

## ADMINISTRATIVE APPEALS BOARD

Administrative Appeal No. 17/2015

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BETWEEN

A

Appellant

and

PRIVACY COMMISSIONER

Respondent

FOR PERSONAL DATA  
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Coram: Administrative Appeals Board  
Mr Alan Ng Man-sang (Deputy Chairman)  
Mr So Yiu-wing (Member)  
Professor Cheung Siu-yin (Member)

Date of Hearing: 23 February 2016 and 5 May 2016

Date of Handing Down Written Decision with Reasons: 17 October 2016

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### DECISION

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Note: (1) By written Ruling handed down on 16<sup>th</sup> February 2016, the Deputy Chairman presiding over the instant appeal granted the Appellant's application for an anonymity order. To this end, the name of the Appellant will be redacted in this Decision and replaced by letter "A".

- (2) By letter dated 24<sup>th</sup> December 2015, the Board hearing the instant appeal granted leave to Mr. Corbin to attend the appeal hearing to assist the Appellant as “McKenzie friend”. On the 1<sup>st</sup> day of the appeal hearing, upon the Appellant’s application and without objection by the Respondent and the Party Bound, leave was granted to Ms Lior Sadé to be the Appellant’s “McKenzie friend” in place of Mr. Corbin.

## **Background**

1. By a Notice of Appeal dated 27<sup>th</sup> May 2015 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 30<sup>th</sup> April 2015 (“**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 undated complaint lodged by the Appellant with and received by the Respondent on 9<sup>th</sup> February 2015<sup>1</sup> (“**the Complaint**”) further.

2. The Appellant, a British national, is a single migrant mother of a young boy and was a client of PathFinders Limited (“**PathFinders**”).

3. PathFinders is an approved charitable institution whose principal activity is providing assistance and support to distressed migrant women and their children born in Hong Kong. The Annual Report of PathFinders 2014 stated that “PathFinders helps migrant mothers focus on their children’s best interest and work towards safe, legal and sustainable futures ...”<sup>2</sup>, that

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<sup>1</sup> See Hearing Bundle at 214-220

<sup>2</sup> See Hearing Bundle at 392

“[c]ase managers help mothers understand their legal rights and obligations, access critical services and support networks and empower them to make decisions which are centered on their children’s best interests”<sup>3</sup>, and that “[its] Mother’s Protection Programme ensures each mother and child is cared for by a Case Manager.”<sup>4</sup> The assistance and support provided by PathFinders to the distressed mothers and children include access to legal advice and representation<sup>5</sup>, access to vital medical services<sup>6</sup>, and provision of a safe and supportive home for those in need of shelter<sup>7</sup>.

4. PathFinders has published its Privacy Policy<sup>8</sup> which prescribes the privacy principles that PathFinders has maintained, including that “[w]e will not disclose your personal data to any external organization unless we have your consent or are required by law or have previously informed you” [Clause 1(2)(3)] and that “[w]e maintain strict security systems designed to prevent unauthorized access to your personal data by anyone, including our staff.” [Clause 1(2)(6)]

5. In November 2010, the Appellant was arrested and put on police bail for a credit card fraud because her rental home address was used in a credit card application and the credit card issued was used fraudulently. In March 2011, the Appellant’s son (then aged 2) was placed in Po Leung Kuk by way of a care and protection order on suspicion of her committing the

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<sup>3</sup> See Hearing Bundle at 392

<sup>4</sup> See Hearing Bundle at 393

<sup>5</sup> See Hearing Bundle at 394

<sup>6</sup> See Hearing Bundle at 395

<sup>7</sup> See Hearing Bundle at 396

<sup>8</sup> See Hearing Bundle at 166

offence of child abuse/neglect. The Appellant sought help from PathFinders and became its client in March 2011. At that time, Ms Luna Chan (“Luna”) (the Chief Operations Officer of PathFinders)<sup>9</sup> was assigned by PathFinders as the case manager to give support to the Appellant. After the police bail for her suspected credit card fraud was lifted and her suspected child abuse/neglect case closed<sup>10</sup>, PathFinders ceased its assistance to the Appellant in June 2011.

