

ADMINISTRATIVE APPEALS BOARD  
ADMINISTRATIVE APPEAL NO. 47/2015

BETWEEN

Hodfords.com Ltd

Appellant

and

PRIVACY COMMISSIONER FOR  
PERSONAL DATA

Respondent

Coram: Administrative Appeals Board  
Mr. Lo Pui-yin (Deputy Chairman)  
Dr. Cheung Chor-yung (Member)  
Mr. Lau Chun-kong (Member)

Date of Hearing: 1 February 2016

Date of Handing Down Written Reasons for Decision: 9 March 2016

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REASONS FOR DECISION

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*Introduction*

1. On 1 February 2016, this Hearing Board, having heard submissions from Mr. Jason Cheng, President of Hodfords.com Ltd, and from Ms. Catherine

Ching of the Office of the Privacy Commissioner for Personal Data (“PCPD”), found that the Notice of Appeal in this Administrative Appeal was not lodged by the complainant on whom the decision of PCPD was served within the meaning of section 39(4) of the Personal Data (Privacy) Ordinance (Cap.486) (“PDPO”) and that this Administrative Appeal has not been lawfully constituted. This Hearing Board dismissed this Administrative Appeal. This Hearing Board then indicated that written reasons for its Decision would be handed down and distributed at a later date.

2. This Hearing Board’s reasons for its Decision are as follows.

*The Notice of Appeal*

3. The Secretary to the Administrative Appeals Board received on 17 August 2015 the Notice of Appeal in this Administrative Appeal, which states as follows:

“I/We, Hodfords.com Ltd the Appellant, at the address of Room 903, 103 Des Voeux Road West, Hong Kong (Telephone No. \_\_\_\_\_ Fax No. 21497061), appeal against the decision of the \_\_\_\_\_ (A copy of the notice of decision dated 22 July 2015 is at Annex A).

Grounds of appeal are then stated, which include references to “our letter to PCPD of 7 August 2015” and “our company”. And the Notice of Appeal was signed with the signature of one Jason Cheng and dated 13 August 2015.

4. Annex A to the Notice of Appeal includes a letter dated 22 July 2015 of the Office of the PCPD addressed to “Mr Jason Cheng, c/o Hodfords.com Ltd, Suite 903, Lucky Commercial Centre, 103 Des Voeux Road West, Hong Kong”. The letter begins with “Dear Mr Cheng”, refers to “Case No.: 201506758” and then states:

“You made a complaint against the Mandatory Provident Fund Schemes Authority. We have taken follow-up actions and examined the relevant information. Having considered all the circumstances of this case, I decide to exercise the Commissioner’s power under the Personal Data (Privacy) Ordinance not to pursue this complaint further. The reasons for my decision are set out in the Annex to this letter.”

The letter then provides for the particulars of a contact person of the Office of the PCPD and ends with the signature of Ms Fanny Wong, Deputy Privacy Commissioner of Personal Data.

5. Annex A to the Notice of Appeal also includes the following:
- a. a letter of the Office of the PCPD dated 11 August 2015 addressed to “Mr Jason Cheng c/o Hodfords.com Ltd”;
  - b. a letter of Hodfords.com Ltd addressed to the Office of the PCPD dated 7 August 2015 and ending with “Jason Cheng *President*”;
  - c. a letter of Hodfords.com Ltd addressed to the Office of the PCPD dated 8 June 2015 and ending with “Jason Cheng *President*”;

- d. a letter of the Office of the PCPD dated 21 May 2015 addressed to “Hodfords.com Ltd, Suite 903, Lucky Commercial Centre, 103 Des Voeux Road West, Hong Kong (Attn: Mr Jason CHENG, President)”;
- e. a letter of the Office of the PCPD dated 5 June 2015 addressed to “Hodfords.com Ltd, Suite 903, Lucky Commercial Centre, 103 Des Voeux Road West, Hong Kong (Attn: Mr Jason CHENG, President)”; and
- f. a letter of the Office of the PCPD dated 11 June 2015 addressed to “Hodfords.com Ltd, Suite 903, Lucky Commercial Centre, 103 Des Voeux Road West, Hong Kong (Attn: Mr Jason CHENG, President)”.

