ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No.35 of 2006

BETWEEN

KWONG CHEUNG YUI, KENNETH — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board

Date of Hearing: 16 November 2006

Date of handing down Decision with Reasons: 20 December 2006

DECISION

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1. On 2 June 2006 the Appellant lodged a complaint ("**the Privacy Complaint**") with the Privacy Commissioner of Personal Data ("**the Commissioner**") against Whampoa Garden Management Limited ("**WGML**"). By a letter dated 7 July 2006, the Commissioner informed the

Appellant that after considering his case, he did not propose to carry out or continue an investigation. The reasons for the Commissioner's decision ("**the Decision**") were set out in an Annex to the Commissioner's said letter of 7 July 2006.

2. The Appellant appealed against the Decision. Pursuant to section 10 of the Administrative Appeal Board Ordinance ("**AAB Ordinance**"), the Notice of Appeal was served by the Secretary of the Board on WGML as a "person who is bound by the decision appealed against" (see, section 10(b) of the AAB Ordinance). WGML had also made written representations to the Board in regard to the present Appeal. WGML however did not attend the hearing of the Appeal, having given prior notice to the Board that it did not intend to do so. The hearing of the Appeal accordingly took place in the absence of WGML. We have however taken into account the written representations made by WGML before coming to this decision.

Background to the appeal

3. The Appellant is a resident in Whampoa Garden. He lodged a complaint ("**the Antenna Complaint**") to WGML regarding the installation of a mobile phone antenna at the roof top of Whampoa Gourmet Place, Site 8, Whampoa Garden. That part of Whampoa Garden was part of the commercial areas of the estate and was managed by a management team known as the "Estate Management Office (Commercial)" ("**the Commercial Management Team**").

4. By a letter dated 29 May 2006, WGML wrote to the Appellant and informed him, inter alia, that:

> *"As per your request, we have asked the estate management team of Whampoa Garden commercial premises to advise if there is any mobile phone antenna installed at the roof top of the captioned commercial building and conveyed your concern about the potential adverse health effects arising from the mobile phone antenna installed near residential premises. We will revert to you once we receive the above information."*

5. The letter of 29 May 2006 which the Appellant received bore the name and address of the Appellant as the addressee of the letter. The letter also bore the words "*c.c. Miss Maggie Yau, Estate Management Office (Commercial), Shop B 18 B1, Site 11, Whampoa Garden*" at the end, thus suggesting that the same had been copied by WGML to Miss Maggie Yau of the Commercial Management Team.

6. The gist of the Privacy Complaint was that WGML had, without the consent of the Appellant, disclosed the Appellant's name and address to Miss Maggie Yau of the Commercial Management Team. At the hearing of the Appeal, the Appellant confirmed that this was his only complaint. The Appellant did not allege that any other personal data had been disclosed by WGML other than his name and address as set out in the letter of 29 May 2006, which was copied to Maggie Yau of the Commercial Management Team.

7. The Commissioner conducted a preliminary enquiry of the Privacy Complaint. At the hearing of the Appeal, we heard some interesting submissions from Miss Margaret Chiu (representing the Commissioner) on the nature of such preliminary enquiry – in particular whether such preliminary enquiry is an "investigation" within the meaning of s.2(1) and s.38 of the Personal Data (Privacy) Ordinance ("**the Privacy Ordinance**"). It

was contended by Miss Chiu that such preliminary enquiry was not an "investigation", and was merely in the nature of a pre-investigation enquiry. For that reason Miss Chiu submitted that in the present case the Commissioner had not in fact started any investigation at all. However, Ms Chiu was unable to point to any provisions in the Privacy Ordinance that governed such alleged "pre-investigation enquiry", or the Commissioner's powers in relation to such enquiry. She contended that the power of the Commissioner to make such pre-investigation enquiry was an "inherent power".

8. It is not necessary for us in this case to decide whether the preliminary enquiry conducted by the Commissioner is an investigation within the meaning of s.2(1) or s.38 of the Privacy Ordinance. Suffice for us to observe that we are far from being satisfied that the "preliminary enquiry" made by the Commissioner was made pursuant to some inherent power of the Commissioner not spelt out in the Privacy Ordinance (as opposed to the statutory powers of investigation conferred on him by s.38 of the Privacy Ordinance). We have not received mature submissions on the point, and certainly we have not been referred to any authorities or provisions in the statute that points to the existence of some inherent power on the part of the Commissioner to conduct "pre-investigation enquiry" without invoking his statutory powers to make investigations under the Privacy Ordinance.

