Corrigendum

By the order and direction of the Administrative Appeals Board, the following amendments to the Decision with Reasons dated 18th September 2009 in respect of the appeal AAB No. 7/2009 by Madam YUNG Mei-chun, Jessie which was heard by the Board on 25th August 2009 have been made:

(1) "collection" in the first line of para 2 in page 1 is replaced with "correction";

(2) "40" in the last line of para 39 in page 15 is replaced with "38";

(3) "Administrative Appeals Board Ordinance" in the last line of para 44 in page 18, the second last line of para 47 in page 19 and the second last and last line of para 49 in page 20 is replaced with "Ordinance";

(4) "subsection" in the third line of para 41 in page 16 is replaced with "section";

(5) "39(2)" in the first line of para 42 in page 16 is replaced with "39(2)(d)"; and

(6) "38" in the 14th line of para 50 in page 20 is replaced with "36".

(Ms Anna Chan)
Secretary
Administrative Appeals Board
23 September 2009

ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 7 of 2009

BETWEEN

YUNG MEI-CHUN, JESSIE	Appellant
and	
THE PRIVACY COMMISSIONER FOR PERSONAL DATA	Respondent

Coram: Administrative Appeals Board

Date of Hearing: 25th August 2009

Date of handing down Written Decision with Reasons: 18th September 2009

DECISION

The Complaint

1. The Appellant is a subscriber for mail collection service provided by Jumpstart Business Centre ("Jumpstart"). The Appellant was previously employed by Merrill Lynch (Asia Pacific) Limited ("ML") and she specified Jumpstart's address as her corresponding address.

2. On 27th August 2008, the Appellant sent a data collection request ("DCR") to ML. On 6th October 2008, ML's solicitors, Messrs. Deacons, sent a letter regarding the DCR to the Appellant at the Jumpstart address ("the Letter"). The Letter was delivered by hand by a messenger of Deacons to the Jumpstart address.

3. According to the Appellant's complaint, the messenger passed a copy of the Letter without any cover to the receptionist of Jumpstart, Ms. Mable Kwan. The messenger also

asked Ms Kwan to sign on a copy of the Letter as acknowledgment of receipt. Ms. Kwan then immediately called the Appellant and read out part of the contents of the Letter over phone to the Appellant. The Appellant complained to the Respondent that the Letter contained her personal data and should not have been disclosed by Deacons to Ms Kwan and the messenger.

4. The Respondent made enquiries with Ms. Kwan who said that she did not know and could not recall anything in relation to the incident on 6th October 2008. Ms. Kwan was also invited to attend an interview concerning the Appellant's complaint. By an email dated 4th November 2008, Ms Kwan stated that she was not willing to attend a statement taking interview or to provide further information to the Respondent in writing.

5. By a letter dated 21st November 2008, Deacons stated that the Letter was placed in a sealed envelope and the messenger was also provided with a copy of the first page of the Letter which was placed in an unsealed envelope. Upon arrival at Jumpstart's address, the messenger delivered by hand the sealed envelope to the receptionist and took out the copied first page of the Letter for the receptionist to acknowledge receipt thereon. Upon seeing that the Letter was from a law firm, the receptionist called the Appellant to seek her instruction. The receptionist merely read out to the Appellant the name of the law firm and the contact details provided in the header of the Letter. The Appellant then instructed the receptionist not to receive the Letter. The receptionist did not read out the content of the first page of the Letter to the Appellant over phone. As the Appellant refused to receive the Letter, the messenger brought back the sealed envelope containing the Letter and the duplicate first page of the Letter back to Deacons' office.

6. Although there exist two slightly different versions of event, Deacons was prepared to and did on 27th February 2008 provide the following undertakings to the Respondent:-

(i) not to disclose the Complainant's personal data to any person other than the Complainant when delivering any document to the Complainant by hand at her

address of service including Jumpstart's address in the course of obtaining acknowledgment of the document or otherwise; and

(ii) to give clear instructions to Deacon's staff for the purpose of complying with the aforesaid undertaking.

