ADMINISTRATIVE APPEALS BOARD
Administrative Appeal No. 5/2012

BETWEEN

FACE MAGAZINE LIMITED Appellant

and

THE PRIVACY COMMISSIONER
FOR PERSONAL DATA Respondent

Coram: Administrative Appeals Board
Horace Wong Yuk-lun SC (Chairman)
Eugene Fung Ting-sek SC (Member)
Lam Wai-choi (Member)

Date of hearing: 28th and 29th October 2013

Date of handing down Written Decision with Reasons: 6 January 2014

DECISION

A. INTRODUCTION

1. Administrative Appeal Nos. 5 and 6 of 2012 arise out of the complaints made by three television artistes (two in Appeal No. 5 of 2012 and one in Appeal No. 6 of 2012) to the Privacy Commissioner for Personal Data ("**the Commissioner**") in 2011. On 20th February 2012, the Commissioner issued a Result of Investigations ("**the Result of Investigations**") and enforcement notice ("**the Enforcement Notice**") pursuant to section 50 of the Personal Data

(Privacy) Ordinance (Cap 486) ("**the Ordinance**") to each of the Appellants. By separate Notices of Appeal dated 6th March 2012, the Appellants appealed against the Commissioner's decisions to serve the Enforcement Notice on them.

2. On 3rd August 2012, the Chairman of the Administrative Appeals Board made a direction that both appeals be heard consecutively one after another.

3. The issues that require the Board's determination are common to both appeals and both Appellants have been represented by the same team of solicitors and counsel. In these circumstances, the Board considers it appropriate to set out our discussions and determination of the issues in this Decision and make references to this Decision in the decision of the Administrative Appeal No. 6 of 2012.

B. THE RELEVANT FACTS

4. The Commissioner made certain factual findings in the Result of Investigations. In the Skeleton Submissions as well as the oral submissions of Mr Philip Dykes SC (appearing together with Mr Hectar Pun) for the Appellant, it was confirmed that such findings would not be challenged by the Appellant in this appeal. We accordingly find all of them as facts. For the purpose of this Decision, we set out some of them below. The Result of Investigations was prepared by the Commissioner in Chinese. The facts set out in this Section are based on the translation provided by the Appellant, on which no issue was raised by the Commissioner.

5. Mr Wong Ho ("**Mr Wong**") and Miss Chen Chi Yiu ("**Ms Chen**") are artistes of Television Broadcasts Limited. On 8th June 2011, Mr Wong and Ms Chen discovered that photographs ("**the said Photographs**") of their daily lives and intimate acts at a private residence ("**the Residence**") and a relevant article ("**the Article**") were published on the cover page, page 17 and pages 34-37 of FACE Magazine Issue No. 211. According to the Article, the photographs were taken in the evenings of 24th and 25th May 2011, and the afternoon of 27th May and 2nd June. The photographs could only be taken at a place outside the Residence. See §2 of Result of Investigations.

6. According to Mr Wong and Ms Chen, FACE Magazine did not inform them or obtain their consent prior to the taking and publishing of the said Photographs. They felt that their privacy was seriously invaded as their private activities inside the Residence were observed and photographed by other persons. They lodged a complaint with the Commissioner. See §5 of Result of

Investigations.

7. The Appellant stated that its publisher ("**Mr Yan**") was solely responsible for the publication of the photographs and editing of the Article. See §9 of Result of Investigations.

8. The Appellant admitted that the photographs were taken by a photographer hired by it in the course of his duty. It said that the shooting location was approximately 10 metres away (although the actual distance as measured on site was about 80 metres) from the Residence and the photographer took the photographs using equipment including a 70-200mm and a 300mm telephoto lenses and a 1.4x magnifier. See §13 of Result of Investigations.

9. Mr Yan asserted that the purpose of the Appellant's taking and publication of the photographs was to prove that Mr Wong and Ms Chen were living together and that what they previously said was not true. Mr Yan stated that both Mr Wong and Ms Chen were idols of young people, and therefore "role models", and that the words and acts of Mr Wong and Ms Chen would influence the young people. The Appellant hoped to show, by publishing the Article, to the young people, that what their idols said might not be true. Mr Yan said that the Appellant took and published the photographs on the basis of public interest. See §§20 and 21 of Result of Investigations.

10. The Appellant and Mr Yan admitted that the photographs were taken and published without the prior consent of Mr Wong and Ms Chen. See §22 of Result of Investigations.

11. Mr Yan was asked by the Commissioner's staff whether the Appellant had established a code on the coverage of artistes' privacy. Mr Yan replied that there was no such written code, that each case would be discussed on a case by case basis, and that the principle of guidance for the staff was that no illegal acts should be committed, including the invasion of privacy. See §25 of Result of Investigations.

12. Mr Wong told the Commissioner that the media started asking him whether he was cohabiting with Ms Chen in mid-2010. Since he was not cohabiting with Ms Chen at the time, he denied such cohabitation. After he started cohabiting with Ms Chen, he was asked by the media again and he said that he was cohabiting with her. Mr Wong confirmed that he never talked to the media on his initiative about whether he was cohabiting with Ms Chen and that

he only responded when being asked by the media about his cohabitation. See §26 of Result of Investigations.

13. Ms Chen stated that the media started asking her about her cohabitation with Mr Wong in 2009 but she denied. She confirmed that she never talked to the media on her own initiative about the cohabitation and only responded when the media made enquiries. See §27 of Result of Investigations.

