[Note: Office of the Privacy Commissioner for Personal Data has edited this Decision. Please see the remarks for details.]

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 37 of 2009

BETWEEN

COMMISSIONER OF CORRECTIONAL SERVICES — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board

Date of Hearing: 26 August 2010

Date of handing down Decision with Reasons: 31 December 2010

DECISION

The Appeal

1. This appeal raises an important question concerning the proper construction of s.28 of the Personal Data (Privacy) Ordinance (the "**Ordinance**"). The section relates to the fees that may be imposed by a data user for complying with data access request(s) ("**DAR**" or "**DARs**"). In the context of the facts of the present case, this appeal relates to the amount of fees sought to be imposed by the Appellant in complying with three DARs (collectively as the "**3 DARs**") made by a Mr X (the "**Complainant**"). * (see remark below)

2. The 3 DARs were made by the Complainant on 8, 15 and 16 November 2007 respectively. In this Decision, when we refer to the DARs made by the Appellant on these 3 occasions, we shall refer to them as "DAR 1", "DAR 2", and "DAR 3" respectively.

3. The personal data requested by the Complainant under the 3 DARs are set out in Annex 1 annexed to this Decision. ** (see remark below)

4. Following a complaint made by the Complainant to the Respondent, the Respondent carried out an investigation (the "**Investigation**") and concluded that the fees imposed by the Appellant (the "**Imposed Fees**") for complying with the 3 DARs is "excessive, contravening the requirements of section 28(3) of the Ordinance".

5. The Respondent further concluded that as "there is no indication

that [the Appellant] would cease to charge the Imposed Fees for complying with the 3 DARs made by the Complainant, he was of the opinion that "the contravention [would] likely to continue or be repeated". Accordingly, the Respondent decided to, and did, serve an enforcement notice on the Appellant pursuant to s.50 of the Ordinance (the "**Enforcement Notice**"). The Enforcement Notice, which was dated 12 October 2009, required the Appellant, *inter alia*, to:

> "1. revise the administrative fee for complying with the [3 DARs] to an amount not more than HK$63.21 per hour, and if the basic salary of the staff member who actually handles the location, retrieval and/or reproduction of the requested data is less than HK$10,190 per month (the entry salary point of an Assistant Clerical Officer), the administrative fee should not be more than an amount calculated on the basis of the annual basis salary of the staff member concerned and the annual working hours of 1934.4 hours;
>
> 2. notify the Complainant in writing the administrative fee to be charged for complying with [the 3 DARs] as revised under paragraph 1 above".

6. By a Notice of Appeal dated 27 October 2009, the Appellant lodged the present appeal against the decision of the Respondent and the Enforcement Notice, pursuant to s.50(7) of the Ordinance.

Background Facts

7. The background facts leading to the Investigation have been set

out in the "Result of Investigation" dated 12 October 2009 issued by the Respondent. As these background facts are not in dispute between the parties, we would gratefully adopt the Respondent's descriptions of the same, and summarise them as follows:-

(a) the Complainant is a prisoner of the Stanley Prison. On 8, 15 and 16 November 2007, Mr Michael John Vidler ("**Mr Vidler**"), the Complainant's legal representative, made the 3 DARs to the Appellant on behalf of the Complainant;

(b) according to Mr Vidler, the personal data that the Complainant sought to access in the 3 DARs were relevant to the Complainant's judicial review proceedings against the Appellant and the Chief Executive of HKSAR for their refusal to allow the Complainant to receive special footwear and diet in prison; delay in determining the Complainant's position to the Chief Executive of HKSAR; and biased adjudication by the Appellant's officers in the Complainant's disciplinary cases;

(c) in respect of the 3 DARs, the Respondent received complaints from the Complainant via Mr Vidler, complaining (inter alia) that the fees imposed by the Appellant for complying with the 3 DARs were excessive, contrary to section 28(3) of the Ordinance;

(d) by a letter dated 4 December 2007 and in response to DAR 1, the Appellant gave an indication that an administrative cost of HK$488.04 per hour with an estimate of 24 man hours of retrieval of the requested data, performed by an officer with nursing qualification, plus a photocopying fee of HK$1 per page of the data, would be imposed for complying with DAR 1;

(e) Mr Vidler wrote to the Appellant on 8 December 2007 that he considered the fee imposed was excessive and required an amended quotation. On 28 December 2007, the Appellant wrote to Mr Vidler that upon reflection, they would deploy an Assistant Clerical Officer ("**ACO**") instead to handle DAR 1 and lower the administrative fee to HK$221.12 per hour with an estimate of 24 man hours;

(f) on 11 December 2007 and 28 December 2007, the Appellant wrote to Mr Videler in response to DAR 2 and DAR 3 that they would assign an ACO to retrieve the requested data; and that a fee representing administrative cost at a rate of HK$221.12 per hour with an estimate of 2 man hours of retrieval for DAR 2 and 40 man hours of retrieval for DAR 3, plus a standard photocopying charge of HK$1 per page and registered postage for delivery of the requested data, would be levied;

(g) according to the Appellant, the personal data requested by the Complainant were all in English and kept in different files/records under different subjects. The 3 DARs are very extensive, with the requested data covering over 10 years of time. It is estimated by the Appellant that around 6,000 pages of documents are involved;

(h) the Appellant had handled many of the Complainant's other DARs on previous occasions but on a smaller scale and "less general". The Appellant did not charge any administrative or labour costs (except photocopying charges) on these previous occasions, as the requested data involved in the previous data requests could be located and retrieved much more easily. It was however far more time-consuming in complying with the 3 DARs which were complex and extensive. To strike a balance between public interests and the Complainant's personal interests, the Appellant considered it reasonable to impose a charge on the Complainant with a view to recovering the necessary costs in complying with the 3 DARs;

