

ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 33/2012

BETWEEN

FU LOK MAN, JAMES

Appellant

and

THE PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA

Coram: Administrative Appeals Board

Date of Hearing: 14 March 2013

Date of Handing down Written Decision with Reasons: 16 April 2013

DECISION

Note: references in this Decision to "AB" are references to the Appeal Bundle referred to in paragraph 26 herein and references to "the Ordinance" are references to the Personal Data (Privacy) Ordinance, Cap. 486.

THE FACTS

1. On 29th September 2009, an application was made by one Mr. George Fu Wing Lok (hereinafter referred to as “George Fu”) for the deregistration of a private family-run company incorporated in Hong Kong called Coronet Leather Ware Company Limited (hereinafter referred to as “The Company”) under section 291AA (9) of the Companies Ordinance, Cap. 332 (“the CO”). George Fu was a director and shareholder of the Company. In his application form (Form DR1, AB, 295-297) which was presented by the Company’s accountants, Best Genius Accounting Services Centre (“Best Genius”), to the Companies Registry (“the CR”), George Fu made a declaration that “all members of the company agree to the deregistration of the company”.

2. The deregistration process was subsequently completed pursuant to section 291AA of the CO and the Company was formally dissolved on 19th February 2010.

3. George Fu was the majority shareholder of the Company and held 69% of its share capital. The other shareholders were his siblings who reside overseas, namely Renee Fu Chau Fong (“Renee Fu”), Alice Fu Pui Fong (“Alice Fu”), Steven Fu Co Low (“Steven Fu”), each with 10% of the share capital. The remaining 1 % was held by the estate of their deceased father, Mr. Johnny Fu Chiu Chun (“Johnny Fu”).

4. The Appellant, Mr. James Fu Lok Man, is also a sibling of George Fu, but, in 2009 when the application for deregistration of the Company was lodged with the CR, he held no shares or posts within the Company.

5. In mid-March 2011, the Appellant became aware, much to his surprise, of the fact that the Company had been deregistered (see AB, 209-211).

6. On 23rd May 2011, he wrote a letter to the CR (which was received on 24th May 2011) raising doubts about the deregistration of the Company (AB, 212). In that letter, he made a number of allegations, viz. that George Fu was not a honest person ; that he had left Hong Kong for France in a rush and that he (the Appellant) had been told by the remaining shareholders that they had never signed any papers consenting to the deregistration of the Company. He further made a request to the CR in these terms: "I hereby request your kind attention to review [the deregistration application]. I am sure you will find the signatures of all shareholders are not according to the signature specimen. The fake documents submitted into your department should be jointly processed by the suspected couple, named: Fu Wing Lok, George and Cao, Betty [their ID Card numbers are then listed]". Betty Cao is the wife of George Fu and was a director of the Company prior to its dissolution.

7. These allegations, put forward by the Appellant as described aforesaid, raised a suspicion in the mind of the CR that George Fu might have made a false declaration in his application to deregister the Company, thus laying him open to criminal liability under section 291AA(14) of the CO.

8. On 3rd June 2011, the CR wrote to the Appellant and informed him that the deregistration process had already been completed and the Company was formally dissolved on 19th February 2010. The CR was therefore no longer in a position to consider his objection to George Fu's deregistration application. However, the Appellant's attention was

drawn to section 291AA(12) (the liability [if any] of the company's officers and members continue and are enforceable even after its dissolution) and 291AA(2) (a person aggrieved by the deregistration of a company may apply for its reinstatement within 20 years of the said deregistration). The letter then ended with this sentence: "Regarding the possible breach of section 291AA(14) of the CO, the matter is now under consideration." (our emphasis)

9. On the same day, i.e. 3rd June 2011, the CR wrote letters to the following persons: viz. George Fu, Steven Fu, Johnny Fu, Alice Fu and Betty Cao at their last known addresses according to the CR's records. These letters were copied to Best Genius at its address at Room 1701AB, Nan Dao Commercial Building, 359-361, Queen's Road Central, Hong Kong. This address was also the given address of the Company and George Fu in the CR's records.