14. The Commissioner considered that:

(1) the means of news gathering (including entertainment news) by media organisations are regulated under the Ordinance (see §36 of Result of Investigations);

(2) because the photographs had already been published in the FACE Magazine and complaints were received from both Mr Wong and Ms Chen, the exemption in section 61(1) of the Ordinance would not apply (see §39 of Result of Investigations);

(3) the taking of the photographs by the Appellant in this case amounted to collection of personal data of Mr Wong and Ms Chen (see §44 of Result of Investigations);

(4) the privacy of an individual should be protected against unjustifiable interference irrespective of his social status and occupation and Mr Wong and Ms Chen should not be deprived of their rights to privacy protection simply because they are television artistes (see §48 of Result of Investigations);

(5) in the circumstances of this case, Mr Wong and Ms Chen had reasonable expectation of their privacy at the Residence and did not reasonably expect to have their activities at the Residence being photographed by persons outside (see §§49 and 50 of Result of Investigations);

(6) given the actual distance between the shooting location and the Residence was about 80 metres, to photograph the activities inside the Residence would require the use of devices such as telephoto lenses and magnifiers. An ordinary person inside the Residence would not reasonably expect that he would be photographed from a location far away from his home using such devices (see §51 of

Result of Investigations);

(7) the Appellant's acts in this case seriously invaded the privacy of Mr Wong and Ms Chen (see §53 of Result of Investigations);

(8) the publication of the photographs in the FACE Magazine did not involve public interest (see §§59-66 of Result of Investigations);

(9) it was improper to rely on the Appellant's employees to interpret the requirements under the Ordinance without a specific guideline on data collection (see §68 of Result of Investigations).

15. The Commissioner concluded that:

(1) the Appellant used unfair means to collect personal data from Mr Wong and Ms Chen by taking the said Photographs in the circumstances mentioned above and contravened the provisions under Data Protection Principle 1(2) (see §69 of Result of Investigations);

(2) it was likely that the contravention by the Appellant would continue or be repeated (see §71 of Result of Investigations);

(3) an enforcement notice under section 50 of the Ordinance should be issued to the Appellant (see §72 of Result of Investigations).

16. In the Enforcement Notice, the Appellant was directed to:

(1) Permanently delete the Photographs from FACE's database and website;

(2) Establish privacy guidelines on the systematic monitoring of the collection of personal data by convert and/or long-distance photograph shooting ("**the Privacy Guidelines**") to the satisfaction of the Privacy Commissioner for Personal Data. The Privacy Guidelines shall include the following:-

(a) The personal data privacy of a data subject must be respected and the requirements under the Ordinance be observed when personal data are collected. Personal data must also be collected in a fair manner in the circumstances;

(b) Where a photograph is taken of the data subject in a private place without his consent, the data subject's reasonable expectation of privacy must be taken into account to avoid interference of his privacy (Irrespective of a data subject's social status and occupation, his personal privacy ought to be protected against unjustifiable interference. He should not be deprived of his right to protection nor should he suffer from an impaired right to protection solely for the reason that he is an artiste);

(c) Where the abovementioned acts of data collection involves a certain extent of privacy invasion, the following elements must be taken into consideration:-

(i) Whether the acts of data collection involve public interest (It should be noted that public interest is not equivalent to things that the public is interested or curious to know);

(ii) Whether the interference of the data collection acts are in proportion to the public interest involved (The more interfering a data collection act is, the more likely that it is considered unfair, unless the public interest involved is sufficient to offset such as interfering act);

(d) Expressly state the position of the senior staff who monitors the enforcement of the guidelines described in paragraphs (a) to (c) above; and

(e) State that all staff must obtain prior direction and authorization of the senior staff in circumstances described in paragraphs (a) to (c) above;

(3) Provide the Commissioner with a copy of the Privacy Guidelines and implementation date; and

(4) Take all reasonable and practicable steps, e.g. proper training, instruction and supervision (disciplinary action if necessary), to ensure that FACE staff complies with the Privacy Guidelines.

The Appellant was required to comply with these directions within 21 days of the service of the Enforcement Notice.

17. By a letter dated 26th September 2013, the Appellant's solicitors amongst other things informed the Commissioner's Office that the said Photographs had already been permanently deleted from the Appellant's database and website and that paragraph (1) of the Enforcement Notice was no longer a matter that the Board would have to deal with at the substantive hearing.

C. THE GROUNDS OF APPEAL

18. In its Notice of Appeal, the following grounds were relied upon by the Appellant:

(1) The service of the Enforcement Notice is unlawful ("**Ground 1**") in that the Commissioner erred in finding:

(a) the means by which the Appellant obtained photographs for news coverage (i.e. use of long-distance lens camera) is covered by the Ordinance;

(b) the taking of photographs amounts to the collection of "personal data" within the meaning of paragraph 1(1) of the Data Protection Principles;

(c) the photographs were taken by means which are unfair in the circumstances of the case as required by paragraph 1(2)(b) of the Data Protection Principles;

(d) it is likely that the contravention of the requirement of paragraph 1(2)(b) of the Data Protection Principles (which is denied) would continue or be repeated.

(2) The direction that the Appellant do formulate privacy guidelines within 21 days as required in paragraph (2) of the Enforcement Notice and provide a copy of the guidelines and their implementation date as required in paragraph (3) is unlawful ("**Ground 2**") in that:

(a) section 50(1)(b)(iii) of the Ordinance does not empower the Commissioner to require the Appellant to draft privacy

guidelines to his satisfaction;

(b) the Commissioner only has power to direct a data user to take such steps to remedy a contravention of a requirement under the Ordinance (or the matter occasioning it) committed in the past (which is denied);

(c) the Commissioner does not have power to direct how a data user should collect personal data in the future.

