ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 8/2018

BETWEEN

HUI CHI FUNG Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA Respondent

Coram: Administrative Appeals Board
Mr Paul Lam Ting-kwok, SC (Chairman)
Mr Chan Kam-man (Member)
Ms Christine Yung Wai-chi (Member)

Date of Hearing: 10 September 2019

Date of Handing down Written Decision with Reasons: 23 March 2020

DECISION

Mr Paul Lam Ting-kwok, SC and Ms Christine Yung Wai-chi:

A. INTRODUCTION

1. The Appellant is a member of the Legislative Council of the HKSAR ("LegCo"). On 30 January 2018, he made a complaint ("the Complaint") to the Respondent in relation to the deploying of public officers to carry out

marshalling duties within the LegCo Complex ("Marshalling Duties"). He requested the Respondent to investigate whether the Administration Wing, Chief Secretary for Administration's Office and the LegCo Secretariat had breached various Data Protection Principles ("DPP") in Schedule 1 of the Personal Data (Privacy) Ordinance (Cap. 486) ("the PDPO"). He attached a letter dated 8 May 2017 from his and other Councillors to the Secretary General of the LegCo. On 23 April 2018, the Respondent decided not to investigate the Appellant's complaint further in accordance with s.39(2)(d) of the PDPO and paragraph 8(e) of the Complaint Handling Policy on the ground that, *inter alia*, the Marshalling Duties had not breached the PDPO ("the Decision"). By notice of appeal dated 21 May 2018 ("the Notice of Appeal"), the Appellant appeals against the Decision. In the Notice of Appeal; the Appellant set out 6 grounds of appeal.

2. The members of this Board are able reach a consensus on the first to fifth grounds of appeal. However, in respect of the sixth ground of appeal, the members are unable to reach a consensus as to whether there was a breach of DPP5. Hence, the decision on this point is made by the majority pursuant to s.23 of the Administrative Appeals Board Ordinance (Cap. 442); the dissenting member i.e. Mr Chan Kam-man will set out his views on this point separately below.

B. THE MARSHALLING DUTIES

3. It appears that the deployment of Marshalling Duties at LegCo dated back as early as 1995 before the enactment of the PDPO. Such practice continued after the LegCo was relocated to the present LegCo Complex in about 2011/2012. As recorded in a press release dated 23 October 2013 (the

"2013 Press Release"), a LegCo member raised various questions based on the following observation:

> "In recent years, whenever Members of the Legislative Council debate or vote on an important motion or bill, the Government very often deploys public officers to station at the various passageways and doorways of the Legislative Council Complex."

4. The then Secretary for Civil Service responded to questions raised as follows:

> "The Government fully respects the Legislative Council (LegCo)'s functions of enacting laws, controlling public expenditure and monitoring the work of the Government. Secretaries of Departments (SoDs) and Directors of Bureaux (DoBs), from time to time, attend LegCo meetings to brief Members on and elucidate government policies, participate in discussions on government motions and bills, and handle various matters relating to LegCo.
>
> In this connection, other public officers (including other politically appointed officials and civil servants) may need to assist and support SoDs and DoBs. Their specific duties include assisting SoDs and DoBs in contacting Members, canvassing Members' views, taking note of their voting preferences, providing Members with detailed explanations and further information when necessary, as well as acquiring first-hand information about the conduct of meetings, including the content of discussions, Members' attendance and the conduct of voting, so as to report to SoDs and DoBs.
>
> Assisting SoDs and DoBs in handling LegCo business is one of the duties of public officers. When need arises for relevant officers to visit the LegCo Complex for attending to LegCo business, officers will be discreet and they will fully comply with

> the rules of the LegCo Complex, so as to ensure that the conduct of meetings and the activities of Members and other members of the public in the LegCo Complex will not be affected.
>
> ..."

5. In about October 2016, the Appellant became a member of the LegCo.

6. By letter dated 8 May 2017, 7 LegCo members, including the Appellant, asked the LegCo Secretariat to answer various questions concerning the Marshalling Duties and complained that the Marshalling Duties had infringed the privacy of the LegCo members. However, there was no reference to the PDPO.

7. By letter dated 31 May 2017 addressed to the Director of Administration (i.e. the Person Bound (1)), the Legislative Council Commission ("LCC") (i.e. the Person Bound (2)) stated that the LCC had discussed the said joint letter in its meeting on 26 May 2017, and requested the Director of Administration to provide information concerning the Marshalling Duties.

8. By letter dated 19 June 2017, the Director of Administration provided, *inter alia*, the following information:

> "As explained by the Government at the Council meeting of 23 October 2013 in response to an oral question titled "Arrangement of public officers to station at Legislative Council Complex", assisting Secretaries of Departments (SoDs) and Directors of Bureaux (DoBs) in handling LegCo business is one of the duties of public officers. When the Government's legislative, funding, public works, staffing or other policy items are discussed at meetings of the LegCo or its committees, public officers may need

to render support to SoDs and DoBs which includes acquiring first-hand information about the progress of meetings and contents of discussion, as well as carrying out marshalling duties to monitor the conduct of voting. When public officers perform marshalling duties in the LegCo Complex, they are expected to be discreet and to fully comply with the rules of the LegCo Complex, and to ensure that meetings and the activities of Members and other members of the public in the LegCo Complex will not be affected. We regret that isolated incidents in the performance of such duties have caused concern of Members. We have relayed the views and concerns expressed by the Commission to SoDs and DoBs, and have invited them to impress upon public officers carrying out duties the importance of acting discreetly and with sensitivity.

Whenever SoDs and DoBs have to conduct important LegCo business, the senior echelon of relevant bureaux or departments will evaluate and consider if assistance is needed, as well as the manpower so required. When necessary, relevant bureaux or departments will deploy a team of public officers to carry out supportive work including performing marshalling duties in the LegCo Complex. The team will stay in the public areas of the LegCo Complex to gather information regarding the presence of Members in the Chamber/Conference Room or LegCo Complex, with a view to facilitating the SoDs, DoBs or senior echelon in liaising with Members where appropriate. Such information is transient in nature and will continuously be updated when performing the marshalling duties. There is no operational need to keep such information afterwards. The Government will observe the provisions of the Personal Data (Privacy) Ordinance (Cap. 486) and follow the Data Protection Principles as stipulated in the Ordinance."

9. By letter dated 26 June 2017, the LCC raised a number of follow-up questions upon receipt of the said letter from the Director of Administration. The PDPO was mentioned.

10. By letter dated 6 July 2017, the Director of Administration replied that:

"As explained vide our letter of 19 June 2017, whenever Secretaries of Departments (SoDs) or Directors of Bureaux (DoBs) have to conduct important Legislative Council (LegCo) business, the senior echelon of relevant bureaux or departments will evaluate and consider if assistance is needed, as well as the manpower so required. In other words, the scale of supportive work and the means of communication within the team of public officers may vary case-by-case, depending on a host of factors including the Government's lobbying strategy and the availability of manpower resources as well as technological support. While there is no standard practice, it is quite common that some public officers will stay in the public areas of the LegCo Complex to gather information regarding the presence of Members in the Chamber/Conference Room or the LegCo Complex and pass such information to the subject officer(s) via walkie-talkies or instant messaging tools. Such information will then be consolidated onto a whiteboard or on a laptop so that SoDs, DoBs or the senior echelon will have a better grasp of Members' attendance as a whole.

The information regarding the presence of Members so collected is transient in nature and will continuously be updated during the performance of the marshalling duties. It will not be kept for purposes other than the above operational need, and will be erased by all practicable means immediately after the marshalling duties.

We wish to reiterate that the Government respects personal data privacy and is committed to implementing and complying with the Data Protection Principles and relevant provisions under the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO). Bureaux have been reminded that the PDPO binds the Government and that one of the Data Protection Principles provides that personal data shall not be kept longer than is necessary for the fulfilment of the purpose for which the data is or is to be used. In particular, once the personal data held is no longer required for the purpose for

> which the data was used, all practicable steps should be taken to erase the personal data. In light of the views of Members conveyed to us vide your letter of 31 May 2017, we have relayed to bureaux Members' concern on whether the collection of information about Members by public officers performing marshalling duties was in compliance with the provisions of the PDPO and reminded them that all information relating to the whereabouts of Members should be erased immediately after the marshalling exercise."

11. By letter dated 11 September 2017, the Appellant asked the Acting Director of Administration to provide further information about the Marshalling Duties and to stop recording the whereabouts of the LegCo members. By letter dated 16 October 2017, the Director of Administration replied by repeating substantially the content of the said letters dated 19 June 2017 and 6 July 2017. It appears that this letter was dispatched by fax but the Appellant claimed that he had never actually received it.

12. In December 2017, the Administration Wing issued a "Points-to-note when conducting marshalling exercises in the Legislative Council Complex" to all Government bureaux (the **"Point-to-note"**). The first paragraph reads as follows:

> "The purpose of conducting marshalling exercise is to acquire first-hand information about the progress of meetings and monitor the conduct of voting. The team of public officers deployed to carry out marshalling duties should stay in the public areas of the LegCo Complex to observe the whereabouts of LegCo Members (for example, whether they are in the Chamber/Conference Room or the LegCo Complex) and pass such information to the subject officer(s) via walkie-talkies or other instant messaging tools. Such information will then be consolidated onto a whiteboard or on a laptop, if necessary, in order to have a better grasp of Members' attendance as a whole."