***The Hearing Board’s Observations and Directions of 10 September 2015***

6. This Hearing Board was constituted to consider the Notice of Appeal and its enclosures in Annex A.

7. On 10 September 2015, this Hearing Board sent a letter through the Secretary to the Administrative Appeals Board (“the Secretary”) to the PCPD and Hodfords.com Ltd. The letter informed the addressees the constitution of this Hearing Board and conveyed to them the following preliminary observations of this Hearing Board:

- (a) The Notice of Appeal dated 13 August 2015 and received by the Secretary on 17 August 2015 appears to state the appellant to be “Hodfords.com Ltd”;
- (b) “Hodfords.com Ltd” appears to be a limited company;
- (c) The signature of the appellant on the Notice of Appeal appears to be that of an individual in the name of Jason Cheng. There is no indication of Jason Cheng's relation with “Hodfords.com Ltd”. There is also no indication that the signature of the appellant on the Notice of Appeal is that of an authorized signatory of “Hodfords.com Ltd” and no company seal is affixed in relation to the signature. Also the Notice of Appeal was not lodged together with a letter of authorization;
- (d) The Notice of Appeal refers to “our company”, which suggests that the appeal is lodged by the company “Hodfords.com Ltd”. The Notice of Appeal also refers to a letter dated 7 August 2015 apparently of “Hodfords.com Ltd” to the Office of the Privacy Commissioner for Personal Data (“PCPD”), which was signed by “Jason Cheng, President”;
- (e) The decision of the Deputy PCPD in Case No. 201506758 dated 22 July 2015 appears to have been made in respect of a complaint by Jason Cheng against the Mandatory Provident Fund Schemes Authority (“MPFA”). The decision was conveyed to Mr. Cheng by letter of the same date addressed to “Mr. Jason Cheng c/o Hodfords.com Ltd”;
- (f) Annexed to the letter of the Deputy PCPD were the Reasons for decision not to pursue the complaint further. Paragraphs 1 to 3 appear to summarize the complaint to be one lodged by Mr. Jason Cheng in respect of the way in which a statutory notice of the MPFA was sent;

- (g) The letters of the Office of the PCPD dated 21 May 2015, 5 June 2015 and 11 June 2015 were addressed to “Hodfords.com Ltd ... (Attn: Mr. Jason CHENG, President)”.

8. On the basis of the above preliminary observations, this Hearing Board indicated in the same letter that the following issues arise for determination before the merits of this Administrative Appeal could be further considered:

- (a) The identity of the complainant under the Office of the PCPD’s Case No. 201506758;
- (b) The identity of the person in respect of whom the Deputy PCPD’s decision of 22 July 2015 was made;
- (c) Whether the Notice of Appeal was validly lodged with the Secretary to the Administrative Appeals Board by a person who has locus standi or standing to maintain the appeal under section 39(4) of the Personal Data (Privacy) Ordinance (Chapter 486, Laws of Hong Kong); and
- (d) Whether this Appeal has been lawfully constituted in accordance with the Administrative Appeals Board Ordinance (Chapter 442, Laws of Hong Kong).

9. To facilitate the determination of the above issues, the Hearing Board issued the following directions in the same letter:

- (a) The Secretary to the Administrative Appeals Board shall serve the Notice of Appeal, together with this letter, on the Office of the PCPD within 7 days of the date of this letter;

- (b) The PCPD shall be regarded as the Respondent in this Appeal for the purpose of the determination of the above issues.
- (c) The PCPD, as Respondent, shall within 28 days after the service upon him of a copy of the notice of appeal lodge with the Secretary and “Hodfords.com Ltd” the statement referred to in section 11(2)(a) of the Administrative Appeals Board Ordinance; and the description of documents referred to in section 11(2)(b) of the same. The statement should also address the preliminary observations and issues set out in the preceding paragraphs. The description should also identify all documents that are considered to relate to the issues set out in the preceding paragraphs.
- (d) The PCPD, as Respondent, shall endeavour to lodge copies of all the documents identified in the description of documents referred to in (c) above at the same time as he lodges the statement and the description referred to in (c) above.