(3) Even if section 50(1)(b)(iii) of the Ordinance empowers the Commissioner to require the Appellant to draft privacy guidelines to his satisfaction (which is denied), the direction that the Appellant do formulate privacy guidelines within 21 days as required in paragraph (2) of the Enforcement Notice and provide a copy of the guidelines and their implementation date as required in paragraph (3) is unlawful ("**Ground 3**") in that:

(a) it is not fair and reasonable for the Commissioner to require the Appellant to draft privacy guidelines to his satisfaction within 21 days;

(b) the Commissioner may never be satisfied with any guideline drafted by the Appellant or the Appellant may not be able to draft guidelines meeting the Commissioner's satisfaction within 21 days;

(c) it is especially unreasonable when the failure to draft privacy guidelines to the satisfaction of the Commissioner within the prescribed time limit would attract penal sanctions under section 64(7) of the Ordinance.

(4) The direction that the Appellant do take all reasonable and practical steps, e.g. proper training, instructions and supervision (including disciplinary action), to ensure that the Appellant's staff complies with the privacy guidelines is unlawful ("**Ground 4**") in that:

(a) section 50(1)(b)(iii) of the Ordinance does not empower the Commissioner to require the Appellant to ensure the compliance of the Appellant's staff with any privacy

guidelines in the future;

(b) the Commissioner only has power to direct a data user to take such steps to remedy a contravention of a requirement under the Ordinance (or the matter occasioning it) committed in the past (which is denied).

(5) Even if section 50(1)(b)(iii) of the Ordinance empowers the Commissioner to require the Appellant to ensure the compliance of the Appellant's staff with any privacy guidelines in the future (which is denied), the direction that the Appellant do take all reasonable and practical steps, e.g. proper training, instructions and supervision (including disciplinary action), to ensure that the Appellant's staff complies with the privacy guidelines is unlawful ("**Ground 5**") in that:

(a) it is unfair and unreasonable to impose an open-ended obligation on the Appellant for ensuring the compliance with the privacy guidelines;

(b) such direction unreasonably empowers the Commissioner to intervene in the Appellant's business whenever there is a purported non-compliance with the privacy guidelines;

(c) it is especially unreasonable when the failure to ensure compliance of the staff with the privacy guidelines would attract penal sanctions against the Appellant under section 64(7) of the Ordinance.

D. GROUND 1

D1. Grounds 1(a) and 1(b)

19. In this appeal, no submissions have been made by the Appellant to support its Grounds 1(a) and 1(b) to challenge the Commissioner's findings that (1) the means of taking photographs for news coverage (i.e. use of long-distance lens camera) is covered by the Ordinance and (2) the taking of photographs in the circumstances amounts to the collection of personal data within the meaning of paragraph 1(1) of the Data Protection Principles. In these circumstances, we do not see the need to deal with Grounds 1(a) and 1(b).

D2. Ground 1(c)

20. The issue here is whether the Commissioner was correct in his finding that the taking of the photographs constituted unfair collection of personal data in the circumstances of the case in contravention of the requirement of fairness provided under paragraph 1(2)(b) of the Data Protection Principles.

21. Paragraph 1(2) of the Data Protection Principles provides:

> "*Personal data shall be collected by means which are:*
> *(a) lawful; and*
> *(b) fair in the circumstances of the case.*"

22. "*Personal data*" is defined in section 2 of the Ordinance to mean "*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*".

23. "*Data*" is also defined in section 2 to mean "*any representation of information (including an expression of opinion) in any document, and includes a personal identifier*".

24. There is no dispute between the parties that photographic images can constitute "data" for the purposes of the Ordinance: *Eastweek Publisher Ltd & Another v Privacy Commissioner for Personal Data* [2000] 2 HKLRD 83.

D2a. The Appellant's case

25. The Appellant's case is that the taking of the relevant photographs was fair in the circumstances of the case given that it was in the public interest to do so.

26. The Appellant contended that public interest includes preventing the public from being misled by some statements or actions of an individual, and the interest of the public in knowing the truth. The Appellant relied on what the English Court of Appeal and the House of Lords said in *Campbell v MGN Ltd* ([2003] QB 633 at §43; [2004] 2 AC 457 at §§24 and 82) for the proposition that where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record straight.

27. The Appellant argued that (1) Ms Chen had misled the public by denying that she and Mr Wong lived together, which was inconsistent with what Mr Wong had told the press; and (2) it was in the public interest to expose the falsity of "*Mr Wong and Ms Chen's public image, in that they are 'idols of young people who will be influenced by their words and deeds*'"; and (3) the most effective means by which the public could be prevented from being misled by Ms Chen's false statements was to take and publish photographs showing Mr Wong and Ms Chen's "*daily life and intimate acts at their home premises*".

D2b. Fairness in collecting personal data and public interest

28. The Appellant introduced the concept of public interest to contend that the collection of personal data in this case (namely the taking of the relevant photographs) was fair in the circumstances of the case. It is right for us to briefly examine the inter-relationship between the concept of fairness to collect personal data and the concept of public interest.

29. As pointed out by in the oral submissions of Mr Paul Shieh SC (appearing with Mr Raymond Leung) for the Commissioner, public interest is not recognised as a separate defence under the Ordinance in relation to the contravention of the Data Protection Principles. Nonetheless, Mr Shieh submitted that the Commissioner's position has always been that public interest is relevant in deciding what would or would not be fair in the collection of personal data in the circumstances of the case. This position was echoed by the Law Reform Commission of Hong Kong in §2.27 of the Report on Civil Liability for Invasion of Privacy published in December 2004:

> *"The Privacy Commissioner has advised that collection by means unknown to the individuals concerns (eg, photo-taking in public places using long-range lens or hidden cameras) is generally not considered to be a fair means of collection. Other examples given by the Privacy Commissioner include the taking of photographs of individuals in private premises from outside without their consent, and the taking of photographs of individuals in public where they have made it clear that they do not wish to be photographed. These means might nonetheless be considered fair if there is an over-riding public interest in the collection of personal data."*

30. As a matter of principle, it seems to us correct to recognise that public interest is one of the factors to consider as to whether or not the collection of

personal data in an individual case is fair. Where there are competing considerations, it is a question of balancing the fairness in collecting personal data against the public interest in knowing the truth.