The document then sets out a number of points to note, which will not be repeated here.

13. The Point-to-note was apparently attached to a confidential memorandum issued by the Director of Administration dated 1 December 2017.

14. The Marshalling Duties were debated and discussed extensively at the meeting of the House Committee of the Legislative Council held on 11 May 2018 and 18 May 2018. Suffice to say that there were different and divergent views among LegCo members. In the meeting held on 18 May 2018, the Chairman reported that:

> "...the Chief Secretary for Administration ("CS") had reiterated that the purpose of the Administration's deployment of public officers to perform marshalling duties in the LegCo Complex was to ensure that when important government bills or motions were considered at meetings of the Council or its committees, there would be a sufficient number of Members present and participating in the votes to be taken at those meetings. Public officers performing marshalling duties would not cause any disturbance to Members, and would erase the information they had collected regarding the presence of Members in the LegCo Complex immediately after the marshalling exercise. CS had also stressed that it was necessary and in the public interest to deploy public officers to perform the said marshalling duties. He would remind bureaux and departments to impress upon their officers the importance of acting discreetly when discharging the marshalling duties, and to avoid deploying too many officers to perform such duties. He hoped that the Executive Authorities and LegCo would show mutual understanding and tolerance towards the performance of marshalling duties by public officers."

15. On 20 August 2019, the Administration Wing issued a revised "Points-to-note when conducting marshalling exercises in the Legislative Council Complex". The first paragraph reads the same as in the one issued in December 2017. There are revisions to the specific points to note, the details of which will not be set out here.

C. THE COMPLAINT AND THE DECISION

16. In the Complaint, the Appellant stated that, since he became a LegCo member in 2016, he noticed that whenever it was necessary to vote on any motion, there would be unidentified persons at the entrances, lift lobbies, passageways of the LegCo Complex monitoring the LegCo members to ensure that the Government's motions could be passed. He said that he had written to the LegCo Secretariat in May 2017. The LegCo Secretariat replied briefly that the matter had been relayed to the LCC. According to his understanding, the LegCo Secretariat did not know the details of the Marshalling Duties. He made further inquiries with, for example, the Administration Wing but was of no avail. He observed that public officers holding a name list of the LegCo members and their photos would record the time when they entered or left the LegCo Complex, the number of LegCo members inside the LegCo Complex, etc. He found out further that the public officers recorded such information in mobile phones. He asked the Respondent to investigate whether the Administration Wing and the LegCo Secretariat had breached the principles under the PDPO.

17. The Decision is a lengthy document consisting of 42 paragraphs and 10 pages. The Respondent stated that, upon receiving the Complaint, it had

obtained information from the Administration Wing and the LegCo Secretariat. It then summarized the information so obtained. After that, the Respondent set out its observations and analysis. We shall refer to the Respondent's observations and analysis wherever appropriate below.

18. The Respondent concluded that, first, based on the information provided by the Administration Wing, the performance of Marshalling Duties by public officers had not breached the requirements under the PDPO; and second, the LegCo Secretariat was not the user of the relevant personal data involved in this case. Hence, it decided not to investigate the Appellant's complaint further in accordance with s.39(2)(d) of the PDPO and paragraph 8(e) of the Complaint Handling Policy. S.39(2)(d) of the PDPO provides that:

> "The Commissioner may refuse to carry out or decide to terminate an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case, any investigation or further investigation is for any other reason unnecessary."
>
> Paragraph 8(e) of the Complaint Handling Policy provides that:
>
> "In addition, an investigation or further investigation may be considered unnecessary if after preliminary enquiry by the PCPD, there is no prima facie evidence of any contravention of the requirements under the Ordinance."

19. For the sake of completeness, we should mention that, after receiving the Decision, by an open letter dated 3 May 2018, the Appellant raised a number of questions with the Respondent. By letter dated 4 May 2018, the Respondent provided the answers. It is unnecessary to consider the details

in this respect as only the Decision is the subject matter of this appeal.

D. THE APPELLANT'S APPLICATION TO ADDUCE NEW EVIDENCE

20. At the beginning of the hearing of this appeal, the Appellant applied to adduce the following new evidence:

(a) Various excel spreadsheets attached to his letter dated 19 August 2019; and

(b) his witness statement dated 5 September 2019 (stating the oral evidence he intended to give).

Both the Respondent and Person Bound (1) opposed the application. After hearing all the submissions, we dismissed the application. We now give the reasons.

21. In deciding whether the Appellant should be allowed to adduce the new evidence, we took the view that the burden was on the Appellant to show that the new evidence was relevant to this appeal, and that it was reasonably necessary for the fair disposal of this appeal.

22. As to the various excel spreadsheets, they were apparently obtained by the Appellant from the mobile phone of a public officer carrying out Marshalling Duties on 24 April 2018. The Appellant claimed that they showed that the Government bureaux and departments had kept information obtained from such Marshalling Duties for many months and stored them by various means. The simple point is that such new evidence was obtained in an incident which took place after he made the Complaint; and hence, had not

been considered by the Respondent in the Decision. The sole purpose of this appeal is to consider the correctness of the Decision. Such new evidence was therefore irrelevant to this appeal. If the Appellant takes the view that such new evidence provides grounds to make a fresh complaint, there is nothing to stop him from doing so.

23. In respect of the Appellant's witness statement, he referred to various documents (including those mentioned above) and claimed that he was unaware of the details of the Marshalling Duties. While we recognized that there may be factual disputes as to how much the Appellant knew about the Marshalling Duties, for reasons which will become clear, none of the grounds of appeal raised by the Appellant turns on the Appellant's (or any individual LegCo member's) actual degree of knowledge of the Marshalling Duties. The Appellant also referred to the incident on 23 April 2018, which was irrelevant as we stated above. His statement also consisted of personal views, which were matters for submissions. For these reasons, we were not satisfied that his witness statement was relevant or reasonably necessary for the fair disposal of this appeal. We declined the Appellant's application to give oral evidence on his witness statement.

24. We should put on record that, in the course of the hearing of appeal, on a number of occasions, the Appellant sought to address us directly; and complained when we refused to allow him to do so. As we had explained to him clearly, we did not find it relevant or necessary to hear oral evidence from him; and since he was legally represented, he should make submissions through his counsel. In fact, at the hearing of the appeal, ample time and opportunities had been given to him to give instructions to his legal representatives, and we had heard and considered all submissions made by

counsel of his behalf.

E. THE NATURE OF THIS APPEAL

25. For the purpose of this appeal, the Respondent submitted a statement of defence on 1 August 2018 ("the Respondent's Statement"). On the other hand, the Person Bound (1) submitted its written representations on 13 August 2018. In addition, the Appellant, the Respondent and the Person Bound (1) submitted written skeleton submissions, and their legal representatives made oral submissions at the hearing of this appeal. We have considered all the evidence and submissions (both oral and written) adduced by the parties.

26. It is well-established that the nature of the hearing of the Administrative Appeals Board is by way of rehearing on the merits and not simply by way of review; its jurisdiction is appellate and not merely supervisory. Having said that, as the Court of Appeal in *Li Wai Hung Cesario v Administrative Appeals Board* (unreported, CACV 250/2015, 15 June 2016) put it succinctly at [7.6]:

> "In an appeal on the merits, the appellant has to say why the decision below is wrong and the tribunal will address these grounds of appeal. But it does not follow from that that the tribunal is required to perform the task of a first instance decision maker afresh and set out its own findings and reasons for the decision. This is not how such a tribunal works in reality… In every case, one does not simply look at the language used but at the substance of the decision in the context of the way of how the grounds of appeal are presented to the tribunal."

27. In short, the burden of proof is on the Appellant to show the Decision is wrong. We shall now turn to the Appellant's 6 grounds of appeal.

F. GROUND 1

28. Under Ground 1, the Appellant claims that the Respondent erred in holding that PDPO does not apply to the Marshalling Duties on the ground that the public officers may not have recorded the whereabouts of the LegCo members. This ground is misconceived, and is apparently based on a misconstruction or misunderstanding of the relevant paragraphs in the Decision.

29. In §§12-15 of the Decision, the Respondent stated clearly that the performance of Marshalling Duties by public officers were governed by the PDPO unless any exemption in Part 8 thereof applied. Referring to the definition of personal data in s.2 of the PDPO and applying the principles laid down by the Court of Appeal in *Eastweek Publisher Limited & Another v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83, the Respondent took the view that the performance of Marshalling Duties by public officers indeed involved the collection of personal data of the LegCo members. We agree that the whereabouts of the LegCo members recorded in the course of the Marshalling Duties in these circumstances constituted personal data within the meaning of PDPO. We note that, in construing the meaning of "personal data" under the Data Protection Act 1998, Lewison LJ held in *Ittihadieh v 5-11 Cheyne Gardens RTM Co Ltd* [2018] QB 256 at 282, [67]:

> "In addition to the categories of data which I have thus far considered, it seems to me that a person's whereabouts on a particular day or at a particular time may also amount to that

person's personal data. Those data may be highly relevant, for example in calculating sick pay or holiday pay, or in the investigation of crime."