9. Whether or not the Commissioner has such inherent powers, in the present case the Commissioner has decided that he would not carry out or continue investigation of the Privacy Complaint. If the preliminary enquiry made by the Commissioner was an investigation within s.38, he has decided not to continue that investigation. On the other hand, if the preliminary enquiry was not an investigation within s.38 (as Miss Chiu contends), then the Commissioner has decided that he would not carry out any investigation at all.

Either way, this Board would have to consider whether the Decision was rightly made or not.

The Commissioner's reasons for refusing to investigate

10. In response to the preliminary enquiry made by the Commissioner, WGML denied that they had disclosed the Appellant's personal data to the Commercial Management Team at all. According to WGML, when the letter of 29 May 2006 was copied to Maggie Yau, the name and address of the Appellant had been concealed and no personal data of the Appellant had been disclosed in the copy that was sent to Maggie Yau of the Commercial Management Team. Maggie Yau has confirmed that this was the position. A copy of the edited letter (i.e. with the name and address of the Appellant concealed) sent to Maggie Yau had been provided by WGML to the Commissioner under cover of its letter dated 19 June 2006.

11. The Commissioner took the view that in the absence of anything that cast doubt on the evidence or statements of WGML, there is nothing to show that the personal data of the Appellant had in fact been disclosed by WGML.

12. The Commissioner further took the view that the collection of personal data of the Appellant (i.e. his name and address) by WGML was originally for the purpose of dealing with the Antenna Complaint. The subsequent use of those data in the letter of 29 May 2006 copied to the Commercial Management Team was for the purpose of following up the Antenna Complaint and that purpose was within, or was directly related to, the original collection purpose. The Commissioner was of the opinion that there was no case of any contravention of Data Protection Principle 3 ("**DPP3**") of Schedule 1 of the Privacy Ordinance, which provides as follows:

> *"Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than –*
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> *(a) the purpose for which the data were 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)."*

13. For the reasons mentioned above, the Commissioner was of the opinion that, in all the circumstances of the case, "any investigation is unnecessary in accordance with section 39(2)(d) of the [Privacy] Ordinance" (see, paragraph 6 of the Annex to the Commissioner's letter of 7 July 2006 to the Appellant).

14. At the hearing of the Appeal, Miss Chiu for the Commissioner made a further point. She submitted that as the Appellant has not suffered any prejudice which is more than trivial, even if there had been wrongful disclosure of the Appellant's name and address in the letter of 29 May 2006 copied to Maggie Yau of the Commercial Management Team, the Commissioner was entitled to exercise his discretion under s.39(2) of the Privacy Ordinance to refuse to carry out or continue investigation into the Privacy Complaint.

The Grounds of Appeal

15. By his letter dated 17 July 2006 addressed to the Secretary of the Board and annexed to his Notice of Appeal, the Appellant set out his grounds of appeal. At the hearing of the Appeal, the Appellant elaborated on his grounds. Briefly, the Appellant's submissions are as follows:

(a) he contends that given the close relationship between WGML and the Commercial Management Team, there are reasonable grounds for him to be suspicious of WGML's allegation that it had concealed his name and address when copying the letter of 29 May 2006 to Maggie Yau;

(b) accordingly, the Appellant contends that the Commissioner should not have accepted the allegation of WGML on its face value and should have proceeded to investigate the Privacy Complaint;

(c) on the basis that his name and address was in fact disclosed by WGML to Maggie Yau, the Appellant further contends that such disclosure was unnecessary as the Commercial Management Team could have handled the matter without being informed of his name and address. In this connection, the Appellant argued that as he had directed the Antenna Complaint to WGML, it was for WGML to deal with the same and to contact him in relation to his complaint. There was no need for the Commercial Management Team to be provided with his personal data;

(d) although the Appellant accepts that he has not suffered any real prejudice from the alleged disclosure of his name and address, he contends that the Commissioner should not have refused to investigate or continue to investigate into the Privacy Complaint. He argues that personal data should be protected from wrongful disclosure as a matter of principle and that is so even if the data subject has not suffered any prejudice or inconvenience as a result.

Our Decision

(I) No Disclosure of Personal Data

16. As pointed out above, during the preliminary enquiry of the Commissioner, WGML had provided evidence and statements to the Commissioner showing that in fact no personal data of the Appellant had been disclosed as the Appellant's name and address was concealed from the letter copied to Maggie Yau of the Commercial Management Team. As said, Maggie Yau had confirmed that when she received the copy letter the name and address of the Appellant had been covered up or concealed. Maggie Yau's copy of the letter (with the Appellant's name and address concealed) had been supplied to the Commissioner.