D2c. Discussion on the Appellant's case of public interest

31. The Appellant relied on the English authorities of *Woodward v Hutchins* [1977] 1 WLR 760 and *Campbell v MGN Ltd* [2004] 2 AC 457 and asserted that it was in the public interest to expose the falsity of Ms Chen's statements by the taking and publication of the photographs. We do not find that the two English authorities assist the Appellant.

32. In *Woodward v Hutchins*, the English Court of Appeal discharged an injunction that had been granted to a well-known group of singers against their former press officer to restrain him from publishing articles which dealt with aspects of their private life. Lord Denning MR noted (at 763H-764C) that the singers had actively sought publicity:

> *"But this case is quite out of the ordinary. There is no doubt whatever that this pop group sought publicity. They wanted to have themselves presented to the public in a favourable light so that audiences would come to hear them and support them ... If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth ... In this case the balance comes down in favour of the truth being told, even if it should involve some breach of confidential information."*

Similarly, Bridge LJ at 765E said:

> *"It seems to me that those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light."*

33. In *Campbell v MGN Ltd*, the *Daily Mirror* published articles and photographs which were claimed by Ms Naomi Campbell, an internationally famous fashion model, to have, *inter alia*, infringed her right to respect for her private life, contrary to article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The photographs included a photograph of her in the street as she was leaving a group meeting of "Narcotics Anonymous" (a self-help group which the model regularly attended for therapy to rid herself of her drug addiction), which had been taken by a freelance photographer specially employed for the purpose. Ms Campbell admitted that she was a drug addict and that she had lied about it publicly. It was accepted on her behalf that, as Lord Hoffmann put it at §36, it was those falsehoods that entitled the newspaper to publish the fact that she was addicted to drugs. This left three matters which were said to infringe her rights under article 8: first, the fact that she attended meetings of Narcotics Anonymous; secondly, the published details of her attendance and what happened at the meetings; and thirdly, the photographs taken in the street without her knowledge or consent. Ms Campbell succeeded at the first instance, failed in the Court of Appeal, and succeeded by a majority in the House of Lords.

34. Because Ms Campbell went out of her way to deny the taking of drugs, the House of Lords considered that it was in the public interest for the press to disclose the untruth and that she could not complain about it. Lord Nicholls at §24 said:

> *"When talking to the media Miss Campbell went out of her way to say that, unlike many fashion models, she did not take drugs. By repeatedly making these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private. Public disclosure that, contrary to her assertions, she did in fact take drugs and had a serious drug problem for which she was being treated was not disclosure of private information."*

Similarly, Lord Hope at §82 said:

> *"Miss Campbell cannot complain about the fact that publicity was given in this article to the fact that she was a drug addict. This was a matter of legitimate public comment, as she had not only lied about her addiction but had sought to benefit from this by comparing herself with others in the fashion business who were addicted."*

And Baroness Hale at §151 said:

> *"The answer which she herself accepts is that she had presented herself to the public as someone who was not involved in drugs. It would have been a very good thing if she were not. If other young women do see her as someone to be admired and emulated, then it is all to the good if she is not addicted to narcotic substances. It might be questioned why, if a role model has adopted a stance which all would agree is beneficial rather than detrimental to society, it is so important to reveal that she has feet of clay. But the possession and use of illegal drugs is a criminal offence and a matter of serious public concern. The press must be free to expose the truth and put the record straight."*

35. In the present case, there is nothing to suggest that either Mr Wong or Ms Chen, unlike the group of singers in *Woodward v Hutchins* or Ms Campbell, positively sought publicity of their personal relationship at any time. In a telephone interview conducted on 5th January 2012 between Ms Chen and a staff of the Commissioner's Office, Ms Chen stated that she never positively mentioned to the media about her cohabitation and that she only denied cohabitation when she was asked about it.

36. Moreover, the fact that the Appellant sought to publicly disclose about Mr Wong and Ms Chen (namely cohabitation) is entirely different in nature to Ms Campbell's possession and use of illegal drugs which, as Baroness Hale pointed out, was a criminal offence and a matter of serious public concern.

37. We agree with the observation made by the Law Reform Commission of Hong Kong in §7.72 of its Report on Civil Liability for Invasion of Privacy that the "*mere fact that a person is an artiste or is engaged in some occupation which brings him into public notice is not of itself enough to make his private life a matter of public interest*".

38. What may interest the public is not necessarily something in the public interest. As Baroness Hale said in *Jameel (Mohammed) and another v Wall Street Journal Europe Sprl (No. 3)* [2007] 1 AC 359 at §147:

> *"The public only have a right to be told if two conditions are fulfilled. First, there must be a real public interest in*

communicating and receiving information. This is, as we all know, very different from saying that it is information which interests the public – the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about it ..."

39. For the above reasons, we do not consider it was in the public interest for the Appellant to take and publish photographs showing Mr Wong and Ms Chen's daily life and intimate acts at their private premises.

40. Our conclusion is reinforced when we looked at the Article and the photographs published by the Appellant in the particular issue of the magazine. We do not find any references to Ms Chen's previous denial of cohabitation with Mr Wong. If the only purpose of taking the photographs was to expose the untruth of Ms Chen's previous statements as now asserted by the Appellant, one would expect that some references to that topic would be found in the Article. Moreover, it is quite plain to us that the contents of and the captions to some of the published photographs are inconsistent with the Appellant's asserted purpose for taking the said Photographs.