(i) the Appellant stated that they needed to assign an ACO who was the lowest grade of clerical staff and competent in terms of English proficiency to handle the 3 DARs and the total working hours required for an ACO to retrieve the requested data of the 3 DARs were 66 hours. In this respect, the Appellant had provided a breakdown of the working hours

required for retrieving the requested data of the 3 DARs in different locations;

(j) the Hourly Charging Rate (the "**HCR**") of an ACO was $221.12. The Appellant adopted the items used for staff costing in the Staff Cost Ready Reckoner No. 2007/1 promulgated by the Government Treasury (the "**Reckoner**") and the Financial and Accounting Regulations 440 of the Government (the "**Regulation**") in calculating the HCR. The Appellant used the following formula to calculate the HCR of an ACO:-

> [Annual Staff Cost ("**ASC**") of an ACO provided in the Cost Table of the Reckoner / Net Annual Working Hours ("**NAWH**") provided in the Reckoner] + 20% Overhead Charge based on the principles in the Regulations.

(k) according to the Reckoner, the ASC for an ACO was HK$310,488, which consisted of the Average Annual Salary ("**AAS**") of HK$235,788 and the average cost of fringe benefits ("**fringe benefits**") of HK$74,700. The items covered by the cost of fringe benefits included:

(i) Civil Service Pensions and Judicial Officers Pensions;

(ii) Widows and Orphans/Surviving spouses' and Children's Pensions;

(iii) Employer's contributions to the Mandatory Provident

Fund (MPF) and Civil Service Provident Fund (CSPF);

(iv) Contract gratuities;

(v) Leave (earned but untaken) and leave pension;

(vi) Leave passages;

(vii) Housing benefits;

(viii) Education allowances (including school passage);

(ix) Medical and dental benefits; and

(x) Any other case allowances covered by the contract of employment.

(l) regarding the NAWH, it was calculated by deducting the following from the number of days available in a year (i.e. 365 days):

(i) 13 days of public holidays on weekdays;

(ii) 52 Sundays in a year;

(iii) 52 Saturdays in a year;

(iv) 27 days of "Net annual leave" ("Net annual leave" was arrived at by taking the average number of days of entitled leave (30 days based on average for all civil service ranks for 2002-03) and deducting the average number of days of untaken leave (3 days based on average for all civil service ranks for 2002-03); and

(v) 5 days of other leave, such as sick leave, training, etc. (on average each officer took 5 days of sick leave, training, etc. per annum).

(m) further, the Appellant relied on the Regulation to impose a 20% overhead charge for complying with the Complainant's 3 DARs. The Regulations provided that:

> "Except where otherwise approved by the Secretary for Financial Services and the Treasury or provided under any enactment, an overhead charge as specified below will be levied on stores or services supplied for private works which have been requested, including those for the Armed Services. The overhead charge is determined as follows:-
>
> ...
>
> (b) For a job with an estimated value below $500,000, departments may continue to apply the standard rate of 20% or, if they prefer and circumstances permit, conduct an individual costing to ascertain the overhead charge."

(n) the Appellant contended that the inclusion of 20% overhead charge was to recover the costs of administrative overheads on top of the staff cost incurred, which was the cost for reproducing the requested data.

(o) the Appellant further stated that the computation of the recovery cost of reproduction (including the administrative overheads) with regard to the Complainant's case had been endorsed by the Financial Services and the Treasury Bureau ("**FSTB**");

(p) accordingly, on the Appellant's computation, the HCR of an ACO to retrieve the requested data of the 3 DARs was HK$221.12 ([HK$310,488/1,685 hours] x 120%). As the Appellant estimated that the ACO would need a total of 66 man hours to retrieve the relevant data, the costs for complying with the 3 DARs are calculated as follows: HK$221.12 x 66 = HK$14,593.92. This is the amount of the Imposed Fees that the Appellant sought to impose on the Complainant for complying with the 3 DARs.

8. As noted above, the Appellant had handled many DARs made by the Complainant on previous occasions. We have before us a table of comparison of the 3 DARs against 49 previous DARs made by the Complainant before November 2007. It is not necessary for us to go into the details of these previous DARs. Suffice for us to point out that in all these previous DARs, the Appellant only sought to charge the Complainant the photocopying charges for copying the relevant documents subject of the DARs. They had never sought to charge labour costs for retrieving the relevant personal data or documents in complying with the previous DARs. Further, according to the Appellant's records, out of the said 49 DARs, the Complainant had withdrawn 5 of them and refused to pay for 20 after viewing the data. The Complainant had only collected 20 sets of data upon payment of photocopying charges for the same.

9. The 3 DARs in the present case are more extensive than the 49

DARs made by the Complainant previously. In the light of what happened before, it is understandable that the Appellant might take the view that it was necessary to charge the Complainant the costs that his department would need to incur to comply with the 3 DARs. It is also understandable that there might be a concern on his part that his department's resources may be wasted at the end of the day, if the Appellant should fail to collect the data supplied pursuant to the data requests and refuse to pay the charges therefor. At one stage at the hearing of the appeal, counsel for the Appellant, Ms Ho, sought to apply for certain directions to impose a timetable for the payment by the Complainant of the Appellant's "estimated fees" before the Appellant would comply with the 3 DARs. Although Ms Ho decided not to pursue the application for directions upon the Board pointing out to her the statutory provisions under s.28 (5) of the Ordinance (and the doubt expressed by the Board regarding its power to make the directions suggested by her), clearly her attempt reflected the concern on the part of the Appellant as mentioned above.