30. The Respondent merely added in §16 of the Decision that, if the public officers merely recorded the overall attendance of LegCo members as a whole (instead of the attendance of individual members), or if the public officers merely orally reported the whereabouts of the LegCo members by walkie-talkies or phones without making any record, such acts would not constitute collection of the personal data of the LegCo members.

31. At the hearing of the appeal, the Appellant did not pursue this ground of appeal. For reasons stated above, it must be rejected.

G. GROUND 2

32. Under Ground 2, the Appellant claims that the Respondent erred in holding that there was no breach of DPP2(2) on the ground that the Respondent had not investigated whether the Government bureaux and departments had in fact complied with the direction to erase the personal data on a daily basis.

33. DPP2(2) provides that:

"All practical steps must be taken to ensure that personal data is not kept longer than is necessary for the fulfilment of the purpose (including any directly related purpose) for which the data is or is to be used."

34. In §27 of the Decision, the Respondent referred to the "Points-to-note

when conducting marshalling exercises in the Legislative Council Complex" issued in December 2017, which provided, *inter alia*, that:

> "the Government respects personal data privacy and is committed to implementing and complying with the Data Protection Principles and relevant provisions under the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO). The PDPO binds the Government and that Data Protection Principle 2 of the PDPO provides that personal data shall not be kept longer than is necessary for the fulfilment of the purpose for which the data is or is to be used. Once the personal data held is no longer required for the purpose for which the data was used, all practicable steps should be taken to erase the personal data. In this connection, B/Ds are reminded that all information about Members as observed or obtained by public officers deployed on marshalling duties, including the Members' whereabouts, be they appear on the instant messaging tools, laptops or other media, should be erased immediately and by all practicable means after the marshalling exercise. Should the marshalling exercise last for more than one day, the information should be erased on a daily basis."

35. In §28 of the Decision, the Respondent stated that, in its view, there was no information at that time ("現時没有資料") showing that any Government bureau or department had not followed the above direction.

36. It is significant to note that, in the Complaint, the Appellant had not made any specific complaint that there was in fact a breach of DPP2(2), let alone provided any information or evidence substantiating any such complaint. In fact, he had not referred to DPP2(2) at all; he only mentioned DDP2(1)(a) and (b). In the circumstances, what the Respondent stated in §28 of the Decision was factually true and correct at the material time. And since there was no information, or any *prima facie* evidence, suggesting any breach of DPP2(2) at that time, we take the view that the Respondent was

correct in deciding that no further investigation needed to be done in this regard.

37. The Appellant referred to his open letter to the Respondent dated 3 May 2018 in which he asked the Respondent to state whether there was a breach of the PDPO when the Government had kept the personal data for 6 months. It appears that he believed that the Government acted in such manner based on the information he obtained in the incident that took place on 24 April 2018. In §3 of the Respondent's reply dated 4 May 2018, the Respondent took the view that, having regard to all relevant circumstances, even if the personal data of the LegCo members was kept for 6 months, it would not be unreasonable. We need to point out that the Respondent's view as expressed in this letter was not part of the Decision; and hence, not the subject matter of this appeal. Therefore, we will not express any view in this respect.

38. For these reasons, we reject Ground 2.

H. GROUND 3

39. Under Ground 3, the Appellant claims that the Respondent erred in holding that there was no breach of DPP1(3) on the ground that the Administration Wing had failed to notify the LegCo members directly and clearly about the purpose of using the personal data collected and the persons to whom such personal data may be transferred.

40. DPP1(3) provides that:

"Where the person from whom personal data is or is to be collected is the data subject, all practicable steps shall be taken to ensure that –

(a) he is explicitly or implicitly informed, on or before collecting the data, of –
   (i) whether it is obligatory or voluntary for him to supply the data; and
   (ii) where it is obligatory for him to supply the data, the consequences for him if he fails to supply the data; and

(b) he is explicitly informed –
   (i) on or before collecting the data, of –
      (A) the purpose (in general or specific terms) for which the data is to be used; and
      (B) the classes of persons to whom the data may be transferred; and
   (ii) on or before first use of the data for the purpose for which it was collected, of –
      (A) his rights to request access to and to request the correction of the data; and
      (B) the name or job title, and address, of the individual who is to handle any such request made to the data user,

unless to comply with the provisions of this subsection would be likely to prejudice the purpose for which the data was collected and that purpose is specified in Part 8 of this Ordinance as a purpose in relation to which personal data is exempt from the provisions of data protection principle 6."

41. In §24 of the Decision, the Respondent stated that, according to its understanding, the public officers performing Marshalling Duties would not collect personal data directly from the LegCo members, they would merely observed their attendance and whether they were present in the Chamber/Conference room or the LegCo Complex; the PDPO does not provide that personal data may only be collected directly from the data

subject; and if the relevant acts did not involve collecting personal data directly from the data subject, DPP1(3) would not be applicable.

42. The critical issues are how DPP1(3) should be properly construed; and upon its proper construction, whether it applies to the Marshalling Duties.

43. It appears that the Respondent's interpretation relied heavily on the first sentence in DPP1(3) i.e. "Where the person from whom personal data is or is to be collected is the data subject..." The Respondent's interpretation is supported by its publications. First, in *Data Protection Principles in the Personal Data (Privacy) Ordinance – from the Privacy Commissioner's perspective* (2nd Edition, 2010), §5.27 at p. 40 states that:

> "DPP1(3) requires a data user to inform the data subject of the prescribed information on or before collection of his personal data.. ***Such requirement is however applicable only to collection of personal data directly from the data subject.*** It implies that personal data may be collected from a third party in the absence of the data's consent or even knowledge without contravening DPP1(3). The AAB in *AAB No. 46/2005* expressed their concern that in such circumstances the privacy of the data subject would not be well protected because the data subject would not have any redress against the data collector, albeit the disclosure of personal data by the third party has to be in compliance with DPP3." (emphasis added)
>
> §5.28, p. 40, states further that:
>
> "Given the wording used in DPP1(3), i.e. "from whom personal data are or are to be collected is the data subject", ***the duty to inform the data subject of the matters prescribed thereunder is taken to arise in situations when the data in question are collected directly from the data subject.*** Hence, the notification requirement under this principle is generally considered by the Commissioner not to be applicable where the personal data in question are:

- collected from a third party;
- unsolicited and supplied by the data subject; or
- generated by the data user itself (this is possible because the definition of "*data*", as referred to in paragraph 2.1 of Chapter 2, includes an expression of opinion in a document)." (emphasis added)

In §5.29, pp. 40-41, it goes on to state that:

"The notification obligation under DPP1(3) arises in commonly encountered situations of collection of personal data, such as when:
- an individual is asked to provide written information about himself (e.g. by filling in a form);
- the individual is asked to provide oral information to be recorded (e.g. making a statement to the Police);
- personal data are generated by the data user in the course of its conduct with the data subject (e.g. entering into employment or banking transactions); or
- personal data about the individual are obtained through automatic or scientific devices (e.g. recording a telephone conversation, conducting a medical checkup, etc.)"

44. In *Personal Data (Privacy) Law in Hong Kong: A Practical Guide on Compliance* (2016), §5.66, p. 78, states that:

"DPP1(3) requires a data user to notify the data subject of prescribed information (outlined further below) on or before the collection of his personal data. ***This requirement is generally only applicable where a data user collects personal data directly from the data subject***, except in respect of personal data used for direct marketing purposes (see paragraph 5.107 below). However, the data user is still required to comply with DPP3, i.e. without the data subject's prescribed consent it cannot use the personal data for any purpose other than the original purpose for which it was collected from the data subject or a directly related purpose (DPP3 is discussed in further detail in Chapter 7)." (emphasis added)

§.5.67, pp. 57, provides that:

"DPP1(3) provides, at the outset, "Where the person from whom personal data is or is to be collected is the data subject…", ***there is a duty to inform the data subject of the prescribed matters where the data in question is collected directly from the data subject.*** Hence, the notification requirement under this principle is generally considered by the Commissioner not to be applicable where the personal data in question is:

- collected from a third party;
- unsolicited and supplied by the data subject; or
- generated by the data user itself (considering the definition of "*data*", as explained in paragraph 2.1 of Chapter 2, includes an expression of opinion in a document)." (emphasis added)

§.5.68, p. 57, provides further that:

"The notification obligation under DPP1(3) arises in commonly encountered situations of collection of personal data, such as where:

- an individual is asked to provide written information about himself (e.g. by filling in a form);
- the individual is asked to provide oral information to be recorded (e.g. making a statement to the Police);
- personal data is generated by the data user in the course of its conduct with the data subject (e.g. entering into employment or banking transactions); or
- personal data about the individual is obtained through automatic or scientific devices (e.g. recording a telephone conversation, conducting a medical checkup, etc.)"

45. In considering whether the Respondent's interpretation of DPP1(3) is correct, it is necessary to bear in mind the general principles for statutory interpretation. In *HKSAR v Fugro Geotechnical Services Ltd* (2014) 17 HKCFAR 755 at 765, §19, Fok PJ held that:

"As to the approach to statutory construction, it is common ground that the Court should adopt a purposive approach, construing the statutory language having regard to its context and purpose."

