ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 12 OF 2011

BETWEEN

MICHAEL DAVID REEVE — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board

Date of Hearing: 7 December 2011

Date of handing down Written Decision with Reasons: 30 March 2012

DECISION

Note: references in this Decision to "AB" are references to the Appeal Bundle referred to in paragraph 15 herein.

THE FACTS

1. The Spiritual Assembly of the Baha'is of Hong Kong ("the Assembly") is a religious organization and is incorporated in Hong Kong by the Spiritual Assembly of the Baha'is of Hong Kong Incorporation Ordinance, Cap. 1143. It is the administrative body responsible for governing the affairs of the local Baha'i community.

2. The Appellant was a member of the Baha'i faith. In June 2008, he visited Hong Kong and met a fellow member of the faith, a young lady whom we shall refer to as "Miss SL". Two months later, in August 2008, the Appellant moved to Hong Kong, renewed his contact with Miss SL and met her family. He also began to have contact with other members of the Baha'i community in Hong Kong.

3. Soon afterwards, for reasons which we shall not go into (because it is unnecessary for the purposes of this appeal to do so), a dispute arose between the Appellant on the one hand and Miss SL and her family on the other, concerning whether the Appellant had behaved inappropriately and contrary to the Baha'i faith towards Miss SL and her family. The Assembly intervened in the matter. Various advice, guidance and warnings were given to the Appellant regarding his conduct towards Miss SL as well as to other members of the Hong Kong Baha'i community. The dispute, however, dragged on and, in April 2009, the Appellant's "administrative rights" were removed by the Assembly. In May 2009, the Appellant appealed to the Universal House of Justice ("the House"), the supreme international administrative body of the Baha'i Faith, against the removal of his rights (AB, 218).

4. In a letter dated 29th January 2010 addressed to the House ("the Letter") (AB, 233), the Assembly stated its version of the events leading to its decision to remove the Appellant's administrative rights and its reasons for doing so.

5. On 23rd June 2010, the Assembly received a Personal Data Access Request (DAR) from the Appellant requesting "everything relating to the data subject in correspondence from the Spiritual Assembly to all Baha'i institutions since August 2008 to date".

6. The Assembly initially refused to comply with the DAR, but subsequently relented. On 2nd December 2010, the Assembly wrote to the Appellant stating that it would accede to his request for access to his personal data and enclosed a copy of the Letter together with certain annexes referred to in the Letter (AB, 178).

7. Meanwhile, on 29th November 2010, the Assembly notified the Appellant that the House has advised that, on the basis of his established pattern of behavior and the actions he has taken, he no longer met the requirements of membership of the Baha'i faith and that, consequently, his name had been removed from the membership roll (AB, 177).

8. By a letter dated 30th December 2010 (AB, 179-84), the Appellant wrote to the Assembly disputing parts of the Letter and ended by saying "I expect that you will now write to the Universal House of Justice in order to make the necessary corrections to your letter of 29th January, 2010".

9. By an e-mail dated 2nd January 2011, the Appellant wrote to the Assembly reiterating some of the matters mentioned earlier in his letter of 30th December 2010 and raising further comments regarding the contents of the Letter.

10. On 10th January 2011, the Assembly advised the House of the aforesaid two pieces of correspondence received from the Appellant (viz. the letter dated 30th December 2010 and the e-mail dated 2nd January 2011) and attached copies of the same (AB, 282-4).

11. On 3rd March 2011, The Appellant lodged a complaint with the Respondent, the Privacy Commissioner for Personal Data ("the Commissioner"), regarding the Assembly's failure/refusal to correct his personal data pursuant to his request (AB, 174).

12. On 9th March 2011, the Appellant e-mailed the Assembly, referring to his letter dated 30th December 2010 and pointing out that the Assembly was in breach of the Personal Data (Privacy) Ordinance, Cap. 486 ("the Ordinance") in failing to correct the "false or misleading information" in the Letter (AB, 261).

13. The Assembly replied on 15th March 2011, saying that it did not believe that the personal data to which the Appellant's letter dated 30th December 2010 relates was inaccurate and would therefore have no additional comments to make to the House. The Assembly also denied being in breach of the Ordinance (AB, 261).

THE APPEAL

14. The Commissioner considered the Appellant's complaint and decided not to pursue it any further. The Appellant was so informed by a letter dated 29th April 2011 (AB, 288). The Appellant now appeals to this Board against the Commissioner's decision by way of an appeal lodged on 18th May 2011 (AB, 115).

15. At the hearing of this appeal, the Appellant appeared in person and the Commissioner was represented by counsel, Miss Carmen Tang. The Spiritual Assembly also made an appearance and was represented by its Secretary, Miss Meena Datwani and its Vice-Chairman, Mr. Victor Ali. None of the parties called any oral evidence. However, a bundle of documents relating to the appeal was submitted for our consideration in the form of an Appeal Bundle ("AB") which we received as evidence pursuant to section 21(1)(b) of the Administrative Appeal Boards Ordinance, Cap. 442. All parties made submissions on the various documents contained in the AB. In the course of the hearing, with the consent of all parties, we also received as evidence three annexes to the Letter (Annex E, F & M4) which had not been included in the AB.