17. We do not accept the Appellant's contention that merely because WGML and the Commercial Management Team have a close relationship, the evidence and statements provided by WGML and Maggie Yau to the Commissioner should be viewed with suspicion. There is nothing to suggest that WGML and Maggie Yau had fabricated evidence or was not providing truthful information to the Commissioner. There is, for example, no suggestion that either Maggie Yau or anyone of the Commercial Management Team had ever contacted the Appellant (in which case an inference might well be drawn that the personal data of the Appellant had indeed been "leaked" to the Commercial Management Team) and the Appellant had confirmed to us at the hearing that that was so.

18. It is a serious allegation to suggest that WGML and Maggie Yau were lying to the Commissioner when they responded to his inquiry regarding the alleged disclosure of the Appellant's name and address in the copy letter to Maggie Yau. There is nothing before us or before the Commissioner to

justify any inference that what was purportedly stated by WGML and Maggie Yau to have happened was not true. In these circumstances, we agree that the Commissioner has properly exercised his discretion not to carry out or continue investigation of the Privacy Complaint. There is no *prima facie* evidence of any disclosure of personal data at all and there is simply nothing to show that any investigation or further investigation would carry the matter any further.

19. The Commissioner may refuse to investigate or further investigate if he is of the opinion that, having regard to all the circumstances of the case, "any investigation or further investigation is for any other reason unnecessary": see section 39(2)(d) of the Privacy Ordinance. Given the lack of *prima facie* evidence of any disclosure of the Appellant's personal data, we are of the view that the Commissioner was entitled to form the opinion that any investigation or further investigation would be unnecessary in all the circumstances of the present case.

20. In exercising his discretion, the Commissioner was following his "Complaint Handling Policy" (a copy of which was provided to the Appellant on 9 June 2006 and again on 7 July 2006), paragraph (B) (d) of which provided as follows:

> *"...an investigation or further investigation may be considered to be unnecessary if:*
>
> *(d) after preliminary enquiry by the [Commissioner], there is no prima facie evidence of any contravention of the requirements of the [Privacy] Ordinance;"*

21. By virtue of s.21(2) of the AAB Ordinance, the Board is required, in exercising its powers under s.21(1)(j) of the AAB Ordnance (i.e. to either confirm, vary or reverse the decision appealed against, or to substitute

therefore such other decision or make such order as it may think fit), to "have regard to any statement of policy lodged by the respondent (in this case the Commissioner) with the Secretary of the Board under s.11(2)(a)(ii) of the AAB Ordinance, provided that the Board is satisfied that at the time of the making of its decision the appellant was or could reasonably have been expected to be aware of the policy."

22. In the present case, as mentioned above, a copy of the Complaints Handling Policy had been supplied to the Appellant on 9 June 2006 and 7 July 2006, and the Commissioner has lodged a copy of the same with the Board under cover of his letter dated 21 August 2006. Hence the conditions under section 21(2) have been satisfied, and the Board is required to have regard to the said Complaints Handling Policy before it exercises its power to confirm, vary or reverse the Decision.

23. We have accordingly taken into account of the provisions of the Complaints Handling Policy. We are of the view that it is reasonable for the Commissioner in the present case to follow the stated policy as set out in paragraph (B)(d) thereunder. That paragraph makes a lot of good sense, for normally it is a waste of time and resources of the Commissioner to undertake or continue an investigation if there is not even prima facie evidence of any contravention of the Privacy Ordinance. The present case is such a case.

24. We accordingly take the view that the discretion of the Commissioner was properly exercised and on this ground alone, the appeal must be dismissed.

(II) Trivial act and absence of prejudice

25. We also take into account the fact that, as frankly admitted by the Appellant, the alleged disclosure of his name and address has not resulted in any prejudice, harm, loss or damage to him. The Appellant has not even pointed to any inconvenience that might have arisen from the alleged disclosure.

26. Section 39(2)(b) of the Privacy Ordinance provides that the Commissioner may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case, the act or practice specified in the complaint is trivial.

