not appear to me that Part VII of the Ordinance is intended to cover a complaint to the Privacy Commissioner against an act of his own Office." If this argument is valid, the decision of the Commissioner must be upheld. Unfortunately, the Commissioner and Mr Lau have not pursued this argument to its logical conclusion, overly confident to rely simply on the maxim, *no man may be a judge in his own cause.* This Board is of the view that the maxim alone cannot justify generally the refusal to investigate complaints against the Commissioner. The functions and empowers of the Commissioner, the rights of complainants, and the right of the party complained against should be examined in the light of the Ordinance and the maxim.

29. Before the intent of legislature is examined, some words of caution should be borne in mind. Firstly there is no inherent injustice when a statutory regulator or the like, cannot investigate himself. It is a matter for the legislature who enacts the ordinance setting up the body. To quote an example which should be well known to the Appellant as she has also made a complaint in respect of the present matter to the Ombudsman. The Ombudsman is vested the duty and power by section 7(1) of **the Ombudsman Ordinance** Cap 397 to investigate into complaints about administrative actions of an organisations set out in Part I of Schedule 1 of the same ordinance. The Ombudsman or his office, is not listed in this schedule. As a result, it is not the function or within his power of the Ombudsman to undertake an

investigation to a complaint against himself or his office. He must therefore decline to accept such complaints. Secondly if the Commissioner has contravened a requirement of the Ordinance, the right of anyone so aggrieved is entitled to claim compensation. This right is not affected in anyway by the decision of the Commissioner to investigate or not to investigate.

30. When the Commissioner makes a decision not to investigate or to refuse to investigate, persons not familiar with the provisions of the Ordinance are often mistaken into thinking that the Commissioner does not want to make any enquiry or investigation in its ordinary meaning ignoring whatever grievance a complainant may have. In reality, before the decision not to investigate, more often than not, the Commissioner has already obtained the basic facts and circumstances giving rise to the complaint. These facts and circumstance are supplied by the complainant and by the party complained against or other persons involved through a preliminary enquiry without invoking special powers of investigation. Investigation is specifically defined under section 2 of the Ordinance. Investigation means an investigation under section 38 and only in carrying out an investigation under section 38 that the Commissioner can evoke various powers vested in him by the Ordinance, say power of search of premises.

31. It is the statutory duty of the Commissioner to investigate when he receives a complaint. The duty is governed by section 38 and 39 of the Ordinance.

> Section 38. Investigations by Commissioner
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> Where the Commissioner-
>
> (a) receives a complaint; or
>
> (b) has reasonable grounds to believe that an act or practice-
>
> i. has been done or engaged in, or is being done or engaged in, as the case may be, by a data user;
>
> ii. relates to personal data; and

iii. may be a contravention of a requirement under this Ordinance, then

(i) where paragraph (a) is applicable, the Commissioner shall, subject to section 39, carry out an investigation in relation to the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a requirement under this Ordinance;

(ii) where paragraph (b) is applicable, the Commissioner may carry out an investigation in relation to the relevant data user to ascertain whether the act or practice referred to in that paragraph is a contravention of a requirement under this Ordinance.

It should be noted that there must be an identified target, namely 'the relevant data user' for investigation. Section 38(b) is an investigation initiated by the Commissioner against a relevant data user and is not intended to mean an investigation by the Commissioner against himself. Firstly, the investigation is quite unnecessary. Furthermore it would make a nonsense of the provisions of this section. To initiate an investigation under Section 38(b), it requires the Commissioner to have reasonable grounds that he himself may be in breach of the requirement of the Ordinance. Whether or not there may be a breach, he should know better. If there may in fact be any such breaches, he should and could have put the matters right without going through the formal investigation process. Clearly section 38(b) is not intended to include the Commissioner himself as the target for investigation. If section 38(a) covers an investigation against the Commissioner, it would be odd to place it under the same section.