10. The Hearing Board then indicated in the letter that it “will give further directions on the lodging and service of written submissions and the mode of hearing and determination of the above issues”.

11. The Hearing Board ended the letter with the advice that: ‘In the meantime, “Hodfords.com Ltd” and Mr. Jason Cheng are advised to take independent legal advice on the matters stated in this letter.’

*The PCPD’s Statement of 10 November 2015*

12. Having obtained from this Hearing Board an extension of time, the PCPD provided on 10 November 2015 to the Secretary with copy to

“Hodfords.com Limited ... (Attn: Mr. Jason CHENG)” the statement referred to in the direction reproduced in paragraph 9(c) above (“the Statement”).

13. The Statement first referred to the facts of the complaint and then to the reasons for the decision on which this Administrative Appeal related.

14. The Statement next considered the issues this Hearing Board identified in the Secretary’s letter of 10 September 2015 and made the following points:

(a) Mr. Jason Cheng was the complainant.

(b) The PCPD’s Decision not to pursue the complaint further was made against Mr. Cheng as the complainant. The formal notice in writing served under section 39(3) of the PDPO, against which the complainant is entitled to lodge an appeal to the Administrative Appeals Board, was addressed to Mr. Cheng personally.

(c) The Notice of Appeal with Hodfords.com Ltd being named as the Appellant was not validly lodged. Hodfords.com Ltd was not the party on whom the PCPD’s decision was served pursuant to section 39(3) of the PDPO, and thus has no locus standi to lodge an appeal under section 39(4).

(d) This Administrative Appeal has not been lawfully constituted.

(e) Mr. Cheng may rectify the said irregularity by filing an Amended Notice of Appeal with him being named as the Appellant. And if



this were done, the PCPD would ask that the requirement under section 11(2) of the Administrative Appeals Board Ordinance (“AAB Ordinance”) to submit a statement in response to the Amended Notice of Appeal may be dispensed with and the Statement shall stand.

15. The Statement also contained the PCPD’s reply to the grounds of appeal referred to in the Notice of Appeal.

16. The Statement was accompanied by copies of the evidence and other matters the PCPD indicated to have been evidence and other matters considered and relied upon when he made the decision that is the subject matter of this Administrative Appeal.

***The Hearing Board’s Directions of 24 November 2015***

17. On 24 November 2015, having considered the Statement of the PCPD provided on 10 November 2015, the Hearing Board referred to the points that the PCPD had made on the “preliminary issues” (reproduced in paragraph 14 above) and issued the following directions to the PCPD and Hodfords.com Ltd (Attn: Mr. Jason Cheng):

- (a) The Respondent is now required under section 11(1)(a) and (b) of the AAB Ordinance to inform AAB in writing within 14 days from the date of this letter of the name and address of any person who is bound by the decision appealed against, or who has made representations to the Respondent relevant to the decision now appealed against.

(b) (i) If Mr. Jason Cheng chooses not to apply to amend the Notice of Appeal with him named as the Appellant, there should be filed within 14 days from the date of this letter written submission in reply to the Respondent's submissions on the preliminary observations and issues mentioned in paragraph 2 above. The written submission should also be served on the Respondent.

(ii) If Mr. Jason Cheng chooses to apply to amend the Notice of Appeal with him named as the Appellant, he should file with AAB an Amended Notice of Appeal within 7 days from the date of this letter. Mr. Cheng, as the Appellant, should also make written representations on the Respondent's statement received. His representations, if any, will be considered by AAB together with the appeal under reference. The Appellant's written representations, if any, should reach AAB within 28 days from the date of this letter. He should include all supporting documents that he wishes to rely upon as evidence of the appeal as annexures to his written representations. However, the Appellant should not raise in the written representations fresh points which do not arise out of the Respondent's statement received. The Appellant should also serve a copy of his representations on the Respondent. If AAB does not hear from the Appellant within the specified period, the Hearing Board shall assume that the Appellant does not have any further comments.