6. In February 2013, the Appellant was arrested again for the same credit card fraud. Through her former employer, the Appellant was introduced to Ms Melissa MOWBRAY D’ARBELA (“Melissa”) (the Co-founder and Director of PathFinders), and sought assistance from PathFinders again. According to the Appellant’s Case File compiled by Melissa on behalf of the Appellant on 27<sup>th</sup> March 2013<sup>11</sup> (“**the 27/3/13 Case File**”), Melissa described herself as PathFinders principal case officer and Luna as PathFinders secondary case officer providing support to the Appellant. By an email dated 1<sup>st</sup> April 2013, Melissa sent the 27/3/13 Case File to Ms Kylie Uebergang (“Kylie”) (Co-founder and Board Co-Chair of PathFinders) and others, and informed her of the lawyers who agreed to provide pro bono criminal law services to the Appellant and that she would attend with the Appellant on 9<sup>th</sup> April 2013 court hearing as PathFinders advocate.

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<sup>9</sup> See Hearing Bundle at 159

<sup>10</sup> The Magistrate ordered her son to be returned to the care of the Appellant

<sup>11</sup> See Hearing Bundle at 58-66, the Appellant’s Case File was compiled on PathFinders’ letterhead

7. In early April 2013, the Appellant and her son were evicted from her rented premises and began staying intermittently at Melissa's place of residence.<sup>12</sup>

8. On 9<sup>th</sup> April 2013, Cathlyn McNabb ("**Cathlyn**") was assigned by PathFinders as the case manager of the Appellant's case.<sup>13</sup> By the email dated 9<sup>th</sup> April 2013 from Kylie to Cathlyn (copy to Luna and Melissa)<sup>14</sup>, Kylie told Cathlyn that Melissa could brief her the relevant parts of the Appellant's case, that Melissa and her could work towards developing a care plan to help the Appellant stabilize herself in terms of her mental health, to assess the immediate and longer term risk of her mental state to herself and her son, to ensure that the Appellant's son was adequately cared for and that the Appellant had access to ongoing psychological support, and to help the Appellant through her legal issues with the assistance of pro bona lawyers that Melissa had connected with.

9. On 15<sup>th</sup> April 2013, the Appellant met with Melissa and Cathlyn in Central. During the meeting, the Appellant signed a pro forma document entitled "Consent to Release or Obtain Personal Data" dated 15<sup>th</sup> April 2013<sup>15</sup> ("**the 15/4/13 Consent Document**") whereby, *inter alia*, the Appellant consented to authorised representatives of PathFinders to release her personal data to, and /or obtain her personal data from PathFinders' supporter as required by them or PathFinders on a need-to-know basis for

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<sup>12</sup> See Hearing Bundle at 77, paras.2 & 4, and 310, para.106

<sup>13</sup> See Case Recording Form regarding the Appellant ("**the Case Record**"), Hearing Bundle at 92

<sup>14</sup> See Hearing Bundle at 141; and subsequent email discussions about the Appellant's case among the personnel of PathFinders including Melissa, see Hearing Bundle at 142

<sup>15</sup> See Hearing Bundle at 86

the provision of PathFinders' services to her and/or her child. In the 15/4/13 Consent Document, it was stated that PathFinders services included assisting clients on immigration, welfare, medical, legal issues; providing educational and skill workshops and counseling services.<sup>16</sup> During the same meeting, the Appellant expressed concern for 2 main issues: Lack of accommodation and her low mood, and advised that she would think about what she would like further assistance with from PathFinders and would discuss the same with Cathlyn at next meeting.