D2d. The relevant circumstances of the case

41. We find that the said Photographs were taken by the Appellant in the following circumstances: (1) showing Mr Wong and Ms Chen engaging in personal activities in private residential premises; (2) Mr Wong and Ms Chen's personal activities could not be seen by any passer-by unless vision enhancing devices are used; (3) without the knowledge or consent of either Mr Wong or Ms Chen; (4) using systematic surveillance (including telephoto lenses) for 3 to 4 days.

D2e. Unfair collection of personal data in the circumstances of the case

42. In the circumstances of the case, we agree with the Commissioner and find the Appellant's collection of the personal data of Mr Wong and Ms Chen to be unfair and that the Data Protection Principle 1(2) was contravened. Accordingly, we reject Ground 1(c).

D3. Ground 1(d)

D3a. The Appellant's contentions

43. The Appellant challenged the Commissioner's finding that it is likely that the contravention of paragraph 1(2) of the Data Protection Principles would continue or be repeated. The Appellant asserted that the Commissioner's basis of his opinion was premised on the Appellant's possession of the said Photographs, and argued that there is no longer such a basis when it had already deleted all the relevant photographs from its website and database pursuant to paragraph (1) of the Enforcement Notice before the substantive hearing of this appeal.

D3b. Propensity of repetition of contravention

44. Paragraph 1(2) of the Data Protection Principles is concerned with the fairness in the collection of personal data. When such a principle is contravened (as we have already found), it does not follow that the subsequent destruction of the personal data in question by the contravener would mean that the contravener will not continue or repeat the unfair collection of personal data (by similar or other means) in the future.

45. Whether or not the contravention of paragraph 1(2) of the Data Protection Principles will continue or be repeated must necessarily be based on an inference to be drawn from the objective facts.

46. The Commissioner relied on a number of matters to support his inference that the Appellant's contravention of paragraph 1(2) of the Data Protection Principles will continue or be repeated. We find that it was reasonable for the Commissioner to draw his inference on the basis of the following matters:

(1) The Appellant's stance that there was nothing wrong with the taking of the said Photographs in the circumstances of the case.

(2) The apparent lack of any effort on the part of the Appellant's management to provide guidance or instructions to its staff on the proper principles and instructions for collecting personal data involving invasion of privacy.

(3) The continuing existence of an incentive to collect personal data of similar nature and to publish them for commercial gains.

47. For these reasons, we do not accept that the Commissioner erred in finding that there is a likelihood that that the contravention of paragraph 1(2) of the Data Protection Principles will continue or be repeated. Accordingly, we reject Ground 1(d).

E. GROUND 2

48. Ground 2 challenges the Commissioner's ability to issue an enforcement notice under section 50 of the Ordinance to direct the formulation of privacy guidelines. In our view, the issue depends entirely on the proper construction of section 50.

E1. Section 50 of the Ordinance

49. At the time when the Enforcement Notice was issued on 20th February 2012, section 50(1) of the Ordinance provided as follows:

> *"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."

50. Section 50 of the Ordinance was amended by the Personal Data (Privacy) (Amendment) Ordinance 2012. However, for the purpose of this appeal, it is unnecessary for us to consider the extent and effect of the subsequent amendments.

E2. The Appellant's Contentions

51. The Appellant contended that section 50(1)(b)(iii) of the Ordinance (1) does not empower the Commissioner to require the Appellant to draft privacy guidelines to his satisfaction or to direct how a data user should collect personal data in the future, (2) does not confer any jurisdiction on the Commissioner to direct the Appellant to take steps to remedy anything beyond that which is specified in the complaints or to direct the Appellant as to how they should collect personal data of persons other than the complainants in the future, and (3) only empowers the Commissioner to direct a data user to take such steps to remedy a contravention of a requirement under the Ordinance committed in the past, or the matter occasioning the service of the enforcement notice.

52. To support its contentions, the Appellant relied on (1) the effect and the legislative intention of the exemptions in section 61(1) of the Ordinance, (2) the construction of 50(1)(b)(iii) of the Ordinance by reference to the Chinese version, and (3) the effect of section 12(1) of the Ordinance.

E3. Appellant's Reliance on Section 61(1)

53. Section 61(1) of the Ordinance provides:

"*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),

are exempt from the provisions of-

(i) data protection principle 6 and sections 18(1)(b) and 38(i) unless and until the data are published or broadcast (wherever and by whatever means);

(ii) sections 36 and 38(b)."

54. As we understand it, the Appellant relied on the effect of the exemption from sections 36 and 38(b) (namely section 61(1)(ii)) to submit that the Commissioner did not have the power to issue an enforcement notice under section 50(1) to direct the Appellant to establish privacy guidelines on the systematic monitoring of the collection of personal data by convert and/or long-distance photograph shooting in the future.

E3a. Section 36

55. Section 36 of the Ordinance provides:

"Without prejudice to the generality of section 38, the Commissioner may carry out an inspection of –

(a) any personal data system used by a data user; or

(b) any personal data system used by a data user belonging to a class of data users,

for the purposes of ascertaining information to assist the Commissioner in making recommendations –

(i) to –
(A) where paragraph (a) is applicable, the relevant data user;
(B) where paragraph (b) is applicable, the class of data users to which the relevant data user belongs; and

(ii) relating to the promotion of compliance with the provisions of this Ordinance, in particular the data protection principles, by the relevant data user, or the class of data users to which the

relevant data user belongs, as the case may be."

56. "*Personal data system*" is defined in section 2 to mean "*any system, whether or not automated, which is used, whether in whole or in part, by a data user for the collection, holding, processing or use of personal data, and includes any document and equipment forming part of the system*".