27. It must however be emphasized that the absence of prejudice to a complainant does not necessarily mean that the act or practice subject of the complaint must be trivial. It is conceivable that there may be cases where there may have been a gross breach of the Privacy Ordinance without producing prejudice (or more than minimal prejudice) to the complainant. The absence of prejudice may be a matter of sheer luck in some cases and its absence is not necessarily conclusive of the triviality of the act or practice subject of the complaint. However, the extent of prejudice (if any) to the complainant is clearly part of the circumstances which the Commissioner would have regard when exercising its discretion under section 39(2) and in many cases, the absence of prejudice is indeed indicative of the triviality of the complaint. Usually but not necessarily, a trivial contravention of the Privacy Ordinance is likely to generate little prejudice whereas a serious breach is more likely to cause greater harm. In all cases, the Commissioner is required by law to have regard to all the circumstances of the case before forming the opinion whether the act or practice specified in the complaint is trivial or not; and even if he does form an opinion that the act or practice

concerned is trivial, he still have a discretion to exercise and is not bound to refuse to carry out or continue an investigation.

28. Further, as we have already pointed out in paragraph 18 above, the Commissioner has a discretion under section 39(2)(d) of the Privacy Ordinance to refuse to carry out or continue an investigation if he is of the opinion that any investigation or further investigation is "for any other reason unnecessary". In an appropriate case, the absence of prejudice (or more than minimal prejudice) to the complainant may be a good reason for the Commissioner to consider that any investigation or further investigation is unnecessary. That is so even if the act or practice subject of the complaint may not be considered to be trivial, for the power under section 39(2)(d) is additional to the power provided under section 39(2)(b). However, as in the case of section 39(2)(b), if the Commissioner seeks to rely on section 39(2)(d) to refuse investigation on the ground that no or minimal prejudice has been caused by the act or practice complained of, he must first have regard to all the circumstances of the case. Where the act or practice contravening the Privacy Ordinance is serious, the Commissioner must obviously bear in mind the seriousness of the breach (as being part of the circumstances that he must have regard) before exercising his discretion under section 39(2)(d) on the ground of lack of prejudice. If the Commissioner exercises his discretion unreasonably or without due regard to all the circumstances of the case, this Board would be entitled to intervene on appeal. Otherwise the discretion rests with the Commissioner, and the Board should not intervene with his discretion if the Commissioner has acted properly following the statutory requirements.

29. In the present case, we agree with Miss Chiu for the Commissioner that even if there had been a disclosure of the Appellant's name and address (for which there is no *prima facie* evidence), the disclosure was trivial and the

Appellant has not suffered any prejudice. The disclosure was made by WGML internally to the management team responsible for the management of the commercial areas of Whampoa Garden. There has not been any disclosure to any outside third party and it has not been shown how such disclosure could or could have produced any harm or prejudice to the Appellant which is more than trivial. Indeed, as a matter of fact, there is none.

30. In these circumstances, we agree with Miss Chiu that, even assuming that the alleged disclosure complained of had in fact been made, the Commissioner has properly exercised his discretion not to investigate or further investigate the Privacy Complaint pursuant to section 39(2) (b) and (d) of the Privacy Ordinance. On this ground as well, the appeal must also be dismissed.

(III) Breach of DPP3

31. The above would have been sufficient reasons for dismissing the appeal. However, as pointed out above, Miss Chiu has sought to argue that even if there had been disclosure of the Appellant's name and address in the letter copied to Maggie Yau, such disclosure was not a breach of DPP3 and accordingly the Commissioner was entitled not to carry out or continue investigation on the ground that there was no possible case at all for any contravention of the Privacy Ordinance. As we have great reservation to this contention by Miss Chiu, we would, in deference to her, make some observations on her argument; although our observations on this point is not strictly necessary for the disposal of the present appeal.

32. Miss Chiu submitted that even if there had been disclosure of the Appellant's name and address in the said copy letter to Maggie Yau, the disclosure was for a purpose directly related to the purpose of the original collection of the Appellant's personal data because:

(a) the purpose of collection of the Appellant's personal data by WGML was for handling the Antenna Complaint;

(b) the Commercial Management Team was responsible for management of commercial areas of Whampoa Garden;

(c) it is clear from the said letter of 29 May 2006 that WGML was referring the Antenna Complaint to the Commercial Management Team for follow up actions;

(d) there is no evidence to show that the Appellant had imposed any restriction on disclosure of his personal data upon WGML; and

(e) there is no evidence to show that WGML had disclosed the Appellant's personal data to any other unrelated parties.

c.f. paragraph 4 of the Statement of the Commissioner dated 21 August 2006 filed with the Board.

