ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 48/2015

BETWEEN

GAVIN THOMAS SHIU — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board
Mr Robert Pang Yiu-hung, SC (Deputy Chairman)
Mr Dick Kwok Ngok-chung (Member)
Ms Joan Ho Yuk-wai (Member)

Date of Hearing: 15 August 2017

Date of Handing down Written Decision with Reasons: 18 June 2024

DECISION

A. Introduction and Background

1. This is the Appellant's appeal against the Respondent's ("**PCPD**" or "**the Commissioner**") decision dated 14 August 2015 ("**the Decision**") regarding the Appellant's complaints against the Department of Justice ("**DoJ**") and the Hong Kong Police Force ("**the Police**"). DoJ and the Police are the persons bound by the Decision appealed against ("**the Persons Bound**").

2. The Appellant was a Senior Assistant Director of Public Prosecutions ("**SADPP**") in DoJ. The Appellant's complaints arose out of a criminal case in which the Appellant was the supervisor of the advising counsel in DoJ. The case was a prosecution in relation to a conspiracy to defraud and/or money laundering ("**the Criminal Case**"). The background to the criminal case can be found in the judgment of Poon J. (as he then was) in HCAL 127/2012. In the course of the criminal case, the defendants applied to stay the prosecution on the ground that the prosecution was being used by the liquidators of the relevant company (who had made the initial complaint to the Police) as leverage against the defendants to pressure them into a global settlement of the various civil proceedings that were ongoing between them, and (*inter alia*) that the Police and the DoJ were influenced by the conduct of the liquidators to the extent that they had abdicated their responsibilities as an independent investigator and prosecutor respectively.

3. The stay application, and a second stay application arising from certain actions taken by the Appellant are not directly relevant to our decision, but have been set out in the judgment of the Court of Appeal in CACV 20/2013. We will refer to those facts only insofar as necessary for this decision.

4. On or around 25 May 2012, the Appellant had directed his secretary to download from DoJ's document management system a number of documents said to have been relevant to the criminal case to his two thumb drives and delete the same from the system. On 29 May 2012, the Appellant testified on the stay application. Subsequently, the advising counsel in the case testified. There were press reports on 2 June 2012 that their testimonies were inconsistent and some missing documents were recovered. The application for stay was refused on 5 June 2012.

5. The deletion was discovered by DoJ, who interviewed the Appellant's secretary on 4 June 2012. On 7 June 2012, DoJ reported the matter to the Police. On the same date, a large party of Police including an assistant commissioner, chief superintendent, senior superintendent and superintendent as well as other lower ranking officers entered DoJ's office to seize both the Appellant and his secretary's office computers and thumb drives. On the next day, the Appellant attended the Police Headquarters to assist their enquiries. On 9 June 2012 and within a few days thereafter, the above incidents ("**the Incidents**") were widely reported in the printed and electronic media disclosing the Appellant's name and post title.

6. On 18 June 2014, the Appellant complained to PCPD that DoJ and/or the Police had either failed to safeguard, or leaked, his personal data in contravention of the Data Protection Principles under the Personal Data (Privacy) Ordinance (Cap. 486) ("**PD(P)O**" or "**the Ordinance**"). After investigation, PCPD concluded in the Decision that DoJ and the Police had not contravened those principles and issued the investigation report dated 14 August 2015 ("**the Investigation Report**") containing the Decision. Dissatisfied with PCPD's decision, the Appellant lodged an appeal to the

Administrative Appeals Board ("**this Board**") by Notice of Appeal dated 11 September 2015.

B. Relevant Statutory Provisions and Principles

7. Data Protection Principles ("**DPP**")3(1), DPP4(1)(c)&(d) in Schedule 1 to PD(P)O provide : -

> *"**Principle 3—use of personal data***
>
> *(1) Personal data shall not, without the prescribed consent of the data subject, be used for a new purpose."*

> *"**Principle 4—security of personal data***
>
> *(1) All practicable steps shall be taken to ensure that any personal data (including data in a form in which access to or processing of the data is not practicable) held by a data user is protected against unauthorized or accidental access, processing, erasure, loss or use having particular regard to—*
>
> ...
>
> *(c) any security measures incorporated (whether by automated means or otherwise) into any equipment in which the data is stored;*
>
> *(d) any measures taken for ensuring the integrity, prudence and competence of persons having access to the data;"*

8. Section 44 of PD(P)O provides that:-

*"**44 . Evidence***

(1) Subject to subsection (2) and section 45, the Commissioner may, for the purposes of any investigation, summon before him any person who—

(a) in the opinion of the Commissioner, is able to give any information relevant to those purposes;

(b) where the investigation was initiated by a complaint, is the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person, or both),

and may examine any such person and require him to furnish to the Commissioner any information and to produce any document or thing which, in the opinion of the Commissioner, is relevant to those purposes and which may be in the possession or under the control of any such person."