10. On the other hand, it is important to remember that the previous DARs were not the subject-matter of the Investigation, and do not raise any direct issues in the present appeal. They are merely part of the background. Whether or not the fees sought to be imposed by the Appellant are excessive must be judged against the 3 DARs and not the previous DARs. It is the application of the relevant statutory provisions to the 3 DARs – not the 49 DARs made before November 2007 – that we are concerned with in the present appeal. In this connection, we would

specifically reject the Appellant's contention (made in one of his written submissions dated 22 December 2009) that, in considering whether the fees sought to be imposed by the Appellant is excessive, regard should be given to the prior DARs.

The relevant statutory provisions

11. Section 28 of the Ordinance provides as follows:

> "(1) A data user shall not impose a fee for complying or refusing to comply with data access request or data correction request unless the imposition of the fee is expressly permitted by this section.
>
> (2) Subject to subsections (3) and (4), a data user may impose a fee for complying with a data access request.
>
> (3) No fee imposed for complying with a data access request shall be excessive.
>
> (4) Where pursuant to section 19(3)(c)(iv) or (v) or (4)(ii)(B)(II) a data user may comply with a data access request by supplying a copy of the personal data to which the request relates in one of 2 or more forms, the data user shall not, and irrespective of the form in which the data user complies with the request, impose a fee for complying with the request which is higher than the lowest fee the data user imposes for complying with the request in any of those forms.
>
> (5) A data user may refuse to comply with a data access request unless and until any fee imposed by the data user for complying with the request has been paid.
>
> (6) Where-

(a) a data user has complied with a data access request by supplying a copy of the personal data to which the request relates; and

(b) the data subject, or a relevant person on behalf of the data subject, requests the data user to supply a further copy of those data,

then the data user may, and notwithstanding the fee, if any, that the data user imposed for complying with that data access request, impose a fee for supplying that further copy which is not more than the administrative and other costs incurred by the data user in supplying that further copy." (emphasis added and underlined)

12. On the question of the Enforcement Notice, s.50 of the Ordinance provides, *inter alia*, as follows:

"(1) Where, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user-

(a) is contravening a requirement under this Ordinance; or

(b) has contravened such a requirement in circumstances that make it likely that the contravention will continue or be repeated,

then the Commissioner may serve on the relevant data user a notice in writing-

(i) stating that he is of that opinion;

(ii) specifying the requirement as to which he is of that opinion and the reasons why he is of that opinion;

(iii) directing the data user to take such steps as are specified in the notice to remedy the contravention

or, as the case may be, the matters occasioning it within such period (ending not earlier than the period specified in subsection (7) within which an appeal against the notice may be made) as is specified in the notice; and

(iv) accompanied by a copy of this section.

(2) In deciding whether to serve an enforcement notice the Commissioner shall consider whether the contravention or matter to which the notice relates has caused or is likely to cause damage or distress to any individual who is the data subject of any personal data to which the contravention or matter, as the case may be, relates.

(3) ....

(4) Subject to subsection (5), the period specified in an enforcement notice for taking the steps specified in it shall not expire before the end of the period specified in subsection (7) within which an appeal against the notice may be made and, if such an appeal is made, those steps need not be taken pending the determination or withdrawal of the appeal." (emphasis added and underlined)

13. For completeness' sake, we also set out below s.47(2) of the Ordinance, which contains the following provisions:

"(2) Where the Commissioner has completed an investigation, he shall, in such manner and at such time as he thinks fit, inform the relevant data user of-

(a) the result of the investigation;

(b) any recommendations arising from the investigation that the Commissioner thinks fit to make relating to the promotion of compliance with the provisions of this Ordinance, in particular the data protection principles, by the data user;

(c) any report arising from the investigation that he proposes to publish under section 48;

(d) whether or not he proposes to serve an enforcement notice on the data user in consequence of the investigation; and

(e) such other comments arising from the investigation as he thinks fit to make." (emphasis added and underlined)

14. The proper construction of these statutory provisions is crucial to the disposal of the present appeal. We shall have to return to these statutory provisions when we discuss the parties' submissions later in this Decision.

Respondent's reasons for concluding that the Imposed Fees were excessive

15. The Respondent took the view that "for first time compliance with a DAR, the amount of fee imposed by a data user shall not carry the effect of recovering the full sum of the actual commercial costs involved, thereby shifting the cost burden to the data requestor, or deterring the data subjects from exercising their statutory right of access to their personal data held by the data user. However, for subsequent supply of copies of

the same data, the data user may impose a fee that is no more than the administrative and other costs incurred by the data user in supplying that further copy of the data."

16. The Respondent was of the opinion that a data user may be allowed to recover only the labour costs and the actual out-of-pocket expenses involved in complying with a DAR in so far as they related to the location, retrieval and reproduction of the data requested ("**the Tasks**"). The amount of the labour costs should reflect only the necessary skills and labour for performing the Tasks. He also took the view that a clerical or administrative staff of the Appellant should be able to perform the Tasks, and the labour costs should therefore only refer to the reasonable salary of the clerical or administrative staff in performing the Tasks.

17. The Respondent did not find the photocopying charges (at HK$1 per page) and the registered postage imposed by the Appellant excessive. He also did not find the 66 man hours estimated by the Appellant as the time required for retrieving the requested data excessive, given the considerable scope and extent of the data requested under the 3 DARs. The Respondent also accepted that considering the language used in the 3 DARs, the nature and complexity of the requested data, it is not unreasonable for the Appellant to assign an ACO to perform the Tasks.

18. However, the Respondent did not consider that the Reckoner should form the basis for calculating the labour costs for complying with

the 3 DARs. He did not consider that the AAS of HK$235,788 (which would average out to give a monthly salary of HK$19,649) under the Reckoner should be used in computing the labour costs. Instead the Respondent considered that since the salary range of an ACO, with effect from 1 April 2008, is from point 3 to point 15 of the Government's Master Pay Scale (equivalent to HK$10,190 to HK$20,835 per month), the entry salary point of HK$10,190 should be adopted because "while [the Appellant] may instruct its ACO whose salary is at the maximum salary point in the Master Pay Scale to perform the Tasks, the same task can also be performed by an ACO at the lowest salary point." The Respondent also considered that the inclusion of the fringe benefits (based on the Reckoner) as part of the labour costs is "apparently unjust for shifting the cost burden to the Complainant".