He added further at §22 on the same page:

> "When it is said that context is the starting point, together with purpose, in statutory interpretation, that is not to say that one puts the words being construed to one side. On the contrary, since contextual and purposive construction is a tool or aid to assist a court in arriving at an interpretation that gives effect to the legislative intention, one must always have regard to the particular words used by the legislature in expressing its will. A court cannot attribute to a statutory provision a meaning which the language of the statute, understood in the light of its context and the statutory purpose, is incapable of bearing. For that reason, one must necessarily look to the statutory language to see what meaning or meanings it is capable of bearing."

46. In *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568 at 575, §14, Li CJ held that:

> "The purpose of a statutory provision may be evident from the provision itself. Where the legislation in question implements the recommendations of a report, such as a Law Reform Commission report, the report may be referred to in order to identify the purpose of the legislation. The purpose of the statutory provision may be ascertained from the Explanatory Memorandum to the bill. Similarly, a statement made by the responsible official of the Government in relation to the bill in the Legislative Council may also be used to this end..."

47. The Explanatory Memorandum to the *Personal Data (Privacy) Bill 1995* provides that:

> "This Bill gives effect to the majority of the recommendations contained in the Report on Reform of the Law Relating to the Protection of Personal Data (Topic 27) issued by the Law Reform Commission of Hong Kong. The objects of the Bill are:-
> (a) to control the collection, holding, processing and use of

personal data by data users, in particular by the promulgation of the data protection principles set out in Schedule 1 to the Bill;

..."

48. It is, therefore, pertinent to refer to the *Report on Reform of the Law Relating to the Protection of Personal Data (Topic 27)* issued by the Law Reform Commission of Hong Kong, August 1994. For the present purpose, Chapter 9 "Collection of personal data" is relevant. To begin with, §9.1, p.96, provided that:

> "The processing of personal data begins with its acquisition or collection. In this chapter, "collection" means the obtaining of personal data from the data subject, whereas by "acquisition" we mean obtaining data relating to the data subject from third parties. Data may be collected from the data subject with his active co-operation, such as where he provides answers to questions, or without, such as where a utilities meter provides information automatically to the utilities company. Where he initiates the collection himself, the data subject may not appreciate the extent of the data collecting capabilities of the equipment he is using."

49. Pausing there, two important points should be noted. First, a distinction was drawn between collection of personal data and acquisition of personal data. Collection of personal data means obtaining personal data from the data subject. Acquisition of personal data means obtaining personal data from third parties. Second, in respect of collection of personal data, it may be done with or without the data subject's co-operation.

50. §9.2, p. 96, then stated:

> "The data collection principles require that limits be set on the

collection of personal data. We address the need to restrict collection or acquisition of data to that which is relevant to the data purpose. The principles also require that collection methods should be fair. ***Fair consensual collection requires that the data subject be informed of relevant matters, such as the purposes for which the data is sought and its intended recipients. These requirements need adjustment when data is collected from the data subject without his knowledge or consent.*** We consider, but reject, a requirement of collection only from the data subject, which would exclude acquisition of personal data relating to him from third parties. While the Collection Limitation Principle does not apply to data acquired from third parties (a point not made clear in the Consultative Document), such data is subject to the Use Limitation Principle discussed in the next chapter. A later report will make more specific recommendations on when it is permissible to collect data without the individual's knowledge or consent but once collected, it is subject to the application of the other data protection principles, subject to any exemptions applying." (emphasis added)

51. The recommendations made by the Law Reform Commission were set out in §9.5, p. 97:

"We recommend adoption of the OECD Collection Limitation Principle. This provides that:

> "there should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject" (paragraph 9.11)."

The law should provide that personal data shall not be held or collected or held unless:

(a) the data are collected, acquired or held for a lawful purpose directly related to a function or activity of the collector; and

(b) the collection, acquisition or storage is necessary for, or

directly related to, that purpose. (paragraph 9.15)

When data are collected with the knowledge of the data subject, he should upon the first collection be informed about:

- ***(a) the purpose of the processing for which the data are intended;***
- ***(b) the obligatory or voluntary nature of any reply to questions to which answers are sought;***
- ***(c) the consequences for him if he fails to reply;***
- ***(d) the recipients or categories of recipients of the data;***
- ***(e) the existence of a right of access to and rectification of the data relating to him; and***
- ***(f) the name and address of the controller and of his representative if any.***

Items (a) to (d) should be specified upon the collection of the data. As for (e) and (f), it should be sufficient if the data subject is informed of these by the time that the data are used (paragraphs 9.23 and 9.24). While (a), (d), (e) and (f) must be made explicit, (b) and (c) need not be made explicit when obvious (paragraph 9.25). Where the data user collects data from the same individual on more than one occasion, he should take reasonable steps to remind him of these matters from time to time (paragraph 9.26)." (emphasis added)

52. In §9.6, the Law Reform Commission considered the situation where personal data is collected from a data subject without his knowledge through automatic metering.

53. It is significant to note that a distinction was drawn between consensual collection and non-consensual collection. In respect of consensual collection, the Law Reform Commission elaborated on its views in §§9.20-9.24, p.101-103 under a sub-section entitled "Consensual collection: informing data subjects of relevant matters". First, in §9.20, p.101-102, it referred to the draft Directives of the Commission of European

Commission promulgated on 18 July 1990:

"Article 11 of the draft Directive addresses the extent to which there should be legislative provision to ensure that data subjects from whom data are collected are informed of relevant matters, namely:

"(a) the purpose of the processing for which the data are intended;
(b) the obligatory or voluntary nature of any reply to the questions to which answers are sought;
(c) the consequences for him if he fails to reply;
(d) the recipients or categories of recipients of the data;
(e) the existence of a right of access to and rectification of the data relating to him; and
(f) the name and address of the controller and of his representative if any.

2. Paragraph 1 shall not apply to the collection of data where to inform the data subject would prevent the exercise of or the co-operation with the supervision and verification functions of a public authority or the maintenance of public order.""

54. In §9.23, pp. 102-103, it stated that:

"We therefore recommend that the following matters should be specified upon the collection of the data, ***as being directly relevant to the individual's decision whether or not to respond***:

(a) the purpose of the processing for which the personal data are intended;
(b) the obligatory or voluntary nature of replying;
(c) the consequences for him of failing to reply; and
(d) the recipients or categories of recipients of the personal data."

And then, in §9.24, p. 103:

> "That leaves (e), requiring that the data subject be told of access and correction rights, and (f), requiring contact details of the data controller. We recommend that it be sufficient if the data subject is informed of these by the time that the data are used..." (emphasis added)

55. It is clear that the main purpose of requiring the provision of all these information is to ensure that the data subject can make an informed decision or choice as to whether and to what extent he would supply the personal data as requested. This connotes a consensual collection process in which the data subject plays an active role and has a choice whether to co-operate by supplying the personal data as requested or not.

56. This important point was put beyond doubt in §9.27, p.103-104, under "Non-consensual collection: new technologies", where it stated that:

> "Article 11 addresses the matters that a data subject must be informed of when the data collection requires his co-operation. Its reference to questions and replies conveys that ***it is primarily concerned with the conventional consensual collection methods requiring an active rather than a passive data subject.***..." (emphasis added)

57. Returning to the wording of DPP1(3), it is reasonably clear that it was drafted to implement the recommendations made by the Law Reform Commission in §§9.23-9.24 of the Report based on Article 11 of the draft Directive. This may be demonstrated by the following table of comparison:

Sub-clause in DPP1(3)	**Corresponding sub-clause in Article 11 of the draft Directive**
(a)(i)	(b)

Sub-clause in DPP1(3)	**Corresponding sub-clause in Article 11 of the draft Directive**
(a)(ii)	(c)
(b)(i)(A)	(a)
(b)(i)(B)	(d)
(b)(ii)(A)	(e)
(b)(ii)(B)	(f)

58. We do not think the proper construction of DPP1(3) should depend simply on the phrase "Where the person from whom personal data is or is to be collected is the data subject" as suggested by the Respondent. DPP1(3) must be construed as a whole with regard to each and every provision therein.

59. For reasons stated above, we take the view that, upon a proper construction of the wording of DPP1(3) as a whole in the light of its context and purpose (as revealed by its legislative history), DPP1(3) is intended to apply to consensual collection of personal data where the data subject plays an active role: first, deciding whether to supply the personal data as requested; and second, if so, providing such personal data as he or she sees fit. It is not intended to apply to non-consensual collection of personal data where the data subject plays a passive role where his consent or knowledge is not required.

60. Returning to the facts of this case, it is clear that the Marshalling Duties did not involve consensual collection of personal data where the LegCo members, being the data subject, played any active role. The public officers performing Marshalling Duties would just record the whereabouts of individual LegCo members based on their own visual observations. The individual LegCo members were not approached or asked directly where they

were. They needed not know, and may not have known in fact, that their movements within the LegCo Complex were being observed, and then recorded, at any particular point of time by any particular public officer. The whole process did not require the consent or knowledge of the LegCo members.

61. For these reasons (which are more detailed than those given in §24 of the Decision or the Respondent's submissions made in this appeal), we agree with the Respondent's conclusion that there was no breach of DPP1(3) because it was not engaged or applicable.