9. Section 46 of PD(P)O provides that:-

"46. Commissioner, etc. to maintain secrecy

(1) Subject to subsections (2), (3), (7) and (8), the Commissioner and every prescribed officer shall maintain secrecy in respect of all matters that come to their actual knowledge in the performance of their functions and the exercise of their powers under this Part.

(2) Subsection (1) shall not operate so as to prevent the Commissioner or any prescribed officer from—

(a) subject to subsection (8), disclosing any matter if the disclosure is necessary for the proper performance of

the Commissioner's functions or the proper exercise of the Commissioner's powers under this Ordinance;"

10. Section 61 of PD(P)O provides an exemption that:-

"61. News

(1) Personal data held by a data user—

(a) whose business, or part of whose business, consists of a news activity; and

(b) solely for the purpose of that activity (or any directly related activity),

is exempt from the provisions of—

...

(2) Personal data is exempt from the provisions of data protection principle 3 in any case in which—

(a) the use of the data consists of disclosing the data to a data user referred to in subsection (1); and

(b) such disclosure is made by a person who has reasonable grounds to believe (and reasonably believes) that the publishing or broadcasting (wherever and by whatever means) of the data (and whether or not it is published or broadcast) is in the public interest."

11. Section 2(1) of PD(P)O contains, amongst others, the following definitions:

"*personal data*" means "*any data –*

(a) relating directly or indirectly to a living individual;

(b) from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and

(c) in a form in which access to or processing of the data is practicable"

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

"*data subject*", in relation to personal data, means "*the individual who is the subject of the data*"

12. Section 21(1)(j) of the Administrative Appeals Board Ordinance ("**AABO**") (Cap. 442) provides that "*[f]or the purposes of an appeal, the Board may ... subject to subsection (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit*".

C. The Approach this Board Should Adopt in Deciding this Appeal

13. At the hearing, an issue arose as to the approach this Board should adopt in deciding the present appeal, whether it was to be a consideration of whether the Decision is reasonable (in the *Wednesbury* sense), or whether an appeal was to be by way of rehearing and the implications of this. The parties' attention was drawn to the case of *Li Wai Hung Cesario v Administrative Appeals Board* (unreported, CACV 250/2015, 15 June 2016) and post-hearing submissions were invited from the parties.

14. After considering the parties' submissions, we reject the suggestion that our jurisdiction is only limited to decide whether the Decision is reasonable.

The decision of a differently constituted board in Administrative Appeal ("**AAB**") No. 21 of 1999 initially relied on by the Persons Bound does not support that view. We also reject the Respondent's submissions that an appeal to this Board is in the nature of a hearing *de novo.* We are bound by the decision in *Li Wai Hung Cesario v Administrative Appeals Board* that the nature of the hearing of the Board is an appeal by way of rehearing on the merits and not simply by way of review.

15. As to the implications of an appeal by way of rehearing, the Appellant's position is that the Board is not restricted to identifying errors raised by the Appellant or otherwise. The Board is not restricted to the Notice of Appeal and can exercise the discretion afresh to ensure that the decisions are fair and reasonable in the circumstances. The Persons Bound accept that the discretion can be exercised afresh, but when ruling on challenges to the exercise of a discretion (which the Persons Bound state the present case is), the Board ought to follow the approach adopted by the Court of Appeal in conducting ordinary appeals *ie* that the Board should not interfere with the Respondent's exercise of discretion unless the Board finds that the Respondent had misunderstood the law or the evidence, or that the exercise of discretion was plainly wrong such that it was outside the generous ambit within which a reasonable disagreement is possible.

16. We consider that the proper approach has been set out in *Li Wai Hung Cesario v Administrative Appeals Board* at §§7.5 – 7.6 :

> 7.5 ...Whilst it is in the nature of a rehearing, it is nonetheless an appeal, albeit on the merits of the decision.
>
> 7.6 In an appeal on the merits, the appellant has to say why the decision below is wrong and the tribunal will address these grounds of

appeal. But it does not follow from that that the tribunal is required to perform the task of a first instance decision maker afresh and set out its own findings and reasons for the decision. This is not how such a tribunal works in reality. This is more so when the tribunal has rejected the grounds of appeal advanced by the appellant. If it disagrees with the finding of the decision-maker then it is expected to set out its own finding on a particular matter. But, if it agrees with the finding, then it can simply adopt these findings as its own. Generally speaking it is not even necessary for the Board to state that it confirms or adopts such finding. By saying, for example, the decision maker is not wrong on an issue, by implication it must have confirmed or adopted the finding. In every case, one does not simply look at the language used but at the substance of the decision in the context of the way of how the grounds of appeal are presented to the tribunal.

