

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO.13/2014

BETWEEN

FU LOK MAN JAMES

Appellant

and

THE PRIVACY COMMISSIONER
FOR PERSONAL DATA

Respondent

Coram: Administrative Appeals Board

- Mr. Alan NG Man-sang (Deputy Chairman)
- Ms Joan HO Yuk-wai (Member)
- Mr. Barry WONG Man-sing (Member)

Date of Hearing: 21 January 2015

Date of Handing down Written Decision with Reasons: 17 November 2015

DECISION

1. By a Notice of Appeal dated 31st March 2014 lodged by the Appellant with the Administrative Appeals Board (“**the Board**”) (“**the Notice of Appeal**”), the Appellant appealed against a decision of the

Respondent dated 11th March 2014 (“**the Decision**”) whereby the Respondent decided to exercise his power under *section 39(2)(d) of the Personal Data (Privacy) Ordinance (Cap. 486)* (“**the PD(P)O**”) not to pursue the complaint lodged by the Appellant with the Respondent on 8th August 2012 (“**the Complaint**”) further.

2. The Appellant has not formulated his grounds of appeal on the Notice of Appeal, but attached to the Notice of Appeal as “Annex B” a document in support of his present appeal (“**the Annex B**”).

3. The present appeal can be said to be a sequel to the Appellant’s appeal against the decision of the Respondent made on 16th October 2012 (“**the 1st Decision**”) under Administrative Appeal No. 33/2012 (“**the 1st Appeal**”). Before we begin to comprehend and analyze the issues ventilated in the present appeal, the pertinent background can be summarized as follows.

The Relevant Background

4. On 29th September 2009, Mr. George Fu Wing Lok (“**Mr. George Fu**”), a sibling of the Appellant, applied to deregister Coronet Leather Ware Company Limited (“**the Company**”) under *section 291AA(9) of the Companies Ordinance (Cap.32)* (“**the CO**”). In support of the application, Mr. George Fu made a declaration that “all members of the [C]ompany agree to the deregistration of the [C]ompany”.

5. The Company was a family owned Hong Kong private company. The Company was founded by the Appellant's deceased parents and the Appellant had worked as the general manager of the Company between 1979 and 2005. Prior to Mr. George Fu's application to deregister the Company, the Company was owned, as to 69% shareholding, by Mr. George Fu, as to 10% shareholding each, by Ms Fu Chau Fong Renee ("**Ms Renee Fu**"), Ms Fu Pui Fong Alice ("**Ms Alice Fu**") and Mr. Fu Co Low Steven ("**Mr. Steven Fu**"), and as to the remaining 1% shareholding, by Mr. Fu Chiu Chun Johnny ("**Mr. Johnny Fu**"). The Appellant, Mr. George Fu, Ms Renee Fu, Ms Alice Fu and Mr. Steven Fu are siblings and Mr. Johnny Fu is their late father.

6. Having received no objection after Mr. George Fu's application to deregister the Company was gazetted, the Company was formally dissolved on 19th February 2010.

7. In about mid-March 2011, the Appellant first noticed the deregistration of the Company.

8. On 23rd May 2011, the Appellant wrote a letter to the Registrar of Companies. In the letter, the Appellant asked the Registrar of Companies to review the deregistration application as he was told by the other remaining shareholders of the Company that they had "never signed any papers to dissolve the Company", and levelled various allegations against Mr. George

Fu. The most serious allegations were that Mr. George Fu was not an honest person and that the documents submitted to the Registrar of Companies were fake and were jointly processed by Mr. George Fu and his wife, Ms Betty Cao. Ms Betty Cao was a director of the Company prior to its dissolution.

9. The aforesaid allegations sowed the seeds of suspicion in the mind of the Registrar of Companies that Mr. George Fu might have made a false declaration in his application to deregister the Company, thereby attracting criminal liability under *section 291AA(14) of the CO*. By the letter to the Appellant dated 3rd June 2011, the Registrar of Companies brought to the attention of the Appellant, *inter alia*, the possible breach of *section 291AA(14) of the CO* by Mr. George Fu and that the matter was now under consideration. On the same day, the Registrar of Companies wrote letters to Mr. George Fu, his wife and some other shareholders of the Company at their last known addresses according to the Companies Registry's records and the contents of those letters were identical and copied to the Company's accountants, Best Genius Accounting Services Centre ("**Best Genius**"). In those letters, the Registrar of Companies drew to the attention of the addressees of those letters *section 291AA(14) of the CO* and the seriousness of a breach of *section 291AA(14) of the CO*, asked for their explanation to the matter within the next 14 days, and expressly reserved all rights of prosecution. The letters to Mr. George Fu's wife and some other shareholders of the Company were returned to the Registrar of Companies undelivered.