19. As regards the NAWH, the Respondent considered that the "annual leave and other leave entitlements in the NAWH reflects the long-term costs considerations for hiring an officer", and "the inclusion of the such leave entitlements in calculating an ACO's hourly rate for complying with a DAR is unreasonably shifting the costs burden to the Complainant". However, the Respondent did not object to the deduction of the public holidays, Sundays and Saturdays in calculating the annual working hours. Accordingly, he considered that the annual working hours for the purpose of calculating the fee for complying with a DAR should be: ([365 days – 13 public holidays on weekdays – 52 Sundays – 52 Saturdays] x 7.8 working hours per weekday) = 248 x 7.8 working hours = 1934.4 hours.

20. The Respondent did not agree that complying with a DAR is "a service supplied for private works" within the meaning of the Regulations. He considered that the obligation to comply with the 3 DARs is a statutory obligation, and the Appellant is not entitled to include an overhead charge as the cost for reproducing the requested data.

21. Accordingly, the Respondent concluded that the estimated labour costs for complying with the 3 DARs should be no more than HK$4,172 (HK$10,190 x 12 months / 1934.4 hours x 66 hours). The amount of HK$14,593.92 imposed by the Appellant as the Imposed Fees was therefore excessive.

The Grounds of Appeal

22. In his Notice of Appeal, the Appellant stated his grounds of appeal as follows:

> "*(i) The Commissioner had failed to take into consideration the standing practice of calculating the administrative fee and found that the calculation following such standing practice is excessive.*
>
> *Pursuant to section 28 of the Personal Data (Privacy) Ordinance, a data user may impose a fee for complying with a data access request. Given the Hourly Charging Rate of HK$221.12 including the 20% Overhead Charge was endorsed by the*

Financial Secretary and Treasury Bureau (FSTB) ...., the Privacy Commissioner should take this into account and find that the fees charged by the Department not excessive.

(ii) *Referring to section 47(2)(d) of the Personal Data (Privacy) Ordinance, the Privacy Commissioner shall inform a data user where he has completed an investigation whether or not he "proposes to serve an enforcement notice" in consequence of the investigation. In fact, we received the result of investigation and were served with the Enforcement Notice at the same time, i.e. 12 October 2009 .....*

(iii) *In the Enforcement Notice, the Privacy Commissioner has formed an opinion that our Department will continue to charge the administrative fee for data access requests made by the Complainant. To this end, a finding of "the contravention will continue or be repeated" was concluded in the Enforcement Notice is without factual basis.*

As a matter of fact, the Complainant had put up 45 data access requests in the past years involving more than a thousand photocopies. The Department has never imposed any administrative fee in response to these data access requests."

Discussion

The Law

23. Section 28(2) of the Ordinance provides that subject to

subsections (3) and (4), a data user may impose a fee for complying with a DAR. By reason of s.28(1) a data user is prohibited from imposing any fee for complying with a DAR unless the imposition of the fee is *expressly* permitted by s.28. Accordingly, any fee or charge that is not expressly permitted under the section cannot be imposed by a data user for complying with a DAR.

24. The problem, however, is that s.28 does not define the fee that is permitted under subsection (2). Nor is there any provision in the other sections of the Ordinance that provides such a definition. The legislature has not, for example, seen fit to make any provisions for the items of charges – whether they be costs or otherwise – that may be included in the fee imposed by the data user under s.28(2). The Ordinance contains no statutory formula or guidelines on how the amount of the fee is to be computed.

25. The only express provision that may be found in the Ordinance which controls the amount of the fee imposable under s.28 (2) is subsection (3). That subsection provides that no fee imposed for complying with a DAR shall be *excessive*. Unfortunately, however, neither the section nor the rest of the Ordinance defines what is "excessive". In the absence of a statutory definition, the word "excessive" must be interpreted according to its ordinary meaning. The Chinese version of the subsection uses the expression "超過適度", which is in line with the dictionary meaning of "excessive" as "exceeding what is right, appropriate, or desirable; immoderate, given to excess" (see the

Shorter Oxford English Dictionary, 6th edition).

26. However, the dictionary meaning does not help much. In order to decide whether a fee *exceeds* what is right or appropriate (or "超過適度"), one has to first decide what is right or appropriate (i.e. what is "適度") for the fee. But it is in this regard that the Ordinance is unfortunately silent and economic in its provisions.

27. Ms Liu, acting for the Respondent, seeks to rely on the *Law Reform Commission's Report on Reform of the Law Relating to Protection of Personal Data Privacy 1994* (the "**LRC Report**"). In particular, she relies on Chapter 14 of the LRC Report where the Law Reform Commission ("**LRC**") made, *inter alia*, the following recommendations:

> "Fees
>
> ....
>
> 14.26 We recommend that a nominal, waivable, fee be payable by a data subject merely inquiring as to whether data exist relating to him. To deter mischievous requests, a fee should be payable for full access requests which require the supply of a copy of data held. This objective should be fulfilled by a nominal fee, not one that is cost-related. The fee should accordingly be set at a moderate level. It should operate as a maximum, and organizations should be at liberty to reduce or even waive it. In this regard we note that in the Federal Republic of Germany no charges are made for access to government files because of the difficulty and expense entailed in administering an accounting system.

14.28 We also agree with Citibank's submission and have concluded that data users should not be restricted to nominal reimbursement when they had earlier provided that same data. We therefore recommend as proviso to the right to be provided a copy of data at a nominal fee that a fee may be charged on a commercial basis if a copy had been provided earlier. Alternatively, the data user may confirm if requested that the data provided earlier remains accurate."