7. Having considered the circumstances of the case and in the light of the above undertakings, the Respondent decided that, pursuant to section 39(2)(d) of the Personal Data (Privacy) Ordinance, Cap.486 ("the Ordinance"), a full investigation of the Appellant's complaint was unnecessary. The grounds for that decision were:-

(i) there was hardly any damage or harm done to the Appellant given that Ms. Kwan had no recollection of the alleged disclosure; and

(ii) as a result of the remedial action taken by Deacons in giving the undertakings, any further investigation of the Appellant's complaint would not reasonably be expected to bring about a better result.

8. By a letter dated 3rd March 2009, the Respondent informed the Appellant of his decision not to carry out a full investigation. Dissatisfied with the decision, the Appellant appealed to this Board.

Grounds of Appeal

9. By a letter dated 30th March 2009 attached to the Notice of Appeal, the Appellant appealed against the Respondent's decision upon the following grounds:-

"(1) The decision clearly stated that "*there is no dispute that the first page of the Letter had been shown to Ms Kwan in the incident*".

(2) There is evidence that Deacons and Merrill had violated the ordinance and this is not the first time Merrill had violated the ordinances.

(3) My complaints against Merrill for violation against the Ordinances includes:-

i. 200808452

ii. 200713131

iii. 20081686

iv. 20086846

v. 200810395

(4) This is evidence that Merrill had deliberately and repeatedly violated the Ordinances.

(5) I also put on record that there is no evidence that I did not decline to specify exactly what Ms. Kwan had read out to me over the phone as per paragraph 7 of the decision. This is story made up by PCPD."

Event's leading to the hearing of this appeal

10. On 14th May 2009, the Respondent submitted the Respondent's Statement in this appeal. Under the usual procedure adopted by the Administrative Appeal Board, the Appellant has one month's time to prepare and submit her written response to the Respondent's Statement. By a letter dated 15th June 2009, the Appellant sought an extension of time to submit her written response until the end of July 2009. According to the Appellant, it was due to the fact that she:-

"*1. Attended hearing of DCCJ4126 of 2007 hearing on 26th May 2009, 2nd June 2009; and*

2. was admitted to the hospital last week and currently on sick leave."

11. This application for extension of time was given, pursuant to section 27(2)(a), to the presiding Chairman Mr. Jason Pow, SC for his consideration. Pursuant to section 27(2)(a), the presiding Chairman may grant extension of time if satisfied that there is good cause for doing so. After considering the nature of this appeal and the reasons put forward by the Appellant, Mr. Pow granted a one-month extension of time from the date of the application, i.e. the Appellant was required to file her written response by 4:00 pm on 15th July 2009.

12. By a letter dated 26th June 2009, the Appellant stated that she could not comply with the deadline of 15th July 2009 due to:-

> "*1. As mentioned before, I was admitted to the Hospital a couple of weeks and still needed to have followed up examinations at Hospital scheduled on 16 July 2009, 13 August 2009 and 3 September 2009.*
>
> *2. I also have to attend a hearing at the Labour Tribunal on 17 July 2009 which was fixed on 1 June 2009.*
>
> *3. On 1 August 2009, I have to attend a high court hearing action number HCA 4594 of 2002. Again this was fixed long time ago.*"

The Appellant requested for a re-consideration of her application.

13. After considering the nature of this appeal and the further application of the Appellant, Mr. Pow considered that the one month extension already granted to the Appellant was sufficient for her to provide a written response to the Respondent's Statement. Mr. Pow did not see good cause for extending the deadline any further and declined the application. The Appellant was notified of Mr. Pow's decision on 6th July 2009.

14. By a letter dated 6th July 2009, the Appellant further stated that she had to go to Queen Mary Hospital on 16th July 2009 and 13th August 2009 for further medical examination.

She said that given her schedule and medical condition, she could not finish the written response by 15th July 2009. The Appellant asked for the Presiding Chairman's reasons for refusing her application.