10. As rightly pointed out by the Board hearing the 1st Appeal, the contents of the letters to the shareholders (other than Mr. George Fu) and Mr. George Fu's wife, upon a closer scrutiny, were clearly erroneous.

11. By an email dated 17th June 2011 ("**the 17/6/11 Email**"), Mr. George Fu responded to the Registrar of Companies' letter of 3rd June 2011 and told the Registrar of Companies that he had received an email from Best Genius informing him that the Appellant had objected to the deregistration of the Company. By the same email, Mr. George Fu confirmed to the Registrar of Companies that in 2009, all members of the Company had agreed that its business should cease, and asked for the Registrar of Companies to defer 14 days in dealing with the matter in order that he could prepare documents for lodgment with the Registrar of Companies.

12. Later on, the Appellant became aware of and was greatly displeased by the fact that his report of the matter to the Registrar of Companies had been revealed to Mr. George Fu.

13. By a further email dated 27th July 2011, Mr. George Fu further wrote to the Registrar of Companies informing the latter that since the shareholders of the Company and he himself were not familiar with the procedure to deregister the Company, they had instructed Best Genius to apply to deregister the Company, that according to the reply and explanation by Best Genius, Best Genius had followed the proper procedure to apply to

deregister the Company and there had already been a lapse of 2 years from such successful application, and that they would not make any application to the Court to reinstate the registration of the Company.

14. A series of correspondence between the Appellant and the Registrar of Companies ensued.¹ In this series of correspondence, the Appellant complained of the disclosure of his identity to Mr. George Fu whilst the Registrar of Companies explained that such disclosure was to provide Mr. George Fu with sufficient information to enable him to answer the allegations and was part of a proper investigation into whether Mr. George Fu had committed an offence contrary to *section 291AA(14) of the CO*.

15. The Appellant did not find the explanation acceptable and therefore lodged the Complaint. The subject matter of the Complaint was about disclosure by the data user (i.e. Registrar of Companies) of the identity of the complainant (i.e. the Appellant) to a criminal suspect (i.e. Mr. George Fu). By letter dated 30th August 2012, the Appellant confirmed with the Respondent that he complained against the Registrar of Companies because of his discovery that the Registrar of Companies had disclosed his report dated 23rd May 2011 and his identity to Mr. George Fu.² The Appellant also so confirmed with the Board at the outset of the hearing of the 1st Appeal.³

¹ See for example letters by the Registrar of Companies to the Appellant dated 23rd August 2011, 14th September 2011, 8th February 2012, 13th March 2012, 24th April 2012 and 25th June 2012

² See para.32 of the 1st Appeal Decision

³ See para.32 of the 1st Appeal Decision

16. The Respondent investigated into the Complaint and reached the 1st Decision. Dissatisfied with the 1st Decision, the Appellant appealed to the Board. The Board (presided over by Deputy Chairman Mr. Thong Keng-ye) heard the 1st Appeal on 14th March 2013 and handed down its decision on 16th April 2013 (“**the 1st Appeal Decision**”).

The 1st Appeal Decision

17. In the 1st Appeal Decision, the Board agreed and found the following:-

- (a) The Appellant’s identity/name was personal data.⁴
- (b) The personal data was collected⁵ for the purpose of handling the Appellant’s allegations of possible criminal conduct on the part of Mr. George Fu.⁶
- (c) Mr. George Fu was entitled to be aware of the identity of his accuser, without which he would not be in a position to respond to the accusation and to put forward representations in answer thereto, which are complete, fair and proper. Without disclosing such information to Mr. George Fu, it was not possible for the Registrar of Companies to carry out a fair and

⁴ See para.16 of the 1st Appeal Decision

⁵ When the Registrar of Companies received the Appellant’s letter dated 23rd May 2011

⁶ See para.27 of the 1st Appeal Decision

proper investigation into whether Mr. George Fu had committed an offence under *section 291AA(14) of the CO*.⁷