33. It was further argued by Miss Chiu that given the nature of the Antenna Complaint (which related to the installation of an antenna on the rooftop of a commercial building in Whampoa Garden, which was under the management of the Commercial Management Team), the disclosure of personal data to the Commercial Management Team, if at all proved, for further handling was necessary and was for a purpose consistent with and directly related to the original purpose of collecting the Appellant's personal data. Hence by reason of DPP3, it was not necessary for WGML to obtain the Appellant's prescribed consent before disclosure and the Commissioner was entitled to take the view that a case of contravention of the Privacy Ordinance had not been made out.

34. When asked by the Board why it was necessary for WGML to disclose the Appellant's name and address to the Commercial Management Team,

Miss Chiu's answer was that it was necessary because the Commercial Management Team might need to contact the Appellant in relation to the Antenna Complaint and they would need to know his address in order to be satisfied that the Appellant was a resident of Whampoa Garden and had a legitimate interest to make the Antenna Complaint. In this connection, Miss Chiu referred us to another decision of the Board in AAB 47/ 2004.

35. We are not convinced that it was necessary for the Commercial Management Team to be informed of the name and address of the Appellant. On the face of the letter of 29 May 2006, the Commercial Management Team was asked by WGML to advise if there was any mobile phone antenna installed at the rooftop of Whampoa Gourmet Place, and to provide information regarding "the potential adverse health effects" for which the Appellant had expressed concern. WGML expressly stated that they (not the Commercial Management Team) would revert to the Appellant once they received the information (presumably from the Commercial Management Team). Indeed on 14 August 2006, it was WGML who wrote to the Appellant again advising him that "as informed by the [Commercial Management Team], the mobile phone antennae installed at the roof top of Whampoa Gourmet Place had obtained the licences issued by the Office of the Telecommunication Authority and fulfilled the relevant safety requirement for radiofrequency radiation...".

36. Hence it is clear from the letter of 29 May 2006 that the Commercial Management Team was merely being asked by WGML to follow up on the Antenna Complaint by advising WGML if there was indeed a mobile phone antenna installed at the roof top of Whampoa Gourmet Place and also the adverse health effects complained of by the Appellant. The Commercial Management Team was never asked to contact the Appellant in relation to his complaint, and they never did. In the letter WGML stated clearly that they

would revert to the Appellant once they had got the relevant information from the Commercial Management Team. Indeed they did so on 14 August 2006.

37. Hence, on the face of the letter of 29 May 2006, the Commercial Management Team was merely instructed by WGML to provide information and advice relating to the installation of the antenna and the adverse health effects complained of by the Appellant. There is nothing before the Commissioner, and nothing before this Board, to show that it was necessary for the Commercial Management Team, in order to provide such information and advice to WGML, to be apprised of any personal data of the Appellant. Clearly the Commercial Management Team was not asked to contact the Appellant direct. As the Appellant pointed out at the hearing, his complaint was directed to WGML and there was no reason why anyone else should contact him on his complaint. Certainly, on the face of the letter of 29 May 2006, WGML itself had not seen the need of asking the Commercial Management Team to contact the Appellant direct. We also do not see why it was the business of the Commercial Management Team to be concerned with the question whether the Appellant had the legitimate interest to make his complaint. The Commercial Management Team was merely asked to advise WGML and to provide it with the relevant information to enable WGML to revert to the complainant. In these circumstances we fail to see why it was necessary for the Commercial Management Team to be informed of the identity and address of the complainant.

38. Indeed the argument that it was necessary for the Commercial Management Team to be informed of the name and address of the Appellant seems to us to be most unreal. It is inconsistent with the fact, maintained by WGML, that when the letter was copied by them to Maggie Yau, WGML had concealed the name and address of the Appellant. If indeed it was necessary for the Commercial Management Team to be informed of the Appellant's

name and address before they could do their job, why did WGML remove the data from the copy letter? The fact that they took the step of concealing such data from the copy letter shows quite clearly that the data was not considered necessary for the Commercial Management Team to do what it was instructed to do. We therefore cannot accept the contention by Miss Chiu that the disclosure of the Appellant's name and address was necessary for the follow up actions to be taken by the Commercial Management Team.