15. By a letter dated 7th July 2009, the Secretary of the Administrative Appeal Board ("the Secretary") informed the Appellant of the Presiding Chairman's reason for refusing further extension as follows:-

"*The Chairman has given due consideration to the application and considered that sufficient time has been provided to the Appellant.*"

16. On 7th July 2009, the Appellant wrote a 4-pages letter to the Secretary in response. In the end, the Appellant required the Presiding Chairman to justify his conclusion within the next two days or else she could reasonably conclude that the Presiding Chairman has bias against her.

17. Mr. Pow considered the contents of this 4-pages letter and responded through the Secretary on 9th July 2009 as follows:-

"*If the Appellant should dedicate her time to prepare the written response instead of writing letters like the lengthy letter dated 7th July 2009, the Appellant would no doubt find that she has ample time to do what is necessary for the expedient disposal of her appeal. The presiding Chairman requires the Appellant to file her written response on 15th July 2009 by 4:00 pm.*"

18. The Appellant responded immediately by a letter dated 9th July 2009. The Appellant stated that the presiding Chairman erred in concluding that if she had time to prepare the lengthy letter dated 7th July 2009, she ought to have sufficient time to prepare the written response. The Appellant then said that preparing the schedule in the 7th July 2009 involved less than 30 minutes but the preparation of her written response would

"*probably involve more than 8 hours to complete!*". The Appellant further asked for the identity of the presiding Chairman.

19. Mr. Pow considered the contents of this letter dated 9th July 2009 and felt assured that his previous decision was indeed correct. Given the will to do so, the Appellant could certainly find 8 hours or so of her time within the one month extension to complete her written response. Mr. Pow therefore responded by instructing the Secretary to disclose his identity as the presiding Chairman and advised the Appellant that her letter dated 9th July 2009 had been considered by the presiding Chairman and that the Appellant could make any application to the board at the hearing. The Secretary did so by a letter dated 13th July 2009.

20. In the end, the Appellant was able to and did submit her written response to the Respondent's Statement in accordance with the deadline set by the presiding Chairman, namely, on 15th July 2009 which was an 8-pages document.

21. The hearing of this appeal was eventually fixed to be heard on 25th August 2009. It now transpires that between 13th July 2009 and 25th August 2009, there were further numerous correspondence exchanges between the Appellant and the Administrative Appeal Board. These correspondence exchanges were taken up by the Chairman of the Administrative Appeal Board Mr. Christopher Chan.

22. By a letter dated 27th July 2009 ("the 1st letter of 27th July 2009"), the Appellant applied for an adjournment of the hearing of the appeal. The reason put forward was that she had an "*upcoming busy schedule*". On the same day, the Appellant issued another letter to the Administrative Appeal Board ("the 2nd letter of 27th July 2009"). She then claimed that "*I have already scheduled meeting on that day*". In yet another letter dated 31st July 2009, the Appellant claimed that "*I will be out of town*". The Appellant persisted in her application for adjournment of the hearing scheduled on 25th August 2009 by yet another letter dated 14th August 2009.

23. By a letter dated 19th August 2009, the Chairman Mr. Christopher Chan stated as follows:-

"*I am not certain of the true reason why she is not able to attend the hearing on 25 August 2009:-*

(a) because she has a busy schedule from 27 July 2009; or

(b) because she has a meeting on 25 August 2009; or

(c) because she is out of town; or

(d) for all the three reasons that she has a busy schedule and has to attend meeting out of town".

The Chairman required evidence of her inability to attend the hearing on 25th August 2009 and stated that when such evidence is received, he would consider whether it is reasonable for him to exercise his discretion to adjourn the hearing of the case.

24. The Appellant responded by a letter dated 19th August 2009 accusing the Chairman of misconduct and stated that a comprehensive complaint letter would be sent to the HK CEO shortly. The Appellant did not attempt to answer the Chairman's query nor provide any evidence in support of her application for adjournment. The Appellant then categorically stated that she could not attend the hearing on 25th August 2009.

25. By a letter dated 20th August 2009, the Secretary informed the Appellant of the Chairman's remarks and directions as follows:-

"*(a) As I have explained my position very clearly and the Appellant has not supplied me with what I have requested for, I do not think I should adjourn the hearing of the case.*

(b) The hearing will be held as scheduled on 25 August 2009.

