

ADMINISTRATIVE APPEALS BOARD  
Administrative Appeal No. 12/2013

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BETWEEN

F

Appellant

and

PRIVACY COMMISSIONER  
FOR PERSONAL DATA

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Respondent

Coram: Administrative Appeals Board

Mr. Alan Ng Man-sang (Deputy Chairman)

Ms Maggie Chan Mei-kit (Member)

Miss Ho Yuen-han (Member)

Date of Hearing: 30 December 2013

Date of Handing Down Written Decision with Reasons: 14 April 2014

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**DECISION**

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Note: As per letter to the parties of this appeal dated 30<sup>th</sup> October 2013, the Chairman of the Administrative Appeals Board ("the Board"), in order to better secure the overall justice in this case, *via* the Secretary of the Board, granted the Appellant's application for an anonymity order. To this end, the name of the Appellant will be redacted in this Decision.

**Background**

1. By Notice of Appeal dated 31<sup>st</sup> May 2013 ("the Notice of Appeal"), F appealed to the Board against the decision of the Respondent made on 3<sup>rd</sup> May 2013

under section 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap.486) (“PD(P)O”) not to carry out or continue an investigation initiated by a complaint of F on 2<sup>nd</sup> January 2013 against one Ms Ng Wing Sze, the court clerk of Court No.13 of the Eastern Magistrates’ Court on duty on 23<sup>rd</sup> May 2012<sup>1</sup> (“the Decision”). In reply to F’s enquiry *via* email dated 8<sup>th</sup> May 2013, the Respondent further clarified the Decision by way of a letter to F dated 27<sup>th</sup> May 2013 (“the 27/5/13 Letter”).

2. The circumstances giving rise to F’s complaint are as follows.

3. F is a law student. On 27<sup>th</sup> April 2011, F attended Court No.8 of Tuen Mun Magistrates’ Court as a member of the public to observe a court hearing and was prevented by a security officer from using his note book to take notes of the proceedings in court. He was told by the security officer not to take notes in court “unless [he has] obtained prior approval from the court clerk”. F voiced his disagreement, but chose not to further argue with the security officer and put his note book back into his bag.

4. Thereafter, F complained the incident to various parties including the Judiciary Administration and the Chief Magistrate. On 18<sup>th</sup> May 2011, the Chief Magistrate wrote a reply letter to F (“the 18/5/11 Letter”). The relevant part of the 18/5/11 Letter is excerpted as follows:-

“ According to Mr. Ho [the presiding Special Magistrate of Court No.8], he was well aware of the rule that if a member of public was trying to take notes in his court, there was no need to ask for prior approval from him or his clerk. However, if he or his clerk had suspicion that the person taking notes was about to use them to assist a future witness to tailor his testimony so as to match the testimony of an earlier witness, he would make enquiry to clarify this.

Obviously, you are not connected in any way to those involved in those proceedings before Mr. Ho on 27 April 2011. The clerk or the security guard in Court 8 might have misunderstood the instruction from Mr. Ho on how to approach the issue of note-taking by a member of public. I regret for what have happen to you on that day. In order to avoid this happening again, I have asked Mr. Ho to brief his clerk and the security guards working in his court on the rule spelt out in the preceding paragraph.

Lastly, may I thank you once again for drawing this matter to my attention. But for your letter, I would not be able to rectify those misunderstandings on the part of the clerk or the security guards in court 8 of Tuen Mun.”

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<sup>1</sup> In the Complaint Form signed by F on 2<sup>nd</sup> January 2013 (“the Complaint Form”), the party complained against [data user] was named as Judiciary Administration (Ms Ng Wing Sze court clerk)