- (d) The Registrar of Companies had not contravened *Data Protection Principle 3 (“DPP3”)* in *Schedule 1 to the PD(P)O* by disclosing the Appellant’s identity to Mr. George Fu.⁸
- (e) The disclosure of the Appellant’s identity to Mr. George Fu’s wife and some other shareholders of the Company would have been improper and contravened *DPP3* but for the fact that the letters of 3rd June 2011 addressed to those persons had been returned to the Registrar of Companies undelivered.^{9, 10}
- (f) There appeared to be no reason for the Registrar of Companies in conducting the criminal investigation into the conduct of Mr. George Fu, to have copied the letters to Best Genius.¹¹
- (g) Although the subject matter of the Complaint was unsubstantiated, the Respondent had either ignored or, by oversight failed to notice, that there was evidence of a breach of *DPP3* by the Registrar of Companies in disclosing the personal data of the Appellant to Best Genius, and such disclosure was

⁷ See para.29 of the 1st Appeal Decision

⁸ See para.9 hereinabove; and para.31 of the 1st Appeal Decision

⁹ See para.9 hereinabove

¹⁰ See para.34 of the 1st Appeal Decision

¹¹ See para.9 hereinabove; and para.35 of the 1st Appeal Decision

not exempted from liability by *section 58(2) of the PD(P)O*.¹²

18. In order to save time, costs and trouble to all parties concerned, the Board allowed the 1st Appeal, reversed the 1st Decision under *section 21(1)(j) of the Administrative Appeals Board Ordinance (Cap.442) (“the Ordinance”)* and exercised its power under *section 21(3) of the Ordinance* to order the case to be sent back to the Respondent for him to consider what measures/steps he might take to rectify the breach of *DPP3* by the Registrar of Companies (and/or to prevent its recurrence) in accordance with and pursuant to the powers conferred upon him by the provisions of *the PD(P)O*.¹³

The Follow-up Steps taken by the Respondent after the 1st Appeal Decision

19. After the 1st Appeal Decision, the Respondent followed up on the direction given by the Board referred to in para.18 hereinabove. What followed was the exchange of written and oral communications between the Respondent and the Appellant and those between the Respondent and the Registrar of Companies.

20. By an email dated 4th June 2013, the Respondent asked the Appellant for further information and supplied him with, *inter alia*, the Respondent’s Complaint Handling Policy (“**the Policy**”).

¹² See paras.37, 38 and 44 of the 1st Appeal Decision

¹³ See paras.46-47 of the 1st Appeal Decision

21. On 6th June 2013, the Respondent wrote to the Registrar of Companies, explaining to the latter the 1st Appeal Decision and inquiring, *inter alia*, whether the latter would devise any policy and/or guidelines in relation to proper disclosure of an informant's identity in order to prevent recurrence of similar incidents. The purpose of the inquiry was to enable the Respondent to find out whether the matter could be resolved without the Respondent exercising his statutory power under *the PD(P)O*.

22. In light of the 1st Appeal Decision, the Registrar of Companies has conducted a review of its procedure on handling objection cases relating to applications for deregistration under *section 291AA of the CO*. There were communications between the Respondent and the Registrar of Companies on the revised procedure to be implemented by the Registrar of Companies.¹⁴ After taking into account the comments made by the Respondent, the final version of the revised procedure to be implemented by the Registrar of Companies is that annexed to the letter by the Registrar of Companies to the Respondent dated 17th October 2013 (“**the 17/10/13 Letter**”). In the 17/10/13 Letter, the procedure on handling objection cases relating to deregistration applications was revised in bold under para.A.(3). It clarified the procedure to be followed after the Registrar of Companies received an objection to a deregistration application. Amongst other things, the Registrar of Companies had to send letter to seek a representation from the Applicant at the address stated in Form DR1 and reported in the

¹⁴ See letter by the Registrar of Companies to the Respondent dated 9th July 2013, and the letter by the Respondent to the Registrar of Companies dated 28th August 2013

Companies Registry's public record and the sender had to take note of the following which was the crux of the revised procedure:-

“(i) In case the Objector is a member of the [c]ompany disagreeing to the deregistration of the [c]ompany or a creditor of the [c]ompany, both the identity of the Objector and the grounds for objection will be disclosed. Consent from the Objector is considered not necessary as the disclosure of his identity is necessary for the investigation as to whether a breach of section 291AA(14) has been committed and, where appropriate, for the processing of his objection.

(ii) In case the Objector is neither a member disagreeing to the deregistration of the [c]ompany nor a creditor of the [c]ompany, only the grounds for objection will be mentioned and the Objector's identity will not be disclosed.”