(c) *I will leave it to the Board hearing the case to consider what course it would take under section 20(1) of the Administrative Appeals Board Ordinance (Cap.442) if the Appellant does not appear at the hearing.*"

26. The Appellant responded by a letter dated 20th August 2009 (marked as the 2nd Letter). The Appellant accused the Chairman of misconduct. The Appellant mentioned that she had already lodged a complaint against Mr. Jason Pow with the HK CEO. She stated that she would lodge her complaint against Mr. Christopher Chan with the HK CEO shortly. The Appellant than formally object to Mr. Jason Pow and Mr. Christopher Chan to be the presiding chairman of the appeal. The Appellant also applied to have Ms Mable Kwan to attend a hearing. The Appellant then quoted various authorities in support of her assertion that Mr. Jason Pow should be disqualified to act as the presiding chairman of the appeal hearing on 25th August 2009. The Appellant then, in relation to her application for adjournment, accused the Chairman Mr. Christopher Chan of:-

(i) professional incompetence or bias against her;
(ii) deliberately not answering her questions and wasting time;
(iii) refusing to consider her application to adjourn the hearing fixed on 25 August 2009 and to have Ms Mable Kwan to be a witness; and
(iv) deliberately wasting time by leaving the issue to be dealt with by all the Board members.

27. By a letter dated 21st August 2009 (marked 2nd Letter), the Appellant stated that her applications involved question of law which, according to section 23 of the Administrative Appeals Board Ordinance, should be dealt with by the presiding chairman instead of leaving it to the Board panel. The Appellant repeated her accusation that the presiding chairman handled her applications incompetently amounting to misconduct. The letter ended with the intimation that she would complain to HK CEO shortly.

28. On 25th August 2009, the Appellant did not appear at the hearing nor had she sent any legal representative to represent her at the hearing. By reason of the above backgrounds

leading to the hearing date, the Board has to consider firstly whether Mr. Jason Pow, SC should step down as the presiding Chairman of this Board. If he should, then this Board has to be reconstituted and an adjournment of the hearing is inevitable. However, if Mr. Jason Pow, SC can and should continue to act as the presiding Chairman of this Board, then the next issue arises, namely, what course should this Board take pursuant to the options available under section 20 of the Administrative Appeals Board Ordinance in the event of "Failure of the appellant to attend hearing".

Whether the presiding Chairman should step down from hearing this appeal

29. First of all, on the issue of whether there is "*actual bias*" on the part of Mr. Jason Pow, SC against the Appellant, Mr. Pow openly stated that he does not know the Appellant personally. His only interaction with the Appellant was in relation to her earlier application for extension of time for the submission of her written response to the Respondent's Statement. Mr. Pow referred the other two Board members and all parties present at the hearing to the correspondence exchanges mentioned in paragraphs 10 to 19 hereinabove. Mr. Pow stated that he only made decisions upon consideration of the Appellant's application on merits and holds no personal view against the Appellant one way or the other. Mr. Pow is also unaffected by the fact that the Appellant had apparently lodged a complaint against him with the HK CEO and holds no view against the Appellant on account of that.

30. The other two members of the Board accept that Mr. Pow has no actual bias against the Appellant. Mr. Pow is not interested in the outcome of this Appeal. His interaction with the Appellant was only in relation to his handling of an interlocutory application. The contents of the correspondence exchanges show no evidence of bias. The other two members of the Board unanimously accept Mr. Pow's statement that he holds no bias against the Appellant.

