ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 4/2017

BETWEEN

THE INCORPORATED MANAGEMENT COMMITTEE OF S.K.H. TSING YI ESTATE HO CHAK WAN PRIMARY SCHOOL	Appellant
and	
PRIVACY COMMISSIONER FOR PERSONAL DATA	Respondent

Coram: Administrative Appeals Board
Mr Douglas Lam Tak-yip, SC (Deputy Chairman)
Ms Joan Ho Yuk-wai (Member)
Ms Wendy Yuen Miu-ling (Member)

Date of Hearing: 14 March 2018

Date of Handing down Written Decision with Reasons: 25 June 2021

DECISION

A. Introduction and Background

Introduction

1. This is an appeal by The Incorporated Management Committee of S.K.H. Tsing Yi Estate Ho Chak Wan Primary School against the decision (the "**Decision**") of the Privacy Commissioner for Personal Data (the "**Commissioner**") dated 10 February 2017 and the Enforcement Notice issued pursuant to that decision (the "**Notice**").

2. The background leading up to this appeal is undisputed. I take the following summary from the parties' submissions, with minor additions and modifications.

3. Mr Chow Man Hoo ("**Mr Chow**") is and was at all material times a teacher at the school, which is managed by the incorporated management committee (for convenience, I shall refer to the school and the committee compendiously as the "**School**"). As the School controls the collection, holding, processing or use of the personal data of Mr Chow, it is a "data user" as defined in section 2(1) of the Personal Data (Privacy) Ordinance, Cap.486 (the "**PDPO**").

4. The School had issued three warnings to Mr Chow on the following dates:

(1) A written warning dated 25 July 2003 (the "**2003 Warning**");

(2) A verbal warning dated 10 June 2004 (the "**2004 Warning**"); and

(3) A written warning dated 29 August 2014 (the "**2014 Warning**").

5. On 10 August 2015, Mr Chow submitted a data access request form pursuant to section 18(1)(b)[1] of the PDPO requesting the School to provide him with "complete investigation reports" prepared by the School in relation to the incidents listed in the said warnings (the "**Request**").

6. Following the School's refusal to comply with the Request, Mr Chow lodged a complaint with the Commissioner. After conducting an investigation, on 10 February 2017, the Commissioner served upon the School the result of his investigation (i.e., the Decision) and the Notice.

7. The Commissioner made the following findings in the Decision:

(1) The School had failed to inform Mr Chow within 40 days after receiving the Request that it did not hold the investigation report in relation to the 2003 Warning, and therefore contravened the requirement under section 19(1)(b)[2] of the PDPO; and

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[1] Section 18(1) of the PDPO provides that:

> An individual, or a relevant person on behalf of an individual, may make a request—
>
> (a) to be informed by a data user whether the data user holds personal data of which the individual is the data subject;
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> (b) if the data user holds such data, to be supplied by the data user with a copy of such data.

[2] Section 19(1) of the PDPO provides that:

> Subject to subsection (2) and sections 20 and 28(5), a data user must comply with a data access request within 40 days after receiving the request by—
>
> (a) if the data user holds any personal data which is the subject of the request—

(2) The School had failed to supply Mr Chow within 40 days after receiving the Request with a copy of the record of the 2004 Warning (including two attachments) and the investigation report in relation to the 2014 Warning and therefore contravened the requirement under section 19(1)(a) of the PDPO.

8. The Notice thus directed the School, inter alia, to:

(1) Notify Mr Chow in writing that at the time the School received the Request, it did not hold the investigation report in relation to the 2003 Warning, with a copy of such written notice sent to the Commissioner's office; and

(2) Subject to compliance with section 20(1)(b)[3] and section 20(2) of the PDPO, comply with the Request by providing Mr Chow with a copy of:

(i) informing the requestor in writing that the data user holds the data; and

(ii) supplying a copy of the data; or

(b) if the data user does not hold any personal data which is the subject of the request, informing the requestor in writing that the data user does not hold the data.