57. As far as section 36 is concerned, section 61(1)(ii) provides that the personal data held by a data user whose business or part of whose business consists of a news activity (within the meaning of section 61(3)) and solely for the purpose of that activity (or any directly related activity) ("**the News Organisation**") is not subject to an inspection by the Commissioner of its personal data system for the purpose of ascertaining information to assist the Commissioner in making recommendations to the News Organisation relating to the promotion of the compliance of the provisions of the Ordinance by the News Organisation.

58. The Appellant argued that the privacy guidelines imposed by the Commissioner under the Enforcement Notice would constitute part of the Appellant's personal data system and therefore the Commissioner could not require the provision of such guidelines from the Appellant.

59. On the other hand, the Commissioner argued that the guidelines sought in the Enforcement Notice could be part of the "personal data system" of the Appellant. It was submitted that the "personal data system" connotes something that is used as part of the collection, holding, processing or use of personal data, and the internal privacy guidelines for the Appellant's staff cannot linguistically be said to be part of the "personal data system". We agree with the Commissioner's submissions. We do not see how the privacy guidelines sought by the Commissioner in the Enforcement Notice, even when they come into existence, are capable of being used "*for the collection, holding, processing or use of personal data*".

60. Further, we agree with the Commissioner's submissions that Data Protection Principle 5 suggests that the privacy guidelines sought by the Commissioner in the Enforcement Notice cannot be something which the Commissioner has no power to seek. Data Protection Principle 5 provides:

> *"All practicable steps shall be taken to ensure that a person can –*

(a) ascertain a data user's policies and practices in relation to personal data;

(b) be informed of the kind of personal data held by a data user;

(c) be informed of the main purposes for which personal data held by a data user are or are to be used."

61. It is clear that Data Protection Principle 5(a) provides that a data user's policies and practices in relation to personal data, such as the privacy guidelines sought by the Commissioner in the Enforcement Notice when they come into existence, can be ascertained by a third party. Such a principle is not subject to any exemption. Accordingly, "personal data system" in section 36 cannot be construed to include the privacy guidelines sought by the Commissioner.

E3b. Section 38(b)

62. Section 38 of the Ordinance provides:

"Where the Commissioner-

(a) receives a complaint; or

(b) has reasonable grounds to believe that an act or practice-

(i) has been done or engaged in, or is being done or engaged in, as the case may be, by a data user;
(ii) relates to personal data; and
(iii) may be a contravention of a requirement under this Ordinance,

then-

(i) where paragraph (a) is applicable, the Commissioner shall, subject to section 39, carry out an investigation in relation to the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a

requirement under this Ordinance;

(ii) where paragraph (b) is applicable, the Commissioner may carry out an investigation in relation to the relevant data user to ascertain whether the act or practice referred to in that paragraph is a contravention of a requirement under this Ordinance."

63. The Appellant appeared to liken the Commissioner's direction to establish privacy guidelines in the Enforcement Notice as a species of the Commissioner's investigation power under section 38(b). This was presumably why the Appellant submitted in its Skeleton Submissions that "*requiring the Appellant to establish the Privacy Guidelines on taking of photographs in the future went far beyond the Complaints, and amounted to an attempt to circumvent the [exemptions in section 61], thereby subjecting the Appellant's journalistic practices to the Commissioner's oversight in the nature of a section 38(b)-based complaint*".

64. We do not agree with the Appellant's approach.

(1) As pointed out by the Commissioner, complaints were received in this case and the investigations by the Commissioner were carried out in such circumstances under section 38(i) "*in relation to the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a requirement under this Ordinance*".

(2) Moreover, the relevant personal data have been published by the Appellant, which constituted an exception to the exemption in section 61(1)(i). Such an exemption has no application because section 61(1)(i) provides that the personal data held by a News Organisation are exempt from section 38(i) "*unless and until the data are published or broadcast (wherever and by whatever means)*".

(3) In this case, the Commissioner was not exercising any investigation power under section 38(b). Accordingly, we see no basis for the Appellant to equate the Commissioner's direction for privacy guidelines in the Enforcement Notice with an exercise of such power.

(4) In any event, we consider that section 61 does not offer any exemption to News Organisations from the Data Protection Principle 1(2).

65. In short, we cannot accept the Appellant's submissions that the Commissioner's powers to issue an enforcement notice under section 50 are circumscribed in a way as submitted by the Appellant under sections 36, 38 or 61 of the Ordinance.

E4. Appellant's Reliance on Chinese Version of Section 50(1)(b)(iii)

66. Additionally, the Appellant contended that the purpose of section 50(1)(b)(iii) is to empower the Commissioner to serve an enforcement notice on a data user to direct him to take steps to remedy the contravention or the matters occasioning the service of the enforcement notice. In the circumstances of the case, the Appellant argued that the Commissioner only has the power to direct the Appellant to take such steps to remedy a contravention of a requirement under the Ordinance committed in the past, or the matter occasioning the service of the Enforcement Notice.

67. Section 50(1)(b)(iii) provides the Commissioner may serve on the relevant data user a notice in writing "*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*" (underline added).

68. The Appellant construed the word "it" in section 50(1)(b)(iii) to mean "the service of the enforcement notice", and relied upon the words "糾正導致送達該通知的違反或事宜" in the Chinese version of the provision to support its construction. In section 10B(2) of the Interpretation and General Clauses Ordinance (Cap 1), it is provided that the "*provisions of an Ordinance are presumed to have the same meaning in each authentic text*". In his oral submissions, Mr Pun on behalf of the Appellant confirmed that the Appellant's position is that both the English and Chinese versions of section 50(1)(b)(iii) would bear the same meaning.

69. On the proper construction of section 50(1)(b)(iii), we agree with the Commissioner's submissions and consider that the word "it" is a reference to "contravention", and not to "the service of the enforcement notice".