10. The letters' contents were identical and were in these terms: "The Registrar has recently received an objection to the deregistration of the Company by Mr. Fu Man Lok, James on the ground that not all members of the Company agreed to the deregistration of the Company. It appears that not all members of the Company agree to the deregistration of the Company. This is contrary to the information provided in your application made to the Registrar. Pursuant to your application for Deregistration dated 29.9.2009, you certified that all members of the Company agree to the deregistration of the Company. In this connection, I wish to draw to your attention section 291AA(14) of the CO which provides that [and the sub-section is then set out]. I wish to point out that all breaches of the [CO] are regarded seriously. You are under a duty to ensure strict compliance with the provisions of the [CO], failing which prosecution action will be taken. Please let me have your explanation to the matter within the next 14 days. All rights of prosecution are expressly reserved".

11. Now, pausing here, we have the following observations to make with regard to these letters:

(1) It seems to us odd that the contents of the letter to George Fu was identical to those to other shareholders/directors of the Company, because whereas George Fu was a suspect in a possible breach of a sub-section of the CO giving rise to criminal liability and sanctions, the rest of the shareholders/directors were merely potential witnesses. Their status in the criminal investigation launched by the CR was obviously different. For the purpose of a criminal investigation into the conduct of George Fu, it seems that all the information required from them was whether or not they had agreed to the deregistration of the Company.

(2) Consequently, the contents of the letters to those shareholders/directors of the Company, other than George Fu, were clearly erroneous. The letters stated that “It appears that not all members of the Company agree to the deregistration of the Company. This is contrary to the information provided in your application made to the Registrar. Pursuant to your application for Deregistration dated 29.9.2009, you certified that all members of the Company agree to the deregistration of the Company”. This, obviously, is not true. They were *not* the applicants in the application to deregister the Company. Only George Fu was. They did *not* provide any information or certified anything to the CR. Only George Fu did (AB, 297).

(3) In any event, we do not understand why a letter in these terms was sent to Betty Cao, who is neither a suspect in the CR’s investigations, nor even a shareholder of the

Company. For the same reason, we do not understand why these letters were all copied to Best Genius. We shall revisit this question later, as it is, as we shall see, of considerable importance to our Decision in this appeal.

(4) For some unexplained reason, no letter of the sort was ever sent to Renee Fu, the one remaining sibling of the Fu siblings who was a shareholder of the Company in 2009.

12. The letters dated 3rd June 2011 to Steven Fu, Johnny Fu, Alice Fu and Betty Cao (AB, 244-251) were all eventually returned to the CR undelivered. The letter to George Fu and those copied to Best Genius, however, were not.

13. By an e-mail dated 17th June 2011 (AB, 302), George Fu responded to the CR's letter and told the CR that he had received an e-mail from Best Genius informing him that the Appellant had objected to the deregistration of the Company. He confirmed to the CR that, in 2009, all members of the Company had agreed that its business should cease.

14. When the Appellant became aware of the fact that his report of the matter to the CR and his identity was revealed to George Fu in the CR's letter to George Fu dated 3rd June 2011 (AB, 242), he was greatly displeased. This was followed by a series of correspondence between the Appellant and the CR between September 2011 and June 2012 (AB, 176-185), with the former querying the manner in which the investigation of George Fu was being handled and complaining about the disclosure of his identity by the latter. As regards the disclosure of his identity, the CR explained to the Appellant that his identity had to be disclosed in order that a proper investigation into whether George Fu had committed an offence under section 291AA(14) could be carried out. To cut a long story short, the

Appellant did not find this explanation acceptable and lodged a complaint with the Respondent, the Privacy Commissioner for Personal Data (“the Commissioner”) on 8th August 2012 (AB, 205-208).

15. After requesting and obtaining certain information from the CR and the Appellant and carrying out a preliminary inquiry into the matter, the Commissioner decided *not* to pursue the Appellant’s complaint any further and so informed the Appellant by letter dated 16th October 2012, with written reasons for his Decision annexed (AB, 263-267).

16. It is not in dispute that (1) the CR was a “data user” who had collected the data of the Appellant when he made the report against George Fu and Betty Cao in his letter dated 23rd May 2011, (2) the Appellant was a “data subject” and that (3) his identity/name which was disclosed to George Fu in the CR’s letter to the said George Fu dated 3rd June 2011 was “personal data”, as defined in section 2 of the Ordinance.

17. Data Protection Principle 3 (“DPP3”) in Schedule 1 to the Ordinance stipulates that personal data shall not, without the prescribed consent of the data subject, be used (including being disclosed or transferred) for any purpose other than the purpose for which the data were to be used at the time of collection of the data, or for a directly related purpose.