10. On 17<sup>th</sup> April 2013, the Appellant met with Cathlyn in Central again, and discussed PathFinders services provided to her. At that meeting, the Appellant advised Cathlyn that she requested assistance from PathFinders with obtaining accommodation.<sup>17</sup>

11. In late April 2013, further emails were exchanged among the personnel of PathFinders (including Melissa, Luna and Kylie) and other helper concerning the Appellant's case.<sup>18</sup>

12. On 7<sup>th</sup> May 2013, Melissa emailed to the team looking after the Appellant (including Luna) and copied to Kylie recording the meeting notes of the Appellant case conference ("**the Meeting Notes**").<sup>19</sup> In the Meeting Notes, it was recorded that PathFinders personnel including Melissa and Luna were present at the Appellant case conference, that among various

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<sup>16</sup> The circumstances under which the Appellant signed the 15/4/13 Consent Document was detailed in the Case Record, Hearing Bundle at 94

<sup>17</sup> See the Case Record, Hearing Bundle at 94

<sup>18</sup> See Hearing Bundle at 155, 157, 143-144, 118-120, 152

<sup>19</sup> See Hearing Bundle at 54-56, 121-124

ways to help the Appellant, the key priority entrusted to Melissa was to address the legal situation with potentially the hope of attaining justice, that thereafter PathFinders was to assist the Appellant in finding and moving into a new apartment in an affordable and accessible area as soon as possible, and that Melissa was assigned the role of sending out monthly update to all support team members.

13. According to the Appellant's Case File compiled by Melissa on behalf and with the consent of the Appellant on 14<sup>th</sup> May 2013<sup>20</sup> ("**the 14/5/13 Case File**"), it was stated that the Appellant had "full PathFinders support and visibility (obtained through a former client, who brought her full case to PathFinders' (in particular [Melissa]'s) attention"<sup>21</sup>, and that the Appellant was recommended, *inter alia*, to find a new apartment, to continue with specialist psychiatric help and to proceed with the legal plan elucidated therein.<sup>22</sup>

14. In late July 2013, the Appellant moved to live in her new apartment.

15. There were emails exchanged among the personnel of PathFinders (including Melissa, Luna and Kylie) concerning the Appellant's case in late May, June, July and September 2013.<sup>23</sup>

16. According to PathFinders, the Appellant's client relationship with it

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<sup>20</sup> See Hearing Bundle at 67-77, the Appellant's Case File was compiled on PathFinders' letterhead

<sup>21</sup> See Hearing Bundle at 71, para.3

<sup>22</sup> See Hearing Bundle at 74, para.3

<sup>23</sup> See Hearing Bundle at 239-240, 109-117, 146, 148-149

ended in July 2013, and on 7<sup>th</sup> October 2013, it formally closed the Appellant's case.<sup>24</sup>

17. However, the emails between Melissa, the Appellant and the pro bono lawyers continued after September 2013 until March 2014.<sup>25</sup>

18. In March 2014, the Prosecution Bundle for the trial of the Appellant in the District Court ("**the Prosecution Bundle**") was received.<sup>26</sup>

19. On 17<sup>th</sup> April 2014<sup>27</sup>, the Appellant signed a Deed of Appointment of Guardians<sup>28</sup> ("**the Deed of Appointment**") at the office of Messrs. Oldham, Li & Nie (Solicitors) appointing her father and mother as the guardians of her son. On the same day, her father and mother signed on the Deed of Appointment accepting the appointment. There is a dispute as to who instructed Mr. Paul Firmin of Messrs. Oldham, Li & Nie that day. According to the email by Mr. Paul Firmin to the Appellant dated 30<sup>th</sup> June 2014<sup>29</sup>, he did not act for the Appellant and he remembered that on the day when the Deed of Appointment was executed, he met the Appellant, her parents and Melissa from PathFinders. The Recital<sup>30</sup> of the Deed of Appointment stated the reason why it was entered into. Clause 1(c) of the

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<sup>24</sup> See PathFinders' Case Closure Form which recorded that it was Luna's advice to close the Appellant's file, a document marked A9 and submitted by PathFinders' legal representative at the hearing on 23<sup>rd</sup> February 2016