5. On 23<sup>rd</sup> May 2012, F attended another court hearing at Court No.13 of Eastern Magistrates' Court as a member of the public. When F took out his note book this time and was about to take notes of the questions asked by the prosecutor, a court guard stopped him and asked him to discuss the matter outside the court room ("the Court Guard"). Outside the court room, the Court Guard told F that note-taking in court was not allowed without prior approval. F disagreed. The court clerk of Court No.13 of Eastern Magistrates' Court ("the Court Clerk")<sup>2</sup> then arrived and expressed the same view as that of the Court Guard. After a brief argument, the Court Clerk refused to further discuss the matter with F because she was busy to attend to some other matters, and F returned to the court room. After a while, the Court Clerk returned to the court room and asked F to make an application for taking notes in court. F refused to make such an application, but produced his student registration card ("the Student Card") to the Court Clerk voluntarily to show her that he was a law student and attended court only for an academic purpose. However, the Court Clerk took the Student Card and recorded his personal data on a piece of paper ("the Paper") to proceed with the application for taking notes in court.<sup>3</sup> After 15 minutes, the Court Clerk returned the Student Card to F. When the application was brought to the attention of the presiding Deputy Special Magistrate of Court No.13 of Eastern Magistrates' Court ("the Presiding Magistrate"), F came forward and told the Presiding Magistrate that he had not made and would not make such an application. After this incident, F lodged his complaint against various *personae* involved (including the Court Guard and the Court Clerk) to various relevant parties, including the Chief Magistrate and the Judiciary Administration.

6. By letter dated 30<sup>th</sup> May 2012 ("the 30/5/12 Letter"), the Chief Magistrate replied to F and the relevant parts of Chief Magistrate's reply are quoted as follows:-

" I have raised enquiry with Mr. Yeung, the presiding Deputy Special Magistrate sitting in Court 13 on 23 May 2012. He confirmed that he was under the belief that prior approval from the court concerned must be obtained before a member of the public is allowed to take notes in court. This belief was inconsistent with what I have related to you in my previous letter dated 18 May 2011 and those standing instructions issued by the former Chief Justice in 2002. Mr. Yeung now understands what those instructions are and will approach the same situation differently in future.

In order to ensure that all magistrates will bear in mind those standing instructions, I have issued an E-mail to all of them reminding them of the same. I have also asked the Judiciary Administration to

<sup>2</sup> The party complained against by F in the Complaint Form

<sup>3</sup> According to F's complaint to the Judiciary Administration dated 1<sup>st</sup> June 2012, F said that "it was too late for [him] to stop [the Court Clerk] as she had walked away already and it was impossible to shout to her in court."

make sure that such instructions will be re-circulated at regular intervals to all court clerks and all police officers/security guards charged with the duties to maintain order in the magistrates' courts. After all these actions, I am confident what you have encountered will not take place again.

Lastly, may I thank you for bringing this matter to my attention so that appropriate actions may be taken to rectify possible existing irregularities."

7. By letter dated 29<sup>th</sup> June 2012 ("the 29/6/12 Letter"), the Judiciary Administrator replied to F and the essence of which is quoted as follows:-

"4. According to the standing instructions issued by the Chief Justice in 2002, as an element of open justice, there is no objection in principle to members of the media and the general public to take notes during court proceedings. However, if there is a risk of such note-taking adversely affecting the course of the proceedings or the process of the court, then the court has an inherent jurisdiction to take necessary steps to protect its proceedings or process. Any clerk to judges and judicial officers ("JJOs") suspecting anything of this kind should promptly consult the JJOs, who will take necessary steps or direct his/her clerk to do so.

...

5. According to Ms Anna NG, the court clerk concerned [the Court Clerk], she was not aware of the standing instructions before the incident as she had just joined the Judiciary and worked as a court clerk for about 5 months. Having observed the practice adopted by the magistrates she served/is serving, she all along had a misconception that prior approval from presiding magistrate had to be obtained before a member of the public could take notes in court.

6. It is our practice to re-circulate the standing instructions as mentioned in paragraph 4 above to court support staff every 6 months as a regular reminder. Having looked into the date of Ms NG joining the Judiciary and the previous re-circulation schedules of the standing instructions, we find that Ms NG had not had a chance to read the reminder before this incident because of the time gap.

7. In view of the incident, we have requested Ms NG to acquaint herself with the standing instructions immediately and reminded other staff concerned of the same. Apart from re-circulating the standing instructions at regular intervals, we will arrange to bring the standing instructions to the attention of new staff when they join the Judiciary. We have also drawn the attention of the subject officers of the Police to the issue and invite them to remind their staff and security guards of the standing instructions on a regular basis.

...

8. Ms NG denied having taken away your student card without asking you. She confirmed that she had not inputted any data on your student card into her computer. She only wrote down your particulars from your student card on a self-stick removable note for the purpose of reporting the incident to the presiding magistrate. The note had already

been shredded and discarded after the incident. We have reminded Ms NG to be more cautious when collecting personal data from court users.