18. The Commissioner concluded that the CR’s original purpose of collecting the Appellant’s identity as well as the information contained in his report against George Fu and Betty Cao was for the handling of an investigation into the allegations contained in the said report. The subsequent disclosure of the Appellant’s identity as the informant in the report was, in the Commissioner’s view, directly related to the original purpose of the collection of

the Appellant's personal data and hence, in the circumstances, there was no breach of DPP3 on the part of the CR (AB, 266).

19. The Commissioner stated that he decided, pursuant to section 39(2)(d) of the Ordinance, not to pursue the Appellant's complaint any further. This sub-section provides that he 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: (d) any investigation or further investigation is for any other reason unnecessary. The Commissioner also placed reliance on his Complaint Handling Policy, paragraph 8(d) under Part (B) of which provides that an investigation or further investigation may be considered unnecessary if: (d) after preliminary enquiry by [the Commissioner] there is no prima facie evidence of any contravention of the requirements of the Ordinance.

20. Section 21(1) of the Administrative Appeals Board Ordinance provides that for the purposes of an appeal, the Board may : (j) subject to sub-section (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit. Sub-section (2) provides that the Board, in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the respondent with the Secretary under section 11(2)(a)(ii), if it is satisfied that, at the time of the making of the decision being the subject of the appeal, the appellant was or could reasonably have been expected to be aware of the policy.

21. The Appellant was made aware of the Commissioner's Complaint Handling Policy when it was sent to him by the Commissioner under cover of letters dated 13th August (AB, 218) and 16th October 2012 (AB, 263).

22. The CR supported the Decision of the Commissioner for the reasons given by him and further sought to rely on a statutory exemption contained in section 58(2) of the Ordinance which provides that personal data is exempt from the provisions of DPP3 in any case in which- (a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data is held for any of those purposes); and (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection, and in any proceedings against any person for a contravention of any of those provisions, it shall be a defence to show that he had reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of those matters. The purposes referred to in sub-section (1), briefly summarized, are these:

- (a) the prevention or detection of crime;
- (b) the apprehension, prosecution or detention of offenders;
- (c) the assessment or collection of any tax or duty;
- (d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;
- (e) the prevention or preclusion of significant financial loss arising from-
 - (i) any imprudent business practices or activities of persons; or
 - (ii) unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;
- (f) ascertaining whether the character or activities of the data subject are likely to have a significantly adverse impact on anything-
 - (i) to which the discharge of statutory functions by the data user relates; or

- (ii) which relates to the discharge of functions to which this paragraph applies by virtue of subsection (3); or
- (g) discharging functions to which this paragraph applies by virtue of subsection (3) refers.

Sub-section (3) of section 58 refers to the functions of a financial regulator.

23. Counsel for the Commissioner, informed us that, unlike the CR, the Commissioner does *not* seek to rely on the exemption in section 58(2) of the Ordinance because, in his view, there has been no contravention of DPP3 and reliance on the exemption is therefore unnecessary.

THE ISSUES

24. The following issues are therefore raised in this appeal: (1) what was the CR's purpose of the collection of the Appellant's personal data at the time it was collected? ; (2) was the disclosure of the Appellant's personal data to George Fu for this or a purpose directly related thereto; and (3) if it is found that DPP3 had indeed been breached by the CR, does the exemption in section 58(2) of the Ordinance nevertheless operate to exempt the CR from the provisions of DPP3?

THE APPEAL

25. At the hearing of the appeal, the Appellant appeared in person and was accompanied by his wife. The Commissioner was represented by counsel, Mr. Jeffery Lau

and an officer from the Commissioner's Office, Ms. Charly Yu. The CR, being the Person Bound in this appeal, was represented by counsel, Ms. Eva Sze and an officer from the CR, Miss Stephena Choi, accompanied by two legal trainees from the said department.

26. An Appeal Bundle ("AB") containing documents relevant to the appeal and the written submissions of the parties was submitted to the Board for its consideration. This was received as evidence in the appeal pursuant to section 21(1)(b) of the Administrative Appeals Board Ordinance.