<sup>25</sup> See Hearing Bundle at 241-249

<sup>26</sup> See the Summary of Events prepared by Melissa to help the Appellant's parents, Hearing Bundle at 134, 296, 1<sup>st</sup> item

<sup>27</sup> See also the preceding emails between Melissa, the Appellant's father and the Appellant, Hearing Bundle at 275-277

<sup>28</sup> See Hearing Bundle at 254-256

<sup>29</sup> See Hearing Bundle at 457

<sup>30</sup> See Hearing Bundle at 254



Recital stated that the Appellant was desirous of her son being placed in the care of her parents and taken to their home in the United Kingdom where he should live and attend school, until such time as the Appellant was in a position to provide a secure and stable home and take care of her son herself. Thereafter, the Appellant's parents left Hong Kong for the United Kingdom with her son.

20. It is clear from the email between Melissa and the Appellant around early May 2014, Melissa no longer reposed any trust in the Appellant and their relationship had turned sour.<sup>31</sup> According to the Appellant, the working relationship ended in April 2014 and there was no more contact between Melissa and her after May 2014. The Appellant agreed at the hearing that no one from PathFinders had contacted her since May 2014.

21. In June 2014, the Appellant pleaded guilty to and was convicted of the criminal charges brought against her in the District Court. Upon her plea of guilty, she was sentenced to a 12-month imprisonment suspended for a period of 24 months.<sup>32</sup>

22. In July 2014, the Appellant took out an action against her parents in the High Court (Family Division) in London for custody of her son ("**the Custody Action**"). Later on, she discovered that by email dated 2<sup>nd</sup> August 2014 ("**the 2/8/14 Email**")<sup>33</sup>, Melissa had disclosed to her parents the

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<sup>31</sup> See Hearing Bundle at 251-253

<sup>32</sup> See the Complaint, Hearing Bundle at 218, para.2

<sup>33</sup> See Hearing Bundle at 437

Prosecution Bundle and a summary of events compiled by Melissa about her<sup>34</sup> (“**the Summary of Events**”) in order to help her parents defend the Custody Action. This resulted in the Appellant lodging a complaint with PathFinders<sup>35</sup> in October 2014, and thereafter the Complaint against PathFinders<sup>36</sup> for, *inter alia*, disclosing the Prosecution Bundle and the Summary of Events to her parents.

23. On 9<sup>th</sup> February 2015, the Respondent wrote to the Appellant acknowledging receipt of the Complaint and enclosing therewith the Respondent’s Complaint Handling Policy (the 5<sup>th</sup> Revision) issued in April 2013 (“**the Policy**”). Afterwards, the Respondent made enquiries with the Appellant and PathFinders.

24. On 5<sup>th</sup> March 2015, the Respondent formally accepted the Complaint against PathFinders for disclosing the Prosecution Bundle and the Summary of Events to the Appellant’s parents as a “complaint” under *section 37 of PD(P)O*.

25. By the Decision, the Respondent decided not to pursue the Complaint further under *section 39(2)(d) of PD(P)O*.

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<sup>34</sup> See Hearing Bundle at 125-138, 287-298

<sup>35</sup> See emails between the Appellant, Kylie, Kay McArdle and Jennifer Meehan, Hearing Bundle at 257-267

<sup>36</sup> The Complaint Form from the Appellant to the Respondent was undated but received by the Respondent on 9<sup>th</sup> February 2015, Hearing Bundle 214-220

## The Reasons for the Decision

26. 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. According to the Reasons for the Decision, the Respondent's decision not to pursue the Complaint further was in accordance with paragraph 8(e) of the Policy.<sup>37</sup>

27. In the Reasons for the Decision, the Respondent took the view that PathFinders was not a data user in disclosing the Prosecution Bundle and the Summary of Events in the 2/8/14 Email as Melissa did so in her personal capacity.<sup>38</sup> The Respondent premised his view on the following circumstances<sup>39</sup>:-

- (a) The Appellant's parents were not clients of PathFinders.
- (b) PathFinders ceased to have any relationship with the Appellant after July 2013, which was before the sending of the 2/8/14 Email.
- (c) PathFinders did not collect or possess the Prosecution Bundle at any stage.