32. Section 38(a) applies when the Commissioner receives a complaint. By section 38(a)(i), the Commissioner has a duty to investigate, subject to the discretion of refusal given under section 39. If the Commissioner decides to investigate the

complaint, and only if he so decides, section 42(2) give him power to enter premises occupied by the data user, or premises which houses the personal data system used by the data user; or to carry out investigation in the premises. This clearly shows that data user refers to someone other than the Commissioner. The Commissioner hardly needs such statutory power to search his own premises. Other provisions of the same section seek to govern strictly the exercise of such power. These provisions show clearly that it is not the intent of legislature that the Commissioner would become a target for a formal investigation under section 38.

33. The intent of the legislature cannot be more clear in the provisions of section 43 which govern the procedure of investigation. Section 43 provides that:-

> (1) Subject to the provisions of this Ordinance, the Commissioner may, for the purposes of any investigation-
>
> > (a) be furnished with any information, document or thing, from such persons, and make such inquiries, as he thinks fit; and
> >
> > (b) regulate his procedure in such manner as he thinks fit.
>
> (2) Any hearing for the purposes of an investigation shall be carried out in public unless-
>
> > (a) the Commissioner is of the opinion that, in all the circumstances of the case, the investigation should be carried out in private; or
> >
> > (b) if the investigation was initiated by a complaint, the complainant requests in writing that the investigation be carried out in private.

(3) Counsel and solicitors shall not have any right of audience before the Commissioner at any hearing for the purposes of an investigation, but may appear before him if he thinks fit.

(4) It shall not be necessary for the Commissioner to hold any hearing for the purposes of an investigation and no person shall be entitled to be heard by the Commissioner.

(5) If at any time during the course of an investigation it appears to the Commissioner that there may be sufficient grounds for him to make any report or recommendation that may criticize or adversely affect any person he shall give to the person an opportunity to be heard.

It is hard to imagine a worse case in which the maxim that *no man may be the judge of his own cause* would be offended if the Commissioner is to investigate himself. If a hearing is to be held, he would be in a dual role, an arbitrator as well as one of the contending parties. How should it go about when the Commissioner allows himself as a contender to be heard at the hearing, talking to himself ? Section 43 therefore is not intended to cover a complaint against the Commissioner.

34. Another factor which can show the legislative intent is the consequential actions to be considered and taken by the Commissioner if a formal investigation is initiated. It suffices to point out just one possible action to illustrate the point, the Enforcement Notice. The Commissioner has to assess the likelihood of repeating the breaches by him or his office. This exercise again involves becoming a judge in his own cause. An enforcement notice under section 50 is a powerful and effective regulating means, because non-compliance with any term set out in the Enforcement Notice is a criminal offence. It is ridiculous for the legislature to intend a possibility for the Commissioner to serve an Enforcement Notice onto himself.

35. There are other provisions of the Ordinance which are not compatible with the notion that the intent of the Ordinance for the section 38 formal investigation is to

cover a complaint against the Commissioner. Furthermore if there is any substance in the complaint, the Commissioner can be trusted to perform his general and paramount duty under section 8 which provides inter alia that: "*The Commissioner shall monitor and supervise compliance with the provisions of this Ordinance*". He should take measures to rectify the breaches complained against without a formal Enforcement Notice. The Commissioner is also advised by the Personal Data (Privacy) Advisory Committee set up under section 11. If the Commissioner cannot be trusted to do his duty and perform his functions, an investigation by himself can hardly compel him to do so.

36. To sum up if the Commissioner is to investigate into the complaint, the provisions for special powers associated with the formal investigation under section 38, the proceedings for investigation, and the consequential actions are all unnecessary or cannot be carried out without infringing the principle that *no man may be a judge in his own cause.* This cannot be the intent of the legislature. The investigation if carried out would be no more than an internal enquiry or review. The consequential remedial actions after a formal complaint, can equally be achieved by such internal enquiry or review. For all these reasons, it cannot be the intent of the legislature that a formal investigation under section 38 covers a complaint against the Commissioner.

