

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO. 34/2017

BETWEEN

SO CHUNG LEUNG Appellant

and

PRIVACY COMMISSIONER Respondent
FOR PERSONAL DATA

Coram: Administrative Appeals Board
Mr Richard KHAW Wei-kiang, SC (Deputy Chairman)
Mr KWOK Sze-chung (Member)
Mrs Julie MA LI Mun-wai (Member)

Date of hearing: 6 June 2018

Date of Handing down Written Decision with Reasons: 13 March 2019

DECISION

A. INTRODUCTION

1. This is an appeal of Mr So Chung Leung (“**Mr So**”) to the Administrative Appeals Board (“**the Board**”) against the decision of the

Privacy Commissioner for Personal Data (“**the Commissioner**”) dated 20 November 2017 whereby the Commissioner decided not to refer Mr So’s complaint against the Hong Kong Fire Services Officers Association (“**the Association**”) to the Police for criminal investigation and not to pursue the complaint further. In essence, Mr So’s complaint relates to the potential contravention of the direct marketing provisions of the Personal Data (Privacy) Ordinance (Cap 486) (“**the Ordinance**”) on the part of the Association by using his personal data for direct marketing purposes without his consent.

2. The Association was registered in Hong Kong under the Trade Unions Ordinance (Cap 332). Section 13 of the Trade Unions Ordinance provides that “*the registration of a trade union shall render it a body corporate ... with perpetual succession and with power to ... do all things necessary for the purposes of its constitution*”. The objects of the Association, according to its Constitution, are as follows:-

“3. To secure the complete organisation in the Association of all officers employed in the Hong Kong Fire Services Department as provided in Rule 12 (i).

4. To obtain and maintain just and proper rates of wages, hours of work and other conditions of service and, generally, to protect the interests of members.

5. To regulate the relations and to settle disputes between members and employers, between one member and another, and between members and other workers by amicable agreements whenever possible.

6. To promote a spirit of mutual respect and understanding between the employer and the union and to secure the establishment of recognised and permanent machinery for negotiation with the employer.

7. To provide, for members and in certain circumstances their families, any or all of the following benefits and such others as the Annual or Extraordinary General Meeting may decide:-

- (i) Monetary relief, or such other benefits as may be decided, for sickness, accident, disablement, distress, maternity and retirement.
- (ii) Death gratuities and funeral expenses.
- (iii) Educational fees.
- (iv) Victimisation and trade dispute benefits.
- (v) Legal advice and legal assistance where necessary in connection with the employment of members.

8. Generally to promote the material, cultural, social, educational, and recreational welfare of the members and their families in any lawful manner by the provision of educational facilities which the Annual or Extraordinary General Meeting may from time to time deem expedient.

9. The furtherance, financial or otherwise, of the work or purpose of any lawful association or federal body having for its objects the promotion of the interests of labour, trade unionism, or trade unionists.

10. The establishment of, carrying on, or participation, financial or otherwise, in the business of the printing or publishing of a general newspaper or of journals, books, pamphlets, or publications, in the interests of and with the main purpose of furthering the interests of the Association or of trade unionism generally.

11. The promotion of legislation in the interests of its members.”

(1) The Association’s email dated 1 March 2017

3. On or about 1 March 2017, the Association sent an email to all its members, including Mr So, to appeal for donations to be made to APO Relief Fund Limited (敬言仁基金有限公司) (“**APO**”), a private limited company incorporated in Hong Kong in February 2017, with a view to providing financial support to family members of the police officers who were jailed for assaulting a protester during the Occupy Central Campaign (“**the 1.3.2017 Email**”).

(2) Mr So’s complaint

4. By an email dated 7 March 2017, Mr So lodged his complaint to the Commissioner against the Association for non-compliance with Data Protection Principle 3 (“**DPP3**”) in Schedule 1 of the Ordinance. According to DPP3, personal data “*shall not, without the prescribed consent of the data subject, be used for a new purpose*”. The term “*new purpose*” is defined as “*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)*”.