23. In the 17/10/13 Letter, the procedure was further revised to provide that when the Registrar of Companies sent letter to seek representation also from the company (in case the company had not been deregistered and dissolved), directors of the company, members of the company (in case the objection was that not all members agreed to the deregistration of the company), presenter of the deregistration application (in case the company has not been deregistered and dissolved), the sender should take note that **“[o]nly the grounds for objection would be mentioned and the Objector's identity would not be disclosed.”**

24. Upon further enquiry by the Respondent, the Registrar of Companies elucidated in her letter to the Respondent dated 4th December 2013 (“**the 4/12/13 Letter**”) the reasons for the disclosure of the identity of the objector to the applicant for the deregistration of the company if the objector is a member or a creditor of the company, and maintained that the disclosure of the identity of the objector in such circumstances was based on the necessity of the circumstances. In the 4/12/13 Letter, the Registrar of Companies further explained that in cases when the objector was neither a member nor a creditor of the companies, various steps would be taken before the identity of the objector would be disclosed. Such steps, as the Registrar of Companies explained, included seeking consent from the objector and, where no consent was given, referring the case to legal officers who would advise on the follow up action having regard to the circumstances of the case and, among others, the factors mentioned in para.30 of the 1st Appeal Decision.

25. In the 4/12/13 Letter, the Registrar of Companies emphasized that her overriding consideration was whether it was necessary to disclose the identity of the objector to the applicant so that he could answer the objection or accusation, that under the rule of natural justice, she had to inform the relevant parties of the complaints against them so that they were in a position to give a proper response, and that failure to disclose the identity of the objector when the objection was received from a member or a creditor of the company would actually impede the proper investigation of the complaint.

26. In the course of the Respondent's following up on the direction given by the Board referred to in para.18 hereinabove, the Appellant began to inquire of the Respondent about the provisions in *the PD(P)O* relating to making misrepresentations to the Respondent and raised new allegation of misrepresentation against the Registrar of Companies. The Appellant's new allegation of misrepresentation has been neatly summarized in the Decision and will be referred to hereinbelow.

The Decision

27. As we have said, the Respondent decided to exercise his power under *section 39(2)(d) of the PD(P)O* not to pursue the Complaint further. On 11th March 2014, the Respondent wrote to the Appellant, informing the latter of the Decision and enclosing therewith the Reasons for the Decision. According to the Reasons for the Decision, the Respondent's decision not to pursue the Complaint further was in accordance with paragraphs 8(e) and (h) of the Policy.¹⁵

28. In the Reasons for the Decision, the Respondent referred to the steps taken by the Registrar of Companies to review and revise her existing procedure concerning the circumstances under which the identity of an individual who objected to the deregistration would be disclosed to an applicant of the deregistration for response and other parties to the

¹⁵ See para.14 of the Reasons for the Decision

deregistration application¹⁶, and came to the conclusion that in light of the remedial measures/improvements made by the Registrar of Companies, the Respondent was satisfied that an investigation of the contravention of *DPP3* (by the Registrar of Companies disclosing the Appellant's identity to Best Genius) could not reasonably be expected to bring about a more satisfactory result¹⁷.

29. In the Reasons for the Decision, the Respondent neatly and fairly summarized the new allegation of misrepresentation raised by the Appellant.¹⁸ In gist, the Appellant alleged that the Registrar of Companies had made certain misrepresentation to the Respondent when the Respondent was handling the Complaint, that the Registrar of Companies had misled the Respondent by withholding the 17/6/11 Email¹⁹, that if the Respondent had been provided at the outset with a copy of the 17/6/11 Email, the Respondent would have considered and handled as part of the Complaint the disclosure of the Appellant's identity by the Registrar of Companies to Best Genius. The Appellant further complained that it was not until the hearing of the 1st Appeal, when the Board ordered the Registrar of Companies to submit Mr. George Fu's reply for confirming its existence, that the Registrar of Companies eventually handed in the 17/6/11 Email to the Board, and that it was only then that the Respondent discovered from the contents of the 17/6/11 Email that the Appellant's allegations and identity had been disclosed to Best Genius.