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<sup>37</sup> See para.15 of the Reasons for the Decision, Hearing Bundle at 44

<sup>38</sup> See para.14 of the Reasons for the Decision, Hearing Bundle at 43

<sup>39</sup> See para.14 of the Reasons for the Decision, Hearing Bundle at 43

- (d) The Summary of Events was prepared by Melissa for assisting the Appellant's parents in defending the Custody Action.
- (e) Melissa stated clearly in the 2/8/14 Email that the Prosecution Bundle and the Summary of Events were provided to the Appellant's parents in her personal capacity and not in her capacity at PathFinders.
- (f) The 2/8/14 Email was sent out through Melissa's personal email account.
- (g) The Appellant acknowledged in her letter to the Respondent on 3<sup>rd</sup> March 2015 that Melissa assisted the Appellant's parents in her personal capacity.

28. Accordingly, the Respondent held that PathFinders was not liable to the Appellant for disclosing the Prosecution Bundle and the Summary of Events to her parents.<sup>40</sup>

### **The Parameters of the Present Appeal**

29. The Appellant has not formulated her grounds of appeal on the Notice of Appeal, but attached to the Notice of Appeal a 6-page document

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<sup>40</sup> See para.14 of the Reasons for the Decision, Hearing Bundle at 43

dated 25<sup>th</sup> May 2016 (“**the 6-page Document**”) in support of her present appeal.

30. The 6-page Document can hardly be likened to grounds of appeal properly so-called. It is more of a lengthy submission or a witness statement. Be that as it may, we adopt the summary made by the Respondent in his Statement relating to the Decision dated 28<sup>th</sup> July 2015<sup>41</sup> as the Appellant’s grounds of appeal in a nutshell, which are as follows:-

- (a) Evidence showed that Melissa had been involved in the Appellant’s case as case officer, co-founder and director of PathFinders. Melissa would not have been forwarding and sharing the Appellant’s information with other members of PathFinders if she was not working for PathFinders regarding the same.
- (b) PathFinders was still involved in handling the Appellant’s case at the material time when the 2/8/14 Email was sent.
- (c) PathFinders was in possession of the Prosecution Bundle and the Summary of Events because Melissa had obtained the same.
- (d) Melissa would not have access to the Appellant’s personal

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<sup>41</sup> See Hearing Bundle at 192-200

data if Melissa had not been an employee of PathFinders. The Appellant should be protected by the Privacy Policy of PathFinders which stated that “[w]e maintain strict security systems designed to prevent unauthorized access to your personal data by anyone, including our staff.” [Clause 1(2)(6)]

31. PathFinders is the Party Bound in this appeal.

32. At the hearing of this appeal, the Appellant appeared in person (accompanied by Ms Lior Sadé as her “McKenzie friend”), the Respondent was represented by Legal Counsel, Ms Cindy Chan and PathFinders by Mr. Russell Bennett of Tanner De Witt.

33. All parties have made written and oral submissions.

34. The main issues in the present appeal are within a very narrow compass, to wit (a) whether there is *prima facie* evidence that PathFinders at the material time was a data user as defined under *PD(P)O*; and (b) whether there is *prima facie* evidence that PathFinders was liable for Melissa’s act of disclosing the Prosecution Bundle and the Summary of Events to the Appellant’s parents in the 2/8/14 Email.

## The Relevant Law & Policy

35. The following provisions in *PD(P)O* are pertinent to the present appeal:-

### Section 2(1) [the definitional section]

“data user”, in relation to personal data, means a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data.

### Section 2(12)

A person is not a data user in relation to any personal data which the person holds, processes or uses solely on behalf of another person if, but only if, that first-mentioned person does not hold, process or use, as the case may be, the data for any of his own purposes.