5. As contended by Mr So in his email of complaint dated 7 March 2017, his email address should only be used for the purpose of circulation of the Association's newsletters but not otherwise. Further, Mr So alleged that the 1.3.2017 Email "*was for soliciting business for a limited company engaging in a certain kind of business but not an association newsletter*". The nature and purpose of the 1.3.2017 Email will be discussed below. Subsequently, by an email dated 16 March 2017 to the Commissioner, Mr So further pointed out that (1) 1.3.2017 Email "*cannot be viewed as 'furtherance' of 'any lawful association or federal body having for its objects the promotion of the interests of labour, trade unionism, or trade unionists'*" as specified in Clause 9 of the Constitution; (2) APO is a limited company which was established in February 2017 aiming to "*provide pecuniary benefit to 'relatives of Police being affected in the occupying movement'*"; and (3) there is no trade union for the Hong Kong Police Force.

6. By another email dated 10 April 2017, Mr So alleged that there was "*a prima facie case for violation of Section 35A of [the Ordinance]*".

7. In fact, section 35A only contains provisions on definitions of various terms. The provisions on the alleged violation can be found in section 35C which provides that "*[s]ubject to section 35D [i.e. the grandfathering arrangement which will be set out below], a data user who intends to use a data subject's personal data in direct marketing must take each of the actions specified in subsection (2).*" According to section 35A, "*direct marketing*" means not only "*the offering, or advertising of the availability, of goods, facilities or services*", but also "*the solicitation of donations or contributions for charitable, cultural, philanthropic, recreational, political or other purposes.*"

8. Section 35C(2) specifies the requirements regarding the actions which need to be taken by the data user who intends to use a data subject's personal data in direct marketing. Those actions include (1) informing the data subject that the data user intends to so use the personal data and that the data user may not so use the data unless the data user has received the data subject's consent to the intended use; (2) providing the data subject with information relating to the kinds of personal data to be used and the classes of marketing subjects in relation to which the data is to be used; and (3) providing the data subject with a channel through which the data subject may, without charge by the data user, communicate the data subject's consent to the intended use."

9. According to section 35C(5), "*a data user who uses a data subject's personal data in direct marketing without taking each of the actions specified in subsection (2) commits an offence and is liable on conviction to a fine of \$500,000 and to imprisonment for 3 years.*"

10. For the sake of completeness, we should at this juncture mention the grandfathering arrangement stipulated in section 35D of the Ordinance which effectively provides an exception to the operation of section 35C. Section 35D provides:-

"(1) If, before the commencement date [i.e. 1 April 2013]—

(a) a data subject had been explicitly informed by a data user in an easily understandable and, if informed in writing, easily readable manner of the intended use or use of the data subject's personal data in direct marketing in relation to a class of marketing subjects;

(b) the data user had so used any of the data;

- (c) *the data subject had not required the data user to cease to so use any of the data; and*
- (d) *the data user had not, in relation to the use, contravened any provision of this Ordinance as in force as at the time of the use,*

then section 35C does not apply in relation to the intended use or use, on or after the commencement date, of the data subject's relevant personal data, as updated from time to time, in direct marketing in relation to the class of marketing subjects."

11. In the present case, there is no evidence to contradict Mr So's case that he joined the Association in February 2014. Accordingly, the grandfathering arrangement is not applicable since the Association was not a data user who had control over the use of Mr So's personal data before 1 April 2013.

12. On 23 June 2017, the Commissioner's representative wrote to the Association:-

- (1) referring to Mr So's complaint (without disclosing his identity) and the 1.3.2017 Email;
- (2) pointing out DPP3 and the "direct marketing" provisions under the Ordinance;
- (3) informing the Association of the Commissioner's intention to carry out an investigation under section 38(a) of the Ordinance for the purpose of ascertaining "*whether the act or practice specified*

in this complaint is a contravention of a requirement under the Ordinance"; and

- (4) requesting the Association to furnish information and/or documents.

13. By an email dated 7 July 2017, the Commissioner's representative informed Mr So that "*this Office decided to commence a formal investigation*" against the Association under the Ordinance and also that under section 64B(1) of the Ordinance, a complaint or information in respect of an offence under the Ordinance may be made or laid before a magistrate within 2 years from the date of commission of the offence.

14. On 14 July 2017, the Association wrote to the Commissioner providing, amongst others, the following information: -

- (1) According to the membership application form, members confirmed their agreement to the Association's use of their personal data for the purpose of circulation of "會訊". The term "會訊" covers in general all kinds of communications between the Association and its members including those in relation to the activities for solicitation of donations from members.
- (2) By a notice in writing entitled "Updated Privacy Policy and Statement of Collection of Personal Data" dated 31 March 2013 to its members ("**Privacy Policy Notice**"), the Association informed its members that it would use members' contact particulars, including name, email address, telephone, fax, correspondence address etc. for the purpose of communication, which covers a wide range of social and welfare activities including activities

organized by the Association for solicitation of donations from members.