62. We note that, in §25 of the Decision, the Respondent considered a hypothetical scenario where DPP1(3) would become applicable i.e. if the public officers directly asked the LegCo members how he/she would vote or whether he/she would attend a meeting. The Respondent referred to the 2013 Press Release and the information provided by the Administration Wing to the LCC. The Respondent expressed the view that the relevant Government bureaux and departments could be taken to have taken all practicable steps to comply with DPP1(3). We have reservations whether such view was correct. Under s.2 of PDPO, "practicable" means "reasonably practicable". In respect of the requirements under DPP1(3)(b)(i), as demonstrated by the complaint made by the Appellant that he had not been informed of the details of the Marshalling Duties (which we do not find it necessary to determine whether it was in fact true or not), and it seems to be corroborated by the fact that even the LCC needed to request the Director of Administration to provide information concerning the Marshalling Duties as mentioned in paragraphs 6 to 9 hereinabove, it is debatable whether all reasonably practicable steps had been taken to inform each and every LegCo

member of the purpose for which the personal data collected would be used; and the classes of persons to whom the data may be transferred before such data was collected from them. The Respondent admitted that the best practice would be to issue a "Personal Information Collection Statements" to all LegCo members individually. There is also no or insufficient evidence what steps had been taken to meet the requirements under DPP1(3)(b)(ii). Having said that, as these are not live issues in this appeal, we shall refrain from expressing any conclusive view in this respect.

63. We also take the view that whether the existing DPP provide sufficient protection to the data subject in relation to non-consensual collection of personal data may well be a matter that merits serious consideration. This will be a matter for the Respondent, the relevant Government authorities and the legislature. Nevertheless, even though we conclude that DPP1(3) is inapplicable in this case, it is of course still necessary to consider whether there was any breach of other DPP, which were applicable in these circumstances, under the other grounds of appeal raised by the Appellant.

64. For these reasons, we reject Ground 3.

I. GROUND 4

65. Under Ground 4, the Appellant claims that the Respondent erred in holding that there was no breach of DPP1(2) on the ground that there may be a breach thereof because the public officers carried out Marshalling Duties in areas where it was not expected that the activities of the LegCo members would be observed.

66. DPP1(2) provides that:

> "Personal data shall be collected by means which are –
> (a) lawful; and
> (b) fair in the circumstances of the case."

67. There is no suggestion that the collection of personal data in the course of Marshalling Duties involved the use of any unlawful means. The Appellant's complaint is that the means used was unfair in the circumstances.

68. In *Cathay Pacific Airways Ltd v Administrative Appeals Board* [2008] 5 HKLRD 539 at 551, §§.50, Hartmann and Lunn JJ held that:

> "Fairness is a broad principle and as to the manner in which personal data is to be collected, is capable of encompassing the form in which relevant information is conveyed as well as the substance of that information."

69. The Respondent explained in detail why it concluded that there was no breach of DPP1(2) in §§19-23 of the Decision. In §19, it correctly pointed out that there is no requirement that the collection of personal data must be done with the consent of the data subject. Hence, the mere fact that some LegCo members (such as the Appellant) objected to the Marshalling Duties, by itself, does not render the process unfair in the context of DPP1(2).

70. In §21 of the Decision, it referred to the evidence that Marshalling Duties would only be carried out in the public areas of the LegCo Complex. In those areas, the activities of individual LegCo members could be observed

by other LegCo members or members of the public who were given access thereto. It was therefore within the reasonable contemplation of the LegCo members that their activities in those areas could be observed by others. We agree with the Respondent's views in this respect. In the Complaint, the Appellant stated that public officers performed Marshalling Duties at the entrances, lift lobbies and passageways of the LegCo Complex. These were plainly public areas within the LegCo Complex. There is no suggestion, let alone evidence, that Marshalling Duties had been performed in restricted areas inside the LegCo Complex where the activities of individual LegCo members were meant to be kept confidential and not to be observed by others.

71. In §22 of the Decision, the Respondent took the view that Marshalling Duties were performed for a legitimate purpose involving important public interests. In *Face Magazine Ltd v The Privacy Commissioner for Personal Data*, AAB5/2012 (6 January 2014), it was held in §30 of the decision that:

> "As a matter of principle, it seems to us correct to recognize that public interest is one of the factors to consider as to whether or not the collection of personal data in an individual case is fair. Where there are competing considerations, it is a question of balancing the fairness in collecting personal data against the public interest in knowing the truth."

We agree that it is of vital public interest for the Government bureaux and departments to know the whereabouts of the LegCo members in the LegCo Complex, in particular, when there were meetings. As mentioned, the express purpose of the Marshalling Duties was and is to acquire first-hand information about the progress of meetings and monitor the conduct of voting.

In general, the Government would be the promotor and proposer of a bill or motion, and would naturally try its best endeavour to ensure that the bill or motion can be passed. Under Article 62 of the Basic Law:

> "The Government of the Hong Kong Special Administrative Region shall exercise the following powers and functions:
> ...
> (5) To draft and introduce bills, motions and subordinate legislation; and
> (6) To designate officials to sit in on the meetings of the Legislative Council and to speak on behalf of the government."

On the other hand, as stated in §3.43 of *A Companion to the history, rules and practices of the Legislative Council of the Hong Kong Special Administrative Region*:

> "Upon election, Members are returned to the Legislative Council as representatives of their respective constituencies. They have the duty to participate in the work of the Council so that the Legislative Council may perform the powers and functions given to it under the Basic Law. The responsibilities of a Member are wide-ranging. Members are required to observe the rules of order in the Council and committees as set out in the Rules of Procedure. Apart from ***attending meetings of the Council and taking part in the enactment process of laws***, in debates on public policies, and in raising questions to the Government, Members are also expected to take an active role in committees, to handle public complaints under the Redress System and to make themselves available to their constituents..." (emphasis added)

Updated information about the whereabouts of the LegCo members would assist the Government in assessing whether a quorum of meeting is likely to be present, or how likely a bill or motion can be passed. Based on such

information, the Government may then decide on what further lobbying work or other steps may or should be taken. It is correct that individual LegCo members have no duty to assist the Government. But this is beside the point. The point is it is clearly a matter of important public interest for the Government to be able to assess the situation as best as it can in relation to matters transacted in the LegCo.

72. In §23(iii) of the Decision, the Respondent took into account the fact that the personal data collected was merely the whereabouts of the LegCo members in public areas of the LegCo Complex, and was not sensitive personal information. We agree. Objectively speaking, the degree of confidentiality, or level of expectation of privacy, must be low.

73. The Respondent also mentioned in its written submissions that the public officers carried out the Marshalling Duties by observing the whereabouts of the LegCo members without interrupting them in any way. We agree that the means of collecting personal data in these circumstances was non-intrusive. This is relevant in considering the question of fairness.

74. For these reasons, we agree that there was no breach of DPP1(2). We, therefore, reject Ground 4.

J. GROUND 5

75. Under Ground 5, the Appellant claims that the Respondent erred in holding that there was no breach of DPP1(1) on the ground that there was no relationship between recording the whereabouts of the LegCo members and the purpose of the Marshalling Duties and that the data collected was in any

event excessive.

76. DPP1(1) provides that:

> "Personal data shall not be collected unless –
> (a) the data is collected for a lawful purpose directly related to a function or activity of the data user who is to use the data;
> (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and
> (c) the data is adequate but not excessive in relation to that purpose."

77. The Respondent explained why it concluded that there was no breach of DPP1(1) in §§17-18 of the Decision. In particular, in §18, it took the view that the Government was under a duty to procure the timely consideration of bills and motions by the LegCo; and the purpose of the Marshalling Duties was to assist the Government officials to monitor the situation of the LegCo in order to discharge such duty. Hence, it was a proper and lawful purpose. Furthermore, the public officers merely recorded the whereabouts of the LegCo members so that the Government officials would know whether there were sufficient members attending the meetings, considering the bills or motions and voting on the same. The personal data collected was related to the said purpose and not excessive.

78. The Respondent submitted in its written submissions that the purpose of Marshalling Duties was threefold: to acquire first-hand information about the progress of meeting; to monitor the conduct of voting; and to obtain a better grasp of members' attendance as a whole. As explained above, we agree that the Marshalling Duties served a legitimate purpose in the public interest. In particular, the Marshalling Duties were concerned with the

Government's discharge of its constitutional powers and duties. We have no doubt that the personal data (i.e. the whereabouts of the LegCo members) was collected for a lawful purpose directly related to a function of the Government, and that the collection of such data was necessary for or directly related to that purpose.

79. The Appellant claimed that the Government could simply record the number of persons inside the chamber/conference room from the public galleries, or call the individual LegCo members directly by phone to ascertain whether they would attend the meetings. However, we tend to think that in some circumstances, it might not be sufficient to count the number of members inside the chamber/conference room. To know and track the whereabouts of the individual members would enable the relevant Government officials to know, for example, whether a quorum of meeting would likely to be present, and to contact them timeously if it became necessary. To call the individual members directly by phone would be disturbing and may not be successful. In view of these practical problems and potential difficulties about the alternative means suggested by the Appellant, it cannot be said that the means adopted by the Government was unnecessary or excessive.