39. If the personal data of the Appellant was not necessary for the follow up actions by the Commercial Management Team, we fail to see how it can be said that the use or disclosure of the same was for a purpose directly related to the original purpose of the collection of the Appellant's personal data. In our view, the name and address of the Appellant, if they had been disclosed, would not have been disclosed for any purpose directly related to the purpose of collection. No doubt the original purpose (" **the Original Purpose**") for the collection of the Appellant's personal data was for the purpose of the Antenna Complaint, and the purpose of WGML's referral to the Commercial Management Team ("**the Ancillary Purpose**") was directly related to the Original Purpose. However the mere fact that there existed an Ancillary Purpose which was directly related to the Original Purpose does not mean that there could not be a contravention of DPP3. Whether DPP3 was breached depends on whether personal data of the Appellant was indeed disclosed or used for those purposes. If the personal data was disclosed for the Original Purpose, its use would fall within paragraph (a) of DPP3. If the personal data was disclosed for the Ancillary Purpose, its use would fall within paragraph (b) of DPP3. In either case, the prescribed consent of the Appellant would not be required. However, whether the personal data was indeed used for either the Original Purpose or the Ancillary Purpose is simply a question of fact. As a matter of common sense, where the disclosure of the personal data is wholly unnecessary for the attainment of a purpose, it is difficult to see how it can

sensibly be said that its disclosure amounts to a use for that purpose. In the context of the present case, as pointed out above, the disclosure of the personal data of the Appellant was not necessary for the Ancillary Purpose to be carried out. That being the case, it is difficult to see how the same could sensibly be said to have been disclosed (or used) for the Ancillary Purpose.

40. Accordingly this Board is of the view that, in the present case, although the Ancillary Purpose was directly related to the Original Purpose, the personal data of the Appellant, if it had been disclosed, would not have been used for the Ancillary Purpose such as to fall within paragraph (b) of DPP3.

41. For completeness' sake, we would pint out that the case of AAB 47/2004 is very different from the present case. In that case, an owner had complained to the Incorporated Owners of water leakage in her flat and the Incorporated Owners posted up the relevant correspondence in the common area of the building. The Board held that the purpose of posting up the correspondence was to enable the other owners to know about the existence of such complaint, and it was directly related to the original purpose of data collection, which was to enable the Incorporated Owners to handle the complaint of water leakage. It is important to note that in holding that the disclosure of the complainant's personal data did not breach DPP3, the Board held that such disclosure was required so that the other owners would know that the complainant was indeed an owner of a flat in the building and had a legitimate interest to complain about water leakage in the building. Clearly in the context of an Incorporated Owners, the owners of the building have the right to be informed of matters concerning the management of the building, including any complaint that had been made about water leakage in the building. They each have the right to form their own judgment on the legitimacy of the complaint and they could vote at any owners' meeting in accordance with their own judgment. For the Incorporated Owners to handle

the complaint properly, it would have to keep the owners properly informed of the details of the complaint, as the owners have a common interest over the affairs and management of the building to which they were owners. The present case is of course very different. It was not necessary for the Commercial Management Team to be informed of the identity of the complainant, and the Commercial Management Team was not concerned to judge whether the complainant had a legitimate interest to make the complaint. As pointed out above, the Commercial Management Team were merely instructed by WGML to advise it of certain technical matters relating to the installation of the antenna and the potential adverse health effect. They were not required to deal with the Appellant at all, nor were they called upon to make any judgment on the interest of the Appellant in the making the Antenna Complaint.

42. Miss Chiu further made the point that in AAB 47/2004, the Board also held that although it was not necessary for the mobile phone no. of the complainant to be disclosed, the failure by the Incorporated Owners to cover up the mobile phone number in the correspondence posted up at the common area of the building did not necessarily involve a breach of DPP3. The Board however did not explain the reason for this holding, and we have not been able to derive much assistance from the case when the holding regarding the mobile phone was not explained or elaborated upon. In any event, we take the view that the facts in AAB 47/2004 are miles away from the present, and little assistance could be gained by referring to that decision as each case must clearly be decided on its own facts.

43. For reasons mentioned above, we are unable to accept the Commissioner's submission that even if the name and address of the Appellant had been disclosed, there could be no case for any contravention of DPP3. We would have held, had this point stood alone, that the Commissioner was wrong to refuse investigation on the basis that breach of DPP3 could not possibly be established in the present case.

44. However, this point does not stand alone. As we have held above, there is no *prima facie* case of a disclosure of the Appellant's personal data, and the Commissioner has properly exercised his discretion under s.39(2) to refuse to carry out or continue investigation. For those reasons mentioned above, we would dismiss the appeal.

Horace Wong Yuk Lun SC

Deputy Chairman

Administrative Appeal Board