- (3) Notices and emails were sent to members on two occasions in 2016 soliciting for donations for injured and deceased fire services officers.
- (4) At the Annual General Meeting of the Association on 20 March 2017, no enquiries concerning the 1.3.2017 Email or direct marking were ever raised.
- (5) The Association's Constitution provides that it could conduct activities relating to solicitation of donations from members of the Association. In particular:-
 - (a) Clause 13(iii) provides that in the event of the death of a member (except for Honorary Members and Life Members), a death gratuity fund for that member shall immediately be established. Each member (except for Honorary Members and Life Members) may contribute to the fund on a voluntary basis.
 - (b) Clause 14 provides that the Annual or Extraordinary General Meeting of the Association shall have power to alter all fees, subscriptions and contributions, and to impose additional fees, subscriptions and contributions for the purpose of providing further benefits for members.

- (c) Clause 53(vi) provides that the general fund of the Association can be used for payment of donations or grants to registered trade union or other lawful bodies in Hong Kong and subscriptions, fees, and contributions necessary for affiliation with any trade union federation or other lawful trade union organisation in Hong Kong.

15. Further, by an email dated 11 September 2017 to the Commissioner, the Association confirmed that prior to 1 April 2013, it had not used its members' personal data to solicit donations. This confirmation seems to suggest that the grandfathering arrangement under section 35D of the Ordinance should not apply.

(3) The Commissioner's decision to refer the complaint to the Police

16. On 13 October 2017, a letter was sent on behalf of the Commissioner to Mr So stating as follows:-

"We refer to your complaint against [the Association]. You requested this Office to refer your complaint to the Police with a view to prosecuting the offender who had used your personal data in direct marketing without your consent.

2. Having examined the relevant information, we will refer your complaint to the Police for criminal investigation. In this regard, we decide not to investigate your complaint further under section 39(2)(d) of the Ordinance. This is in accordance with paragraph 8(i) of our "Complaint Handling Policy". Please note that the Police may approach you directly for your assistance in their

investigation.

...”

17. Section 39(2) of the Ordinance as referred to in the above letter provides:-

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

(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;

(ca) the primary subject matter of the complaint, as shown by the act or practice specified in it, is not related to privacy of individuals in relation to personal data; or

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

18. Apparently, the Commissioner relied on section 39(2)(d) to the effect that no further investigation would need to be carried out given that the matter had already been referred to the Police. In other words, it appears that the

Commissioner took into account his decision to refer the complaint to the Police in considering whether or what further investigation should be pursued.

19. On the same day i.e. 13 October 2017, the Commissioner's representative wrote to the Commissioner of Police referring Mr So's complaint to the Police as "*a case of suspected offence for breach of section 35C of [the Ordinance]*". The letter also set out the details of the complaint and the Commissioner's observations "*for [the Police]'s follow up action*".

20. On 30 October 2017, the Association made further representations to the Commissioner to the effect that between April 1998 and March 2013, the Association had used its members' personal data on various occasions for communication purposes in a wide range of social and welfare activities, which included sending notices and letters to its members to solicit donations.

(4) The Commissioner's withdrawal of his initial referral to the Police

21. In view of such further representations made by the Association, the Commissioner wrote to the Commissioner of Police on 13 November 2017 withdrawing the previous decision to refer the complaint to the Police. In the letter, the Commissioner stated as follows:-

(1) His officer "*should have gathered comprehensively information and facts of the case before concluding that the grandfathering arrangements under section 35D of the Ordinance did not apply, and hence made the referral decision*".

(2) The Association had all along used members' personal data for communication purposes in a wide range of social and welfare

activities covering the solicitation of donations from members before 1 April 2013. The relevant information showing the Association's use of its members' personal data for solicitation of donations during the period from April 1998 to March 2013 was obtained after the Commissioner's initial decision to refer the complaint to the Police made on 13 October 2017.

- (3) He was of the view that the grandfathering arrangement should apply in the present case. Hence, his decision to withdraw the initial referral to the Police.