¹⁶ See para.8 of the Reasons for the Decision

¹⁷ See para.11 of the Reasons for the Decision

¹⁸ See para.7 of the Reasons for the Decision

¹⁹ See para.11 hereinabove

30. In the Reasons for the Decision²⁰, the Respondent said that the Registrar of Companies had not hidden the disclosure of the Appellant's identity to Best Genius from the Respondent²¹, that whether the Respondent had been given at the outset a copy of the 17/6/11 Email would not have affected the Respondent's consideration of the Complaint, and that any withholding of documents to conceal disclosure by the Registrar of Companies of the Appellant's identity to Best Genius (if any) did not amount to a misrepresentation to the Respondent when the subject matter of the Complaint was only disclosure of the Appellant's identity to Mr. George Fu.

31. After the Decision, the Respondent wrote to the Registrar of Companies on 14th March 2014, informing the latter of the former's intention not to take any further action for the present. On 18th March 2014, the Respondent gave a written warning to the Registrar of Companies that if the latter failed to observe the requirements of *the PD(P)O* in similar incidents in the future, the former might consider serving on the latter an enforcement notice directing the latter to take such steps as were necessary to comply with *the PD(P)O*.

²⁰ See paras.12 and 13 of the Reasons for the Decision

²¹ The Respondent said that when responding to his first inquiry letter, i.e. the letter by the Appellant to the Registrar of Companies dated 23rd May 2011 as referred to in para.8 hereinabove, the Registrar of Companies had provided the Respondent with a copy of her letter to Mr. George Fu dated 3rd June 2011 and the footer of the said letter clearly indicated that the said letter was copied to Best Genius

The Parameters of the Present Appeal

32. As we have said, the Appellant has not formulated his grounds of appeal on the Notice of Appeal, but attached to the Notice of Appeal the Annex B in support of his present appeal.

33. For the purpose of the present appeal, the Respondent filed his Statement dated 10th June 2014 relating to the Decision (“**the Respondent’s Statement**”) and the Registrar of Companies (i.e. the Person Bound by the Decision appealed against) her Statement dated 17th June 2014 (“**the Registrar’s Statement**”). In reply, the Appellant filed his Response dated 25th July 2014 (“**the Appellant’s Response**”) with amendments thereof sought by his letters to the Board dated 28th July 2014 and 31st July 2014.

34. On 5th January 2015, the Appellant further filed with the Board his Skeleton Argument for the present appeal (“**the Appellant’s Skeleton**”).

35. In a nutshell, the Appellant raised the following issues:-

(a) The Board in the 1st Appeal Decision never declared that the disclosure by the Registrar of Companies to Mr. George Fu was not a breach of *DPP3* and the Respondent should find such disclosure a breach of *DPP3*. (“*Issue A*”)

(b) The Appellant has not raised a new allegation against the

Registrar of Companies of withholding evidence²² or misrepresentation. The allegation was the finding of facts by the Board in the 1st Appeal Decision. (“*Issue B*”)

(c) The Decision that the withholding of evidence by the Registrar of Companies did not amount to misrepresentation was wrong. (“*Issue C*”)

(d) The Appellant agreed that the improvements made by the Registrar of Companies after the 1st Appeal Decision could prevent future recurrence of breach of *DPP3* by the Registrar of Companies in cases similar to the present case, but the improvements could not prevent the Registrar of Companies from withholding evidence in the future which might result in the Respondent making a wrong decision not to pursue any complaint further. (“*Issue D*”)

The Relevant Law & Policy

36. *DPP3* (in its version prior to 1st October 2012) provides that personal data shall not, without the prescribed consent of the data subject, be used (including disclosed or transferred) for any purpose other than the purpose for which the data were to be used at the time of collection of the data, or for a directly related purpose.

²² In the Appellant’s Response, the Appellant emphasized that the document withheld by the Registrar of Companies was the 17/6/2011 Email

37. Section 50B(1)(c) of the PD(P)O creates an offence for any person making a false statement to or misleading the Respondent or his prescribed officer in the performance of his functions or the exercise of his powers under Part 7 of the PD(P)O. Any person who makes a statement which he knows to be false or does not believe to be true, or otherwise knowingly misleads the Respondent or his prescribed officer in such performance of his functions or such exercise of his powers commits an offence.

38. Section 39(2) of the PD(P)O provides that 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 :-

...

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

39. Paragraph 8(e) of the Policy provides that an investigation or further investigation may be considered unnecessary if “after preliminary enquiry by the [Respondent], there is no *prima facie* evidence of any contravention of the requirements under the Ordinance”.