(1) Focussing on the English version, we consider it clear that the word "it" in the phrase "*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 ... as is specified in the notice*" can only be a reference to the contravention specified in the enforcement notice.

(2) The Appellant relied on the phrase "糾正導致送達該通知的違反或事宜" in the Chinese version of section 50(1)(b)(iii). This phrase is meant to correspond to the phrase "*to remedy the contravention or ... the matters occasioning it within such period*" in the English version. As the effect of section 10B(2) of the Interpretation and General Clauses Ordinance (Cap 1) is to presume that both texts have the same meaning, and the Appellant's position corresponds with this statutory presumption, we consider that the two versions may be read in a way which would result in having the same meaning.

(a) The only words in the Chinese version in section 50(1)(b)(iii) which may be said to not exactly match those in the English version are the words "送達" (i.e. to serve).

(b) The concept of service of the notice is referred to in the phrase immediately before sub-paragraphs (i) to (iv) in section 50(1). The Chinese words "送達" in section 50(1)(b)(iii) may therefore be read to refer to the fact that the notice has been served.

(c) Read in this way, there is no disharmony between the English and Chinese versions. Both versions provide in section 50(1)(b)(iii) that the notice to be served should set out such steps to be carried out by the data user to remedy the contravention or the matters to which the notice relates.

(d) We note that this construction is consistent with the words "the contravention or matter to which the notice relates" in sections 50(2) and 50(3) of the Ordinance.

(3) Moreover, if the English and Chinese versions of section 50(1)(b)(iii) are intended to have the same meaning, it is in our

view impossible to read the English version to have the meaning contended for by the Appellant.

70. In any event, even if the Appellant were correct to construe the phrase "*to remedy the contravention or ... the matters occasioning it within such period*" in section 50(1)(b)(iii) to mean "to remedy the contravention or matters occasioning the service of the enforcement notice" (which we do not accept), we do not believe this construction advances the Appellant's case any further. This is because the "matters occasioning the service of the enforcement notice" would necessarily include matters to which the enforcement notice relates, and there is no complaint in this appeal that the Enforcement Notice did not set out the contravention of the Data Protection Principle 1(2) or the relevant matters to which the Enforcement Notice related.

E5. Appellant's Reliance on Section 12(1)

71. Finally, the Appellant pointed to section 12(1) of the Ordinance regarding the Commissioner's power to approve and issue codes of practice for the purpose of providing practical guidance in respect of any requirements under the Ordinance imposed on data users, and argued that such power to promote general guidance would suggest that the Commissioner has no power to require specific guidance (such as those imposed by the Commissioner in the Enforcement Notice).

72. We do not agree with the Appellant's submissions. We do not read section 12 of the Ordinance to limit the power of the Commissioner under section 50 in any way.

E6. Our Construction of Section 50(1)

73. We agree with the Commissioner' submissions that the Commissioner must be permitted to be "forward looking" when issuing the directions in the enforcement notice under section 50(1) of the Ordinance.

(1) Section 50(1) addresses not only the contravention of a requirement under the Ordinance (section 50(1)(a)), but also the contravention of such a requirement "*in circumstances that make it likely that the contravention will continue or be repeated*" (section 50(1)(b)).

(2) The Commissioner submitted that the fact that the Commissioner

has to consider the likelihood of the repetition of the contravention suggests that section 50(1) allows the Commissioner to look into the future. The Commissioner further relies on the fact that section 50(1)(b)(iii) provides that the data user can be directed to remedy the matters occasioning the contravention in question and submits that this provides further support to enable the Commissioner to be "forward looking". We accept these submissions.

(3) Finally, we note that section 8(1)(c) provides that the Commissioner shall "*promote awareness and understanding of, and compliance with, the provisions of this Ordinance, in particular the data protection principles*". We consider these functions of the Commissioner as stipulated in the Ordinance are consistent with the ability of the Commissioner to look into the future when issuing directions by way of enforcement notice under section 50.

74. For all of the above reasons, we are not persuaded by the Appellant's submissions that the Commissioner's powers under section 50 are only to direct a data user to take steps to address what has already happened, but not to direct how the data user should collect personal data in the future. We accordingly reject Ground 2.

F. GROUND 3

F1. The Appellant's Contentions

75. The Appellant advanced two points to support its Ground 3. First, the Appellant pointed out that the failure to comply with the Commissioner's direction to establish the privacy guidelines to his satisfaction within 21 days would attract criminal liability under section 64(7) of the Ordinance, and therefore the Commissioner has assumed the role of a "judge" as to whether the Appellant has committed a criminal offence, which violates the principle of separation of powers ("**the Separation of Powers Point**"). Secondly, the Appellant submitted that the 21-day time limit is unreasonable and that the Commissioner may never be satisfied with any guidelines drafted by the Appellant ("**the Time Limit and Satisfaction Point**").

F2. Discussion on Ground 3

F2a. The Separation of Powers Point

76. Section 64(7) of the Ordinance provides:

> *"Subject to subsection (8), any relevant data user who contravenes an enforcement notice served on the data user commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 2 years and, in the case of a continuing offence, to a daily penalty of $1,000."*

77. The crux of the Appellant's argument is that the Commissioner has arrogated to himself the power to decide whether the Appellant has committed a criminal offence under section 64(7) of the Ordinance by directing the Appellant in the Enforcement Notice to establish the privacy guidelines to his satisfaction within 21 days.