31. However, the other two members of the Board still has to consider whether there was "*apparent bias*". Mr. Pow directs the Board to a dictum in *Deacons v. White & Case*

Limited Liability Partnership & oths. FAMV No. 22 and 23 of 2003 which was quoted by the Appellant herself in her letter dated 20th August 2009 (marked 2nd Letter). The dictum reads as follows:-

"*The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.*"

32. Mr. Pow has shown the other two Board members and all other parties present at the hearing the correspondence exchanges in relation to the only interaction that he had with the Appellant, namely, those mentioned in paragraphs 10 to 19 hereinabove. Mr. Pow was merely dealing with an interlocutory application for extension of time. He did grant an extension of time for one month, albeit not to the full length intended by the Appellant. The Appellant persisted in her application. Mr. Pow remained unmoved and considered that the one month extension of time was sufficient. In the end, the Appellant stated in her letter dated 9th July 2009 that her preparation of the written response would "*probably involve more than 8 hours to complete*". Mr. Pow had thus already given her one month to complete such a step in the proceedings. Furthermore, eventually, the Appellant complied with Mr. Pow's direction and succeeded in filing her written response within the time schedule directed by Mr. Pow. This confirmed that the one-month extension was indeed amply sufficient for the Appellant. In the circumstances, no fair-minded and informed observer would suspect Mr. Pow of holding any grudge against the Appellant. Thereupon, Mr. Pow was no longer involved in the subsequent correspondence exchange between the Appellant and the Administrative Appeals Board. Mr. Pow was not involved in the Appellant's application for adjournment of the hearing which was handled by the Chairman Mr. Christopher Chan. The mere existence of a complaint lodged by the Appellant with the HK CEO against Mr. Pow is not sufficient basis to lead a fair-minded and informed observer to conclude that there was a real possibility of bias. If it was otherwise, an appellant could forum shop by the mere mechanism of lodging complaint against whichever member whom he/she seeks to avoid. Neither the Board nor Mr. Pow

has been informed of the contents of the complaint allegedly lodged with the HK CEO. Mr. Pow is a legally trained professional who should be accustomed to people holding different views and utilizing different channels to express their perceived grievances. In any event, the decision of the Board (except on sole question of law) is to be reached by a majority. The crux of the present appeal lies in whether the Respondent had sufficient grounds to conclude that a full investigation of the Appellant complaint was not necessary. The outcome of this appeal depends on the majority opinion of the Board on this factual issue. In the circumstances of this case, the other two members of the Board are of the unanimous view that a fair-minded and informed observer in the circumstances would not conclude that there was a real possibility of bias with Mr. Pow sitting as the presiding Chairman of this Board.

33. In the circumstances, the other two members of the Board rules and declares that this Board (with Mr. Pow sitting as the presiding Chairman) is properly constituted to continue with the hearing of this Appeal.

Non-attendance of the Appellant at the hearing

34. Section 20 of the Administrative Appeals Board Ordinance reads:-

"*Failure of appellant to attend hearing*

(1) If on the day and time fixed for the hearing of the appeal the appellant fails to attend the hearing or fails to make representations either in person or by counsel or a solicitor or by some other person, the Board may---

(a) if satisfied that the appellant's failure to attend was due to sickness or any other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;

(b) proceed to hear the appeal; or

(c) by order dismiss the appeal."

35. This Board is of the view that (as seen from the correspondence mentioned in paragraph 22 hereinabove) the Appellant had put forward apparently inconsistent reasons for the need of an adjournment. Putting it at its highest, the reasons put forward by the Appellant were ambiguous and called for clarification. When Mr. Christopher Chan sought clarification and supporting evidence from the Appellant, such were not provided. Accordingly, no adjournment was ordered by Mr. Christopher Chan. This was made known to the Appellant by the Secretary's letter dated 20th August 2009. This situation remained until the hearing date, viz. 25th August 2009. It has certainly not been suggested by the Appellant that she could not attend due to sickness. Neither has the Appellant provided unambiguous grounds with supporting evidence to show that her failure to attend was due to any other reasonable cause. This Board fails to see any valid ground for adjourning the hearing of this appeal and refuse to exercise its discretion in favour of adjournment.