18. On 26 November 2015, the Office of the PCPD provided the Secretary with the information required under section 11(1)(a) and (b) of the AAB Ordinance. The MPFA, being the person bound by the decision appealed against, was notified of this Administrative Appeal by the Secretary's letter of 30 November 2015.

19. The Secretary did not receive any Amended Notice of Appeal from Mr. Jason Cheng within the 7 day period beginning from the date of the letter of 24 November 2015.

20. On the other hand, two letters printed under the letterhead of Hodfords.com Ltd dated 30 November 2015 and 3 December 2015 respectively were sent to the Office of the PCPD and copied to the Secretary. Both were signed by “Jason Cheng *President*”. The first letter addressed the PCPD’s Statement of 10 November 2015, which included one paragraph that sought to explain why it was stated in the letter printed under the letterhead of Hodfords.com Ltd dated 18 May 2015 that the alleged breach by the MPFA “*has caused irreparable damage to ... me personally*”, with “me” being understood by the PCPD and confirmed by the relevant paragraph of the first letter to refer to Mr. Jason Cheng. Apart from this paragraph, the first letter appeared to be a response to the PCPD’s reply to the grounds of appeal referred to in the Notice of Appeal. The second letter appeared to supplement the first letter by reference to the “Vtech case”.

***The Hearing Board’s Directions of 18 December 2015***

21. On 18 December 2015, having noted the developments since the issuance of the directions of 24 November 2015, the Presiding Chairman of the Hearing Board made the following directions:

- (1) There will be an oral hearing of the present appeal. Notice of hearing will be issued separately.

(2) The name of the appellant shall continue to be what is stated on the notice of appeal. However, please note that this does not mean that the Board hearing this appeal has made a ruling on whether the proper appellant with the right of appeal has lodged an appeal. This matter will be addressed at the oral hearing.

22. The oral hearing was then fixed at 2:30 pm on 1 February 2016.

### ***Oral Hearing of the Administrative Appeal***

23. Prior to the oral hearing, the PCPD sent on 19 January 2016 the Respondent's skeleton submission to the Secretary, Hodfords.com Ltd and the MPFA. This skeleton submission repeated the PCPD's position stated in the Statement regarding the issues set out in paragraph 8 above. The skeleton submission further noted that Mr. Jason Cheng did not file any Amended Notice of Appeal with him named as the Appellant and that instead, letters signed by Mr. Cheng were sent to the PCPD addressing certain issues raised in the PCPD's Statement. As to the contents of these letters, the PCPD made these points in the skeleton submission:

*"Mr. Cheng did not reply specifically to the Respondent's submission that the Notice of Appeal was not validly lodged, or explain why an amended Notice of Appeal need not be filed. However the Respondent noted that Mr. Cheng indeed agreed that he was the complainant under the Complaint. Mr. Cheng stated in his said letter [of 30 November 2015] that "... I always make a point of ensuring the personal data of all my employees are safeguarded and all my efforts were effectively nullified by MPFA's careless act of addressing a communication containing sensitive personal data to a generic addressee".*

24. Mr. Jason Cheng attended the oral hearing on 1 February 2016. The PCPD was represented by Ms Catherine Ching on that day. The MPFA did not attend and was not represented.

25. This Hearing Board first referred the attendees to the Notice of Appeal, the Hearing Board's observations and directions of 10 September 2015, the PCPD's Statement of 10 November 2015, and the Hearing Board's directions of 24 November 2015. This Hearing Board then indicated that the issues it had to hear and determine first were whether the Notice of Appeal was validly lodged with the Secretary and whether this Administrative Appeal had been lawfully constituted and invited submissions from the attendees.