...

11. We apologize for the unpleasant experience you had in this incident. Thank you for bringing the matter to our attention so that we can improve our services.”

8. F was dissatisfied with the reply of the Judiciary Administrator in the 29/6/12 Letter, and hence his complaint to the Respondent on 2<sup>nd</sup> January 2013 (“F’s Complaint”). F raised 5 complaints, the gist of which are as follows:-

- (a) Contrary to Data Protection Principle 1(1)(b) and (c), the collection by the Court Clerk of F’s personal data contained in the Student Card was not for a lawful purpose, and even if the collection was for a lawful purpose, it was unnecessary and excessive.
- (b) Contrary to Data Protection Principle 1(2)(b), the collection by the Court Clerk of F’s personal data contained in the Student Card was by unfair means in that the Court Clerk had taken away the Student Card without F’s consent.
- (c) Contrary to Data Protection Principle 3(1), even if F had consented to collecting his personal data for the purpose of ascertaining his identity as a law student, the use of F’s personal data collected by the Court Clerk for making an application for note-taking in court was a new purpose without F’s consent.
- (d) Contrary to Data Protection Principle 1(3) and 5, there was no personal data collection policy statement when the Court Clerk collected F’s personal data – The Court Clerk did not inform F of the purpose for which his personal data would be used and his rights to request access to and correction of the personal data.
- (e) Contrary to para. 2.2 of Code of Practice on the Identity Card Number and other Personal Identifiers (“the Code of Practice”), the collection by the Court Clerk of F’s personal identifier (university number) without providing F with other less privacy-intrusive alternatives to choose.

9. On 2<sup>nd</sup> January 2013, the Respondent wrote to F acknowledging receipt of

F's Complaint and enclosing therewith the Respondent's Complaint Handling Policy (the 4<sup>th</sup> Revision) issued in October 2012 ("the Policy").

10. On 25<sup>th</sup> February 2013, the Respondent formally accepted F's Complaint as a "complaint" under *section 37 of PD(P)O*.

11. By the Decision, the Respondent decided not to pursue F's Complaint further under *section 39(2)(d) of PD(P)O*.

### The Ground of the Decision

12. The Decision was premised on only one ground, i.e. *section 39(2)(d) of PD(P)O*. The circumstances leading to the Respondent's exercise of his discretion under *section 39(2)(d) of PD(P)O* are as follows:-

- (a) Although the collection of F's personal data for the application of note-taking in court was due to the ignorance of the Court Clerk of the Standing Instructions issued by the Chief Justice in 2002 ("the Standing Instructions"), the purpose of collecting F's personal data by the Court Clerk was for the management of the court, not for the purpose of her own. In the circumstances, according to *sections 2(1) and 2(12) of PD(P)O*, the Court Clerk was not a "data user" in relation to the collection of F's personal data at the material time, but the court was.<sup>4</sup>
- (b) The courts had a discretionary power over the general practice that no application was necessary for a member of the public to take notes in court when the court suspected that such note-taking was likely to be used for perverting the course of justice ("the Discretionary Power"). It was up to the court and the judge, not the Respondent, to decide whether and how to exercise the Discretionary Power (including when the court considered it necessary to record the identity of a person taking notes in court so as to prevent anyone from perverting the course of justice.<sup>5</sup>
- (c) The Judiciary had already destroyed the Paper and had also taken actions as described in the 30/5/12 Letter and the 29/6/12 Letter to make the Standing Instructions clear to all relevant personnel.<sup>6</sup>

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<sup>4</sup> See para. 20 of the Decision