28. As can be seen from the above, the LRC's recommendations were that the Ordinance should permit two sets of fees for complying with a DAR:

(a) a *nominal, non-cost-related fee* to be payable by the data subject when he makes a *first time request* for access to his personal data. The fee is to be set at a *moderate level*, and waivable by the data user;

(b) the data user may, however, charge a fee on a *commercial basis* if he has already supplied the personal data to the data subject pursuant to a previous DAR, and the data subject request for additional copies of the personal data.

29. It is Ms Liu's submission that the LRC's recommendations in paragraphs 14.26 and 14.28 of the LRC Report have been adopted by the legislature when the Ordinance was enacted in 1995. She submits that s.28(3) and s.28(6) of the Ordinance are the subsections that have

incorporated the said recommendations of the LRC. Accordingly, it is her submission that s.28(3) should be construed as exhibiting a legislative intent that the fee imposable under s.28(2) should only be a nominal, non cost-related fee. In other words, when the legislature provided in s.28(3) that the fee shall not be "excessive", it meant to say that the fee should be nominal, and not cost-related.

30. We are unable to accept this submission, for a number of reasons. We do not agree that in enacting the Ordinance, the legislature has adopted the recommendations of the LRC as set out in paragraphs 14.26 and 14.28 of the LRC Report. We note that when the LRC made its recommendations regarding fees chargeable by data users, it clearly had in mind a legislative scheme whereby the nominal, non-cost-related access fees would be set by means of subsidiary legislation. This is clear from the following paragraphs of the LRC Report:

> "**Recommendations**
>
> .....
>
> 14.6 A nominal, waivable, fee should be payable by a data subject for inquiring as to whether data exist relating to him. A nominal (not cost-related) fee should be payable for full access requests which require the supply of a copy of data held, to deter mischievous requests. It should operate as a maximum, and organizations should be at liberty to reduce or even waive it (paragraph 14.26). A fee may be charged on a commercial basis if a copy had been provided earlier (paragraph 14.28).
>
> 14.7 Access fees should be provided for in subsidiary legislation and in a manner facilitating their updating as

required (paragraph 14.31).

.....

Should the data protection authority set fees?

14.31 On the general question of the level of fees, we recognise that the data protection authority is not a disinterested party on this issue. It may accordingly be preferable for levels to be set elsewhere. Once determined, the inclusion of fees in subsidiary legislation would facilitate updating as required. **We recommend that the question of fees be provided for in subsidiary legislation."**

31. It is hence clear that what the LRC had in mind was a set of subsidiary legislation setting or providing for the level of fees to be chargeable by data users in complying with DARs. If the recommendations of the LRC had been adopted, *fixed (non-cost-related) fees* would have been set by means of subsidiary legislation, which may then be updated from time to time. If that had been done, there would have been no need at all for the legislature to provide in s.28(2) that the fees imposable by the data user shall not be excessive.

32. The provision in the present s.28(3) is one which nowhere to be found in the LRC Report. The LRC Report never used the word "excessive" in the formulation of the LRC's recommendations or in the expression of the views of the LRC. Rather than being a subsection that has incorporated the recommendations of the LRC, the present s.28(3) is, in our view, a clear departure from them.

33. Indeed, if the legislature had intended that fixed-sum and non-cost-related fees shall be charged under s.28(2) , it would have been easy for it to provide in the Ordinance that the amounts imposable by a data user shall be those set out either in a schedule or in subsidiary legislation, which amounts may be fixed by the Chief Executive or by whatever authority the Chief Executive might seek to delegate his authority. The schedule or the subsidiary legislation may then set out the fees – in whatever nominal sums as may be fixed, or according to some scale whereby the fixed-sum fees may vary depending on say, the number of pages of documents to be provided by the data user. Such a legislative scheme would have been simple to adopt, but the present s.28(2) and (3) are clearly out of place if the intention was to adopt such a scheme.

34. Turning to s.28(6), we note that the subsection in fact has not followed the LRC's recommendation by allowing the data user to charge a fee on a *commercial* basis. A fee chargeable on a commercial basis would have been a fee that allows for the making of commercial profits – for that is how fees are chargeable by businesses or enterprises when they do business. For example, when a shop providing photocopying service charges its fees on a commercial basis, it would not merely charge for its costs. A fee that is limited to the recovery of costs is not a fee charged on a commercial basis. The present subsection (6) – inasmuch as it limits the fee to be "no more than the administration and other costs incurred by the data user" in supplying the further copy – is clearly not a subsection that allows for the charging of fees on a commercial basis.

Accordingly, we do not accept the Respondent's submission that s.28(6) has incorporated the recommendations of the LRC.

35. In any event, it does not seem to us that the Respondent's submission is a coherent one. If in fact on the construction of s.28(3), the fee allowed under s.28(2) is only a nominal, non-cost-related fee, we do not see how the Respondent can consistently say at the same time that he takes no exception to the Appellant charging a fee that represents "the labour costs and the actual out-of-pocket expenses involved in complying with a DAR in so far as they related to the location, retrieval and reproduction of the data requested" (see paragraph 16 above). Surely a fee that seeks to recover such labour costs and actual out-of-pocket expenses is a fee that is cost-related. It is to be remembered that although the Respondent took the view that some of the items included in the Appellant's calculation were objectionable, the Respondent's own approach allowed for the imposition of a fee that was itself cost-related, and certainly not "nominal". The amount that the Respondent allowed to be charged, being HK$4,172, was not a nominal sum at all.

36. For the above reasons, we do not accept Ms Liu's submission that s.28(2), when read together with s.28(3), only permits the imposition of a nominal, non-cost-related fee. We also reject her submission that the LRC Report provides a helpful aid to the construction of s.28.