36. Despite the non-attendance of the Appellant, she had filed her written response to the Respondent's statement on 15th July 2009. This written response consists of 22 paragraphs of detailed and structured submissions. This Board is thus able to understand and consider her arguments. The Appellant applied to have Ms. Mable Kwan as a witness. Having considered the real issue involved in this appeal, this Board is prepared to assume in favour of the Appellant that the event on 6th October 2008 did taken place in the manner as set out in her complaint (see paragraph 3 hereinabove). Accordingly, the absence of Ms Mable Kwan as a witness would not in any way be prejudicial to the case of the Appellant. In any event, Ms Mable Kwan had stated to the Respondent that she could not remember anything in relation to the incident on 6th October 2008. The Appellant has not suggested otherwise either in her Grounds of Appeal or her written response to the Respondent's Statement. In the circumstances, this Board is of the view that neither the non-attendance of the Appellant nor the absence of Ms Mable Kwan would render it improper or inefficient to dispose of this appeal on merits. This Board thus exercises its discretion not to dismiss the appeal outright by reason of the non-attendance of the Appellant. This Board thus proceeds to hear the appeal despite the non-attendance of the Appellant.

The appeal

37. The subject matter of this appeal is the decision of the Respondent that a full investigation of the Appellant's complaint was unnecessary pursuant to section 39(2)(d) of the Ordinance. Section 39(2) reads:-

"*The Commissioner may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case--*

(a) .....

(b) *the act or practice specified in the complaint is trivial;*

(c) .....

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

38. Part (B) of the Respondent's Complaint Handling Policy contains the following provisions:-

"*Section 39(1) and (2) of the Ordinance contain various grounds on which the [Respondent] may exercise his discretion to refuse to carry out or continue an investigation. In applying some of those grounds, the [Respondent's] policy is as follows:-*

(a) *the act or practice specified in a complaint may be considered to be trivial, if the damage (if any) or inconvenience caused to the complaint by such act or practice is seen to be small;*

In addition, an investigation or further investigation may be considered to be unnecessary if:-

(g) *given the mediation by the PCPD, remedial action taken by the party complained against or other practical circumstances, the investigation or further investigation*

of the case cannot be reasonably expected to bring about a more satisfactory result."

39. By Section 21(2) of the Administrative Appeals Board Ordinance, the Board shall have regard to any statement of policy lodged by the Respondent with the Secretary under section 11(2)(a)(ii), if it is satisfied that, at the time of the making of the decision being the subject of the appeal, the Appellant was or could reasonably have been expected to be aware of the policy. A copy of the Complaint Handling Policy was lodged with the Secretary under section 11(2)(a)(ii) together with the Respondent's Statement. By a letter dated 13th October 2008, the Respondent provided the Appellant with a copy of the Complaint Handling Policy. In the circumstances, this Board is obliged to take into consideration the provisions set out in paragraph 40 hereinabove.

40. In *Administrative Appeal No. 47 of 2004*, the Board held [at paragraph 19] that pursuant to section 39(2)(d) of the Ordinance, the Commissioner can decide not to investigate or not to continue investigation upon whatever ground. Provided that such ground is reasonable and lawful and that the decision was made pursuant to established procedures, the Board would not interfere with such decision. In that case, the complainant was a property owner of a multi-storey building. She complained that her letter to the incorporated owners (bearing her personal data) was posted up by the incorporated owners at conspicuous places of the building. After the initial investigation by the Commissioner pursuant to the complaint, the incorporated owners removed the said letter from the various posts. Paragraph 20 of the Decision of the Board reads:-

"*The Board agreed that under all of the above mentioned circumstances, investigation of the Appellant's complaint would not achieve practical effect because it had achieved the goal of the removal of the letter by the owners' corporation. Furthermore, the Privacy Commissioner has advised the owners' corporation to consider deleting the names and other personal data of the complainants when it finds it necessary to post complaint letters in public in the handling of similar complaints in future, so as to avoid dissatisfaction of the complainants. Such measures can prevent recurrence of similar*

incidents in the owners' corporation and minimize the possibility of intruding other people's privacy, thus achieving the purpose of the Personal Data (Privacy) Ordinance. The Board believed that the Privacy Commissioner had reasonably exercised his discretion not to carry out an investigation. His decision was indubitable."