<sup>5</sup> See para. 21 of the Decision

<sup>6</sup> See para. 22 of the Decision

13. By the 27/5/13 Letter, the Respondent clarified the Decision by stating the following:-

- (a) The major role and power of the Respondent in handling complaints was to require a data user to take steps to prevent any recurrence of the contravention. Given that the Judiciary Administration had already taken improvement actions on or before 29<sup>th</sup> June 2012 and F's confirmation to the Respondent that he had not encountered any similar incident since then, the investigation of F's Complaint was unlikely to bring about a more satisfactory result.<sup>7</sup>
- (b) The ground of refusal set out in paragraph 8(h) of the Complaint Handling Policy ("the CHP") was applicable to the instant case when the Respondent decided to exercise his power under *section 39(2)(d) of PD(P)O*. The exercise of the power under *section 39(2)(d) of PD(P)O* was not limited by reasons set out in the CHP so long as the ground of refusal was reasonable, lawful and in accordance with established procedures.<sup>8</sup>
- (c) The instant case was caused by the Court Clerk's ignorance of the Standing Instructions which only concerned the necessity and manner of collection of F's personal data. Therefore, Data Protection Principle 1(1) and 1(2) were directly relevant to the instant case, whereas Data Protection Principles 1(3), 3 and 5 were not directly relevant.<sup>9</sup>
- (d) Given the improvement actions taken by the Judiciary Administration prior to the Respondent's intervention and taking into account the priority of effective use of the limited resources of the Respondent, the Respondent did not consider it necessary to contact the Judiciary Administration or take any action against the Judiciary Administration for a matter that had already been resolved.<sup>10</sup>

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<sup>7</sup> See para. 4 of the 27/5/13 Letter

<sup>8</sup> See para. 5 of the 27/5/13 Letter

<sup>9</sup> See para. 9 of the 27/5/13 Letter

<sup>10</sup> See para. 10 of the 27/5/13 Letter

### The Grounds of Appeal

14. F raised a multitude of grounds of appeal in the Notice of Appeal. The grounds of appeal are distilled as follows:-

- (a) There was no evidence to support a finding that the Court Clerk was in fact in the exercise of the Discretionary Power when she collected F's personal data ("Ground A").
- (b) The Respondent erred in finding that the Court Clerk was in the exercise of the Discretionary Power ("Ground B").
- (c) The Respondent erred in failing to distinguish the acts of the Court Clerk from the acts of the court ("Ground C").
- (d) The Respondent failed to take into account the Standing Instructions which would suggest that the Discretionary Power would not be engaged at all ("Ground D").
- (e) The Respondent erred in law in holding that the inherent jurisdiction of a Magistrates' Court included the recording of the identity of a person ("Ground E").
- (f) The Respondent failed to give sufficient reasons for the Decision ("Ground F").
- (g) The Respondent failed to comply with his statutory duty to investigate F's Complaints under *section 38 of PD(P)O* in the absence of reasonable grounds for refusing to conduct investigation ("Ground G").
- (h) The Respondent failed to consider all points of F's Complaints, i.e. contravention of Data Protection Principles 1(3), 3(1) and 5 and para. 2.2 of the Code of Practice ("Ground H").

15. F further noted that the 27/5/13 Letter was of no effect since it was not issued by the Deputy Commissioner and could not serve as clarifying the Decision.



## The Appeal

16. At the hearing of this appeal, F appeared in person and the Respondent was represented by counsel, Mr. Jeffrey Lau.

17. A bundle of documents relating to the appeal was submitted for our consideration in the form of an Appeal Bundle which we received as evidence pursuant to *section 21(1)(b) of the Administrative Appeals Board Ordinance (Cap.442) ("AABO")*.

18. Both parties have made written and oral submissions.

19. Before F made his oral submissions, we granted leave to F (unopposed by the Respondent) to file and rely on an additional authority (i.e. *R. v City of Westminster ex p. Ermakov* (1996) 28 H.L.R. 819) out of time.

## The Relevant Statutory Provisions

20. The following provisions in *PD(P)O* are pertinent to the instant appeal:-

### Section 2(1) [the definitional section]

“data” means any representation of information (including an expression of opinion) in any document, and includes a personal identifier

“personal identifier” means an identifier (a) that is assigned to an individual by a data user for the purpose of the operations of the user; and (b) that uniquely identifies that individual in relation to the data user

“personal data” means any data (a) relating directly or indirectly to a living individual; (b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and (c) in a form in which access to or processing of the data is practicable

“data user”, in relation to personal data, means a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data

## Section 2(12)

A person is not a data user in relation to any personal data which the person holds, processes or uses solely on behalf of another person if, but only if, that first-mentioned person does not hold, process or use, as the case may be, those data for any of his own purposes

## Section 4

A data user shall not do an act, or engage in a practice, that contravenes a data protection principle (meaning any of the data protection principles set out in Schedule 1 to *PD(P)O* – Section 2(1) ) unless the act or practice, as the case may be, is required or permitted under *PD(P)O*.