Investigation of JUNE COMPLAINT

37. Turning to the facts of the instant case, originally the act complained of is the disclosure of the two documents to Chan and Lo, the parties to the appeal AAB No. 18 of 2008. In defending this act the Commissioner disclosed to the Appellant that he had taken into consideration the two documents when handling the complaint against Chan and Lo. In response to that the Appellant raises the point that she has not authorized the Commissioner to use the materials she supplied in another

complaint. Therefore using the materials in one complaint in handling the other is another act the Appellant complained of.

38. If contrary to finding of the Board, the Commissioner is bound to take up the complaint against himself, he has to comply with section 38(a)(i), namely "*carry out an investigation in relation to* ***ascertain whether the act or practice specified in the complaint is a contravention*** *of a requirement under this Ordinance.*" As the complaint is against the Commissioner. He has to investigate himself. This he has done as he laid bare the facts and the circumstances. Two things are required of the Commissioner. The first thing he has done. He has ascertained the acts complained of and he admitted to the two acts. Also he has offered an explanation or justification to the Appellant. Such factual basis for the explanation is not disputed and the Appellant only challenges his good faith and the legal basis. The second thing required of him is to make a ruling or judgment whether his acts amount to a contravention of a requirement under the Ordinance. Though he has not made a formal ruling as he declines to be a judge in his own cause, he has made known his opinion that he is legally right in disclosing the two documents.

39. At the time of making the decision to refuse to initiate a formal investigation under section 38, the Commissioner has already completed an investigation or enquiry in the ordinary sense and according to the letters of section 38(a)(i), namely he has ascertained the two acts complained of, namely that he has disclosed the two documents to Chan and Lo, and that he has used the materials supplied to him in another complaint. There are remaining disputes. One is the good faith of the Commissioner in doing these acts. The other is the Appellant's consent in using the two documents. Let's see what if anything a formal investigation under section 38 can do about these two disputes. The Commissioner has denied he acted in bad faith. In an ordinary case, it is the duty of a complainant to provide prima facie evidence or at the very least some leads for the Commissioner to follow up in his investigation, formal or informal. This principle should apply even if the Commissioner himself is the party complained against. Nothing has

been suggested and no reason has been given by the Appellant why the Commissioner should have acted in bad faith. A formal investigation would not take the issue of good or bad faith any further. As to the other issue in dispute, the Commissioner has already stated his ground, any further investigation cannot resolve the issue.

40. If a formal investigation is to be initiated, it would not serve the purpose of discovering relevant facts helping to solve the disputes. However if the Commissioner is to carry out an formal investigation just the same, he needs to inform himself his intention to carry out the formal investigation by notice in writing (see section 41). This notice may seem laughable but that is the statutory requirement. After complying with the requirement of serving the notice on himself, the Commissioner can conclude the investigation by pronouncing judgment or making a ruling whether the acts complained of amount to a contravention of the requirement. Whatever his ruling is, he has to do another equally laughable matter of informing himself of the results of the investigation together with recommendation he sees fit to make to himself (see section 47). Other consequential actions, for example serving Enforcement Notice, also involve him becoming a judge in his own cause. All these scenarios must be or should be present in the mind of the Commissioner when coming to his decision. They must be the reasons for him citing the maxim: *no man may be a judge in his own cause* though the Commissioner does not choose to elaborate in such detailed way.

Remaining Disputes

41. The Appellant does not agree that the Commissioner is obliged to include the two documents in the Appeal Bundle of AAB No. 18 of 2008, thereby disclosing the two documents to Chan and Lo, the party bound in the appeal. Section 11 of the **Administrative Appeals Board Ordinance** provides that:-

(1) The respondent shall, within 14 days after the service upon him of a copy of a notice of appeal under section 10, inform the Secretary in writing of the name and address of any person, other than the appellant, who-

(a) is bound by the decision appealed against; or

(b) before the decision appealed against was made, had made representations to the respondent in relation to the subject-matter of that decision.