### Section 4

A data user shall not do an act, or engage in a practice, that contravenes a data protection principle (meaning any of the data protection principles set out in Schedule 1 to *PD(P)O* – *Section 2(1)* ) unless the act or practice, as the case may be, is required or permitted under *PD(P)O*.

Section 65(1)

Any act done or practice engaged in by a person in the course of his employment shall be treated for the purposes of *PD(P)O* as done or engaged in by his employer as well as by him, whether or not it was done or engaged in with the employer's knowledge or approval.

Section 65(2)

Any act done or practice engaged in by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of *PD(P)O* as done or engaged in by that other person as well as by him.

Section 65(3)

In proceedings brought under *PD(P)O* against any person in respect of an act or practice alleged to have been done or engaged in, as the case may be, by an employee of his it shall be a defence for that person to prove that he took such steps as were practicable to prevent the employee from doing that act or engaging in that practice, or from doing or engaging in, in the course of his employment, acts or practices, as the case may be, of that description.

Data Protection Principle 3(1)

Personal data shall not, without the prescribed consent of the data subject, be used (including disclosure – Section 2(1)) for a new



purpose.

Section 39(2)(d)

The Respondent may refuse to carry out or decide to terminate 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.

36. 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”.

37. *Section 21(1) of the Administrative Appeals Board Ordinance (Cap.442)* 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

### Whether PathFinders was at the material time a data user

38. The only act complained of by the Appellant is the disclosure of the Prosecution Bundle and the Summary of Events by Melissa to the Appellant's parents on 2<sup>nd</sup> August 2014.

39. It is undisputed the following:-

- (a) Melissa was at the material time the Co-founder and Director of PathFinders. Melissa, as confirmed by Mr. Russell Bennett at the hearing, has not entered into any service contract with PathFinders, and therefore was not an employee of PathFinders.
- (b) The Prosecution Bundle was received by the Appellant's agent in March 2014 in preparation for the criminal trial of the Appellant in June 2014.
- (c) The Summary of Events was compiled by Melissa in order to help the Appellant's parents to defend the Custody Action. This is well supported by the contemporaneous emails between Melissa and the Appellant's parents.

(d) The Appellant's parents were not clients of PathFinders.

40. According to PathFinders, the Appellant's client relationship with it ended in July 2013, and on 7<sup>th</sup> October 2013, it formally closed the Appellant's case.<sup>42</sup> The reason why the PathFinders-and-Appellant relationship ended in July 2013 was that the Appellant only requested the assistance of PathFinders to look for accommodation and July 2013 was the month in which the Appellant and her son moved to the new accommodation. The case of PathFinders on this aspect is supported by PathFinders' Case Closure Form and the fact that there was no email exchanged among the personnel of PathFinders concerning the Appellant's case after September 2013. Mr. Russell Bennett submitted at the hearing that the last email exchanged among the personnel of PathFinders was the one dated 19<sup>th</sup> September 2013<sup>43</sup>.

41. However, according to the Appellant, the working relationship between Melissa and her ended in April 2014<sup>44</sup> and there was no more contact between Melissa and her after May 2014<sup>45</sup>. The Appellant agreed at the hearing that no one from PathFinders had contacted her since May 2014.

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<sup>42</sup> See PathFinders' Case Closure Form which recorded that it was Luna's advice to close the Appellant's file, a document marked A9 and submitted by PathFinders' legal representative at the hearing on 23<sup>rd</sup> February 2016

<sup>43</sup> See Hearing Bundle at 117

<sup>44</sup> In the Complaint, the Appellant said that Melissa withdrew her support in April 2014 after she understood that the Appellant had lied to her, Hearing Bundle at 217, last para.; see also para.6 of the letter dated 3<sup>rd</sup> March 2015 by the Appellant to the Respondent ("the 3/3/15 Letter"), Hearing Bundle at 323

<sup>45</sup> In the 6-page Document, the Appellant said that the last time she had contact with Melissa was in May 2014 since then she had made or had no further contact with her, Hearing Bundle at 51, penultimate para.