40. Paragraph 8(h) of the Policy further provides that an investigation or further investigation may be considered unnecessary if “given the conciliation by the [Respondent], remedial action taken by the party complained against or

other practical circumstances, the investigation or further investigation of the case cannot reasonably be expected to bring about a more satisfactory result”.

41. *Section 21(1) of the Ordinance* provides that for the purposes of an appeal, the Board may: (j) subject to sub-section (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit. Sub-section (2) provides that the Board, in the exercise of its powers under subsection (1)(j), shall have regard to any statement of policy lodged by the Respondent with the Secretary to the Board 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.

Our Views

Issue A

42. The provenance of this issue is paras.6-9 of the Annex B. The Appellant submitted that the Board in the 1st Appeal Decision never declared that the disclosure by the Registrar of Companies to Mr. George Fu was not a breach of *DPP3* and the Respondent should find such disclosure a breach of *DPP3*. On a plain reading of the 1st Appeal Decision, this argument must be wrong. The Board hearing the 1st Appeal has clearly so found in paras.30, 31, 32 and 33 of the 1st Appeal Decision.

43. The Appellant seemingly sought to re-open this issue in the present appeal.²³ At the hearing of the present appeal, the Appellant sought to re-open this issue by questioning the decision of the Registrar of Companies to write to Mr. George Fu on 3rd June 2011 whereby the latter was informed of the Appellant's objection to the deregistration of the Company. The Appellant submitted that without proof to substantiate his complaints raised in his "objection" letter to the Registrar of Companies on 23rd May 2011, it was wrong for the Registrar of Companies to disclose his objection to deregistration to anyone including Mr. George Fu. In our view, this argument is tantamount to a collateral attack on one of the important findings of the 1st Appeal Decision and must fail in the present appeal. Furthermore, it seems to us that the Appellant has confused "investigation" with criminal "prosecution". Whilst there must be sufficient credible proof of a complaint before a criminal "prosecution" can be instituted, there need not be any such proof before an "investigation" can be embarked. At the end of the day, it is the outcome of the "investigation" which determines whether there should be a criminal "prosecution". In the present case, the complainant is the Appellant who is a sibling of Mr. George Fu and who had worked for the Company as the general manager of the Company between 1979 and 2005. The Appellant is not a stranger to the Company and Mr. George Fu. There was every reason for the Registrar of Companies to conduct investigation into the complaints raised by the Appellant in his letter of 23rd May 2011, and as part of the proper investigation, to write to Mr. George Fu, the accused, to reply to the complaint.

²³ See in particular paras.26-31, 40, 42, 72, 75 and 76 of the Appellant's Response; paras.17-19 of the Appellant's Skeleton

Issues B & C

44. We think it is apposite to deal with Issues B and C together.

45. In para.12 of the Annex B, the Appellant advanced as a ground of appeal that he had not raised any new allegation against the Registrar of Companies of withholding evidence²⁴ or misrepresentation, and that the allegation was the finding of facts by the Board in the 1st Appeal Decision. The Appellant further contended that the new allegation was in the previous submission which the Respondent had failed to notice in the 1st Appeal.

46. For the purpose of deliberating on Issues B and C, we have read the 1st Appeal Decision again. We do not accept the Appellant's submission that his allegation against the Registrar of Companies of withholding evidence or misrepresentation was not a new allegation, but the finding of facts by the Board in the 1st Appeal Decision. The oral and written communications between the Appellant and the Respondent²⁵ *post* the 1st Appeal Decision clearly show that the foregoing allegation against the Registrar of Companies was a new allegation raised by the Appellant after the 1st Appeal Decision.

²⁴ In the Appellant's Response, the Appellant emphasized that the document withheld by the Registrar of Companies was the 17/6/2011 Email

²⁵ See the Telephone Attendance Notes dated 13th June 2013, 5th July 2013, 18th July 2013, 29th July 2013 and 26th August 2013; undated written note from the Appellant to Mr. D F Lo of the Respondent; letter from the Respondent to the Appellant dated 29th July 2013; email from the Appellant to the Respondent dated 26th August 2013

47. Clearly, the Appellant's new allegation is that the Registrar of Companies had misrepresented to and misled the Respondent by withholding the 17/6/11 Email. It is not the case of the Appellant that the Board hearing the 1st Appeal was misled.²⁶ In fact, the Board has referred to and considered the evidential value of the 17/6/11 Email in para.36 of the 1st Appeal Decision.²⁷ The Appellant further submitted that if the Respondent had been provided at the outset with a copy of the 17/6/11 Email, the Respondent would have considered and handled as part of the Complaint the disclosure of the Appellant's identity by the Registrar of Companies to Best Genius.²⁸

48. In substance, the Appellant's new allegation is a complaint of breach of *section 50B(1)(c) of the PD(P)O*. We hold that any complaint of breach of *section 50B(1)(c) of the PD(P)O* does not fall within the jurisdiction of the Board because such complaint was not a complaint referred to in *sections 37 and 2(4) of the PD(P)O*.