80. As to the particulars of the personal data collected, it only included the name of the individual LegCo members and whether they were in certain public areas of the LegCo Complex. It contained the bare essential information concerning the whereabouts of the LegCo members in the LegCo Complex. It was not excessive.

81. For these reasons, we agree that there was no breach of DPP1(1).

Hence, we reject Ground 5.

K. GROUND 6

82. Under Ground 6, the Appellant claims that the Respondent erred in holding that there was no breach of DPP5 and DPP 6 on the ground that the relevant Government bureaux and departments merely stated that they did not hold any personal data of the LegCo members. It appears that the Appellant has conflated DPP5 and DPP6, and has failed to draw any distinction between the two. We take the view that it is necessary to consider them separately. As stated at the outset, the members of this Board are unable to reach a consensus as to whether there was a breach of DPP5. What follows (insofar they concern DDP5) represent the views of the majority and the word "we" should be construed accordingly.

83. DDP5 provides that:

> "All practicable steps shall be taken to ensure that a person can –
> (a) ascertain a data user's policies and practices in relation to personal data;
> (b) be informed of the kind of personal data held by a data user;
> (c) be informed of the main purposes for which personal data held by a data user is or is to be used."

84. DPP6 provides that:

> "A data subject shall be entitled to –
>
> (a) ascertain whether a data user holds personal data of which he

is the data subject;

(b) request access to personal data –
  (i) within a reasonable time;
  (ii) at a free, if any, that is not excessive;
  (iii) in a reasonable manner; and
  (iv) in a form that is intelligible;

(c) be given reasons if a request referred to in paragraph (b) is refused;

(d) object to a refusal referred to in paragraph (c);

(e) request the correction of personal data;

(f) be given reasons if a request referred to in paragraph (e) is refused; and

(g) object to a refusal referred to in paragraph (f)."

85. The Respondent explained why it took the view that there was no breach of DPP5 in §36 of the Decision, and why there was no breach of DPP6 in §37 of the Decision.

86. The purpose of DPP5 is to require any person who collects personal data to be open and transparent about its personal data policies and practices. It is not concerned with any specific request or individual. In §36 of the Decision, the Respondent referred to the 2013 Press Release (as mentioned in paragraphs 2 and 3 above) and the communications between the Administration Wing and the LCC in 2017.

87. *Personal Data (Privacy) Law in Hong Kong – A Practical Guide on Compliance* (2016), §9.2, p. 176, states that:

> "Although the obligation imposed under DPP5 is not an absolute one insofar as it only requires a data user to take all reasonably practicable steps to comply with it, the Commissioner regards it as important for a data user who engages in regular acts or practices that involve the collection of substantial amount of personal data in the course of its business or performance of its activities or

functions, to make known and be transparent about its personal data policies and practices. Good governance dictates that organizational data users, such as government departments or corporations take heed of increasing public concern to ensure that data subjects' personal data privacy is properly protected by following a set of privacy policies or practices that is made generally available. In AAB No. 15/2000, the Commissioner's decision to issue an enforcement notice on implementing a privacy policy statement in compliance with DPP5 against a regulatory body whose daily operation involves the collection of sensitive personal data from general public was upheld by the AAB."

88. In *Data Protection Law in Asia* (2nd ed.), §5.059, it is stated that:

"This principle provides for openness by data users about the kinds of personal data they hold and the main purposes for which personal data are used."

89. In *LT v Privacy Commissioner for Personal Data*, AAB233/2013, § 25, it was held that the requirement in DPP5 is not specific to any individual.

90. It is necessary to bear the following points in mind. First, DPP5 does not impose any absolute duty; it requires a data user to take reasonable practicable steps. Second, DPP5 does not require steps to be taken in any particular form. Third, in deciding whether there was a breach of DPP5, one should consider the state of affairs as at the time of the Appellant's complaint.

91. In this case, DPP5 requires the Government to take reasonable practicable steps to ensure that a person can ascertain its policies and practices in relation to the collection of personal data in the course of Marshalling Duties. In particular, it shall take reasonable practicable steps to ensure that a person can be informed of the kind of personal data held by a data user and

the main purpose for which personal data held by it is or is to be used in the context of carrying out Marshalling Duties.

92. To begin with, in the 2013 Press Release, in answering specific questions raised about the Marshalling Duties, the Government had explained that the duties of public officers would include acquiring first-hand information about the conduct of meetings, including LegCo members' attendance and the conduct of voting. Information about LegCo members' attendance would necessarily involve their whereabouts in the LegCo Complex. The Government also explained that such information would be used to assist the SoDs and DoBs to contact LegCo Members, canvassing their views, taking note of their voting preferences, and providing them with detailed explanations. The Government's answers seem to have described, in general terms, the practice of the Marshalling Duties, its purposes and the nature of the personal data held by it. They were published as a press release. Hence, the Government had ensured that its explanations in this respect would be in the public domain. However, we are not satisfied that the 2013 Press Release, by itself, would satisfy DPP5. In particular, there was no reference to any policy in relation to personal data; the PDPO or DPP was not mentioned at all.

93. Having said that, in the communications between the Administration Wing and the LCC in 2017 as described in detail in paragraphs 5 to 9 above, the Government provided further and more detailed information about the Marshalling Duties. In the letter dated 19 June 2017, the Director of Administration stated expressly that "The Government will observe the provisions of the Personal Data (Privacy) Ordinance (Cap. 486) and follow the Data Protection Principles as stipulated in the Ordinance." Under DPP5, a general statement of policy which expresses a data user's overall commitment

in protecting the privacy interests of the individual would be sufficient (*Personal Data (Privacy) Law in Hong Kong – A Practical Guide on Compliance* (2016), §9.7 at p. 177). The kind of personal data held by the Government, and the main purpose for which it would be used had been clearly stated as it provided, *inter alia*, that the public officers would "gather information regarding the presence of Members in the Chambers/Conference Room or LegCo Complex, with a view to facilitating the SoDs, DoBs or senior echelon in liasing with Members where appropriate". Insofar as the practice was concerned, it stated, *inter alia*, that "Such information is transient in nature and will continuously be updated when performing the marshalling duties. There is no operation need to keep such information afterwards." It also provided that "When public officers perform marshalling duties in the LegCo Complex, they are expected to be discreet and to fully comply with the rules of the LegCo Complex, and to ensure that meetings and the activities of Members and other members of the public in the LegCo Complex will not be affected."

94. In the letter dated 6 July 2017, the Director of Administration added that "While there is no standard practice, it is quite common that some public officers will stay in the public areas of the LegCo Complex to gather information regarding the presence of Members in the Chamber/Conference Room or the LegCo Complex and pass such information to the subject officer(s) via walkie-talkies or instant messaging tools. Such information will then be consolidated onto a whiteboard or on a laptop so that SoDs, DoBs or the senior echelon will have a better grasp of Members' attendance as a whole." It also stated that the information collected "will not be kept for purposes other than the above operational need, and will be erased by all practicable means immediately after the marshalling exercises." In the second

last paragraph, it was reiterated that "the Government respects personal data privacy and is committed to implementing and complying with the Data Protection Principles and relevant provisions under the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO)…."

95. The LCC is an independent body consisting of the President and members of the LegCo responsible for overseeing the LegCo Secretariat. As shown by the relevant communications mentioned above, the LCC was the means of communication between the Administration Wing and the LegCo members in this respect. In the letter dated 31 May 2017, the secretary to the LCC stated expressly that she had been directed by the LCC to raise various concerns and queries with the Administration Wing. It is reasonably clear that the LegCo members were aware that this issue had been discussed between the LCC and the Administration Wing. At the House Committee of the LegCo held on 11 May 2018, Ms Claudia Mo, a LegCo member, said that "the Legislative Council Commission ("LCC") had discussed relevant issues for several times". The Appellant was present at that meeting. In his earlier letter to the Acting Director of Administration dated 11 September 2017, he stated that he had been informed that various queries raised by him and 6 other LegCo members by letter dated 8 May 2017 had been referred to the LCC; and he intended to follow up the matter. The Appellant had not complained that he was unaware of the communications between the Administration Wing and the LCC. Nor had he complained that the LCC was not an effective means of communication between the LegCo members and the Administration Wing on this issue. In the circumstances, we take the view that the Administration Wing had taken reasonably practicable steps to effectively communicate the requisite information to the LegCo Members.

96. It may be argued that the Administration Wing could have informed

the LegCo members of the requisite information individually one by one, and that this would be a more effective means. However, under DPP5, the data user is not obliged to take the best possible means to inform the persons concerned the requisite information. Furthermore, insofar as the Appellant is concerned, in fact, in reply to the Appellant's letter dated 11 September 2017, the Director of Administration had repeated the requisite information in her letter dated 16 October 2017. For the purpose of DPP5, it does not matter whether the Appellant had actually received that letter.