16. The hearing of this appeal concluded on the same day it commenced, i.e. on 7th December 2011.

17. By letters dated 20th December 2011 and 30th December 2011, the Appellant applied to adduce further and additional documentary evidence in

support of his appeal. The documents which he sought to adduce were enclosed with the aforementioned letters. The Commissioner and the Assembly were then given the opportunity to make submissions in response to the Appellant's application and the Appellant was afforded the opportunity to reply. Due largely to intervening public holidays, this process took some time and it was not until 18th February 2012 that all submissions were completed. We handed down our written ruling on 13th March 2012, whereby we admitted some of the documents produced by the Appellant and rejected others.

THE RELEVANT STATUTORY PROVISIONS

18. The following statutory provisions in the Ordinance are relevant to this appeal:

Section 18 of the Ordinance provides:

(1) An individual, or a relevant person on behalf of an individual, may make a request-

(a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject;

(b) if the data user holds such data, to be supplied by the data user with a copy of such data.

Section 22 of the Ordinance provides:

(1) Subject to subsection (2), where-

(a) a copy of personal data has been supplied by a data user in compliance with a data access request; and

(b) the individual, or a relevant person on behalf of the individual, who is the data subject considers that the data are inaccurate,

then that individual or relevant person, as the case may be, may make a request that the data user make the necessary correction to the data.

Section 23 of the Ordinance provides:

(1) Subject to subsection (2) and section 24, a data user who is satisfied that personal data to which a data correction request relates are inaccurate shall, not later than 40 days after receiving the request-

(a) make the necessary correction to those data;

(b) supply the requestor with a copy of those data as so corrected; and

(c) subject to subsection (3), if-

(i) those data have been disclosed to a third party during the 12 months immediately preceding the day on which the correction is made; and

(ii) the data user has no reason to believe that the third party has ceased using those data for the purpose (including any directly related purpose) for which the data were disclosed to the third party,

take all practicable steps to supply the third party with a copy of those data as so corrected accompanied by a notice in writing stating the reasons for the correction.

Section 24 of the Ordinance provides:

(3) A data user may refuse to comply with section 23(1) in relation to a data correction request if-

(b) the data user is not satisfied that the personal data to which the request relates are inaccurate;

(d) the data user is not satisfied that the correction which is the subject of the request is accurate;

Section 25 of the Ordinance provides, inter alia, as follows:

(1) A data user who pursuant to section 24 refuses to comply with section 23(1) in relation to a data correction request shall, as soon as practicable but, in

any case, not later than 40 days after receiving the request, by notice in writing inform the requestor-

(a) of the refusal and the reasons for the refusal;.....

(2) Without prejudice to the generality of subsection (1), where-

(a) the personal data to which a data correction request relates are an expression of opinion; and

(b) the data user concerned is not satisfied that the opinion is inaccurate,

then the data user shall-

(i) make a note, whether annexed to that data or elsewhere-

(A) of the matters in respect of which the opinion is considered by the requestor to be inaccurate; and

(B) in such a way that those data cannot be used by a person (including the data user and a third party) without the note being drawn to the attention of, and being available for inspection by, that person; and

(ii) attach a copy of the note to the notice referred to in subsection (1) which relates to that request.

(3) In this section, "expression of opinion" includes an assertion of fact which-

(a) is unverifiable; or

(b) in all the circumstances of the case, is not practicable to verify.

Section 39 of the Ordinance provides, inter alia, as follows:

(2) The Commissioner may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case-

(a) the complaint, or a complaint of a substantially similar nature, has previously initiated an investigation as a result of which the Commissioner was of the opinion that there had been no contravention of a requirement under this Ordinance;

(b) the act or practice specified in the complaint is trivial;

(c) the complaint is frivolous or vexatious or is not made in good faith; or

(d) any investigation or further investigation is for any other reason unnecessary.

19. It is not in dispute that the Assembly was a "data user" who held "personal data" of the Appellant within the meaning of section 2(1) of the Ordinance. It is also not disputed that the Letter contained personal data of the Appellant which was sent to him by the Assembly pursuant to his data access request received on 23rd June 2010.

THE ISSUES & THE BOARD'S DECISION ON THE ISSUES

(A) Lateness In Responding To The DCR

20. The first issue which falls to be determined by us is whether the Appellant's letter dated 30th December 2010 was a data correction request (DCR) under section 22(1) of the Ordinance. Since the concluding words of the letter were in these terms, namely "I expect that you will now write to the Universal House of Justice in order to make the necessary corrections to your letter of 29th January, 2010", we are of the view that it *was* a DCR. Indeed, before us, Miss Tang, on behalf of the Commissioner, very properly conceded that it was.

21. The Assembly, however, failed to realize that the letter was a DCR until 9th March 2011 when the Appellant pointed out that, in not responding to the said letter of 30th December 2010, the Assembly was in breach of the Ordinance. The

Assembly then responded on the 15th of March 2011. By that time, it was already late in so doing by 15 days (see paragraphs 12 and 13, above).

22. The next issue for us to consider is what legal consequences flow from this breach? Does the Assembly's failure to respond to the DCR within the stipulated 40 day limit mean that it is precluded from refusing to accede to the request?