49. Under *sections 37 and 38 of the PD(P)O*, where the Respondent receives a complaint that an act or practice relating to a personal data may be a contravention of a requirement under *the PD(P)O*²⁹, the Respondent shall, subject to *section 39 of the PD(P)O*, carry out an investigation in relation to

²⁶ See the email from the Appellant to Mr. D F Lo of the Respondent dated 26th August 2013

²⁷ The Appellant seems to have shifted his stance in para.21 of the Appellant's Skeleton where he submitted that the Registrar of Companies deliberately deceived the Board hearing the 1st Appeal, resulting in the Board coming to a wrong ruling. We take the view that this new stance is totally devoid of merits and we also wonder whether we are the proper tribunal to deal with this new stance

²⁸ See letter from the Respondent to the Appellant dated 29/7/2013

²⁹ Under *section 2(4) of the PD(P)O*, a contravention of a requirement under *the PD(P)O* means where the data user has done/is doing an act, or engaged/engaging in a practice, in contravention of a data protection principle

the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a requirement under *the PD(P)O*.

50. *Section 39 of the PD(P)O* prescribes the circumstances under which the Respondent may refuse to carry out or decide to terminate an investigation initiated by a complaint. If the Respondent decides to terminate an investigation initiated by a complaint before its completion, the Respondent must, as soon as practicable by notice in writing served on the complainant, inform the complainant of the decision and the reasons for the decision. An appeal may be made by the complainant to the Board against any refusal or termination of an investigation by the Respondent.

51. An investigation into a possible offence under *section 50B(1)(c) of the PD(P)O* is not a matter falling within the investigative role of the Respondent under *sections 37, 38 and 39 of the PD(P)O*, and therefore a matter outside the jurisdiction of the Board.³⁰ Furthermore, a decision to investigate into and/or prosecute for a possible offence under *section 50B(1)(c) of the PD(P)O* is not a relevant decision of the Respondent under the *Schedule to the Ordinance* to which *the Ordinance* applies³¹.

52. The long and short of our conclusion on these Issues is that there is no *prima facie* evidence of any contravention of the requirements under the PD(P)O, i.e. any data protection principle.

³⁰ Under *section 64B of the PD(P)O*, a complaint or information in respect of an offence under *the PD(P)O* may be made to or laid before a magistrate within 2 years from the date of commission of the offence

³¹ See *section 3(a) of the Ordinance*

53. The question of jurisdiction aside, if we were required to consider the merits of the Appellant's new allegation, we would have agreed with the decision of the Respondent on Issue C.³²

Issue D

54. In para.10 of the Annex B, whilst agreeing that the improvements/remedial measures taken by the Registrar of Companies after the 1st Appeal Decision could prevent future recurrence of breach of *DPP3* by the Registrar of Companies in cases similar to the present case, the Appellant submitted that the improvements could not prevent the Registrar of Companies from withholding evidence in the future which might result in the Respondent making a wrong decision not to pursue any complaint further.

55. In para.90 of the Appellant's Response, it was submitted that the Board had ordered the Respondent to pursue the Appellant's complaint further, but the Respondent pursued nothing. We disagree.

56. It is abundantly clear that after the 1st Appeal Decision, the Respondent had followed up on the direction given by the Board and wrote to the Registrar of Companies, explaining to the latter the 1st Appeal Decision and inquiring, *inter alia*, whether the latter would devise any policy

³² See para.30 hereinabove

and/or guidelines in relation to proper disclosure of an informant's identity in order to prevent recurrence of similar incidents. As a result of the follow-up actions by the Respondent³³, the Registrar of Companies came up with a revised procedure on handling objection cases relating to deregistration applications. In essence, the overarching consideration underscored by the revised procedure is whether it is necessary to disclose the identity of the objector to the applicant so that he could answer the objection or accusation in conformity with the rule of natural justice. In light of this overarching consideration, the policy is that if the objector is a member or a creditor of the company, the identity of the objector would be disclosed to the applicant for the deregistration of the company and that if the objector is neither a member nor a creditor of the company, various steps would be taken before the identity of the objector would be disclosed and such steps included where no consent is forthcoming from the objector, seeking advice from legal officers on the follow up action to be taken. In our view, the revised procedure has addressed the concerns of the Board hearing the 1st Appeal, and rectified and prevented the recurrence of the breach of *DPP3* by the Registrar of Companies.