42. The question is whether PathFinders either alone or jointly or in common with other persons, controlled the collection, holding, processing or use of the Prosecution Bundle and the data contained therein.

43. We do not accept that the assistance rendered by PathFinders to the Appellant was limited to finding a new apartment for the Appellant. In our view, there is *prima facie* evidence:-

- (a) that PathFinders' assistance to the Appellant extended beyond mere finding a new apartment to the realm of legal and psychological/psychiatric services<sup>46</sup>;
- (b) that Melissa was authorized by PathFinders to render legal assistance to the Appellant after she was re-arrested for the offence of credit card fraud in 2013 (including preparation for the District Court trial of the Appellant in June 2014); and
- (c) that there was email communication between Melissa, the Appellant and her team of lawyers at least until March 2014.<sup>47</sup>

44. However, there is no evidence to support any allegation that

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<sup>46</sup> See paragraph 13 hereinabove

<sup>47</sup> See Hearing Bundle at 241-249

PathFinders collected and/or received the Prosecution Bundle in March 2014. It is more probable that it was the legal team (i.e. solicitors) representing the Appellant on a pro bono basis who collected and received the Prosecution Bundle on behalf of the Appellant. In the Appellant's criminal case, the Appellant was the client of the legal team (solicitors and counsel) and the solicitors collected and/or received the Prosecution Bundle *qua* agent on behalf of the Appellant. It is also more probable that it was the legal team (solicitors and counsel) who would hold, process or use the data contained in the Prosecution Bundle before and after the District Court criminal trial.

45. Although it is undisputed that the Prosecution Bundle fell into the hands of Melissa in August 2014 so that she could prepare the Summary of Events to help the Appellant's parents to defend the Custody Action, this does not necessarily mean that because Melissa was the Co-founder and Director of PathFinders, PathFinders can be said to be in control of the holding, processing or use of the Prosecution Bundle and the data contained therein. This was particularly so where on either the PathFinders' or the Appellant's case, the working relationship between Melissa and the Appellant had already ended in August 2014. We do not accept for one moment the submission of the Appellant at the hearing on 5<sup>th</sup> May 2016 that although Melissa had withdrawn her support from the Appellant in April 2014 and the last time she had contact with Melissa was in May 2014, her relationship with PathFinders nevertheless still persisted. Furthermore, the Appellant admitted in the 3/3/15 Letter that on this matter, Melissa assisted

her parents in her personal capacity.<sup>48</sup>

46. In our view, there is no evidence to substantiate the suggestion that PathFinders either alone or jointly or in common with other persons, controlled the collection, holding, processing or use of the data contained in the Prosecution Bundle. If we are required to make a finding at this stage, we are more inclined to accept that PathFinders did not collect or possess the Prosecution Bundle at any stage.

47. Accordingly, we agree with the Respondent that PathFinders was not at the material time a data user. On this ground alone, the appeal should be dismissed.

Whether PathFinders was liable for Melissa's act of disclosing the Prosecution Bundle and the Summary of Events to the Appellant's parents in the 2/8/14 Email

48. As confirmed by Mr. Russell Bennett at the hearing, Melissa has not entered into any service contract with PathFinders. She is not and at the material time was not the employee of PathFinders.

49. Another question in the present appeal is whether Melissa had the express, implied or ostensible authority of PathFinders to disclose the Prosecution Bundle and the Summary of Events to the Appellant's parents in

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<sup>48</sup> See Hearing Bundle at 323

the 2/8/14 Email.

50. In the present appeal, there is no evidence to the effect that Melissa had the express or implied authority of PathFinders so to do. In our view, the evidence is against the existence of such express or implied authority for the following reasons:-

- (a) The Appellant's parents were not clients of PathFinders.
- (b) Such disclosure was certainly against the interest of the Appellant and would run counter to the Privacy Policy<sup>49</sup> which prescribes the privacy principles that PathFinders has maintained, including that "[w]e will not disclose your personal data to any external organization unless we have your consent or are required by law or have previously informed you".
- (c) On either the PathFinders' or the Appellant's case, the working relationship between Melissa and the Appellant had already ended in August 2014. So was the relationship between PathFinders and the Appellant.
- (d) Our inclination to accept that PathFinders did not collect or possess the Prosecution Bundle at any stage.