(2) A copy of a notice of appeal served under section 10 may be accompanied by an order of the Chairman, made in such form as the Chairman may determine, that the respondent shall within 28 days after the service upon him of a copy of notice of appeal under section 10 lodge with the Secretary, the appellant and any person of the description mentioned in subsection (1)(a)-

(a) a statement in writing relating to the decision that sets out-

(i) the reasons for the decision to which the appeal relates;

(ii) the policy, if any, relied upon by the respondent when such decision was made;

(iii) the particulars of any evidence or other thing considered and relied upon by the respondent when such decision was made;

(iv) the findings on material questions of fact relating to the decision;

(v) whether or not the appellant was made aware of the matters referred to in subparagraphs (i) to (iv) when such decision was made; and

(b) a description of every document or part of a document that is in the possession or under the control of the respondent-

(i) which is considered by him to relate to the appeal;

(ii) in respect of which he wishes to claim privilege as to disclosure,

and the respondent shall, subject to section 14, comply with such order.

Along the line of these provisions, the Chairman of the Administrative Appeal Board has made the standing instructions to the Respondent to provide Party Bound:

(a) a description of every document or part of document that is in the Respondent's possession or control which *are considered by the Appellant to relate to the appeal*;

(b) copies of the documents as listed in the Respondent's description.

The Commissioner has considered these documents before coming to his decision. It is therefore right for him to contend that these documents relate to the appeal and thus he is bound by the provisions of section 11(a) and the Chairman's standing instructions to disclose to the parties bound by his decision. One may easily fall into the trap of thinking that the Commissioner should be a paradigm in protecting personal data and therefore should do all his best to resist the directions of the Chairman and the legal provisions. As a matter of law, how he should set an example of a responsible data user is irrelevant. The Commissioner is bound by law. He is required to comply with the provisions of section 11(1)(a) and the Chairman's standing instructions to include the documents unless good cause can be shown. There is none. There is nothing in the Personal Data (Privacy) Ordinance which enables him to do. He can apply under section 14 to the Chairman or the Deputy Chairman hearing the appeal for non-disclosure of documents in his possession or control. The application must be on specific grounds as mentioned in section 14.

These grounds are the same as those as if the proceedings were before a court of law. Protecting the personal data of the Appellant in this case is not a ground for non-disclosure. In fact the Commissioner is also in a role of an arbitrator for the two contending factions. On one side it is the Appellant, and on the other Chan and Lo, the parties she complained against. Chan and Lo are parties bound by the decision of the Commissioner and they are also bound by the decision of the Administrative Appeals Board. The Appellant and the parties bound all have an equal interest in the appeal. Chan and Lo have the right to support the Commissioner's decision. This right is as important as the right of the Appellant to challenge the decision. The Commissioner has a duty to balance the interest of a complainant in having his allegation investigated with the right to freedom of the party complained against from being subjected to investigation without reasonable grounds. The Commissioner would be wrong if he is to take sides and there is no requirement, and there should never be such a practice, that a regulator should favor the side who makes the complaint. There is no legal basis for the Commissioner to apply to the Board to have the two documents excluded from the appeal bundle. What the Commissioner should do or failed to do to resist the Chairman's directions has become academic. This is because the Appellant has applied to the Chairman hearing the appeal AAB No. 18 of 2008 for the exclusion of the two documents.

42. The learned Chairman in that appeal has held a hearing on the preliminary point whether these two documents should be excluded from the appeal bundle. The grounds for the application are repeated by the Appellant in her argument at the hearing of the instant appeal. The Appellant maintains that she did not give her consent to the Commissioner for him to use the materials in another complaint and that the two documents do not relate to the appeal AAB No. 18 of 2008.

43. The Commissioner contends that in the request for material and information supporting her complaint against Chan and Lo, the Appellant has replied by letter of 14 January 2008 consenting to the Commissioner using the documents

supplied in an earlier complaint against ML. To rebut this contention of the Commissioner, she quoted the following paragraph in the letter in question:

> "For the mail sent to the Merrill office, please kindly see the documents I have provided for the other case, reference no.---"

The Appellant argues that by this paragraph, her consent is restricted to mail to Merrill office. As the two documents are not mail sent to Merrill office, she has not consented to the Commissioner to consider the two documents. Further she contends that the two documents are not relevant to the complaint against Chan and Lo and doubted that the Commissioner has considered the two documents in handling the complaint.