97. It appears that the communications between the Administration Wing and the LCC in 2017 are not in the public domain. Although DPP5 provides that all practicable steps shall be taken to ensure that "a person" can be informed of various information, we are inclined to the view that DPP5 only requires the requisite information be made generally available to those persons who may be affected i.e. those persons whose personal data may be used or collected. In (*Personal Data (Privacy) Law in Hong Kong – A Practical Guide on Compliance* (2016), §9.8 at p. 177, it is stated that "The PPS once in place has to be effectively communicated to the persons affected."; and in §9.4, p. 177, it is stated that "The PPS should be presented in an easily understandable and readable (if in writing) manner, taking into account factors such as content, language and font size used. Data users should avoid using technical or legalistic terms that may not be easily understood by the data subjects." It cannot be the purpose of DPP5 to impose a duty on the data user to make the requisite information available to persons whose personal data will not be potentially affected or involved at all. In this case, the person affected were the LegCo members. For reasons explained above, we take the view that the Administration Wing had taken reasonably practicable steps to make the requisite information available to the LegCo Members via the said

communications with the LCC. In any event, it was not the Appellant's complaint that there was a violation of DPP5 because the Administration Wing had not made the requisite information available to any person other than the LegCo members e.g. an ordinary member of the public.

98. It is correct that the requisite information was only provided by the Administration Wing in response to enquiries made by the LCC. It might be argued that the Administration Wing could have acted more proactively. However, this is quite beside the point. The important objective fact is that, by the time the Appellant made the Complaint, the Administration Wing had provided the requisite information to the LegCo members via the LCC.

99. In the circumstances, we agree with the Respondent's conclusion that, at the time of the Appellant's complaint, there was a sufficient degree of openness and transparency regarding the personal data policies and practices in relation to the Marshalling Duties; and hence, there was no breach of DPP5.

100. Turing to the Appellant's complaint about breach of DPP6, in §37 of the Decision, the Respondent stated that, at the time of the Decision, there was no information that any LegCo member had made a data access request to the Administration Wing or any other Government departments. In any event, even if there was any such request, it was possible that the Government departments would no longer be in possession of such data because it should have been erased on a daily basis upon completion of the Marshalling Duties for that particular day. If that was the case, it would be sufficient for the Administration Wing or the Government departments to reply that they did not hold the personal data of that particular member.

101. In the Complaint, the Appellant had not suggested that he had made

any data access request. On the evidence, in the Appellant's letter to the Administration Wing dated 11 September 2017, although he raised various questions, he had not asked whether the Administration Wing held any of his personal data. In the circumstances, the Respondent's view as stated in §37 of the Decision was factually correct.

102. For these reasons, we agreed that there was no breach of DPP5 or 6.

L. CONCLUSION AND ORDER

103. We need to stress that this appeal is not a review of the merits of the Marshalling Duties, which may well involve controversial political considerations. In accordance with the statutory duty of the Administrative Appeals Board, this appeal is only concerned with the correctness of the Decision made by the Respondent in response to the Appellant's Complaint.

104. For the above reasons, we unanimously reject the Appellant's first to fifth grounds of appeal, and by majority reject his sixth ground of appeal. The appeal is, therefore, dismissed. In the absence of any application by any party, we shall make no order as to costs.

Mr Chan Kam-man: (dissenting)

M. INTRODUCTION

105. I have had the advantage of reading in draft the joint judgment of the Chairman Mr Paul Lam Ting-kwok, SC and the member Ms Christine Yung Wai-chi. Save as set out below, I gratefully adopt the detailed account of

the primary facts and background of this case stated therein. I shall also continue to use the same abbreviations.

106. With great respect, I have reached a different conclusion in relation to the question as to whether there was a breach of DPP5 under Ground 6. Save and except for this, I respectfully concur in everything decided by the other members of this Board.

N. BREACH OF DPP5 UNDER GROUND 6

107. By way of background, the Appellant lodged the Complaint with the Respondent and requested the Respondent to investigate, *inter alia*, the Administration Wing and the LegCo Secretariat's alleged breaches of each and every one of the DPP in the PDPO (namely DPP1 to DPP6).

108. With particular regard to DPP5, in §36 of the Decision, the Respondent:-

(i) acknowledged that a data user shall take all reasonably practicable steps to make known to the public its policies and practices in relation to personal data and to explain the kind of personal data held by it and the purposes for which the personal data is or is to be used; and

(ii) referred to and relied on the 2013 Press Release and the communications between the Administration Wing and the LCC in 2017 to find that there is a "certain degree of transparency" in the deployment of Marshalling Duties by public officers, and hence no breach of DPP5.

109. As such, pursuant to s.39(2)(d) of the PDPO and paragraph 8(e) of the Complaint Handling Policy, the Respondent decided not to investigate the Appellant's complaint further in respect of the alleged breach of DPP5 by the Administration Wing.

110. In the present appeal, under Ground 6, the Appellant claims, *inter alia*, that the Respondent erred in holding that there was no breach of DPP5.

111. To explain my reasoning, it is pertinent to set out DPP5 in full as follows:

> **Principle 5 – Information to be generally available**
>
> "All practicable steps shall be taken to ensure that a person can –
>
> (d) ascertain a data user's policies and practices in relation to personal data;
>
> (e) be informed of the kind of personal data held by a data user;
>
> (f) be informed of the main purposes for which personal data held by a data user is or is to be used."

(a) The 2013 Press Release

112. With regard to the Respondent's purported reliance on the 2013 Press Release, there is no dispute that it was in public domain. However, it is plain that the 2013 Press Release merely set out the background, purpose and details of the Marshalling Duties. There was simply no reference to the Government's collection of any personal data of the LegCo members through the Marshalling Duties, the kind of personal data collected or held by the Government and the main purposes for using the personal data (as required

under DPP5(b) and (c)), not to mention the Government's policies and practices in relation to the personal data (as required under DPP5(a)). As such, although the Government might have described in general terms the purpose and nature of the Marshalling Duties, it may seem far-fetched to contend that the 2013 Press Release has contained the essential information as required by DPP5.

113. In particular, in my view, the general description of the Marshalling Duties in the 2013 Press Release that "*other public officers (including other politically appointed officials and civil servants) may need to assist and support SoDs and DoBs. Their specific duties include assisting SoDs and DoBs in contacting Members, canvassing Members' views, taking note of their voting preferences, providing Members with detailed explanations and further information when necessary, as well as acquiring first-hand information about the conduct of meetings, including the content of discussions, Members' attendance and the conduct of voting, so as to report to SoDs and DoBs*" does not necessarily involve, and indeed could hardly associate with, collection of the personal data about the members' whereabouts ***"outside"*** the chamber/conference room.

114. I therefore consider that the 2013 Press Release does not contain the essential information as required under DPP5. As such, the Government could not rely upon the 2013 Press Release for its purported compliance with DPP5.

115. For the sake of completeness, even if the 2013 Press Release was to contain the information as required by DPP5, the next issue would be whether the Government has taken ***all*** reasonably practicable steps to ensure that any person (especially all the LegCo members) can ascertain and be informed of

the relevant essential information.

116. As rightly acknowledged by the Respondent in §36 of the Decision, a data user shall take all reasonably practicable steps to make known to the public its policies and practices in relation to personal data and to explain the kind of personal data held by it and the purposes for which the personal data is or is to be used. Such view is indeed echoed by the Respondent's own publication, *Personal Data (Privacy) Law in Hong Kong – A Practical Guide on Compliance* (supra.), at §9.2 which states, *inter alia*, that "*the Commissioner regards it as being of absolute importance for a data user who engages in acts or practices that involve regular collection of personal data in the course of its business or performance of its activities or functions* ***to make known and be transparent about its personal data policies and practices****. Good governance dictates that organizational data users,* ***such as government departments*** *or corporations, take heed of the increasing public concern that data subjects' personal data privacy should be properly protected under a set of privacy policies and practices* ***that is made generally available***". *(emphasis added)*

117. There is no dispute that the Administration Wing is one of the government departments. As such, the above guidance should be applicable to it. It is therefore incumbent upon the Administration Wing, as a data user, to make known and be transparent about its personal data policies and practices and make them generally available.

118. In the present case, soon after the Appellant became a member of the LegCo in October 2016, the Appellant has complained that he had not been informed of the details of the Marshalling Duties. The communications exchanged among the Appellant, the LCC/the LegCo Secretariat and the

Director of Administration/Administration Wing from May to December 2017 (as identified in paragraphs 6 to 13 of the joint judgment) evidence that not only the Appellant, but also the LCC, did not have much information about the details of Marshalling Duties, let alone the kind of personal data collected and/or held by the Government and the main purposes for using the relevant personal data. Although the 2013 Press Release was available in the public domain, the Government has not suggested, and there is also no or insufficient evidence as to, whether any (and if so, what) steps had been taken by the Government to bring the 2013 Press Release to the attention of the Appellant and other LegCo members when they started to serve their term in October 2016 (who might or might not be a member of LegCo at the time when the 2013 Press Release was issued) or that the LegCo members were told by the Government that the 2013 Press Release existed. This is, in my opinion, the least the Government could, and ought to, do as a data user under DPP5.

119. For instance, in ***Chung Agnes v Privacy Commissioner for Personal Data*** (unreported, AAB14/2006, 13 October 2006), a differently constituted panel of this Board held that an employer who failed to draw the attention of an employee employed in 2004 to an existing privacy policy statement issued in 2000 could be in breach of DPP5. In particular, it was held at §38 and §39 that:-

> "38. In relation to the Circular, the Academy confirmed that it was distributed to its staff in April 2000. The Appellant commenced her employment in June 2004. The Academy has not suggested that a copy of the Circular had been given to the Appellant when she started employment, or that she was told that such a Circular existed or how to access it. As noted above, the Appellant denied knowledge of the existence or content of the Circular.
>
> 39. In the circumstances, in so far as the Academy seeks to justify

> the action of Mr Chok by reference to this Circular, there may be reasons to think that Principle 5(a) might not have been complied with."