41. In *Administrative Appeal No. 52 of 2004*, the Board held [at paragraph 17] that under section 39(1), the Respondent has a wide discretion whether to carry out or continue an investigation. In particular, under subsection 39(2)(d), the Respondent may refuse to carry out or continue an investigation initiated by a complaint if he is of the opinion that, having regard to all the circumstances of the case --- any investigation or further investigation is for any other reason unnecessary. The Board then held that it was reasonably open to the Respondent to come to the view that any further investigation of the complaint was unnecessary in view of the voluntary remedial action taken by the person complained against.

42. In the present case, the Respondent exercised his discretion pursuant to section 39(2) upon the following grounds:-

(1) The Respondent did not consider the disclosure of the first page of the Letter to Deacon's messenger as a contravention of DPP4.

(2) Since Ms Kwan maintained that she had no recollection of the disclosure of the first page of the Letter to her, there could hardly be any damage or harm done to the Appellant by reason of this disclosure to Ms Kwan.

(3) Deacons has already given an undertaking to avoid recurrence of the act complained of, any further investigation of the complaint would not reasonably be expected to bring about a better result.

43. The Board will approach this appeal by first examining section 50 of the Ordinance. Section 50 reads:-

"*Enforcement notices*

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

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

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

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

(i) .....

(ii) .....

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

44. It can be seen from the language of section 50(1)(a) and (b) that the issuance of enforcement notice depends on whether there is, upon completion of a full investigation, a continuing contravention or a likelihood that a past contravention will continue or be repeated. The present complaint involves a one-off incident. The alleged disclosure of personal data to Ms Kwan and the messenger would not be " *a continuing contravention*" by the time of completion of a full investigation (if made). Accordingly, section 50(1)(a) would not be applicable. Even assuming that the alleged disclosure to Ms Kwan and the messenger constituted a contravention of DPP4, by reason of Deacons' undertaking given to the Respondent, there is simply no evidence of likelihood that the contravention will continue or be repeated. Accordingly, section 50(1)(b) would equally not be applicable. In other words, even if a full investigation is undertaken, and even if contravention of DPP4 is proven at the end of the full investigation, no enforcement notice would likely be issued by the Respondent under the circumstances of this case. Furthermore, even if an enforcement notice is to be issued, it would be in terms of requiring Deacons to refrain from further carrying out the conduct complained against. This remedy has in fact been achieved through the undertaking given by Deacons to the Respondent even without undergoing a full investigation. This Board is of the view that the Respondent is fully justified in concluding that any further investigation of the

complaint would not reasonably be expected to bring about a better result. On this ground alone, the Respondent's decision was in accordance with paragraph (g) of Part (B) of the Respondent's Complaint Handling Policy. This is also a valid ground upon which the Respondent could exercise his discretion to refuse further investigation under section 39(2)(d) of the Administrative Appeals Board Ordinance.

45. This Board is entitled to exercise common sense. A messenger of a law firm is unlikely to be interested in the contents of the document which he was asked to deliver by hand. There is no suggestion or evidence that the messenger knew of the Appellant at all. In fact, the Appellant does not suggest (whether in her Notice of Appeal or her written response) that she suffered any loss, harm or inconvenience by reason of this alleged disclosure to the messenger.

46. As for Ms Kwan, this Board is prepared to accept that personal data of the Appellant appearing in the Letter were in fact disclosed to Ms Kwan. The Appellant argues that prior to the incident, Ms Kwan did not know that the Appellant's employment was terminated on the *false* ground of material non-disclosure on a SFC Form 5. The Appellant argues that this false information of failure to make full and frank disclosure has seriously damaged her reputation and amounted to defamation. The Appellant's case is thus that this statement in the Letter was false. In Administrative Appeal No. 49 of 2005, this Board held that "false statement or information" about a person does not constitute "*personal data*" within the meaning of the Ordinance. Accordingly, it cannot be said that the Appellant suffered loss, harm or inconvenience by reason of disclosure of her "*personal data*". Whether the Appellant has a cause of action in the tort of defamation is irrelevant to the Respondent's consideration. It is however true that the Letter contained references to court actions involving the Appellant which were personal data concerning the Appellant. The Appellant argues that Ms Kwan did not know of the existence of those court actions prior to the 6th October 2008 incident. However, the Appellant has not pointed to any specific loss, harm or inconvenience (whether in the Notice of Appeal or in her written response) brought about by Ms Kwan being made aware of such court actions. In any event, Ms Kwan had previously stated that she "*did*