23. When a data user receives a DCR, it can respond either by acceding to the request (in accordance with section 23 of the Ordinance) or by refusing to do so (in accordance with section 24). If it fails or refuses to respond within the time limit stipulated in those sections (i.e. within 40 days from the date of receipt of the DCR), the Commissioner may issue an enforcement notice under section 50 of the Ordinance to compel it to do so. The Ordinance, however, is silent as to what the legal consequences are if a data user *does* respond but is late in doing so. This raises the question we posed in the paragraph above, viz. does this tardiness in responding mean that the data user is precluded from refusing to accede to the request? We think that had the legislature intended that the data user be precluded from refusing to accede to the DCR if he fails do so within the 40 day time limit, it would have expressly said so. There is no express provision in the statute to this effect. We hold, therefore, that the Spiritual Assembly is *not* so precluded despite being 15 days late in responding to the Appellant's DCR.

(B) The Role of The Commissioner In "Factual Dispute Cases"

24. The next issue for us to determine is this: when one reaches the stage where a data user has refused a data subject's request to correct his personal data on the ground that it (the data user) does not think that the data is inaccurate, what happens next? The parties have reached a deadlock. How is this impasse to be resolved? We would have thought that, in such a situation, it falls to the Commissioner to step in and assume the role of the adjudicator or umpire, i.e. the Commissioner has the power to investigate the matter and resolve the disagreement between the parties.

25. However, there is a previous decision of this Board which seems to suggest that this is *not* the position where the case involves serious factual disputes and conflicting testimonies in relation to the accuracy of the data (we shall, for convenience, refer to such cases as "the factual dispute cases"). The decision in question is Cheung Kin Wah v Privacy Commissioner for Personal Data, AAB No. 22/2000. In that case, the complainant made a DCR to his ex-employer regarding allegations of unsatisfactory performance against him in his letter of termination. The Board held that if an employee disputes the grounds of termination upon which his employment is terminated, he should seek redress, not through the office of the Commissioner, but through other legal channels, such as taking his case to the Labour Tribunal. It was further held (at p. 8) that sections 22, 23 and 24 of the Ordinance do *not* apply to the factual dispute cases. They only apply to cases where the personal data concerned is *obviously inaccurate*, e.g. where the data on the complainant's identity card and that of the data user's record is completely incompatible. It was stated that, in factual dispute cases, the only thing the Commissioner can do is to consider whether the data user has reasonable justifications not to accept the data correction request on inaccurate data....(p. 9).

In this type of cases, the Commissioner's scope of investigation is limited....When the Commissioner comes across disputable testimonies, due to the [limited] scope of his investigatory duties, the Commissioner is unable to make any factual finding on these disputes (at p. 10).

26. We have little doubt that the present case is similar in nature to the one dealt with by the Board in AAB No. 22/2000. If we were to follow that decision, that would be the end of the matter and we need proceed no further. This appeal will *have* to be dismissed. However, with respect to the Board which decided AAB No. 22/2000, we have reservations as to whether we should go as far as to hold that sections 22-24 of the Ordinance have no application at all to *any* factual dispute case. If the legislature had intended this to be the case, we think it would have expressly said so. It did not choose to do so. Let us consider, for example, this scenario: suppose the personal data record of a data subject states that his liabilities far exceed his assets and that he is seriously in debt. This is disputed. There is conflicting testimony about the state of the data subject's finances. The data subject then requests that the data user corrects his data. The data user refuses to do so. We cannot see why, in such a situation, the Commissioner should be absolutely precluded from stepping in and assuming the role of investigator and adjudicator of this dispute. We would have thought that, in such a situation, the Commissioner should have the jurisdiction to step in to resolve this conflict. He may of course decide not to do so in accordance with the provisions of section 39 (1) and (2) of the Ordinance. That, however, is another matter.

27. We think, therefore, that we should proceed to examine the Letter (AB, 233) and the Appellant's requests for the correction of the data contained therein.

These are those found in the Appellant's letter dated 30th December 2010 (AB, 179-84). There is also an e-mail dated 2nd January 2011 (AB, 185-7) in which the Appellant reiterated some of the matters he had mentioned in his letter dated 30th December 2010 and raised certain comments/observations regarding the contents of the Letter. We note the Appellant had *not* claimed that this e-mail was a DCR in his letter to the Assembly dated 9th March 2011 (AB, 261), but we shall examine it all the same to consider the effect (if any) of its contents.

(C) Anything "Obviously Inaccurate"?

28. Our first point of inquiry is whether there is anything in the Letter which is disputed by the Appellant and which is *obviously* inaccurate. This would be so if, for instance, the contents (or part of the contents) of the Letter are contradicted by contemporaneous documents.

29. The Appellant submitted that there is at least one such instance, which he referred to in his letter of 30th December 2010 (AB, 179, at 181) in the following terms: "The Assembly states that I was sent 'over 20 e-mails and calls to try and arrange a meeting', but that I 'refused to attend such meeting'. This is totally false and misleading, as it suggests I have no intention of meeting, after all. There are copies of 21 e-mails in Annex F [of the Letter], but they are from several different writers and only a few were addressed to me". The relevant passage in the Letter is to be found at the top of page 4 (AB, 236) and we shall hereinafter refer to it as "the said passage".