THE BOARD'S DECISION ON THE ISSUES

27. It seems quite obvious to us that the Appellant's data was collected at the time when the CR received his letter dated 23rd May 2011. What, then, was the purpose of collection? Both the CR and the Commissioner submitted to us that the data was collected for the purpose of handling the Appellant's allegations of possible criminal conduct on the part of George Fu (AB, 159 & 266). We agree with and accept this submission. In our view, the CR's letter to the Appellant dated 3rd June 2011 (AB, 217) is quite telling as far as this question is concerned. First of all, the CR informed the Appellant that, since the Company was *already dissolved*, there was nothing it could do as regards the Appellant's objection to George Fu's application to deregister it. However, it then proceeded to say that "Regarding the possible breach of section 291AA(14) of the CO, the matter is now under consideration." It is quite apparent, therefore, that the only follow-up action the CR could, at that stage, take in respect of the information received from the Appellant was the criminal investigation into the conduct of George Fu. Hence the data collected from the Appellant *must* have been for this purpose.

28. Having decided what the purpose of collection was at the time the Appellant's data was collected, we then had to determine whether disclosing the said data to George Fu was for that purpose (or a directly related purpose). The Appellant submitted that it was totally unnecessary and wrong for his identity to be disclosed to the very person whom he had accused of having committed a crime and it could not have been for the purpose for which it were to be used at the time of its collection or for any directly related purpose.

29. On behalf of the Commissioner and the CR, it was submitted that George Fu was entitled to be aware of the identity of his accuser, without which he would not be in a position to respond to the accusation and to put forward representations in answer thereto which are complete, fair and proper. Without disclosing such information to George Fu, therefore, it was not possible for the CR to carry out a fair and proper investigation into whether George Fu had committed an offence under section 291AA(14) of the CO.

30. We agree with and accept the submissions of the Commissioner and the CR. When a person is faced with a serious accusation of having committed a criminal offence, *and* where the credibility of his accuser is crucial to the law enforcer's decision whether or not to launch a criminal prosecution, it is only fair that the accused person be made aware of the identity of his accuser, so that he may (if necessary) point out to the law enforcement/investigating authorities that his accuser may have made the accusation as a result of a grudge against him or that there may be other reasons why he should not be believed. Needless to say, it would be impossible for the accused to be accorded this opportunity if he is not informed about the identity of his accuser. Informing an accused person (*viz.* George Fu) of who his accuser is, therefore, in the particular circumstances of

the case, and, in the absence of any legal provision or principle which provide otherwise, both important and desirable for the purpose of conducting a fair and proper investigation into whether or not he had committed an offence under section 291AA(14) of the CO. We say this is so “in the particular circumstances of the case” because we should not be taken to be saying that the identity of an informant should be disclosed to the accused person by the investigating authority in *every* case. It is only in circumstances such as those we have described above that such disclosure becomes both important and desirable for the fair and proper conduct of a criminal investigation. We also mentioned that this is so “in the absence of any legal provision or principle which provide otherwise” because, in certain cases, there may well be statutory provisions or common law principles which prohibit such disclosure.

31. Having so found, as aforesaid, that DPP3 has *not* been contravened by the CR’s disclosure of the Appellant’s identity to George Fu, it becomes unnecessary for us to determine whether the exemption in section 58(2) is applicable and we shall thus refrain from doing so.

32. At this stage, it would seem to follow that we should dismiss this appeal. The complaint lodged by the Appellant was that the CR had acted wrongfully, unlawfully and in breach of DPP3 in disclosing his identity to George Fu. We specifically asked the Appellant to confirm that this was his complaint to the Commissioner at the outset of the hearing of this appeal and he did so. Indeed, documents in the AB confirm this as well. In a letter dated 20th August 2012 (AB, 224-226), the Commissioner asked the Appellant, inter alia, this question: “You discovered later that the CR had disclosed the Report and your identity of (sic) the person who made the Report to(sic) the applicant of the Application, you therefore complained against the CR. In this regard please confirm the correctness of our

understanding of the above”. Now despite the fact that the Commissioner’s enquiry was not felicitously worded, we think nevertheless that it must have been quite apparent to the Appellant what it meant. The Appellant confirmed that the Commissioner’s understanding was correct in his reply to the Commissioner by letter dated 30th August 2012 (AB, 227).

33. As explained above, we have considered the Appellant’s complaint and have found it unsubstantiated. Nevertheless, for the reasons set out below, we have considerable hesitation in simply dismissing this appeal, because, in the light of the evidence put before the Commissioner, we cannot agree with his conclusion that there is no prima facie evidence of a breach of DPP3, nor can we agree with his conclusion that it was, in the circumstances, “unnecessary” to investigate the matter any further.