37. In our view, a purposive approach should be adopted, and in construing s.28, regard must be given to the overall structure of the whole

section, and the specific provisions in the individual subsections which cast light (albeit indirectly) on the legislative intent. In construing the section, we have taken into account the considerations set out in the paragraphs that follow.

38. The long title of the Ordinance states the legislative purpose of the Ordinance: the Ordinance is passed "to protect the privacy of individuals in relation to personal data, and to provide for matters incidental thereto or connected therewith". As the legislative purpose of the Ordinance is to protect the privacy of individuals in relation to personal data, s.28 should be construed in a way that is consistent with this legislative purpose. This is the first point.

39. Secondly, one must not forget that complying with a DAR is a statutory obligation (under s.19(1) of the Ordinance). Generally speaking, but subject to any express statutory provisions to the contrary, the costs and expenses incurred by a person in complying with a statutory obligation should be borne by that person. On the other hand, if the statute does allow him to charge a fee, he may do so but only *to such extent* as the statute allows him to do so. Otherwise, the obliged person may, by imposing an exorbitant charge, avoid complying with his statutory obligation. Accordingly, in our view, a statutory provision that allows the obligor to charge a fee for complying with his statutory obligation should be construed *strictly* to avoid creating a loophole for the obligor to escape from his statutory obligation.

40. Thirdly, in construing a statutory provision of this sort, one must assume (subject to any provision to the contrary) that the legislature does not intend to create an arbitrary scheme. This is because it is unlikely that the legislature intends to allow the person imposing the fee to act arbitrarily. In the context of the present case, what s.28(2) allows is a "fee for complying with a [DAR]". Hence the fee imposable by a data user must be related to his complying with the DAR in question. And the only thing that may rationally relate a fee to the compliance must be the costs of the compliance. Accordingly, when the legislature allows a data user to impose a fee under s.28(2), it must have intended that the fee shall be a cost-related fee.

41. Fourthly, in not fixing the amount of fees (either by way of a schedule or by rules or subsidiary legislation), the legislature must have recognised that the costs for complying with a DAR may vary not only with the scope and complexity of the DAR in question, but also with different data users. The circumstances of different data users may be different and this may reflect on the costs that they may need to incur when they comply with a DAR. By not stipulating fixed-sum fees, and merely providing that data user shall not impose fees that are excessive, the legislature intends to allow data users of different circumstances (companies of different sizes, with different resources etc.) some flexibility in the imposition of fees, and that whether a fee purportedly imposed is excessive or not is to be considered according to the circumstances of each case.

42. Fifthly, in allowing the data user to impose a fee and in permitting him not to comply with a DAR until and unless the fee has been paid (see, s.28(5)), clearly the intention of the legislature has in mind of protecting the interest of a data user who may have to incur costs to comply with DARs. And where the DARs are extensive, as in the present case, the costs may be substantial and far from being "nominal".

43. Sixthly, precisely because of s.28(5), a data user may be able to avoid complying with his statutory obligation if he is free to charge an exorbitant fee for the costs of compliance. A data user may, by simply jacking up the costs (say, by claiming to have engaged a team of highly-paid professionals to carry out the work for complying with a DAR, and seeks to recover the full costs incurred thereby), makes it difficult, if not impossible, for a data requester to obtain his personal data. It is, we believe, for this reason that s.28(3) is enacted to strike a balance between the interest of the data user and the interest of the data requester. The costs to be charged by the data user must not be "excessive".

44. Seventhly, in striking the balance between the interest of the data user and the data requester, we consider that the legislature contemplates that there may be situations where it may not be just to allow a data user to recover the full costs actually incurred by him in complying with a DAR, and – to that extent – the legislature intends to lean in favour of the data requester. In this regard, we derive some assistance from s. 28(4), which provides (to the effect) that where a data user may comply with a DAR in one of 2 or more forms, he is, irrespective of the form in which

he complies with the request, prevented from imposing a fee higher than *the lowest fee* charged for complying with the request in any of those forms. Accordingly, if a data user chooses to comply with a DAR in a form that is more costly, he would not be able to charge a fee higher than that would otherwise be chargeable if he had complied with the request in a form that is less costly. For this reason, under s.28(4), the data user may not be able to recover all its actual costs. As he is only able to impose a fee that represents the lowest fee for complying with the DAR in any of the possible forms, he would, in effect, be able to recover only the costs that are *the least of all alternative courses available* for complying with the DAR. Even if the data user was reasonable in choosing to comply with the DAR in one form, he would still not be entitled to impose a fee higher than what he could charge for another form if the fee for that form is less expensive.

45. Subsection (4) is to be contrasted with subsection (6), which applies to situations where the data requester requests for a further copy of personal data that had previously been provided by a data user. In those situations, the data user is still allowed to charge a fee which is "not more than the administrative and other costs incurred by the data user in supplying that further copy". As we pointed out above, this formulation is not the same as allowing a fee to be charged on a commercial basis (which would have allowed a commercial profit to be made), but it does allow for the recovery of the actual costs incurred by the data user. This is in clear contradistinction to the spirit of s.28(4), which relates to first-time DARs.

46. Construing the whole section in its context, and drawing the threads from the special provisions in the various subsections together, we are of the view that the word "excessive" in subsection (3) should be construed as confining the fee only to cover those costs which are *directly related to and necessary for* complying with a DAR. A fee that exceeds such direct and necessary costs is, in our view, excessive. This, of course, only applies to first-time DARs, and do not apply to situations specially provided for under s.28(6) (which requires the adoption of a different statutory formula).

47. We would add the following. As pointed out above, we are of the view that the fee imposable by a data user under s.28(2) is cost-related. But we also hold that this does not mean that the data user can recover all its actual costs incurred for complying with a DAR. He can only recover such costs as are shown to be directly related to and necessary for complying with a DAR. The question arises as to who bears the burden of proof.