44. The learned Chairman has given his ruling after the preliminary hearing rejecting the Appellant's application. He accepted the contention of the Commissioner that the Appellant has given her consent to the Commissioner to use the documents supplied in the complaint against ML and that the two documents are relevant to the appeal and have to be included.

45. The learned Chairman has also ruled on an application by the Appellant in the instant appeal. She is not satisfied with the ruling and wrote to the Board to express strongly her dissatisfaction. In the letter she took the opportunity to criticize the Chairman's earlier ruling referred to in the preceding paragraph. The following is her observations and comment on the ruling:

> "I submit that this is not the first time the AAB Chairman has abused his power and authority to give directions against law.
>
> On 29 December 2009, during the hearing of 18/2008, where I applied to exclude the following documents for the appeal:-
>
> ---
>
> From my letter dated 14 January 2008 to PCPD, I clearly wrote:-

'For the mail sent to the Merrill office, please kindly see the documents I have provided for the other case, reference no. 200710842'

So AAB Chairman accepted(sic) PCPD's allegation that the word 'For the mail sent to the Merrill office' referred to the above two documents are clearly against the documentary evidence before him.

Moreover, AAB Chairman allowed PCPD to include documents of DCCJ4126 of 2007 and HCMP1178 of 2009 to consider whether I have good faith to lodge the complaints against the parties bound are totally groundless. As you can see from the documents submitted to AAB through my letters to PCPD c.c. AAB, these documents have already proved that the parties bounded(sic), ----made false statement to the PCPD and I have reported the case to the Hong Kong Police Force for further investigation.

The facts that AAB Chairman continues to give decisions that are against law are totally unacceptable and the Chairman shall be liabilities (sic) for all decisions that he made.

----- "

46. The content of this letter clearly shows that the Appellant understands the ruling of the learned Chairman, albeit strongly disapproves of his judgment. She attempts in this appeal before a differently constituted Board, to argue the same issue between the same parties. She cannot do that as a matter of law. The principle of *issue estoppel* applies. By reason of this principle, the Appellant is estopped from raising the same issues between the same parties before the same tribunal though differently constituted. Public interest demands that there must be finality to litigation.

47. There is one observation which this Board should make though it is not strictly relevant to this appeal. In the course of appeal some concern has been shown that the Commissioner is using information obtained from one complaint in dealing with another complaint. In the instant case, the grievance, if the Appellant has any, is entirely based on the assumption that the Commissioner cannot do just that. What if the Commissioner has failed to obtain the consent of the Appellant to use the materials supplied in the complaint against ML, can he nevertheless use the materials. The answer is yes.

48. The Commissioner is assisted by his officers, employed or engaged otherwise. They are his delegates. Any knowledge of a delegate is by law imputed to its principal, the Commissioner. The pool of knowledge obtained from receiving and investigating complaints would be stored in some data system unless the Commissioner has an unlimited power of memory. This pool of knowledge must be taken as the Commissioner's. As to access to the data pool, it is up to the Commissioner to decide officers of which rank can access material of which level of sensitivity. Whatever arrangement he may make in this regard, the Commissioner is entitled to have access to this data pool. Other law enforcement agencies, say the police force, if they have no means of cross referencing cases, it would severely hamper their efficiency in detecting and preventing crimes. Likewise, if the Commissioner when dealing with a complaint, pretends he does not know when he is taken to have known about other similar complaint against the same party or made by the same party, he simply cannot perform his function. For instance, he can refuse to investigate for various reasons as provided under section 39(2): a similar complaint has been investigated and found unsubstantiated, the complaint is frivolous or vexatious or is not made in good faith etc. Without looking at the data of other complaint, the Commissioner will not be able to determine if there has been a similar complaint unsubstantiated. A single complaint, no matter how groundless it seems may not be trivial or vexatious or not made in good faith. On the other hand, in the case of a single individual making a large number of seemingly valid complaints, all spinning out from a single incident but drawing in more and more parties complained