### Data Protection Principle 1(1)(b) and (c)

Personal data shall not be collected unless ... (b) subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and (c) the data are adequate but not excessive in relation to that purpose.

### Data Protection Principle 1(2)(b)

Personal data shall be collected by means which are ... (b) fair in the circumstances of the case.

### Data Protection Principle 1(3)

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 VIII of this Ordinance as a purpose in relation to which personal data is exempt from the provisions of data protection principle 6.

#### Data Protection Principle 3(1)

Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose.

#### Data Protection Principle 5

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.

#### Section 51A(1)

Personal data held by a court, a magistrate or a judicial officer in the course of performing judicial functions is exempt from the provisions of the data protection principles and Parts IV (Data User Returns and Register of Data Users) and V (Access to and Correction of Personal Data) and sections 36 and 38(b)

#### Section 39(2)(d)

The Respondent 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 ... (d) any investigation or further investigation is for any other reason unnecessary (My Emphasis).

21. Para. 2.2 of the Code of Practice provides that without prejudice to the generality of paras. 2.1 and 2.3, before a data user seeks to collect from an individual his identity card number, the data user should consider whether there may be any less

privacy-intrusive alternatives to the collection of such number, and should wherever practicable give the individual the option to choose any such alternative in lieu of providing his identity card number. Such alternatives may include but are not limited to para. 2.2.1 the identification of the individual by another personal identifier of his choice; para. 2.2.2 the furnishing of security by the individual to safeguard against potential loss by the data user; or para. 2.2.3 the identification of the individual by someone known to the data user.

22. *Section 21(2) of AABO* provides that this Board, in the exercise of its powers under *subsection (1)(j)* (i.e. the power to confirm, vary or reverse the Decision or substitute therefor such other decision or make such other order as we may think fit), shall have regard to any statement of policy lodged by the Respondent with the Secretary under *section 11(2)(a)(ii)*, if we are satisfied that, at the time of the making of the Decision, the Appellant (i.e. F) was or could reasonably have been expected to be aware of the policy.

## Analysis

### Preliminary Observations

23. A complainant is not required to prove his complaints to the satisfaction of the Respondent before the Respondent may exercise the investigatory powers conferred upon him by *section 38 of PD(P)O*. All a complainant needs to do is to show that there is a *prima facie* case that a requirement (or requirements) of *PD(P)O* might have been contravened by a data user.<sup>11</sup>

24. The duty of the Respondent to carry out an investigation under *section 38 of PD(P)O* is not absolute and is subject to the wide discretion conferred upon him by *section 39 of PD(P)O* to refuse to carry out or decide to terminate an investigation initiated by a complaint. One of the reasons giving rise to such discretion is: If the Respondent opines that, having regard to all the circumstances of the case, any investigation or further investigation is for any other reason unnecessary.<sup>12</sup> (My Emphasis)

25. The wide discretion of the Respondent to refuse to carry out or decide to terminate an investigation under *section 39(2)(d) of PD(P)O* can be exercised even if

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<sup>11</sup> It is even the duty of the Respondent to provide appropriate assistance to an individual who wishes to make a complaint and requires assistance to formulate the complaint, see *section 37(4) of PD(P)O*

<sup>12</sup> *Section 39(2)(d) of PD(P)O*

the complainant is able to show that there is a *prima facie* case of contravention of a requirement (or requirements) of *PD(P)O* by a data user.<sup>13</sup>

26. The rationale behind the aforesaid reason giving rise to the discretion under *section 39(2)(d) of PD(P)O* is that the primary role of the Respondent is not to prosecute or punish a contravention, but to put a stop to it and to prevent any recurrence. If there is no contravention to stop or recurrence to prevent, any investigation will be unnecessary.<sup>14</sup>

27. It is not for this Board to attempt to resolve or make any finding on F's Complaint. The task of this Board is to determine whether or not the Respondent's decision not to carry out an investigation with regard to F's Complaint, i.e. the Decision (given the factual background as described above) was correct.<sup>15</sup>

### The Policy

28. By Part (B), para. 8(h) of the Policy, an investigation or further investigation may be considered unnecessary if given the conciliation by the Respondent, remedial action taken by the party complained against or other practical circumstances, the investigation or further investigation of the case cannot reasonably be expected to bring about a more satisfactory result.