48. In our view, as the matter of costs is clearly one that is known – and often known *only* – to the data user, the evidentiary onus is on the data user to show that the fee that it imposes is not excessive, namely, that it does not go beyond the direct and necessary costs incurred for the compliance with the DAR in question. It is not that there is any legal or statutory presumption that the fee imposed by a data user is presumed to be excessive unless proved otherwise. It is simply that in deciding

whether a fee is excessive or not, the onus rests with the data user to show that the fee represents no more than the direct and necessary costs incurred in complying with the DAR. If, for example, the data user fails to provide any evidence at all as to its direct and necessary costs, this Board is entitled to find that its fee is excessive. There may of course be cases where even without evidence from the data user, the Board is satisfied that the fee imposed is not excessive (e.g. the amount of the fee itself is such that it is on its face eminently non-excessive, or there may be circumstantial evidence to show that the fee does not cross the excessive side – circumstances may vary). But generally speaking, the data user bears the evidentiary burden to show that the fee it imposes does not exceed its direct and necessary costs.

49. It is to be noted that "direct and necessary" is not the same as "reasonable". An item of cost that is reasonably incurred may not be necessary, depending on the circumstances. This distinction would not be difficult to understand, particularly to those who are familiar with taxations in the High Court. A reasonable item is not the same as a necessary item in that it may be an item that a reasonable data user may see fit to incur, yet it may not be strictly necessary as it is still possible to comply with the DAR without incurring that item of cost.

50. We would also point out, for completeness' sake, what might seem to be the obvious. Subsection (3) of s.28 only restricts a data user from imposing a fee that is excessive. It does not prevent a data user from imposing a fee that is *less*, or to waive a fee that he may otherwise

be entitled to charge. A fee that is *less* than the direct and necessary costs for complying with a DAR is thus permissible. This may be important particularly to those data users who may consider that it would be more administratively convenient to impose flat-rate fees for complying with DARs. Those data users (such as banks) who keep records or data in digital databases, and who have a standard procedure for retrieving such records or data, may well consider that it would be administratively more convenient for them to charge flat-rate fees for complying with DARs. So long as the flat-rate fee that is imposed is *lower* than the direct and necessary costs for complying with a DAR, it is unobjectionable. There is no need for the data user to ensure that the fee imposed must exactly match the direct and necessary costs for complying with the DAR in question.

Calculating the HCR

51. Having settled the principles necessary for the application of s.28 to the present case, we now move to deal with the specific items in issue between the parties.

(a) ASC of an ACO

52. As pointed out above, the Respondent accepts that an ACO is required to perform the Tasks. However, it does not accept the ASC in the Reckoner as providing the proper basis for calculating the labour costs of the ACO in performing the Tasks.

53. It is true that the purpose of the Reckoner was to assist government bureaus and departments to carry out staff costing exercises. But in the absence of other evidence to the contrary, the Reckoner provides good evidence of the costing of an "average" ACO, i.e. the costs a hypothetical ACO whose remuneration, consisting of salary and fringe benefits, is calculated on an average basis.

54. If the Respondent accepts that an ACO is necessary or required to perform the Tasks, we do not see how it could be consistently argued by the Respondent that part of the remuneration package of the ACO should be disregarded in the calculation of his labour costs. If the ACO's remuneration does consist of various fringe benefits (and it is not disputed that it does), they are part of the costs of his labour. It appears to us to be wholly artificial to exclude such fringe benefits from the labour costs calculus.

55. Similarly we consider that it is artificial for the Respondent to adopt the entry point of the Master Pay Scale in the calculation of the labour costs of the ACO. It would appear that the Respondent is suggesting that instead of using the average staff costs of an ACO for computing the amount of fee to be imposed, the Appellant should have used the cost of a hypothetical "entry-level ACO". The only basis for doing this is to assume that the Appellant has at its disposal (to perform the Tasks) an ACO who is being paid an entry level salary. We see no basis for the making of such an assumption, and there is no evidence

before us to show that this is in fact the case. While the test, as we set out above, is one of direct and necessary costs, it does not mean that in considering what are the direct and necessary costs we should start making assumptions simply for the purpose of reducing the amount of costs as much as possible. We therefore reject the Respondent's argument that the entry point salary should be adopted for the calculation of the labour costs of the ACO.

(b) NAWH

56. We also reject the Respondent's approach to NAWH as suffering from the same artificiality. The fact is that the ACO only works on average so many hours per year after deducting the public holidays, Sundays, Saturdays, average annual leave and other leave entitlements (sick leave, training leave etc). When averaging out the number of hours that an ACO would work in a year, it is artificial to take out his leave days but include the public holidays, Sundays and Saturdays. We see no basis for doing that.

(c) 20% Overhead Charge

57. On this item, we have no hesitation in holding that the Respondent is right. The Appellant relies on the Regulation. We have already set out the Regulation above, but will repeat it, for convenience, as follows:

> "*440. Except where otherwise approved by the Secretary for Financial Services and the Treasury or provided under any enactment, an overhead charge as specified below will be levied on stores or services supplied for private works which have been requested, including those for the Armed Services. The overhead charge is determined as follows:-*
>
> ....
>
> *(b) For a job with an estimated value below $500,000, departments may continue to apply the standard overhead rate of 20%, or, if they prefer and circumstances permit, conduct an individual costing to ascertain the overhead charge.*" (emphasis supplied and underlined)

58. The Regulation, on its face, only applies to "stores or services supplied for private works", which is of course not the situation here.