against, the Commissioner can have legitimate concern about the good faith of the complainant. The question of good faith cannot be determined by the Commissioner without looking at the previous complaints. The materials in the previous complaints are imputed to him if not his actual knowledge. As has been said the Commissioner is also under a duty to be fair with the party complained against. If the materials in the previous complaint tend to show the later complaint is not made in good faith, or vice versa, the Commissioner's duty is clear and obvious. He should refuse to initiate a formal investigation into the complaint not made in good faith. If he restrains himself from using the materials, pretending he does not know about the facts of previous cases, and initiate an investigation well knowing it was frivolous, or vexatious, or not made in good faith, not only he and his office would lose credibility, it would be a flagrant breach of his duty. Perhaps a hypothetical and ideal scenario can make this point clearer. If the Commissioner because of his tight budget or for whatever reasons, does not employ anyone to assist him to perform investigation work. He has to handle every complaint personally. If a later complaint can be shown to be made in bad faith by reference to earlier complaints the details of which are still in his vivid memory. Is it right for the Commissioner to shut his eyes to the obvious pretending not to know the bad faith of the complainant and carry out investigation against the innocent party? Certainly it is not right.

Merits of Appeal AAB No. 26 of 2009

49. The Commissioner has over simplified the reasons for his refusal to investigate citing in support only the maxim that *no man may be a judge in its own cause.* On closer analysis of the Ordinance, the decision of the Commissioner is right.

50. First of all, the term 'investigation' should not be interpreted in the usual sense as the process of ascertaining and gathering facts or evidence. It covers more

than that. 'Investigation' is defined by section 2 as 'investigation means an investigation under section 38'. Provisions in sections following section 38 require the Commissioner to perform various functions apart from investigation in the usual sense. He has to pass judgment on the data user investigated, judging or assessing the likelihood of the data user repeating the contraventions found proved, determining the content of Enforcement Notice if he sees fit to issue one, making a report on the investigation etc.

51. The investigation the Commissioner refuses to initiate is the investigation under section 38. Such investigation comprises several parts, the first part is the investigation in the usual sense, the other parts deal with consequential actions which involve the Commissioner acting as judge in his own cause. Looking at this way the Commissioner's reason can be better understood. He does not refuse to investigate into the acts or conduct complained of. He has already done the first part of the formal investigation. The act and surrounding circumstances complained of has been ascertained. Though he has not passed judgment formally whether he has contravened any requirement of the Ordinance, he has stated his position. Had he initiated a formal investigation, no more relevant facts would be forthcoming in the circumstances of the case. Given his opinion on his own acts, no Enforcement Notice would be issued. If contrary to his opinion and that of this Board, he is guilty of contravening the requirement of the Ordinance, no useful purpose can be served by initiating a formal investigation.

52. More importantly, the provisions for a formal investigation under section 38 would either involve the Commissioner becoming a judge in his own cause or be incompatible with the notion that the Commissioner is a target for investigation. In these circumstances investigation under section 38 is not intended to include a complaint against the Commissioner himself. The appeal AAB No. 26 of 2009 is therefore dismissed.

Costs

53. As has been said, the reason given by the Commissioner is not easily understood without expanding it with reference to the provisions of the Ordinance. The Appellant can be excused for not accepting the reason, and her appeal cannot be said to be vexatious. The Commissioner only slightly alludes to the fact that a large number of complaints and appeals have sprung out from a complaint against ML. If the present appeal is looked at in the full circumstance of these complaints and appeals, it might improve the grounds for the Commissioner's intended application for costs. The Commissioner desists from drawing assistance from the circumstances of other complaints and appeals, and fairly agrees to withdraw its application for costs.

(signed)

(Mr Yung Yiu-wing)
Deputy Chairman
Administrative Appeals Board