34. As we observed earlier in paragraph 11 above, the CR had handled its investigation in a somewhat puzzling and, indeed, bizarre manner. Before us at the hearing, counsel for the CR confirmed that the only suspect in its investigations was George Fu. Despite this, however, letters, in terms which were identical to the one to George Fu, were sent to Steven Fu, Johnny Fu, Alice Fu and Betty Cao. These persons, as we pointed out earlier, were not suspects. They were potential witnesses. All the CR needed to do in conducting a proper investigation against George Fu was simply to have asked these persons whether they had agreed to the deregistration of the Company. In our view, to have disclosed to them the identity of the Appellant as informant in the case would *not* have been for the purpose of the proper handling of the investigation. Fortunately for the CR, the letters addressed to these persons were returned and never delivered. There was no actual disclosure of the Appellant’s data to these persons and hence no breach of DPP3 occurred. Had the said data been disclosed, however, we would have had no hesitation in holding that such

disclosure would have been wrong and totally unrelated to the purpose of the investigation. DPP3 would certainly have been breached were it not for the fact that the letters were returned undelivered.

35. The CR, however, was not so fortunate as regards the letters which they copied to Best Genius, the Company's former accountants. For the same reason mentioned above, we are of the view that they disclosed to Best Genius personal data of the Appellant which was unrelated to the purpose for which the said data was collected. Best Genius had nothing beyond a purely administrative role to play in George Fu's application for the deregistration of the Company. It had merely acted upon the instructions of George Fu to take the necessary procedural steps in order to present an application to the CR for the deregistration of the Company. George Fu himself confirmed this fact in an e-mail dated 27th July 2011 (AB, 303) wherein he informed the CR that, because he and the other members of the Company were unfamiliar with the procedures for dissolving the Company (our emphasis), the Company decided to employ Best Genius to deal with its dissolution. There appears to be no reason, therefore, for the CR, in conducting the criminal investigation into the conduct of George Fu, to have copied the letters (containing the Appellant's personal data) to Best Genius. Counsel for the CR submitted that, in considering whether it was justified for the CR to copy the letters in question to Best Genius, the Board should take into account the fact that, by 3rd June 2011, the Company had ceased to exist. It seems to us, however, that the fact that the Company had already been dissolved is all the more reason why the said letters should not have been sent to Best Genius, since, upon the dissolution of the Company, Best Genius must have ceased to have any further relationship with either the Company or its former shareholders/directors or with *any* matter which concerns them.

36. We have already seen that, by an e-mail dated 17th June 2011 (AB, 302), George Fu told the CR that he had received an e-mail from Best Genius informing him that the Appellant had objected to the deregistration of the Company and he (George Fu) then confirmed to the CR that all members of the Company had agreed that its business should cease. This e-mail is evidence that Best Genius must, not only have received the letters sent to it by the CR, but must have opened the said letters and read their contents.

37. For the reasons referred to above, we find that the Commissioner had either ignored or, by oversight failed to notice, that, despite the fact that the Appellant's *actual complaint*, concerning the disclosure of his personal data to George Fu, was unsubstantiated, there was nevertheless evidence of a breach of DPP3 by the CR in disclosing the personal data of the Appellant to Best Genius.

38. Having so found, we would then have to proceed to consider the applicability or otherwise of the exemption in section 58(2) of the Ordinance. It is quite obvious to us that Best Genius had no role whatsoever to play in the criminal investigation of George Fu. In our view, the use of such data by the CR by disclosure of the same to Best Genius could not possibly have any effect on the attainment of any of the purposes listed under sub-section (1) of section 58 of the Ordinance, nor would the applicability of DPP3 be likely to prejudice any of the matters referred to in that subsection. Following from this, we also find that the CR had no reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of those matters. We therefore conclude that the exemption does *not* apply.

The “Old” and “New” Law

39. Towards the end of the hearing, we raised a point about the effect (if any) of the recently enacted Personal Data (Amendment) Ordinance 2012 (“the Amendment Ordinance”), which introduced various amendments to the Ordinance with those amendment provisions which are unrelated to direct marketing or the legal assistance scheme taking effect on 1st October 2012.