29. Since the Policy was enclosed with the letter sent by the Respondent to F on 2<sup>nd</sup> January 2013, we are satisfied that F was or at the very least could reasonably have been expected to be aware of the Policy at the time of the making of the Decision. Therefore, we are entitled to place weight on the Policy, para. 8(h) of the Policy<sup>16</sup> having been set out in the Statement relating to the Decision lodged by the Respondent with the Secretary of the Board pursuant to *section 11(2) of AABO* on 6<sup>th</sup> August 2013 ("the Statement").

<sup>13</sup> See *梁惠貞女士 v 個人資料私隱專員*, Administrative Appeal No. 47 of 2004, 6 December 2005, at para. 10; see also *Ho Mei Ying v The Privacy Commissioner For Personal Data*, Administrative Appeal No. 52 of 2004, 18 April 2006, at paras. 17 and 19 wherein the Administrative Appeals Board upheld the Respondent's exercise of his discretion to refuse to carry out or continue an investigation under *section 39(2)(d) of PD(P)O* notwithstanding that the Board must not be taken to have agreed with the Respondent that there was no *prima facie* evidence of breach of Principle 3 of the Data Protection Principles by the data user

<sup>14</sup> See *Yung Mei Chun Jessie v Privacy Commissioner For Personal Data*, Administrative Appeal No. 20/2010, 20 November 2013, at para. 30

<sup>15</sup> See *Lam Shuk Yee v The Privacy Commissioner For Personal Data*, Administrative Appeal No. 13 of 2011, 24 November 2011, at para. 22

<sup>16</sup> In actual fact, the Respondent referred to para. 8(h) under Part (B) of the Respondent's Complaint Handling Policy (5<sup>th</sup> Revision) issued in April 2013 (abbreviated as CHP hereinabove and is the same as para. 8(h) of the Policy), in the Statement

30. Even if this Board is not entitled to place any weight on the Policy, we still should not disturb the Decision if we are satisfied that the Respondent was entitled, in the present circumstances, to consider that any investigation or further investigation of F's Complaint was unnecessary and to exercise his power to refuse to carry out or to decide to terminate an investigation or further investigation under *section 39(2)(d) of PD(P)O*.<sup>17</sup>

Grounds A, B, C, D & E

31. In the Decision, the Respondent has only formed the following views:-

- (a) The Court Clerk collected F's personal data on 23<sup>rd</sup> May 2012 because of her ignorance of the Standing Instructions.
- (b) The purpose of collecting F's personal data by the Court Clerk was for the management of the court, not for a purpose of her own.

32. On all the materials available to this Board at the hearing, we share the aforesaid views of the Respondent. In our view, the aforesaid cause and purpose are the only reasonable cause and purpose of collecting F's personal data by the Court Clerk on 23<sup>rd</sup> May 2012. The Respondent's coming to the aforesaid views cannot be faulted.

33. On a careful reading of the Decision, although the Respondent has referred to the Discretionary Power of the court as a matter of background information, we do not agree that the Respondent has made any of the following findings:-

- (a) The Court Clerk was in fact exercising the Discretionary Power when she collected F's personal data on 23<sup>rd</sup> May 2012.
- (b) The inherent jurisdiction of a Magistrates' Court included the recording of the identity of a person.

34. Any suggestion that the Respondent has found in the Decision that the Court Clerk was in fact exercising the Discretionary Power when she collected F's personal data on 23<sup>rd</sup> May 2012, would be contrary to the Respondent's view that the collection of F's personal data by the Court Clerk was due to her ignorance of the

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<sup>17</sup> See *Ho Mei Ying v The Privacy Commissioner For Personal Data*, (*supra.*), at para. 18

Standing Instructions.

35. Since the Decision is premised only on *section 39(2)(d) of PD(P)O* and the discretion of the Respondent to refuse to carry out or decide to terminate an investigation under *section 39(2)(d) of PD(P)O* can still be exercised even if the complainant is able to show that there is a *prima facie* case of contravention of a requirement (or requirements) of *PD(P)O* by a data user, it was unnecessary for the Respondent to find as to whether the Court Clerk was exercising the Discretionary Power at the material time, and to distinguish the acts of the Court Clerk from those of the court. At any rate, the Respondent was not required to come to any finding at this stage.