26. Mr. Jason Cheng's oral submissions were concerned with the substance of the complaint to the PCPD against the MPFA and how the PCPD had handled it. His submissions were concerned neither with the issues this Hearing Board had identified in the letter of 10 September 2015 nor with the PCPD's points and submissions regarding them in the Statement of 10 November 2015 and in the skeleton submission of 19 January 2016. His submissions did not touch on his approach or position regarding the PCPD's suggestion and this Hearing Board's directions regarding the option of amending the Notice of Appeal. His submissions also did not involve an attempt to seek amendment to the Notice of Appeal nor any expression about the possibility of applying for such an amendment before the Hearing Board.

27. Ms. Ching's oral submissions for the PCPD, the Respondent, touched upon both the issues referred to in paragraph 25 above as well as the substance of

the complaint to the PCPD against the MPFA. Ms. Ching indicated that the PCPD maintained the points made in the Statement of 10 November 2015 and submitted that Hodfords.com Ltd had no right to appeal against the PCPD's refusal to continue to investigate the complaint. Ms. Ching also mentioned that while Mr. Cheng may not be familiar with the procedure or steps involved in an Administrative Appeal, the Hearing Board had made observations and given directions on how the appeal needed to be conducted. If Mr. Cheng was minded to amend the Notice of Appeal to resolve the questions over the validity of this Administrative Appeal, he could have done so. If he did not do so, he could have explained.

28. Mr. Cheng's oral submissions in reply were not concerned with the issues referred to in paragraph 25 above. His submissions were replies to the points Ms. Ching made in respect of the substance of the complaint to the PCPD.

### *Discussion*

29. Section 39(3), (3A) and (4) of the PCPD provides that if the PCPD refuses to carry out an investigation initiated by a complaint or decides to terminate an investigation initiated by a complaint, he must inform the complainant by notice in writing served on him/her the refusal/decision and reasons for the refusal/decision. This written notice must be accompanied by a copy of subsection (4), which states:

“(4) An appeal may be made to the Administrative Appeals Board –

- (a) against any refusal or termination specified in a notice under subsection (3) or (3A); and

- (b) by the complainant on whom the notice was served (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person, or either).

30. This Administrative Appeal was purportedly lodged in respect of the decision of the PCPD of 22 July 2015 to exercise his power under section 39(2)(ca) under the PDPO not to pursue the complaint under Case No.: 201506758.

31. Notice in writing of the decision not to pursue the complaint under Case No.: 201506758 was served on Mr. Jason Cheng in a letter of the same date enclosing the reasons for the decision, a copy of section 39(4) of the PDPO, Data Protection Principle 4 in Schedule 1 to the PDPO, and the PCPD's Complaint Handling Policy. As it has been noted in paragraph 4 above, the letter was addressed to Mr. Jason Cheng "c/o Hodfords.com Ltd".

32. In the light of section 39(3) and (3A) of the PDPO, the "complainant" on whom the notice of the PCPD's decision in writing was served was Mr. Jason Cheng. As a result, the complainant who may appeal to the Administrative Appeals Board against the PCPD's decision of 22 July 2015 pursuant to section 39(4) was Mr. Jason Cheng. As no relevant person within the meaning of section 2 is involved in the complaint, that portion of section 39(4)(b) did not apply.

33. However, the Notice of Appeal named the Appellant as "Hodfords.com Ltd".

34. Therefore, the Notice of Appeal must be regarded as having been lodged by a person not having the right to appeal under section 39(4) of the PDPO. This Administrative Appeal thus falls to be dismissed unless the matter is appropriately remedied.

35. The PCPD had indicated in the Statement of 10 November 2015 that Mr. Jason Cheng “may rectify the said irregularity by filing an Amended Notice of Appeal with him being named as the Appellant”. The Hearing Board considered this to be a legally viable remedy in the light of its powers under the AAB Ordinance (including sections 21 and 27 thereof) to regulate the procedure of appeals generally and to manage individual appeals before it. The Hearing Board thus issued the directions by the Secretary’s letter of 24 November 2015, which specified in clear terms the steps that Mr. Cheng should take if he was minded to amend the Notice of Appeal in the light of the PCPD’s Statement. Yet, Mr. Cheng did not apply to the Hearing Board to amend the Notice of Appeal in accordance with the relevant directions in the Secretary’s letter of 24 November 2015. Nor was there any application from Mr. Cheng to amend the Notice of Appeal at any time thereafter, be it prior to and during the oral hearing of this Administrative Appeal.