not know and could not recall anything in relation to the incident on 6th October 2008". The Board considers that Ms Kwan's statement also accords with common sense. Ms Kwan was a receptionist of a business centre handling numerous information on daily basis. The disclosure of the Letter to her was transient. There is no evidence to show that Ms Kwan kept any copy of the Letter. Common sense dictates that it is not likely that Ms Kwan could remember details such as the actions numbers of various civil actions mentioned in the Letter. The Board is of the view that the Appellant is unlikely to have suffered any loss, harm or inconvenience by reason of the disclosure of these court actions to Ms Kwan.

47. In the circumstances, this Board is of the view that the Respondent is fully justified in concluding that there could hardly be any damage or harm done to the Appellant by reason of the disclosure of the Letter to Ms Kwan or the disclosure of the 1st page of the Letter to the messenger. On this additional ground, the Respondent's decision was in accordance with paragraph (a) of Part (B) of the Respondent's Complaint Handling Policy. Triviality of the contravention is also a valid ground upon which the Respondent can exercise his discretion to refuse further investigation under section 39(2)(b) of the Administrative Appeals Board Ordinance. Furthermore, triviality of damage or harm is also a relevant consideration for the exercise of discretion under section 39(2)(d).

48. This Board is of the view that based on the abovementioned two grounds, the Respondent's decision of not furthering the investigation is fully justified. It is thus not necessary for the Board to form any concluded view on whether or not the disclosure of the 1st page of the Letter to the messenger constituted contravention of DPP4 on account of the messenger's role as an authorized agent of Deacons. The decision of this Board has been reached upon the assumption, in favour of the Appellant, that the disclosure of the 1st page of the Letter to the messenger did constitute contravention of DPP4.

49. This Board is of the view that the 5 Grounds of appeal relied on by the Appellant are without merits. Ground 1 simply set out what the Respondent has accepted as the factual basis on which he exercised his discretion. Grounds 2 to 4 suggested that ML had

repeatedly violated the Ordinance. According to the Respondent's Statement, there has not been any finding of contravention on the part of ML in relation to those complaints listed out in Ground 3. The mere existence of complaints against ML in respect of other alleged separate and distinct incidents is irrelevant to the issue of whether the Respondent was justified in exercising its discretion under section 39(2) of the Administrative Appeals Board Ordinance in this particular complaint.

50. In respect of Ground 5, by a letter dated 31st October 2008, the Respondent requested the Appellant to clarify her previous statement made in the complaint. The Appellant was asked to provide details as to what part of the Letter was allegedly read over-phone by Ms Kwan to her. This was part of the initial investigation conducted by the Respondent. Instead of providing assistance to the Respondent in his investigation, the Appellant stated: "*I don't understand why you have to ask me which part of the enclosed letter was read out to me by Ms. Kwan and why Ms. Kwan would read out the letter to me. Is it relevant to my complaint at all? Please clarify*". The Respondent took it as a refusal on the part of the Appellant to specify exactly what Ms Kwan had read out to the Appellant over the phone at the time. Whilst the Board is of the view that the Appellant could have taken a more cooperative attitude, the Board cannot accept that this incident constituted a refusal on the part of the Appellant to provide the requested information. However, this is not a matter that has any effect on the overall decision of this Board. As stated in paragraph 38 hereinabove, the Board has assumed the Appellant's version of event in respect of the 6th October 2008 incident to be correct and proceeded to analyze this appeal on that premise. Ground 5 has thus become irrelevant as far as the outcome of this appeal is concerned.

51. For the above reasons, this appeal is dismissed.

(Mr Jason POW Wing-nin, SC)
Deputy Chairman
Administrative Appeals Board