22. By a letter dated 20 November 2017, the Commissioner's representative notified Mr So that in view of the information recently obtained from the Association, it was decided that the matter should not be referred to the Police on the basis that the grandfathering arrangement should be applicable in the present case ("**the Determination**"). It is apparent from the letter that the Determination was classified as a refusal to carry out further investigation or a decision to terminate an investigation initiated by Mr So's complaint because §7 of the letter stated:-

"If you disagree with our decision not to pursue your complaint further under section 39(2)(d) of the Ordinance, you may appeal to the Administrative Appeals Board against the decision ..."

(5) The Appeal

23. By a Notice of Appeal dated 5 December 2017, Mr So lodged with the Board an appeal against the Determination pursuant to section 39(4) of the

Ordinance. Mr So's grounds of appeal as contained in the Notice of Appeal may be summarised as follows:-

- (1) Mr So joined the Association on February 2014 and the Association did not have control over his personal data's use before 1 April 2013. Therefore, the "grandfathering arrangement" should not apply.
- (2) The Privacy Commission claimed that the Association had sent a notice to all members on 31 March 2013. Mr So said he could not verify the truthfulness of such statement as he was not informed of the notice since he joined the Association.

24. Pursuant to section 11(2) of the Administrative Appeals Board Ordinance (Cap 442) ("**the AAB Ordinance**"), on 22 February 2018, the Commissioner filed a written statement relating to his Determination. On 14 February 2018, the Association, as the person bound by the Determination, filed its written response. For the hearing of this appeal, Mr So submitted his written Statement of Response on 16 March 2018 and the Commissioner filed his skeleton submissions on 25 May 2018.

B. THE ISSUES OF THE APPEAL

25. The Commissioner's arguments can be summarised as follows:-

- (1) The Board does not have jurisdiction to hear the present appeal against the Determination as the nature of the Determination does

not fall within the classes of decisions which may be dealt with by the Board under the AAB Ordinance.

- (2) The Commissioner accepts that the Association may have contravened section 35 of the Ordinance, but it is argued that he has properly exercised his discretion not to refer the case to the Police for consideration of criminal investigation in view of all the circumstances of the case (including the fact that the Association is a non-profit making organisation, the reason for soliciting donations to APO, the remedial measures taken by the Association and Mr So's knowledge of the Association's use of his personal data, etc).

26. It is noteworthy that the Commissioner, in the written submissions made on his behalf, did not advance the argument that the grandfathering arrangement should apply in the present case. In fact, at the hearing, it was accepted by counsel for the Commissioner that the grandfathering arrangement is not applicable, given that the Association did not have control of Mr So's personal data if it can be proved that he only joined the Association in February 2014 (i.e. after 1 April 2013). As mentioned above, there is no evidence which contradicts Mr So's case that he joined the Association in February 2014. In the circumstances, the grandfathering arrangement clearly does not apply.

27. Any appeal before the Board should be conducted as a hearing *de novo*. This means that the nature of the hearing before the Board is by way of rehearing on the merits and not simply by way of review: *Li Wai Hung Cesario v Administrative Appeals Board* (CACV 250/2015, 15 June 2016, unreported) at §6.1. We shall proceed to consider the merits of Mr So's grounds of appeal

in the light of all the materials and submissions made to the Board. In particular, the Board should exercise its own discretion independently.

28. The Board has extensive powers under section 21(1) of the AAB Ordinance. Pursuant to section 21(1)(j), it may confirm, vary or reverse the decision that is appealed against: see *A v Administrative Appeals Board & Anor* (HCMP 985/2017, Kwan and Poon JJA, 21 July 2017, unreported) at [33]. Under section 21(1)(m), it may do all things ancillary to the powers conferred by section 21, or reasonably necessary for the discharge of its functions under this Ordinance. Moreover, the Board may, on the determination of any appeal, order that the case be sent back to the respondent for his consideration of such matter as the Board may order by virtue of section 21(3) of the AAB Ordinance.

29. We now deal with the Commissioner's arguments.

(1) Whether the Board has jurisdiction to hear this appeal

30. As mentioned above, it is contended on behalf of the Commissioner that the Board lacks jurisdiction to hear and determine the appropriateness of the Determination made by the Commissioner to withdraw his earlier referral to the Police.