30. It was at this point that we noticed that Annex F was missing from the AB. We queried why Annex F was omitted from the AB and enquired from Miss Tang whether the Commissioner had Annex F available to him when he was considering the Appellant's complaint. Miss Tang could not immediately answer our queries and said the Commissioner required time to review his files before these queries could be answered. We allowed the Commissioner time to do this. However, we were informed by Miss Datwani from the Assembly that she had with her a copy of Annex F. Copies of this document were then made available to the Board and all other parties. With the consent of all parties, it was duly admitted as evidence in the appeal.

31. We have read Annex F, which, in our view, ought to be read together with a series of e-mails and SMS messages which we admitted as additional evidence pursuant to the Appellant's application subsequent to the hearing (see paragraph 15 of our Ruling). On a careful perusal of these two sets of correspondence, it became clear to us what had occurred. The picture which emerges from these sets of correspondence is this: All was well between Miss SL and the Appellant until on or about mid-September 2008, when Miss SL stopped responding to the Appellant's e-mails. Then came SMS messages from Miss SL informing the Appellant that she no longer wished to have anything to do with him and did not wish the Appellant to contact her again. In mid-December 2008, the Appellant consulted solicitors about the matter (AB, 206). His solicitors then wrote to Miss SL on 8th January 2009, making certain demands on behalf of the Appellant and threatening legal action if these were not met (see Annex E to the Letter).

32. Turning our attention, next, to Annex F, we could see that Miss SL and her mother must have then informed the Assembly of the solicitor's letter and Dr. David Palmer (an Auxilliary Board Member of the Baha'i Faith) and Mr. Tarrant Mahony (a counselor of the Faith) were called upon to mediate. We note that of the 21 e-mails contained in Annex F (which were dated from January 10th-19th 2009), 16 were communications between the Appellant and Dr. Palmer and/or Mr. Mahony. The gist of these communications reveals that Dr. Palmer and Mr. Mahony were suggesting a meeting with the Appellant to hear his side of the story and to see if a meeting may be arranged with Miss SL (on "neutral ground" as suggested by Mr. Mahony; see E-mail No. 9 of Annex F) to discuss the matter. The Appellant, on the other hand, had placed the matter in the hands of his lawyers (see E-mails Nos. 4 and 5 of Annex F) and wanted Miss SL to comply with his solicitors' demands as set out in their letter to Miss SL dated 8th January 2009 (Annex E to the Letter). The solicitors' demands were in the following terms:"...we hereby demand you to give us a written explanation as to why you alleged that you were being harassed by our client and on what basis you made such an allegation within the next seven days, *failing which legal proceedings may be instituted against you without further notice and legal costs and interests shall be borne by you.* Alternatively, we can arrange a conference between you and your client *at our law firm* at a mutually convenient time so that you can clarify such allegation. We hereby reserve all our client's rights" (Our emphasis). E-mail No. 15 of Annex F, incidentally, is also indicative of the Appellant's stance at the time.

33. In what appears to be his last communication by e-mail with the Appellant in Annex F (E-mail No. 19 in Annex F), Dr. Palmer (quite aptly) summarized the situation as follows: "Counselor Mahony has advised you of the

grave implications of the line of action you have chosen and advised you to drop it. At the same time, in order to spare [Miss SL] and [her mother] the stress and worry of your tactics, and to spare you from the serious consequences of your persisting to disobey the Institutions of the Faith, I offered to meet with you to arrange a meeting between you and [SL]. This would also have been....an opportunity for me to hear your side of the story and to consult on the best way to move forward for everyone concerned. Although [SL] agreed to me arranging such a meeting with you, after *I repeatedly telephoned and wrote to you by e-mail* (our emphasis) to offer to meet with you to arrange a meeting with [SL], you rebuffed all my offers to do so, insisting on her following your lawyers' demands. I take this to mean that you are not interested in meeting with me or in my arranging a meeting with [SL]. I respect your decision. In response to your lawyers' demands, [SL] is now preparing a written explanation of the events, which will be delivered to your lawyers' office. As per your request, I am e-mailing the address and directions to her".

34. In other words, whilst Mr. Mahony/Dr. Palmer suggested a neutral venue for a meeting between Miss SL and the Appellant, the Appellant's solicitors demanded that Miss SL comply with either of two alternatives: (1) to attend a meeting <u>at their offices</u>; or (2) to give a written explanation of why she had claimed to have been harassed by the Appellant. Ultimately, since the venue of the proposed meeting could not be agreed upon, Dr. Palmer advised Miss SL to comply with the latter alternative, i.e. to prepare a written explanation and she in fact did so. The letter of explanation which Miss SL wrote and sent to the Appellant's solicitors was dated 17th January 2009 and it set out in detail her version of the events regarding her contact with the Appellant (AB, 208).

35. The said passage in the Letter stated that, despite being sent over 20 e-mails *and calls* (our emphasis) by Dr. Palmer to try to arrange a meeting, the Appellant refused to attend any such meeting (AB, 236). On our perusal of Annex F, we find that, far from being contradicted by the contemporaneous documents, this statement is in fact *supported* by them.