D. The Complaint and Decision

17. Following the approach to appeals above, it is important firstly to identify the actual complaint to the Respondent and the Decision of the Respondent, which is the decision being appealed against.

18. The Appellant's complaint appears to have been transmitted to the Respondent by email with a number of attachments on 18 June 2014. The details of complaint was a 9-page document which set out the background and the substance of the complaint. The Appellant complained that there had been unauthorized leakage of personal data by the Police and the DoJ in connection with his being witness in the Criminal Case. While the original complaint

covered a number of matters, what is pertinent to the Respondent and this Board is that there was unauthorized disclosure of confidential information to the media on about 8 June 2012, the confidential information being that the Police had visited the Appellant's office on 7 June 2012 on an investigation and with the Appellant's permission taken his computer and thumb drives, that they had taken his secretary's computer, and that he had been to Police headquarters, and that the Police and the DoJ had not taken all practicable steps to safeguard his personal data against unauthorized access, loss or use in accordance with DPP 4.

19. The Respondent carried out an investigation into the Appellant's complaint. The investigation included correspondence between the Appellant and the Respondent, representations and written statements from the DoJ and its relevant staff members, representations from the Police and various supporting documents.

20. In the Decision dated 14 August 2015, the Respondent having carefully considered all the relevant information available and the circumstances of the case, came to a decision that there was insufficient evidence to support that the Police or the DoJ had contravened the requirements of DPP3 or DPP4.

21. The Respondent found that the Police and the DoJ denied having disclosed or leaked the information to the media, and their denials were supported by written statements from the staff members who had handled or accessed the documents. No contrary evidence came to light during the course of the investigation to cast doubt on the reliability and credibility of the statements.

22. While DPP4 requires a data user to take all reasonably practicable steps to ensure that personal data held by him are protected against unauthorized or accidental access, or use, it is not a requirement for a data user to provide an absolute guarantee for the security of the personal data. There were in place circulars and guidelines on the handling of personal data, and there was no substantive evidence of any leaks or failure to comply with the circulars or guidelines.

23. The Respondent noted that the Police visit to the DoJ on 7 June 2012 was carried out overtly, it could not be ruled out that the source of information from the media might be a person who had witnessed the Police operation. If the source of information was from someone who witnessed the operation, it would not fall within the definition of "data" under the Ordinance.

E. The Appellant's Grounds of Appeal

24. There are eight grounds in the Appellant's Notice of Appeal, which are summarised as follows:-

(i) the Appellant contended that PCPD should have exercised his power conferred by section 46(2) of PD(P)O to disclose any necessary matter for the proper performance of PCPD's functions and powers. In the Appellant's views, "evidence in support", i.e. inter alia replies from DoJ and the Police, "should have been disclosed but was not despite request." ("**Ground 1**")

(ii) Not having been provided with the replies from DoJ and the Police as alleged in Ground 1, the Appellant was dissatisfied that PCPD issued the Investigation Report without considering the "possible additional

evidence" that the Appellant could have adduced from the responses from DoJ and the Police. ("**Ground 2**")

(iii) The Appellant was of the view that PCPD had not properly performed his duties and exercised his power as "enquiry with respective media as to their respective sources was not undertaken" by PCPD despite "section 44 of PD(P)O empowers PCPD to [summon] any person to give any relevant information". Further, the Appellant's views were not sought in respect of any evidence obtained or evaluation of the same. ("**Ground 3**")

(iv) The Appellant considered that PCPD wrongly applied section 61(2) of PD(P)O, which provides that personal data is exempted from the provisions of DPP 3 in any case in which the use of personal data consists of disclosing personal data to a data user for the purpose of news activities and such disclosure is in the public interest. The Appellant believed that, as the person disclosing his case information to the media had not been identified, it rendered PCPD not possible to believe that such disclosure was made in the public interest, which is required by section 61(2) of PD(P)O. ("**Ground 4**")

(v) The Appellant alleged that "the only reasonable inference" is that the original disclosure was likely by one or more of the 23 staff members of DoJ and/or Police ("**the 23 staff members**") who had accessed or handled the documents containing information of the Incidents ("**the Documents**"). The Appellant considered that PCPD should have summoned the 23 staff members for examination by relying on section 44 of PD(P)O. The Appellant considered that the leakage of the