31. Pursuant to section 3 of the AAB Ordinance, the Board may only hear appeals of decisions provided in column 3 under the ordinances prescribed in column 2 of the Schedule. Item 29 of the Schedule sets out the following types of decisions made under the Ordinance which are appealable to the Board:-

“A decision of the Privacy Commissioner for Personal Data—

- (a) to impose conditions on his consent to the carrying out of a matching procedure under section 32(1)(b)(i);*
- (b) to refuse to consent to the carrying out of a matching procedure under section 32(1)(b)(ii);*
- (c) to refuse under section 39(3) to carry out an investigation initiated by a complaint; (Amended 18 of 2012 s. 44)*
- (ca) to terminate under section 39(3A) an investigation initiated by a complaint; (Added 18 of 2012 s. 44)*
- (d) not to delete under section 46(5) a matter from a report under the Ordinance;*
- (e) not to serve an enforcement notice under section 47;*
- (f) to serve an enforcement notice under section 50.”*

32. The Commissioner seeks to contend that the decisions prescribed above all concern the investigative or approval powers of the Commissioner and that the Ordinance does not empower the Commissioner to investigate or enforce the criminal offence provisions under the Ordinance, such as section 35C of the Ordinance. In other words, the Commissioner’s decision on whether the complaint in the context of section 35C falls outside the scope of the appealable decisions set out in Item 29 of the Schedule cited above.

33. We are unable to accept this argument.

34. First, in the letter dated 20 November 2017 (containing the Determination i.e. to withdraw his initial referral to the Police), the Commissioner clearly stated that it was a decision *“not to pursue [Mr So’s] complaint further under section 39(2)(d) of the Ordinance”*. The

Determination therefore falls squarely within §§(c) and (ca) of Item 29 of the Schedule.

35. At the hearing, counsel for the Commissioner, for the first time, argued that the reference to section 39(2) of the Ordinance was wrong. However, she was unable to identify any particular provision which would form the statutory basis of the Determination. Although there is no express provision which deals with a decision not to refer a complaint to the Police, such a decision must be inherently incidental to and/or closely connected with the Commissioner's decision either to refuse to carry out or to terminate an investigation initiated by a complaint pursuant to section 39(2). Hence, naturally, the Commissioner chose to refer to section 39(2) in his letter of the Determination. The argument that such reference was wrong seems to us to be an afterthought.

36. Secondly, counsel for the Commissioner referred us to the Board's previous decisions including *Fu Lok Man James v The Privacy Commissioner for Personal Data* (AAB No. 13/2014), *F v The Privacy Commissioner for Personal Data* (AAB No. 55/2014), *馬家俊與個人資料私隱專員* (AAB No. 43/2015) and *郭文英與個人資料私隱專員* (AAB No. 8/2016) for the purpose of arguing that the investigation into a possible offence under section 50B(1)(c) of the Ordinance is not a matter falling within the investigative role of the Commissioner under sections 37, 38 and 39 of the Ordinance in handling a complaint and hence the decision on such investigation falls out the jurisdiction of the Board. By analogy, it is argued that the decision not to refer a complaint to the Police would likewise be considered as one which does not fall within the ambit of the Board's jurisdiction.

37. However, we believe that those decisions concerning section 50B(1)(c) of the Ordinance are clearly distinguishable from the present case. Section 50B(1)(c) provides that a person commits an offence if he makes a false statement or knowingly misleads the Commissioner or his officer in the course of performance or exercise of his functions or powers. The fact that an investigation under section 50B(1)(c) does not constitute an appealable decision and has nothing to do with a decision made pursuant to section 39(2) of the Ordinance which is expressly stipulated as an appealable decision within the jurisdiction of the Board. Further, there is an important distinction between offences under the direct marketing provisions and that under section 50B(1)(c) of the Ordinance. Mr So's complaint of breach of the direct marketing provisions is directly relevant to the use of his own personal data, which satisfies the requirements under sections 37, 38 and 39 of the Ordinance, whilst a complaint under section 50B(1)(c) of the Ordinance does not involve the illegal use of personal data and hence does not fall under the ambit of sections 37, 38 and 39. Hence, the Commissioner's argument is untenable.

38. In the circumstances, we have firmly come to the conclusion that the Board has jurisdiction to hear this appeal.

(2) Whether the Determination should be quashed

39. In view of the acceptance by counsel for the Commissioner that (1) there is arguable case that the Association has committed a breach of section 35C of the Ordinance, and (2) that the grandfathering arrangement under section 35D of the Ordinance does not apply, there are sufficient reasons for the Determination to be quashed, given that it was based solely on the Commissioner's misapprehension on the applicability of the grandfathering arrangement.