120. I cannot see how the present case can be meaningfully distinguished from the case of ***Chung Agnes*** (*supra.*). This reinforces the view that the Director of Administration similarly had a duty to give a copy of the 2013 Press Release to all the members of the present LegCo or at least tell them that the 2013 Press Release existed or how to access it when they started to serve as such in about October 2016. In the circumstances, I am not convinced that the Director of Administration may justify its purported compliance of DPP5 by reference to the mere existence of the 2013 Press Release only.

(b) The correspondences between the Administration Wing/Director of Administration and the LCC in 2017

121. With regard to the Respondent's purported reliance on the communications between the Administration Wing/Director of Administration and the LCC in 2017 (the **"2017 Correspondences"**), even assuming that the said correspondences have contained the essential information as required under DPP5, it was doubtful as to whether the Director of Administration has discharged its duty to take all reasonably practicable steps to ensure that any person (including ***all*** the LegCo members) can be informed of such information by virtue of the relevant correspondences, for the following reasons.

122. First, it is plain and obvious that DPP5 requires data users to ensure that "a person", not just the affected parties, can ascertain their policies and practices in relation to personal data and be informed of other essential information as required by DPP5.

123. To begin with, the title of DPP5 (namely "Information to be ***generally available***") speaks for itself. It clearly indicates that the relevant information should be made available to the general public. In addition, and more importantly, the reference to "a person" in DPP5 may be contrasted with the references to the "data subject" in DPP1(3), DPP3(1), DPP3(2), DPP3(3) and DPP6. As such, it is beyond doubt that DPP5 requires that any person (including not only the affected parties/the data subjects but also any member of the public) can ascertain the data users' policies and practices in relation to personal data and be informed of other essential information as required under DPP5. This is indeed rightly acknowledged by the Respondent in §36 of the Decision (see paragraph 108(i) hereinabove). Furthermore, such contention is consistent with the Respondent's own publication (see paragraphs 116 and 117 hereinabove) and the commentary in *Data Protection Law in Asia* (*supra.*), as referred to in paragraph 88 of the joint judgment:

> "This principle provides for ***openness by data users*** about the kinds of personal data they hold and the main purposes for which personal data are used." *(emphasis added)*

124. In the present case, however, there is no evidence suggesting that the 2017 Correspondences were in the public domain at the time of the Complaint. It follows that the "private" correspondences between the Administration Wing/Director of Administration and the LCC cannot assist the Director of Administration in discharging its duties under DPP5, which, as explained above, provides for openness and transparency by data users about their personal data policies and practices to the general public.

125. Second, in *Personal Data (Privacy) Law in Hong Kong – A Practical Guide on Compliance* (*supra.*), the learned authors suggested at §9.3 and §9.7

(p.176 to 177) that, under DPP5, a typical privacy policy statement, generally known as PPS, may contain (i) a statement of policy which expresses a data user's overall commitment to protecting the privacy interests of the individuals; and (ii) a statement of practices which include the kind of personal data held by the data user and the purposes for which it uses the data. The learned authors added at §9.8 (p.178) that such PPS, once in place, "*has to be effectively communicated to the* ***persons affected***". In this regard, I am of the considered opinion that the data user's such effective communication to the persons affected should and ought to be ***in addition to***, instead of in substitution of, the data user's making the relevant PPS known to any person (to the public), which is always required under DPP5 (see paragraphs 116, 117, 122 and 123 hereinabove). In other words, the data user cannot seek to justify its compliance with DPP5 by merely communicating the PPS (or the essential information required by DPP5) to the persons affected, without making the same known to the public.

126. Even if (i) we are to focus on the communication from the Director of Administration (as a data user) to all LegCo members (as the persons affected) *only* (and to put aside the requirement of making known to the public); and (ii) taking the Director of Administration's case to the highest to assume that the 2017 Correspondences constitute or evince the existence of a privacy policy statement or contain all the information as required under DPP5, I do not see why it would not be a reasonably practicable step for the Director of Administration to simply inform the very limited number of the members of LegCo of the same in writing, which is, in my opinion, the most effective (and indeed a very easy and straightforward) way of communication. One should bear in mind that, as expressly required by DPP5, data users shall take ***"all"*** reasonably practicable steps to ***ensure*** that any person (especially all the persons affected) can ascertain and be informed of the relevant essential

information. Therefore, unless the Director of Administration can justify that sending the relevant information contained in the 2017 Correspondences to all the LegCo members is not one of the reasonably practicable steps (which I am not so convinced), they should be under a duty to take such step. However, there is no or insufficient evidence to show that the Director of Administration has done so.

127. Third, DPP5 imposes a *positive* duty on data users to take all reasonably practicable steps *to ensure* that anyone (including the persons affected/the data subjects) would be able to ascertain their policies and practices in relation to personal data, and be informed of the kind of personal data collected or held by them and the main purposes for using the personal data. In short, it is the *positive* duty of the data users to bring the essential information required by DPP5 to the attention of the data subjects. It is *not* the other way round. It should *not* be the intent of DPP5 that it would be for the data subjects to find out the essential information from the data users. It has been held in the case of ***Chung Agnes*** (*supra.*) that even with a formal privacy policy statement containing all the information as required under DPP5 in place, its mere existence (without the data user taking all practicable steps to bring the same to the attention of the data subject) is not sufficient for the data user's discharge of its duty under DPP5. Therefore, it would be rather implausible to suggest that such *positive* duty could be discharged by the Director of Administration through merely responding to the LCC's enquiries about the Marshalling Duties in the correspondences. As can be seen from the chain of correspondences itself, both letters on 19 June 2017 and 6 July 2017 were only issued by the Director of Administration in response to the letters of enquiries from the LCC dated 31 May 2017 and 26 June 2017. In other words, the Director of Administration has not taken the initiative or any positive step (which they ought to take) to comply with DPP5.

I do not consider that it is sufficient or satisfactory for a data user (especially, in the Respondent's words quoted above, as a government department *who should take heed of the increasing public concern that data subjects' personal data privacy should be properly protected under a set of privacy policies and practices that is made generally available*) to sit back, put their personal data policies and practices and other essential information required by DPP5 into a secret cabinet and only disclose the same to data subjects or persons affected bits and pieces upon the latter's requests. Accordingly, I am afraid that the Respondent can hardly rely on the 2017 Correspondences (more accurately, the responses issued by the Director of Administration to answer the enquiries raised by the LCC relating to personal data) to find that the Director of Administration had discharged its duty under DPP5.

128. Fourth, and more significantly, as a matter of both fact and law, the LCC cannot be regarded as a representative of ***all*** the LegCo members for reasons set out below:-

(i) In the 2017 Correspondences, the LCC was merely the means of communication between the Administration Wing and the 7 LegCo members who issued the joint letter dated 8 May 2017 (instead of ***all*** LegCo members).

(ii) There is no or insufficient evidence showing that the LCC was authorized or appointed to be, or had otherwise adopted the role as, a representative of ***all*** the LegCo members for communication with the Government. In this regard, it is noted that pursuant to section 9 of the Legislative Council Commission Ordinance (Cap. 443), it is not a statutory function of the LCC to act as a means of communication between the LegCo members and the

Government. In addition, as a matter of fact, from 2016 to 2019, the LCC is only consisted of ***13*** LegCo members.

(iii) Last but not least, there is no evidence whatsoever suggesting that the LCC had informed ***all*** LegCo members of the matters raised in the 2017 Correspondences or that all the LegCo members were aware of the same or made aware of the same by the LCC.

Having considered the above matters, I do not accept that the LCC was a representative of ***all*** the LegCo members for communication with the Government or served as the means of communication between the Government and all the LegCo members in this respect. I consider that this is a salient factual issue which needs to be resolved for the purpose of determination of this appeal, irrespective of whether the Appellant has made any specific complaint in this regard.

129. All in all, I am of the view that the mere fact that the Director of Administration communicated with the LCC would not assist its discharge of its duty vis-à-vis all the affected parties (i.e. ***all*** the LegCo members), let alone "any person" as required by DPP5.

O. CONCLUSION

130. In the circumstances, in so far as the Government or the Respondent purports to rely on the 2013 Press Release and/or the 2017 Correspondences in support of the Government's compliance with DPP5, there may be reasons to think that DPP5 might not have not been duly complied with.

131. For the reasons stated above, I am of the view that there are potential non-compliances with DPP5 which appear to warrant further investigation. Therefore, I am unable to agree with the Respondent's decision not to investigate the Appellant's complaint further in respect of the potential breach of DPP5. It follows that I would allow the appeal to such limited extent.

(signed)
(Mr Paul Lam Ting-kwok, SC)
Chairman
Administrative Appeals Board

(signed)
(Mr Chan Kam-man)
Member
Administrative Appeals Board

(signed)
(Ms Christine Yung Wai-chi)
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