36. Accordingly, we find that there was neither before the Commissioner, at the material time when he was considering the complaint, nor before this Board now, when we are considering this appeal, which indicates that the said passage was blatantly inaccurate and requires immediate correction. We therefore reject the Appellant's submission to this effect.

37. The Appellant also submitted that it should be abundantly clear that he never intended, and did not, threaten to take legal action against Miss SL as claimed by the Assembly at page 2 of the Letter (see AB, 234). This may well have been his subjective intention, but it is obvious from Annex E that he (through his solicitors) sent out a message to Miss SL that he *was* indeed threatening legal proceedings (see the relevant extract at paragraph 32 above). Quite apart from Annex E, he also did so in a letter dated 4th February 2009 to Miss SL (AB, 216-217), in which he claimed to have identified two instances of exaggeration, 15 instances of misleading statements and 15 fabrications in Miss SL's letter of explanation dated 17th January 2009 which, he stated, "adds up to perjury on a serious scale and is an indictable offence". He continued to say: "My lawyers advise me that, given all the suffering caused, and the undermining of my reputation in the eyes of those Baha'i institutions listed above, I have clear

grounds to take legal action against you on the basis of defamation of character. This is the position in which you stand at the moment". Although towards the end of the letter, there was an indication that he was prepared "to drop this matter", there was no suggestion that such preparedness was to be unconditional. We find that the letter, taken as a whole, could well be taken as tantamount to a threat of legal proceedings. E-mail No. 15 of Annex F also contains, at the end, a "warning" from the Appellant that "it should be made clear to Miss SL that things are likely to become much more difficult for her if she ignores this advice". We cannot, therefore, accept that it was abundantly clear that the Appellant made no threat of legal proceedings. On the contrary, it seems clear to us that legal proceedings were indeed threatened. We accordingly reject the Appellant's submission.

(D) Adequacy of The Commissioner's Reasons For His Decision

38. Another of the Appellant's grievances is that the Assembly had throughout adopted a dismissive, and often hostile, attitude towards him and thus had acted contrary to and in breach of the Baha'i Constitution. In this regard, we wish to make it quite clear that it is not the Board's function to resolve any dispute between the Appellant on the one hand and the Assembly and/or Miss SL on the other. It is also not within our jurisdiction to make any finding on whether the Assembly had acted appropriately and/or constitutionally towards the Appellant. We decline to do so in the clearest possible terms. The Board's sole function is to determine whether the Commissioner had acted correctly (or had erred, as the case may be) in deciding not to pursue the Appellant's complaint any further. We cannot do anything beyond that.

39. With this mind, we now proceed to consider the Appellant's next complaint against the conduct of the Assembly and that of the Commissioner. It is this: that the Assembly erred and treated him unfairly in that, when it decided to refuse his request for data correction on 15th March 2011, it did not analyze in detail each and every one of his requests (as contained in his letter dated 30th December 2010) and provide him with reasons for the refusal. To compound this error and unfairness, the Commissioner adopted more or less the same approach. Basically, the Commissioner adopted the "blanket approach" of stating (in his Reasons for not pursuing the Appellant's complaint any further, AB, 289, at 291) as follows: ".....the Assembly took further actions to attach your correspondence of 30th December 2010 and 2nd January 2011 in the records of the Assembly and sent your correspondence to the Universal House of Justice accordingly. On review of the personal data to which your correction request relates, I am satisfied that they are *mostly* (our emphasis) expressions of opinion and the actions taken by the Assembly to comply with your request is in compliance with section 25(2) of the Ordinance". In other words, it is the Appellant's submission that the Commissioner's reasons for his decision were inadequate.

40. The law on the adequacy of reasons given by a decision-maker is summarized by the Court of Final Appeal in Oriental Daily Publisher Ltd v. Commissioner for Television and Entertainment Licensing Authority [1998] 2 HKLRD 857, where the Court held that the reasons given would be adequate if they: "show that the Tribunal has addressed the substantial issues before it and shown why the Tribunal has come to its decision. There may not be any need however to address every single issue. But the reasons should show that the issues that arise for serious consideration have been considered. The reasons may not

require great elaboration and they may be brief. It is only when they are defective in substance that they should be considered inadequate. Ultimately, what are adequate reasons in the circumstances of a particular case has to be approached sensibly".

41. In Dr. Marta Stefan v. General Medical Council [1999] 1 WLR 1293, the Privy Council said at p. 1304 A-C :

"The extent and substance of the reasons must depend upon the circumstances. They need not be elaborate nor lengthy. But they should be such as to tell the parties in broad terms why the decision was reached. In many cases, as has already been indicated in the context of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, a very few sentences should suffice to give such explanation as is appropriate to the particular situation. "

42. To the same effect are Fu Ning Dispensary v. Pharmacy and Poisons Board [1995] 3 HKC 497, at 501 A-D and 503 I-504 A; Wong Chi Sung v. Chinese Medical Practitioners Board, HCAL 33/2003 at para. 47, and Dr. Ip Kay Lo v. Medical Council [1999] 1 HKLRD 491, at 504 A-J.