40. Notwithstanding the above, it is argued on behalf of the Commissioner that “*the present case should be distinguished from the usual direct marketing cases that justify referral or taking any further*” and hence the Commissioner would have similarly made the decision to withdraw the referral to the Police in any event (on the basis that the Commissioner should have refused to carry out or terminated an investigation under section 39(2) of the Ordinance) for the following reasons:-

- (1) It has been set out in the 1.3.2017 Email that the reason for soliciting contribution for APO is to render assistance to fellow members of another disciplinary force;
- (2) APO is a lawful body in Hong Kong and is a non-profit making organization as opposed to a commercial organization;
- (3) Mr So was a committee member of the Association and has knowledge of the Association’s use of his personal data in soliciting contributions for other lawful bodies and arguably has consented (or at least has raised no objection) to such use;
- (4) This case “*involves at most a technical breach of the section 35C offence*”; and
- (5) Since Mr So’s complaints, the Association has taken remedial measures in revising its application form for membership (the “**Amended Membership Application Form**”), which now explicitly states that personal data collected by the Association from its members will be used for a number of purposes including solicitation for contributions and/or donations.

41. In effect, the Commissioner's argument is that the factors set out in §40 would have caused him to make the decision to withdraw the referral to the Police (on the basis that he should have refused to carry out or terminated an investigation under section 39(2) of the Ordinance), regardless of the misapprehension on the applicability of the grandfathering arrangement. However, the factors set out in §§40(1)-(4) above are by no means novel since they existed well before 13 October 2017 i.e. the date on which the Commissioner first decided to refer Mr So's complaint to the Police for further investigation. Assuming that those factors have such effect as now alleged by the Commissioner, it is unknown as to why the Commissioner made the initial referral to the Police in October 2017. There is no explanation from the Commissioner in this regard. We cannot exclude the possibility that those factors (or some of them) now relied on by the Commissioner may be relevant or may have substance. But, it is important to explore how all the factors should be weighed or balanced in the equation. For example, if, as now alleged by the Commissioner, Mr So's knowledge (or the extent of the same) of the Association's previous use of his personal data for the purpose of soliciting donations is relevant to the overall assessment under section 39(2) of the Ordinance, it is necessary to resolve the factual dispute on whether Mr So in fact had such knowledge and, if so, the extent of such knowledge at the material time.

42. In the premises, it is incumbent upon the Commissioner to conduct the necessary fact-finding and overall balancing exercise as outlined above before any determination can be made as to whether the circumstances would justify a decision to withdraw in any event.

43. As to the Amended Membership Application Form (as specified in §40(5) above), it is noted that it was introduced only in November 2017, i.e. after the

matter had originally been referred to the Police by the Commissioner on 13 October 2017. However, this does not *per se* render the Amended Membership Application Form compliant with section 35C of the Ordinance which requires not only that the Association's prospective members (i.e. the data subject) be informed of the Association's (i.e. the data user) intention to use the personal data for direct marketing, but also, among other things, that (1) the Association's prospective members be informed that the Association may not so use the data unless with their consent and (2) the Association's prospective members be provided with a channel through which they may, without charge, communicate their consent to the intended use by the Association. As such, it is also necessary for the Commissioner to ascertain the relevance and weight of the Amended Membership Application Form.

44. In the circumstances, having quashed the Determination, the Board, in exercising its discretion, finds it appropriate to remit the matter to the Commissioner for his consideration of whether or not there are justifiable grounds in making the decision to withdraw the referral to the Police (on the basis that the Commissioner should refuse to carry out or should terminate an investigation under section 39(2) of the Ordinance).

C. THE BOARD'S DECISION

45. In the circumstances, the Board unanimously allows this appeal to the extent that the Determination is quashed. In addition, the Board orders that the matter be remitted to the Commissioner for his consideration of the question formulated in §44 above.

46. Pursuant to section 21(1)(k) of the AAB Ordinance, the Board has the power to make an award to any of the parties to the appeal of such sum in respect of the costs of and relating to the appeal. However, as no submissions on costs have been made, we invite the parties to file and exchange written submissions on costs within 28 days from the date of handing down this written decision. The Board will make a decision on costs on paper without any further hearing.

(signed)

(Mr Richard KHAW Wei-kiang, SC)

Deputy Chairman

Administrative Appeals Board