36. The Hearing Board had heard no reasons from Mr. Jason Cheng as to why he did not apply to amend the Notice of Appeal by changing the name of the Appellant from Hodfords.com Ltd to his name. But as the Hearing Board indicated at the oral hearing when it announced the decision to find that the Notice of Appeal was not lodged by the complainant with locus standi and that this Administrative Appeal had not been lawfully constituted, Mr. Cheng had been afforded every reasonable opportunity both prior to the oral hearing and



during the oral hearing to deal with the issues of whether the Notice of Appeal was lodged by the complainant with the locus standi to do so and whether this Administrative Appeal had been lawfully constituted. Indeed he was advised at the first opportunity by the Hearing Board to seek independent legal advice on these issues.

37. As the Notice of Appeal had remained one that was not lodged by a person not having the right to appeal under section 39(4) of the PDPO, namely the complainant on whom written notice of the decision of the PCPD under section 39(2) was served pursuant to section 39(3) or (3A), at the conclusion of the oral submissions, the Hearing Board must hold that this Administrative Appeal had not been lawfully constituted and must fall to be dismissed. For the reasons stated above, the Hearing Board made the said findings and dismissed this Administrative Appeal at the conclusion of the hearing of 1 February 2016.

### *Postscript*

38. Having read the papers relating to the PCPD's investigation that led to this Administrative Appeal, the Hearing Board makes the following observations:

- (a) The PCPD could have considered Hodfords.com Ltd as a complainant alongside Mr. Jason Cheng. Hodfords.com Ltd collected the personal data of its employees and sent such personal data to the Mandatory Provident Fund Scheme approved trustee in the first place. The MPFA received such personal data from the approved trustee in respect of an allegation of failure to pay

contributions and sent the statutory notice to Hodfords.com Ltd with an annex that listed out such personal data.

- (b) There appears to be room for doubt over the PCPD's reliance of section 39(2)(ca) of the PDPO as the basis for not pursuing the complaint. The ground of refusal or termination under section 39(2)(ca) states: "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". The primary subject matter of the complaint in Case No.: 201506758, as the Hearing Board had understood it from paragraphs 1 to 3 of the PCPD's Statement of 10 November 2015, was the MPFA's manner of mailing the statutory notice and an annex that set out personal data of Hodfords.com Ltd's employees to Hodfords.com Ltd's address marked "*Managing Director/Person-in-charge*" and without specifying by name of the person who was to open the letter. The PCPD appeared to have understood the primary subject matter of the complaint to have been concerned with the privacy of individuals in relation to personal data since it referred to Data Protection Principle 4(1) requiring a data user to ensure the protection of personal data held by it from unauthorized or accidental access both in the reasons for his decision of 22 July 2015 and in the Statement of 10 November 2015 and then considered the way MPFA took to mail the statutory notice with the annex containing the personal data of Hodfords.com Ltd's employees. Yet the PCPD then relied on section 39(2)(ca) as the basis of refusal or termination by virtue of the suggestion that the

complaint's primary subject matter was not related to Mr. Jason Cheng's personal data privacy because the statutory notice did not contain his personal particulars. Had this Administrative Appeal proceeded to consider the grounds of appeal, the Hearing Board would have to rule on whether the PCPD was correct in relying on section 39(2)(ca) as the basis for not pursuing the complaint by considering, inter alia, whether, on the true interpretation of section 39(2)(ca), it enables the PCPD to refuse to investigate or terminate an investigation initiated by a complaint due to his opinion that the complaint does not involve, relate to or raise any issue about the complainant's own personal data or his own personal data privacy.

(signed)

(Mr. Lo Pui-yin)

Deputy Chairman

Administrative Appeals Board