43. Although, ideally, the Commissioner's reasons could well have been expressed in somewhat greater detail, we are unable to say that he had failed to tell the Appellant in broad terms why the decision was reached. In our view, it is unnecessary in the circumstances of this case for him to (i) list out each and every one of the Appellant's requests for data correction and explain to the Appellant which of the data to which the Appellant's requests relate are, in his view,

expressions of opinion (bearing in mind the definition of "opinion" in section 25(3) of the Ordinance) and which of them are questions of fact and then (ii) to give reasons for his decision not to pursue these requests any further with the Assembly. This would have been an unduly tedious and painstaking task and failure to do so would not, in our view, invalidate the Commissioner's decision. The Court of Final Appeal has said that what are adequate reasons in the circumstances of a particular case has to be approached sensibly. We respectfully adopt this approach and we accordingly reject the Appellant's claim that the Commissioner's reasons were inadequate.

(E) Mostly Opinion And Partly Fact: Examples

44. We also agree with the Commissioner that the parts of the Letter to which the Appellant's DCR relate consist mostly (though not exclusively) of opinion. For example, under the heading "paragraph 4" (AB, 235) in the Letter, the Assembly stated that the purpose of the guidelines were "an attempt to offer a measure of protection to female members of the community whilst allowing the Appellant to participate in the community within specified parameters". This, in our view, represents the Assembly's opinion as to why issuing those guidelines was necessary and the purposes which they were intended to achieve.

45. An example of what, at first blush, looks like fact, but is actually "opinion" within the meaning of section 25(3) the Ordinance is this: In the fourth paragraph of the Letter (AB, 233), it was stated that the Appellant had behaved inappropriately towards Miss SL, causing her (and her family) much distress. It was also noted that he was very interested in young single women and even

children and asked for their contact details during Baha'i gatherings. The Appellant denies behaving inappropriately and, as far as the allegation about his interest in young single women and children is concerned, he stated in his letter of 30th December 2010 that exchanging contact details with friends is normal practice throughout the world and that it is totally untrue that he has asked children for their contact details (AB, 254). We think that this data is "opinion" within the definition of section 25(3) of the Ordinance. What is to be considered "inappropriate conduct" should, in the present context, be judged by what is considered such by the Baha'i community rather by the Commissioner. In other words, this is a matter which is best left to the Assembly and ultimately to the House. It is not a matter which the Commissioner can competently (in the words of section 25(3)) "verify". Nor, we might add, would it be something which, given the particular circumstances of this case, is *practicable* for him to verify. If the Commissioner were to investigate the matter and proceed to seek evidence from Miss SL and/or other young single female members and children from within the Baha'i community, we have little doubt that such a course would *not* benefit either the Appellant or the Baha'i community. On the contrary, it would only serve to plant the seeds of discord and disturb the harmony of a closely knitted religious group.

46. Another example similar to the one cited in the paragraph above is to be found under the headings "paragraph 10 and paragraph 14" of the Appellant's letter dated 30th December 2010 (AB, 181), where he refers to the Assembly's Letter at AB, 236 & 237 and where it appears that the parties were in disagreement as to whether or not the Appellant had breached certain of the Assembly's guidelines. What we have said in the paragraph above about Baha'i guidelines

being interpreted and judged according to Baha'i principles and standards equally applies and we shall not repeat ourselves here. There is also a remark by the Assembly, without giving any particulars, that the Appellant had "lied on several occasions" (under the heading "paragraph 10" AB, 236). This is quite clearly mere comment and/or opinion. The matter of "Family Day" at the farm mentioned at page 5 of the Letter (AB, 237), Annex L and in the series of e-mail correspondence between the Appellant, one David Leavitt and one Aqua Qiuqiu regarding the same matter also raises the question of whether Baha'i guidelines had been breached. The same considerations referred to above apply and, therefore, we think the question of whether the relevant Baha'i guidelines regarding "Family Day" have been breached is a matter of "opinion" as defined in section 25(3). It is a matter upon which the Baha'i institutions, rather than the Commissioner, should adjudicate.

47. A typical example of a DCR which relates to *fact* in the Letter is to be found at page 3 of the Letter (AB, 235) where the Assembly asserted that "[Miss SL's] refusal to see or speak to him was understandable even though subsequently the Assembly through its Secretary tried to facilitate a meeting in vain. Subsequently, Dr. Palmer also tried to facilitate such a meeting but Mr. Reeve preferred at that stage for his lawyers to deal with the matter". Under the heading "paragraph 3" of the Appellant's letter dated 30th December 2010 (AB, 182), the Appellant, in response to this assertion, claimed that Miss SL had defied the Assembly's request to meet with him for a reconciliation consultation and queried why she was not punished for it. These are conflicting assertions of fact which have not been investigated further by the Commissioner. Should we direct him to

do so? We shall return to deal with this question later on in the course of this Decision.

48. For now, we have simply cited just a few examples as illustrations of why we think the data to which the Appellant's DCR dated 30th December 2010 relates are partly fact and partly opinion. These examples are not meant to be exhaustive nor do we think there is any necessity, in the circumstances, to be exhaustive in going through the entire text of the DCR and the Letter.