36. Accordingly, Grounds A, B, C, D & E must fail.

#### Grounds G & F

37. As we have opined, the duty of the Respondent to carry out an investigation under *section 38 of PD(P)O* is not absolute and is subject to the wide discretion conferred upon him by *section 39 of PD(P)O* to refuse to carry out or decide to terminate an investigation initiated by a complaint. One of the reasons giving rise to such discretion is: If the Respondent opines that, having regard to all the circumstances of the case, any investigation or further investigation is for any other reason unnecessary.<sup>18</sup>

38. Here, the sole ground relied upon by the Respondent in the Decision is *section 39(2)(d) of PD(P)O*. The Respondent has stressed in the Statement, his Skeleton Submissions and *viva voce* submissions that it was mainly based on the remedial actions already taken (described by the Chief Magistrate in the 30/5/12 Letter and the Judiciary Administration in the 29/6/12 Letter) and the destruction of the personal data collected, which led the Respondent to believe that a further investigation would not have achieved a better result. The remedial actions already taken, according to the Respondent, will prevent the recurrence of the contravention or contraventions and it was not necessary for the Respondent to pursue F's Complaint any further.

39. The Respondent submitted that the remedial measures already taken included requesting the Court Clerk to acquaint herself with the Standing Instructions

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<sup>18</sup> *Section 39(2)(d) of PD(P)O*

immediately, reminding other staff concerned of the same, re-circulating the Standing Instructions at regular intervals, bringing the Standing Instructions to the attention of new staff when they joined the Judiciary, an apology and sending emails to remind all magistrates. Those remedial measures, submitted by the Respondent, were adequate.

40. It should be borne in mind that the task of this Board is to determine whether or not the Respondent's decision not to carry out an investigation with regard to F's Complaint (given the factual background as described above) was correct. In the instant case, to consider whether or not a more satisfactory result can be achieved, *section 50 of PD(P)O* which sets out the power of the Respondent to take enforcement actions, following the completion of an investigation, has to be looked at closely. *Section 50(1) and (1A) of PD(P)O* provides as follows:-

“(1) If, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user is contravening or has contravened a requirement under this Ordinance, the Commissioner may serve on the data user a notice in writing, directing the data user to remedy and, if appropriate, prevent any recurrence of the contravention.

(1A) An enforcement notice under subsection (1) must—

- (a) state that the Commissioner is of the opinion referred to in subsection (1) and the reason for that opinion;
- (b) specify—
  - (i) the requirement which, in the opinion of the Commissioner, is being or has been contravened; and
  - (ii) the act or omission that constitutes the contravention;
- (c) specify the steps that the data user must take (including ceasing any act or practice) to remedy and, if appropriate, prevent any recurrence of the contravention;
- (d) specify the date on or before which the steps must be taken; and
- (e) be accompanied by a copy of this section.”

41. It is noteworthy that the whole tenor of enforcement under *section 50 of PD(P)O* is to remedy and, if appropriate, prevent any recurrence of any contravention.

42. The gravamen of F's Complaint is that the Court Clerk has exceeded the purpose (as delineated by the Standing Instructions) of collecting the personal data from F at the material time because the Court Clerk, being a newly recruited court support staff, was ignorant of the Standing Instructions. The upshot of her ignorance was that she had unnecessarily, excessively and unfairly collected the personal data from F. If the Court Clerk had been conversant with the Standing



Instructions, she would not have taken the Student Card from F, recorded his personal data on the Paper, proceeded with the note-taking application in court, handed the Paper to the Presiding Magistrate and detained the Student Card for 15 minutes. In other words, the incident could have been avoided if the Court Clerk had been conversant with the Standing Instructions. The purpose of the measures already taken by the Chief Magistrate and the Judiciary Administration as respectively described in the 30/5/12 Letter and the 29/6/12 Letter was to bring home to the court support staff, in particular the newly recruited support staff the Standing Instructions at the inception of their employment and thereafter on a regular basis. In our view, the aforesaid measures already taken by the Chief Magistrate and the Judiciary Administration will remedy and prevent any recurrence of any similar contravention or contraventions. The enforcement actions which the Respondent could take under *section 50 of PD(P)O* would unlikely bring about any further remedy than what the Chief Magistrate and the Judiciary Administration have already done voluntarily.