40. All the events leading to the Appellant’s complaint against the CR and the lodging of the said complaint with the Commissioner itself took place *before* the effective date. The Decision of the Commissioner together with his Reasons for the Decision, however, were not delivered to the Appellant until 16th October 2012, about two weeks after the Amendment Ordinance took effect. Of particular significance, insofar as this appeal is concerned, is the fact that DPP3 was amended and worded differently from that contained in the (unamended) Ordinance. The new and amended version of DPP3 (insofar as relevant to the present appeal) reads as follows:

3. Principle 3-use of personal data

- (1) Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose.
- (2) [Not relevant]
- (3) [Not Relevant]
- (4) In this section—

new purpose (新目的), in relation to the use of personal data, means any purpose other than—

- (a) the purpose for which the data was to be used at the time of the collection of the data; or
- (b) a purpose directly related to the purpose referred to in paragraph (a).

41. There are no differences between the old and new versions of 58 of the Ordinance, save that the Amended Ordinance has an additional sub-section (6) which provides for definitions of the words “crime” and “offender” in that section.

42. We invited counsel for the Commissioner to put forward submissions as to whether the Board should decide this appeal in accordance with the “old” law or the “new” law. Mr. Lau submitted (and we agree) that, insofar as deciding whether or not the CR had breached any of the requirements of the Ordinance was concerned, the old law should apply. The act of the CR which formed the subject matter of the Appellant’s complaint took place on June 3rd 2011. The complaint was lodged with the Commissioner 8th August 2012. The Amended Ordinance has no provision giving retrospective effect to any of its provisions.

43. It is right, therefore, for us to have used the “old” provisions of the Ordinance in deciding this appeal. We would go further to say that, even if we had to decide this appeal in accordance with the “new” DPP3 and section 58, our decision would not have been any different. Having regard to how the phrase “new purpose” is defined, the effect of the relevant parts of the new DPP3 is, in substance, no different from the old. As far as the section 58(2) exemption is concerned, as we pointed out earlier, there is no appreciable

change in the Amended Ordinance apart from the addition of a couple of definitions, which do *not* alter our views regarding the applicability of the said exemption.

THE BOARD'S CONCLUSION & ORDER

44. We conclude therefore that, in the circumstances of the case, the act of the CR in disclosing the personal data of the Appellant to Best Genius constituted a breach of DPP3, and that, furthermore, the CR was *not* exempted from liability for the said breach by the statutory exemption contained in section 58(2) of the Ordinance.

45. The next question we have to consider is this: Under such circumstances, should we simply dismiss the appeal on the basis that *the particular complaint* which the Appellant lodged with the Commissioner was unsubstantiated or should we send this case back to the Commissioner to be reconsidered in the light of our findings above that there was evidence of a breach of DPP3 in respect of the disclosure of the Appellant's data to Best Genius? We posed this question to counsel for the CR and the Commissioner on the hypothesis that our findings were as described in paragraph 37 above. Mr. Lau, for the Commissioner, initially submitted that the Board should dismiss this appeal, upon which it would then be up to the Appellant to lodge a fresh complaint against the CR to the Commissioner regarding the disclosure of his personal data to Best Genius. This, however, would involve a waste of time, costs and trouble for all parties concerned. Upon further discussion, Mr. Lau eventually accepted (and, in our view, quite fairly and properly) that the Board had the power to remit the case back to the Commissioner to be reconsidered by him and that this would, in the circumstances, be the better course for this Board to take. Counsel for the CR expressed no view on the matter.

46. In the circumstances, we shall take the course most conducive to the saving of time, costs and trouble and which is most convenient for all parties concerned. We hereby allow the appeal and exercise our power under section 21(1)(j) of the Administrative Appeals Board Ordinance to reverse the decision of the Commissioner not to further pursue the Appellant's complaint.

47. We further exercise our power under section 21(3) of that Ordinance to order this case, as so determined by the Board above, to be sent back to the Commissioner for him to consider what measures/steps he may take to rectify the breach of DPP3 by the CR (and/or to prevent its recurrence) in accordance with and pursuant to the powers conferred upon him by the provisions of the Ordinance.

COSTS

48. 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.

49. The Appellant has not adduced any evidence which shows that it would be unjust and inequitable not to order costs against either the Commissioner or the CR. He has conducted these proceedings and has appeared at the hearing of the appeal in person and has not incurred any legal costs. Besides, it has to be borne in mind that his actual complaint to the Commissioner has been found by this Board to have been unsubstantiated and, had it not been for the rather usual circumstances of this case, his appeal would have been dismissed. In these circumstances, we think the fairest course would be for us to make no order as to costs.

(signed)

(Mr Thong Keng-ye)

Deputy Chairman

Administrative Appeals Board