(F) The E-mail Dated 2nd January 2011: Not A DCR

49. We turn now to consider the Appellant's e-mail dated 2nd January 2011. We immediately notice that, unlike his letter dated 30th December 2010, it is nowhere indicated in this e-mail that it was meant to be a DCR. On the contrary, it ends with these words: "I have no idea whether anyone will read *these notes*. If past form is anything to go by, they will be thrown into the shredder." (Our emphasis). We would have thought that any reasonable person reading this e-mail would think that it contains no more than the Appellant's notes containing his observations or comments on the contents of the Letter instead of being a DCR under section 22(1). Moreover, as pointed out earlier, the Appellant had not claimed that this e-mail was a DCR in his letter to the Assembly dated 9th March 2011 (AB, 261). We conclude, therefore, that this e-mail cannot be considered to be a request for data correction under section 22 of the Ordinance.

(G) Section 25(2) of The Ordinance: The "Remedial Measures"

50. Having thus carefully considered the Appellant's requests for data correction contained in his letter dated 30th December 2010, and having found that they relate partially to issues of fact and partially to "opinion", the next question we have to determine is whether, insofar as the ones which relate to "opinion" are concerned, the "remedial measures" taken by the Assembly comply with section 25(2) of the Ordinance. These measures consist of attaching the Appellant's letter dated 30th December 2010 and e-mail dated 2nd January 2011 to its records and forwarding these two documents to the House. Regrettably, we find ourselves unable to say that there has been strict and complete compliance with that sub-section. The Assembly did not make "a note, whether annexed to that data or elsewhere, of the matters in respect of which the opinion is considered by the requestor to be inaccurate and in such a way that those data cannot be used by a person (including the data user and a third party) without the note being drawn to the attention of, and being available for inspection by, that person", nor did it, in its notice of refusal to accede to the Appellant's DCR dated 15th March 2011 (AB, 261), attach a copy of the said note. Even if we were to take as liberal and as purposive an interpretation as we can of the sub-section and hold that attaching the Appellant's letter dated 30th December 2010 to its records and sending a copy of it to the House would constitute compliance with section 25(2)(b)(i), we are unable to see, try as we might, a compliance with section 25(2)(b)(ii).

51. We are bound to observe, however, that although sub-section 25(2) has not been strictly complied with to the letter, the "spirit" of the sub-section has nevertheless been fulfilled. The purpose of sub-section is to ensure that any person who has access to and views the personal data in question would be able to be aware of, not only the Assembly's opinion of the matters in dispute, but also the

Appellant's viewpoint as well. In our view, this purpose has indeed been achieved by the remedial measures taken by the Assembly.

(H) Section 39(2)(d): Investigation Or Further Investigation "Unnecessary"?

52. Nonetheless, we accept (as we must) that the law requires complete and not partial compliance with its statutory provisions. Being mindful of this, and in view of the fact that the personal data to which the Appellant's correction request relates consist partly, but not solely, of opinion, we have to proceed to consider the next (and final) issue arising from this appeal, viz. was the Commissioner correct in coming to the view that it was "unnecessary" to pursue the Appellant's complaint any further pursuant to section 39(2)(d) of the Ordinance?

53. An investigation (or further investigation) into a complaint may be considered "unnecessary" in a variety of circumstances. It may be due to the fact that, as was pointed out in AAB No. 22/2000, there is some other more appropriate forum to deal with the dispute between the parties. We were informed by both the Appellant and the Assembly that there is now an application by the Appellant to the House for reinstatement of his membership to the faith. Submissions have already been made by the Appellant to the House. This application is ongoing and its result is thus still pending. We have little doubt that, in the course of this application, all issues in dispute between the Appellant and the Assembly will be ventilated before the House who will then be called upon to rule on these issues. The Commissioner has also submitted that if the Appellant is aggrieved by the allegations levied against him by Miss SL and/or the Assembly, it is always open to him to commence proceedings in the courts of Hong Kong for defamation or for

a declaration that his rights under the Baha'i Constitution have been infringed. We see considerable force in this submission. Under these circumstances, it would be difficult for us to say that the Commissioner had fallen into error for taking the view that, since the same issues are being (or might be) litigated in other more appropriate forums, it was unnecessary to pursue the complaint any further.

54. An investigation (or further investigation) may also be unnecessary if it would or might result in more harm than good being done to all parties concerned. We have already alluded to what might happen if the Commissioner were to seek evidence from various young single female members or children of the Baha'i community regarding whether the Appellant had shown interest in them and had asked for their contact details. Here is one example of a scenario whereby the Commissioner might, quite justifiably, come to the view that such investigation could well be not only undesirable, but, in the circumstances, unnecessary.