Incidents by anyone who only witnessed or heard of the incidents was only one of the many possibilities and the Respondent should not have accepted the same as a "reasonable alternative possibility" or "sole reasonable possibility". ("**Ground 5**")

(vi) The Appellant alleged that DoJ and the Police had breached DPP4 (1)(c) & (d) for they both had failed to take reasonably practicable steps for ensuring the integrity and efficacy of protection of personal data. The Appellant considered that both DoJ and the Police had failed to properly and reasonably consider the possibility of the leakage, including failing to make enquiries for DoJ and the Police had interest in not doing do. The Appellant also alleged that there was a dereliction of police duty not to investigate the alleged misconduct in public office and perversion of the course of justice. The Appellant accused that the Respondent had failed to consider the above. ("**Ground 6**")

(vii) The Appellant disagreed with DoJ's response that the Incidents would have been disclosed to the Court prior to the leakage to the media as data disclosed in open court would have been limited due to various reasons. The Appellant also contended that the information leakage to the media had prevented him from making appropriate court applications. ("**Ground 7**")

(viii) The Appellant alleged that there was conflict of interest as the Respondent and the Deputy Commissioner for Personal Data were former colleagues of the Appellant in DoJ when the Incidents were leaked to the media. ("**Ground 8**")

F. Discussion

25. Before going to the individual grounds of appeal, it would be helpful to take an overview of the matter. Despite a fairly lengthy investigation into the matter, the Commissioner was unable to find any evidence that anyone within the Police or the DoJ leaked any personal data to the media. This was despite circumstances where there were relevant and material guidelines for the handling of personal data in the form of any confidential files. Secondly, the media reports contained factual inaccuracies which would not have been expected if confidential files with the Appellant's personal data had been leaked to them. While the Appellant tries to explain this by saying that it could be a *deliberate* ruse by the media to disguise the fact that they had obtained access to confidential files, the simpler explanation would be that the media did not have access to the files and made factual mistakes in their reporting.

26. Stripping the Appellant's case to its essentials, the Appellant appears to be saying that since the media were able to make those reports, they *must* have received confidential information which had been leaked to them by someone in the Police or the DoJ. The Respondent and the Persons Bound, however, say that it could well have been the case that the media observed a large number of officers going into the DoJ and then emerging having seized at least two computers. While the Appellant says that the attendance of police officers at the DoJ was a commonplace occurrence and would not have attracted any attention, the large contingent of very senior police officers coming to the DoJ together would have been unusual. This also had to be seen in the context of the Appellant and the advising counsel having given their testimony in court and this fact was known to the media who would have been alert to any unusual occurrences.

27. Thus, it does not follow that simply because the media had published stories about the attendance of the Police at the DoJ, they *must* have received confidential information leaked from either the Police or the DoJ. The media could have put two and two together, with (or without) some office gossip that a large contingent of very senior police officers had come to the DoJ and spent a significant amount of time with the Appellant when the Appellant had just recently given testimony in a stay application which involved imputation as to the propriety of the prosecution. For a SADPP to give evidence in court is itself not a commonplace occurrence and the media would have naturally been particularly sensitive to anything out of the ordinary.

(A) Whether the information leaked to the media amounts to personal data as defined under PD(P)O

28. Section 2(1) of PD(P)O provides the definition of "personal data", i.e. any representation of information (including an expression of opinion) in any document, within the scope of the Ordinance. Mere utterance of personal information may not amount to disclosure of personal data if such information is not recorded in a document (see AAB No. 21 of 1999). We agree with the Respondent's submissions that, in performing investigative journalism, it is not uncommon that reporters would gather information from such persons who only witnessed or even heard of the Incidents but not necessarily from any documents which recorded or narrated the Incidents. Even if the Police operation in the Appellant's office on 7 June 2012 and the Appellant's attendance at the Police Headquarters the day after were discreet as claimed by the Appellant, the possibility that the Incidents were leaked to the media by a person who had witnessed the Police's operation cannot be ruled out. This

observation has addressed the Appellant's **Ground 5** and we find that the complaint has not been made out.

(B) Whether full enquiry has been made

29. The Commissioner has a wide discretion in the conduct of any investigation. Notably, there is no requirement for the Commissioner to consult with any complainant about the facts found in the course of his investigation or what such facts may signify. Whilst the Commissioner may, if he thinks that it would be of assistance, consult with a complainant, there is no duty to do so.