59. In any event, even if the Regulation applies, it is in our view not permissible for the Appellant to impose a fee that includes a 20% overhead charge. Whatever the Regulation says, it cannot possibly prevail over the law (whether it has the endorsement of the FSTB is neither here nor there) and, as we hold above, in order to satisfy s.28(3) of the Ordinance, the fee must not exceed the direct and necessary costs incurred for complying with the 3 DARs. While the labour costs of an ACO would be such direct and necessary costs, we do not see how an overhead charge could be said to be the direct and necessary costs for complying with the requests in question. Administrative overheads and office overheads are, by their very nature, not costs *directly* related to the

compliance with the 3 DARs. They cannot possibly satisfy the test that we hold to be applicable on the proper construction of s.28 of the Ordinance.

60. For the above reasons, we reject the Respondent's submissions regarding ACO and NAWH, but accept his submission regarding the 20% overhead charge. Accordingly, the fee that the Appellant may impose for complying with the 3 DARs must not exceed HK$12,161.55 ([HK$310,488/1,685 hours] x 66 hours = HK$12,161.55).

The Enforcement Notice

61. As noted above, in the present case the Respondent, upon completing his investigation, issued the Enforcement Notice. Ms Liu argued that the Respondent was entitled to do so, as there was a contravention of a requirement under the Ordinance (i.e. the requirement that the fee imposed under s.28(2) should not be excessive) and the Respondent was of the opinion that the contravention was made in circumstances that made it likely that the contravention would continue or be repeated.

62. As we held above, the fee imposed by the Appellant in this case was excessive but only to the extent of the 20% overhead charge. There was nonetheless a contravention of the requirement under s.28(3) of the Ordinance.

63. Accordingly, whether the Respondent was right in issuing the Enforcement Notice depends on whether he was justified in forming the opinion that the contravention was made in circumstances that made it likely that the contravention would be continued or repeated.

64. We are of the firm view that such an opinion on the part of the Respondent is unjustified.

65. As a starting point, the Appellant and his department (the Correctional Services Department) is a government department. Unless there is some convincing evidence to show that this government is one which flagrantly disregards the law (and it would be a sad day for Hong Kong if that is the case), we fail to see on what basis the Respondent would form the opinion that the Appellant would, subject to its right of appeal to this Board, ignores the finding of the Respondent and insist on imposing a fee that the Respondent has found to be excessive.

66. There is no suggestion that the Appellant had previously disregarded the Respondent's determination, and there is no suggestion that the Appellant is a repeated offender of the requirements of the Ordinance.

67. As informed by counsel, we understand that this is the first case that comes before this Board on the proper construction of s.28, in particular s.28(3). In the years since the enactment of the Ordinance, there has not been any direct authority decided either by this Board or by

the Court on meaning of "excessive" in s.28(3). There has been no subsidiary legislation passed to regulate the amount of fees that a data user may impose under s.28(2). The Respondent himself has not issued any guideline on s.28 (2) and (3). Our attention had been drawn to a report published by the Respondent dated 24 February 2010 (Report Number: R10-5528), but that is a report pertaining to "fee at a flat rate" charged by a bank, involving very different facts and rather different issues from the present case. In any event, that Report was only published after 24 February 2010, well after the Enforcement Notice was issued by him in this case.

68. It appears to us that the present case is simply a case where the Respondent has adopted a different view from that of the Appellant regarding the proper construction of s.28(3) and the amount of fee that may properly be imposed by the Appellant in the present circumstances. There is not the slightest shred of evidence of bad faith on the part of the Appellant, nor any suggestion that the Appellant has any personal interest in the matter such as would motivate him to disregard (again, subject to the Appellant's right of appeal) the Respondent's findings in the Investigation. It would be startling to imagine that the Appellant, as part of the government, would (subject to his right of appeal) fail to comply with the Respondent's decision made in the Investigation.

69. Indeed the evidence is to the contrary. In one of his earliest reply to the Respondent's pre-investigation enquiry dated 18 February 2008, the Appellant indicated quite clearly to the Respondent that they

"are pleased to comply with the guiding principles on waiver of administrative fees or standard rate should there be any in the [Ordinance]".

70. The issue involved in the present case relates to the proper amount of fee imposable by the Appellant under s.28(2) of the Ordinance. The contravention by the Appellant did not involve any direct infringement of the privacy rights of Mr X . While understandably some distress might have been caused to Mr X , the present case is clearly not a case where the Respondent could justifiably take the view that without an enforcement notice, some serious contravention of the requirement of the Ordinance could not be properly redressed.

71. In these circumstances, we are of the view that there was no proper basis for the Respondent to form the opinion that the contravention would continue or repeat without serving the Enforcement Notice on the Appellant.

72. The Appellant has made a further point concerning the Respondent's power to serve the Enforcement Notice at the same time when he informed the Appellant of the result of the Investigation. It is the Appellant's contention that s.47(2)(d) of the Ordinance requires the Respondent to inform the data user, at the time when he informed him of the result of the investigation, "whether or not he *proposes* to serve an enforcement notice on the data user in consequence of the investigation". It is the Appellant's contention that it makes no sense for s.47(2)(d) to

require the Respondent to inform a data user whether he proposes to serve an enforcement notice, and yet allow him to serve the enforcement notice itself at the same time. We see the force of this argument. However, in the light of our decision above, it is not necessary for us to come to a final view, or to decide upon, this contention of the Appellant. We prefer to leave this interesting point to another day and express no opinion on the same in this case.

Order

73. We allow the appeal to the extent as set out in paragraph 59 above. We would make an Order that the Appellant is only entitled to impose a fee of not more than HK$12,161.55 for compliance with the 3 DARs.

(Mr Horace Wong Yuk-lun, SC)
Chairman
Administrative Appeals Board

* Due to the sensitive identity of the Complainant, his name was replaced by "X".

** Annex 1 originally annexed to this Decision was removed as it contained personal data of the Complainant.