55. In some instances, the request for data correction might, on the face of contemporaneous documents, be shown to be either unfounded or misconceived. In such circumstances, it would also be "unnecessary" to investigate (or further investigate) the refusal of the data user to accede to the request. Let us revisit the example which we raised in paragraph 47 above. A perusal of the contemporaneous documents (see our analysis of the same in paragraphs 31-35 above) reveals that, not only is there no indication in these documents that Miss SL defied the Assembly, on the contrary, it was upon the advice of Dr. Palmer (on behalf of the Assembly) that she did not meet with the Appellant, but instead provided a written explanation to the Appellant's solicitors in the form of her letter dated 17th January 2009 (AB, 208). At paragraph 47 above, we posed the

question whether we ought to direct the Commissioner to further investigate the conflicting versions of fact put forward by the Appellant and the Assembly. For the reasons given in this paragraph, we think it is unnecessary to do so and accordingly we answer the question in the negative.

56. Another example where a request for data correction ought not to be entertained where contemporaneous documents go against it is to be found under the heading "paragraph 6" of the letter dated 30th December 2010, where the Appellant's response to the Assembly's explanation of how the PSC and Dr. Palmer dealt with the dispute between himself and Miss SL was as follows (AB, 255): "[Miss SL] explained NOTHING to me. Her conduct is not that of a Baha'i. Has her name been deleted from the community records? Was she criticized for [not] contacting me?" With respect to the Appellant, it is clear that it was the opinion of the Assembly that Miss SL's initial reluctance to have any further contact with him was understandable (see AB, 235) and, when the matter progressed to the stage when Miss SL was threatened with legal proceedings and the Assembly had to intervene, we do not understand why the Appellant still maintained that Miss SL "explained nothing to him". It is an undeniable fact that she gave a very detailed explanation in her letter dated 17th January 2009 (AB, 208). In these circumstances, it would be quite unnecessary, we would have thought, for the Commissioner to further investigate the Assembly's refusal to accede to this request for data correction.

57. We wish once again to stress that we are not in any way attempting to adjudicate upon the dispute between Miss SL/the Assembly and the Appellant, nor to determine whether or not the Assembly had acted contrary to the Baha'i faith or

Constitution towards him. All we are saying here is that where a DCR is quite clearly and blatantly shown to be unmeritorious on the face of the contemporaneous documents, then it would, in our view, be unnecessary for the data user's refusal to accede to the DCR to be investigated further by the Commissioner.

58. Finally, we think we should also take into account the remedial measures taken by the Assembly. Although we have ruled that they do not strictly comply with section 25(2) of the Ordinance, we are, nevertheless, of the view that they do in fact result in the purpose of sub-section being achieved in practice, viz. that anyone having access to the data kept by the Assembly would certainly see not only the Assembly's version but that of the Appellant as well. This, we think, is yet another very good and strong reason for the Commissioner to conclude that it would be unnecessary to pursue the complaint further.

59. For the various reasons set out above, we find that the Commissioner had correctly exercised his decision under section 39(2)(d) not to further investigate the Appellant's complaint. We think that, in all the circumstances, the Commissioner was perfectly justified in concluding that it was unnecessary to do so.

SUMMARY AND CONCLUSION

60. In summary, therefore, our conclusions and findings on this appeal are as follows:

(a) The Appellant's letter dated 30th December 2010 was a data correction request under section 22 of the Ordinance. His e-mail dated 2nd January 2011, however, was not.

(b) The Assembly is not precluded from refusing to comply with the Appellant's data correction request despite being late in responding to it under section 24 of the Ordinance.

(c) The requests for data correction in the letter dated 30th December 2010 relate mostly, but not solely, to "opinion" (as defined in section 25(3) of the Ordinance).

(d) Insofar as the requests relate to opinion, the Assembly's "remedial measures" in relation to the same do not strictly and completely comply with section 25(2) of the Ordinance.

(e) However, despite the Board's findings at (c) and (d) above, the Commissioner had nevertheless correctly exercised his discretion under section 39(2)(d) of the Ordinance not to pursue the Appellant's complaint by reason of the fact that, in all the circumstances, it was "unnecessary" to do so.

61. It follows from the foregoing that this appeal should be dismissed. We hereby dismiss the appeal and exercise our power under section 21(1)(j) of the Ordinance to affirm the decision of the Commissioner.

COSTS

62. It remains for us to deal with the question of costs. Section 21(1)(k) of the Administrative Appeals Board Ordinance, Cap. 442 gives the Board power, subject to section 22, to make an award to any of the parties to the appeal of such sum, if any, in respect of the costs of and relating to the appeal. Normally, in civil litigation, the general rule is for costs to follow the event. However, as far as this Board is concerned, the rule is modified to some extent by section 22(1), which provides that:

> The Board shall only make an award as to costs under section 21(1)(k)-
>
> (a) against an appellant, if it is satisfied that he has conducted his case in a frivolous or vexatious manner; and
>
> (b) against any other party to the appeal, if it is satisfied that in all the circumstances of the case it would be unjust and inequitable not to do so.

63. At the end of the hearing of this appeal we asked all the parties whether, in the event this appeal is decided in a manner favourable to them, they would have anything to say in respect of costs. None of the parties had any submissions. In all the circumstances, despite having decided to dismiss his appeal, we are unable to go so far as to say that the Appellant has conducted his case in a frivolous or vexatious manner. We therefore make no order as to costs.

(signed)

(Mr Thong Keng-yee)
Deputy Chairman
Administrative Appeals Board