57. Hence, we agree with the conclusion of the Respondent that in light of the remedial measures/improvements made by the Registrar of Companies, an investigation of the contravention of *DPP3* (by the Registrar of Companies disclosing the Appellant's identity to Best Genius) could not reasonably be expected to bring about a more satisfactory result. In our

³³ See a summary of the follow-up actions and responses in paras.21-25 hereinabove

view, the Respondent is amply justified for not pursuing the Complaint further.

58. The Appellant's submission that the improvements/remedial measures could not prevent the Registrar of Companies from withholding evidence in the future is neither here nor there. In the first place, it was not the order of the Board hearing the 1st Appeal. The Board hearing the 1st Appeal only directed the case to be remitted to the Respondent for him to consider what measures/steps he might take to rectify the breach of DPP3 by the Registrar of Companies (and/or to prevent its recurrence) in accordance with and pursuant to the powers conferred upon him by the provisions of *the PD(P)O*. There is nothing in the order directing the Respondent to consider what measures/steps he might take to prevent the Registrar of Companies from withholding evidence in the future. At any rate, the Board has not decided in the 1st Appeal that the Registrar of Companies has made misrepresentation to or withheld evidence from the Respondent.

Conclusion

59. After the hearing of the present appeal on 21st January 2015, the Appellant has further written to the Secretary to the Board on 7th August 2015 applying for leave to lodge an additional 3-page submission. According to the direction given by the Board on 11th August 2015, the

Respondent³⁴ and the Registrar of Companies³⁵ opposed the Appellant's application with reasons.

60. We have read the Appellant's additional 3-page submission *de bene esse*. In the additional 3-page submission, the Appellant shifted his focus of allegation to the Senior Government Counsel who prepared the Supplemental Statement of the Registrar of Companies for the 1st Appeal. The Appellant wildly alleged that the Senior Government Counsel was dishonest and "malfeasant", and was a partner of the Registrar of Companies in misrepresenting to the Board hearing the 1st Appeal. One can easily discern that the Appellant has been shifting and amplifying his new allegation all along; the Appellant started with the allegation of the misrepresentation of the Registrar of Companies to the Respondent, then amplified the allegation to misrepresentation of the Registrar of Companies to the Board hearing the 1st Appeal, and recently to misrepresentation of the Senior Government Counsel and the Registrar of Companies jointly to the Board hearing the 1st Appeal. As we have said, these are wild allegations unsubstantiated by any shred of evidence or pure reason. We cannot even trace these wild allegations back to the Annex B to the Notice of Appeal. To give leave to the Appellant to make the additional 3-page submission would make a mockery of justice.³⁶ Accordingly, we dismiss the Appellant's application.

³⁴ See the Respondent's letter to the Board on 13th August 2015

³⁵ See the Registrar of Companies' letter to the Secretary to the Board on 17th August 2015

³⁶ As we have opined, we also wonder whether we are the right tribunal to consider these allegations even if these allegations are meritorious; even if we entertain these allegations and find for the Appellant, where will our decision lead us to? To overturn the 1st Appeal Decision?

61. In light of the aforesaid reasons, the Appeal should be dismissed and we so order.

62. As to costs, we have pondered long and hard over whether we should award costs against the Appellant. It is deplorable that the Appellant has felt free to raise whatever wild allegations against whoever he likes. The Board is here to determine rights of the parties according to the jurisdiction conferred by *the Ordinance*. The Board is not a testing ground for the Appellant to try his fanciful allegations raised at his whim. The Appellant comes close to abusing the legal process of the Board. The fact that the Appellant is a layman is no excuse for his whimsical conduct. Notwithstanding the above, since the Respondent and the Registrar of Companies have not pressed for the costs against the Appellant and reflecting on the overall conduct of the Appellant, we decide that there be no order as to costs.

(signed)

(Alan Ng Man Sang)

Deputy Chairman

Administrative Appeals Board