78. We are unable to agree that the issue of the Enforcement Notice by the Commissioner violated the separation of powers principle. Whether or not the Appellant has committed any criminal offence under section 64(7) is ultimately a matter for the judiciary, or more specifically the magistrate, to determine, and not the Commissioner. As far as the matters specified in the Enforcement Notice are concerned, we do not agree that the Commissioner has the final say on the Appellant's criminal liability. The Commissioner's decision of whether the Appellant has established the privacy guidelines to the Commissioner's satisfaction is always subject to the scrutiny of this Board on appeal or, where appropriate, by the Court by way of judicial review.

79. The Appellant further relied on a passage in the judgment of the High Court of Australia in *R v Kirby, ex parte Boilermaker's Society of Australia* (1956) 94 CLR 254 at 279. We do not consider that the passage advances the Appellant's position any further.

80. In the present context, we do not believe an enforcement notice issued under section 50 of the Ordinance can be said to be suggesting that the Commissioner has arrogated himself the power to determine the guilt of the data user.

81. In any event, as pointed out by the Commissioner,[1] it is a common occurrence in the legislation where a person is required to do a certain act to the satisfaction of a particular public official with penal sanctions and the public official's act has never been held to be objectionable on the basis that it makes the official a judge of his own cause.

F2b. The Time Limit and Satisfaction Point

82. The Appellant further asserts that the requirements (1) for the drafting of the privacy guidelines within 21 days and (2) that such guidelines must meet the satisfaction of the Commissioner, are unreasonable and oppressive, particularly when the non-compliance of such requirements attracts penal consequences.

83. As to (1), we do not consider 21 days to be an unreasonable time limit for the Appellant to produce a set of privacy guidelines. We note that nothing has been proffered by the Appellant as to why it is not reasonable for such guidelines to be produced within the time limit. Paragraph (2) of the Enforcement Notice already contains what the Commissioner expects to be set out in the privacy guidelines. In any event, as pointed out by the Commissioner, if the Appellant has any genuine difficulties in drafting the guidelines, the Appellant can always consult the available guidelines or policies of similar media organisations such as those used by the Hong Kong Press Council and the Guardian News & Media Editorial Code (which in turn incorporated the UK press Complaint Commission Code of Practice).

84. As to (2), we do not believe the requirement that the Commissioner needs to be satisfied with the privacy guidelines drafted by the Appellant to be unreasonable or oppressive. There is nothing to suggest that the Commissioner will take into consideration matters other than those set out in paragraph (2) of the Enforcement Notice.

85. As to the penal consequences of not complying with an enforcement notice, we note that section 64(7) is subject to a specific statutory defence in section 64(8) where the data user has "*exercised all due diligence to comply with the enforcement notice concerned*". If the Appellant has used all reasonable endeavours to prepare the privacy guidelines within the time limit, it is difficult to see why the statutory defence is not available to the Appellant.

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[1] Citing sections 19 and 22 of the Places of Amusement Regulation (Cap 132BA), section 6 of the Waste Disposal (Clinical Waste) (General) Regulation (Cap 354O), section 5 of the Fire Safety (Commercial Premises) Ordinance (Cap 502), section 9B of the Public Health (Animals and Birds) Ordinance (Cap 139) and section 5 of the Public Cleansing and Prevention of Nuisances Regulation (Cap 132BK).

86. For all of the above reasons, we do not agree with the contentions advanced by the Appellant and accordingly reject Ground 3.

G. GROUND 4

G1. The Appellant's Contentions

87. In paragraph (4) of the Enforcement Notice, the Commissioner directed the Appellant to "*take all reasonable and practicable steps, e.g. proper training, instruction and supervision (disciplinary action if necessary), to ensure that FACE staff complies with the Privacy Guidelines*".

88. The Appellant argued that the matters directed in paragraph (4) of the Enforcement Notice are not reasonably capable of being completed within 21 days because they involve long-term commitments to ensure compliance with the privacy guidelines such as "*proper training, instruction and supervision (disciplinary action if necessary)*".

G2. Discussion on Ground 4

89. On a proper reading of paragraph (4) of the Enforcement Notice, we do not consider that all the compliance steps are intended to be completed within 21 days from the issue of the notice. It is expressly stated in paragraph (4) that all "reasonable and practicable" steps are to be taken to ensure compliance. A common sense reading would suggest to us that the Commissioner did not direct all steps, such as proper training, instruction and supervision, are to be completed within 21 days; they were not steps which could reasonably and practicably be completed within the time limit.

90. In our view, the purpose of paragraph (4) is to ensure that privacy guidelines drawn up by the Appellant pursuant to paragraph (2) are effective.

91. Accordingly, we cannot agree with the Appellant's contentions and therefore reject Ground 4.

H. GROUND 5

H1. The Appellant's Contentions

92. Under this Ground, the Appellant contended it is unfair and unreasonable

to impose an "*open-ended obligation*" on the Appellant to ensure compliance with the privacy guidelines, and it was argued that the direction in paragraph (4) of the Enforcement Notice has the potential to "*interfere with the terms of contracts of employment between the Appellant and its staff*".

H2. Discussion on Ground 5

93. Again, we are unable to accept the Appellant's contentions. First, as mentioned in Section G2 above, we consider that paragraph (4) of the Enforcement Notice is to ensure that the privacy guidelines to be drawn up are put in place and followed by the Appellant. We do not consider such a direction to be an "open-ended obligation" as suggested by the Appellant.

94. Further, we do not see how the implementation of the privacy guidelines to be drawn up by the Appellant is tantamount to "*adding terms to the employment contract entered into between the Appellant and its staff*" as submitted by the Appellant. There is evidence that the Appellant's staff are expected to observe the law (§25 of Result of Investigations) and the privacy guidelines are no more than means to ensure that the legal requirements and the principles of data collection are observed by the Appellant and its staff.

95. Accordingly, we reject Ground 5.

I. CONCLUSION

96. For all the above reasons, we dismiss this appeal with no order as to costs.

(signed)

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