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<sup>49</sup> See Hearing Bundle at 166

51. There is also no evidence that Melissa had the ostensible authority of PathFinders to disclose the Prosecution Bundle and the Summary of Events to the Appellant's parents in the 2/8/14 Email. The overwhelming evidence is that when Melissa disclosed the Prosecution Bundle and the Summary Facts to the Appellant's parents on 2<sup>nd</sup> August 2014, she did so in her personal capacity, and that Melissa, the Appellant's parents and even the Appellant knew about this at the material time.

(a) In the email by the Appellant's father to Melissa dated 1<sup>st</sup> August 2014 asking for the latter to prepare a statement to defend the Custody Action and to provide him with some information, the Appellant's father expressly addressed Melissa in her personal capacity by bracketing the word "personal" after the name of Melissa.<sup>50</sup>

(b) In the 2/8/14 Email, Melissa clearly and unambiguously stated that she sent the Prosecution Bundle and the Summary of Events in her personal capacity and not in her capacity at PathFinders, and that PathFinders withdrew support from the Appellant well over a year ago.<sup>51</sup>

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<sup>50</sup> See Hearing Bundle at 280, 325

<sup>51</sup> See Hearing Bundle at 437



- (c) The Appellant admitted in the 3/3/15 Letter that Melissa assisted her parents in her personal capacity.<sup>52</sup>

52. In our view, there is no iota of evidence to suggest that Melissa was authorized in whatever way by PathFinders to disclose the Prosecution Bundle and the Summary of Events to the Appellant's parents in the 2/8/14 Email. Accordingly, there is no evidence to suggest that PathFinders was liable to the Appellant for the alleged disclosure made by Melissa on 2<sup>nd</sup> August 2014, i.e. breach of *Data Protection Principle 3(1)*.

53. The present appeal should also be dismissed on this ground.

### **Conclusion**

54. In light of the aforesaid reasoning, the Appeal should be dismissed and we so order.

55. As to costs, we direct that the parties be at liberty to serve on each other and lodge with the Board (*via* its Secretary) within 21 days of the handing down of this Decision any written submissions, with liberty to serve and lodge any written submissions in reply within 14 days thereafter. In the event that any party is minded to request for an oral hearing on costs, the requesting party shall, within 14 days after lodging and serving her/his/its written submissions in reply or the expiry of such a period, write to the Board

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<sup>52</sup> See Hearing Bundle at 323

with full reasons as to why such oral hearing is called for.

56. Finally, there are 2 matters we have to deal with:-

- (a) We understand that any allegation of breach of *Data Protection Principle 4* by PathFinders is new allegation not covered by the Complaint and the Decision. We agree with the Respondent that this is not a competent ground of appeal and we are entitled to ignore this ground of appeal. Even if we are wrong on this, the aforesaid reasoning applicable to dismiss the present appeal in this Decision equally applies to dismiss any appeal premised on the new allegation of breach of *Data Protection Principle 4*.
- (b) After the hearing of the present appeal on 5<sup>th</sup> May 2016, we gave leave to the Party Bound and the Respondent an extension of time to file its Reply on the law raised by the Appellant in her oral closing submissions without first hearing the stance of the Appellant. That we gave our direction speedily without hearing the Appellant was to save all the parties costs and time. As we have said, the application made by the Party Bound and the Respondent was their first application for an extension of time and their application was only for a short time extension for the filing of their respective Reply which was in any event the last step

of the present appeal before this Decision. It was also quite obvious that the Appellant's position would not be prejudiced by our direction.

(signed)

(Mr Ng Man-sang Alan)

Deputy Chairman

Administrative Appeals Board