30. Furthermore, whether to utilize one or more of the powers available to the Commissioner is a matter within the discretion of the Commissioner. In this particular case, whether or not to summon a member of the press to divulge the source of the information would be surrounded by a number of considerations which have to be balanced. One would be whether it would result in any useful information. More importantly, the use of such a power against journalistic materials would engage the rights of freedom of expression and the press and any decision to do so should not be taken lightly. We do not consider that the Commissioner was wrong in any way in not exercising such draconian powers. For the avoidance of doubt, we ourselves do not consider that such powers should be exercised in the circumstances of this case.

31. The Appellant's **Grounds 3 and 4** (including the Appellant's challenge that the Respondent should have cross-examined the 23 staff members also mentioned in Ground 5) have been addressed.

(C) Whether DoJ and/or the Police had breached DPP4 of the PD(P)O

32. DPP4 requires a data user to take all reasonably practicable steps to ensure that personal data held by him are protected against unauthorized or accidental access, processing, erasure or other use. This Board agrees with the Respondent that it is not a requirement under DPP4 for a data user to provide an absolute guarantee for security of personal data held by it as long as all reasonably practicable steps have been taken to ensure security of the personal data. At the material time of the present case, both DoJ and the Police had in place their Circular or Guidelines in relation to the security of personal data against unauthorized access and the control access to classified documents or information, which their staff were well aware of. As regards the Appellant's response that DoJ and/or the Police could have been more discreet during the Police operation in DoJ's office, the Appellant had not concretely pointed out how the Police operation could be more discreet in a way to eliminate the possibility of disclosure of information by any passersby. As such, this Board agrees that there is insufficient evidence of contravention of DPP4 on the part of both the DoJ and the Police. We do not see any merit in the Appellant's **Ground 6**.

33. For the reasons set out from paragraphs 25 to 32 above, this appeal should be dismissed. However, for the sake of completeness, we will continue with the discussion on the rest of the Appellant's grounds of appeal from paragraphs 34 to 36 below.

(A) **Ground 1 & 2** – Respondent's non-disclosure of DoJ and/or the Police replies before the Investigation Report and possible evidence that could have been adduced by the Appellant

34. The Appellant accused that without being provided with DoJ and/or the Police's replies to the Respondent, he was deprived of his right to adduce possible evidence and to rebut DoJ and/or the Police's response during the Respondent's investigation process. This Board agrees with the Respondent's submissions that whilst section 46(2) exempts the Commissioner and every prescribed officer from any criminal liability that may arise from failing to maintain secrecy as required by section 46(1), it does not impose a statutory duty on the Respondent to disclose every investigation finding to the Appellant during the investigation process. In any case, the possible evidence that could have been adduced were pure allegations by the Appellant. We do not see anything in this ground.

(B) **Ground 7** – Whether the information would have been disclosed to the Court prior to the leakage of the Incidents to the media and the information leakage had prevented the Appellant from making appropriate court applications

35. Whether the Incidents would have been disclosed to the Court was only one possibility raised by DoJ but was not the main factor for consideration when the Respondent arrived at the Decision. In considering whether DoJ and/or Police had breached PDPO, the crux lies on factors that we have discussed in paragraphs 25 to 32 above, as opposed to whether the Appellant was prevented from making court applications, which is irrelevant in this case.

(C) **Ground 8** – Conflict of Interest

36. As submitted by the Respondent, both the Commissioner and Deputy Commissioner, who were former colleagues of the Appellant in DoJ, had

delegated the case to one Chief Personal Data Officer, who determined the Appellant's case and informed the Appellant of the Investigation Result on 14 August 2015. The Chief Personal Data Officer concerned had also notified the Appellant by a letter dated 24 August 2015 that she had no conflict of interest in handling the Appellant's case. This Board agrees there is no evidence that there had been any conflict of interest in this case.

G. Independent Exercise of Discretion

37. Notwithstanding that we have rejected the Appellant's Grounds of Appeal, we have also considered whether there is any other matter or matters, independently or collectively which would cause us to exercise our discretion to remit the matter to the Commissioner for further investigation. Having considered the case fully, we do not find any cause for us to do so.

H. Disposal of the Appeal

38. For the reasons given above, this Board unanimously dismisses the appeal.

39. Pursuant to section 22(1) of the AABO, we make no order as to costs.

(signed)
(Mr Robert Pang Yiu-hung, SC)
Deputy Chairman
Administrative Appeals Board

Appellant : Acted in person

Respondent : Represented by Ms Cindy Chan, Legal Counsel

Persons bound by the decision appealed against : Represented by Mr Robin McLeish, Counsel instructed by Messrs. Cheung Tong & Rosa Solicitors