43. Accordingly, we do not agree:-

- (a) that the Respondent has failed to comply with his statutory duty to investigate F's Complaints under *section 38 of PD(P)O* in the absence of reasonable grounds for refusing to conduct investigation; and
- (b) that the Respondent failed to give sufficient reasons for the Decision.

44. We need to mention 2 matters before we leave this part of our Decision. Firstly, we have grave misgivings about F's Complaint in his Further Submissions dated 15<sup>th</sup> October 2013 ("F's Further Submissions") that F's Student Card was forcibly taken away against his express instruction.<sup>19</sup> In F's Complaint, F only mentioned that he indicated very clearly to the Court Clerk that he handed her the Student Card for the only purpose of ascertaining his identity as a law student, but nothing more and that the Court Clerk walked away (towards her bench) with the Student Card without saying a word, despite that he had tried to stop her.<sup>20</sup> Secondly, if the Court Clerk had acted in accordance with the Standing Instructions, it would have been beyond any peradventure that she was only an agent of the Presiding Magistrate (i.e. the data user) acting in the course of performing a judicial function exempted from the provisions of the data protection principles under *section 51A of PD(P)O*.

<sup>19</sup> See para. 2.6.10 at p. 14 of F's Further Submissions

<sup>20</sup> Under the heading Complaint 2: Personal data collected by unfair means at p. 6 of F's Complaint

## Ground H

45. F complained that the Respondent failed to consider all points of F's Complaints, i.e. contravention of Data Protection Principles 1(3), 3(1) and 5 and para. 2.2 of the Code of Practice.

46. As we have opined, the wide discretion of the Respondent to refuse to carry out or decide to terminate an investigation under *section 39(2)(d) of PD(P)O* can be exercised even if the complainant is able to show that there is a *prima facie* case of contravention of a requirement (or requirements) of *PD(P)O* by a data user. Therefore, it would be unnecessary for the Respondent to express any view on whether there was a *prima facie* case that a requirement (or requirements) of *PD(P)O* might have been contravened by the Court Clerk/Judiciary Administration provided that at the time of the Decision, the Respondent had come to the view that for any other reason, any investigation or further investigation was unnecessary and that the reason for refusal was reasonable, lawful and in accordance with established procedures.<sup>21</sup>

47. In the instant case, the sole ground for refusal relied upon by the Respondent was that the measures already taken by the Chief Magistrate and the Judiciary Administration have prevented any recurrence of similar contravention or contraventions and the investigation or further investigation of the case cannot reasonably be expected to bring about a more satisfactory result. This ground is the ground for refusal provided for under Part (B), para. 8(h) of the Policy<sup>22</sup> which we are entitled to place weight at the hearing.

48. In the premises, we hold that it was not legally necessary for the Respondent to come to any concluded view of any *prima facie* contravention of the Data Protection Principles. In this context, any *prima facie* contravention of Data Protection Principles and para. 2.2 of the Code of Practice<sup>23</sup> has paled into insignificance.

## Conclusion

49. In view of our conclusion against F on each and every ground of appeal

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<sup>21</sup> See *梁惠貞女士 v 個人資料私隱專員*, (*supra.*), at para. 10

<sup>22</sup> Same as para. 8(h) under Part (B) of CHP

<sup>23</sup> Para. 2.2 of the Code of Practice cannot by any figment of imagination be relevant since the instant case is about the Student Card, not the identity card of F

raised by him and our holding that the Decision is justifiable under *section 39(2) of PD(P)O*, the appeal is bound to be dismissed.

50. By the same token, it is not necessary for us to express any concluded view on whether there is any *prima facie* contravention of Data Protection Principles.

51. At the end of the hearing, we asked both parties whether, in the event that they win this appeal, they would have anything to say in respect of costs. Mr. Lau, very fairly, submitted that the Respondent would not seek costs against F even if he wins the appeal. On the contrary, F submitted that if he wins the appeal, he would seek costs against the Respondent and lodged with us his Statement of Costs with a detailed breakdown claiming a total sum of HK\$16,054.90. Since we have held against F, there be no order as to costs.

(signed)

(Mr. Alan Ng Man-sang)  
Deputy Chairman  
Administrative Appeals Board