[3] Section 20 of the PDPO provides that inter alia:

(1) A data user shall refuse to comply with a data access request—

(b) subject to subsection (2), if the data user cannot comply with the request without disclosing personal data of which any other individual is the data subject unless the data user is satisfied that the other individual has consented to the disclosure of the data to the requestor…

(a) the record of 2004 Warning (including the two attachments); and

(b) the part containing Mr Chow's personal data in the investigation report in relation to the 2014 Warning,

with a copy of such documentary evidence sent to the Commissioner's office.

9. The School appealed against the Notice in respect of the 2004 and 2014 Warnings.

The 2003 Warning

10. Although there is no issue as to whether the School should disclose materials in relation to the 2003 Warning, Mr Gerard McCoy SC, Senior Counsel for the School, submitted that the 2003 Warning nonetheless formed an important part of the context in which the Commissioner made his decision, as it involved complaints of a similar nature against Mr Chow.

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(2) Subsection (1)(b) shall not operate—

(a) so that the reference in that subsection to personal data of which any other individual is the data subject includes a reference to information identifying that individual as the source of the personal data to which the data access request concerned relates unless that information names or otherwise explicitly identifies that individual;

(b) so as to excuse a data user from complying with the data access request concerned to the extent that the request may be complied with without disclosing the identity of the other individual, whether by the omission of names, or other identifying particulars, or otherwise.

11. In particular, Mr McCoy SC drew the Tribunal's attention to the following aspects of the 2003 Warning:

> "3. Complaint from parents that Mr Chow exerted corporal punishment…
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> "4. Complaint from students that Mr Chow had repeatedly thrown their school bags towards the entrance of the classroom…
>
> "7. Since employment on 1 September 1998, complained frequently by the parents including marking and exerting corporal punishment etc…
>
> "9. On 28 May, Parent (Mr Wong Bing San) called the police, complaining that Mr Chow had exerted corporal punishment…"

12. Although the School ultimately did not have further materials to provide to Mr Chow in relation to the 2003 Warning, it is said that the complaints formed an important part of the backdrop to the School's decision not to accede to Mr Chow's Request.

The 2004 Warning

13. The circumstances leading to the 2004 Warning were as follows:

(1) The original complaint appears to have been related to his conduct of the assessment and marking of his students' exercises.

(2) However, in the course of the School's investigation into the matter, Mr Chow's conduct allegedly gave rise to "serious misgivings" about his integrity.

(3) The School principal concluded that:

> "In relation to Mr Chow's incident, it is not only because Mr Chow has not been able to complete the work assigned by the school, the most serious issue arises from Mr Chow's integrity. The Principal has given him numerous opportunities for him to speak the truth, and Mr Chow knows that he has not finished his work but lied again, to cover up his fault."

The 2014 Warning

14. The School's complaint against Mr Chow related to the manner in which he treated a "special needs" student, allegedly comprising inter alia:

(1) Forcefully dragging the student out of the classroom from the 5th Floor to 3rd Floor and neglecting his teaching duties;

(2) Crushing a ping pong ball of the student, threatening to throw the racket downstairs and requiring him to pick it up;

(3) Throwing the student's exercise books at him;

(4) Demanding the student as a punishment to sing in front of the whole class; and

(5) Changing his teaching schedule unilaterally in violation of the School's instructions in order to attend the classroom of the student.

As a result of Mr Chow's conduct, the student was said to have been in "serious distress" manifested by "crying without reason, loss of sleep, grinding of teeth etc."

15. As mentioned above, the School refused the Request, which resulted eventually in the Decision and the Notice.

16. The basis of the Decision may be summarised as follows:

(1) It was doubtful whether Mr Chow's conduct could amount to "seriously improper conduct" under s.58(1)(d)[4] of the PDPO, taking into account he only received verbal and written warnings as opposed to any concrete disciplinary action from the School after a lapse of 11 years since the 2004 Warning and one year since the 2014 Warning.

(2) The School failed to prove that compliance with the Request would likely prejudice the preclusion or remedying (including punishment) of Mr Chow's alleged "seriously improper conduct" under s.58(1)(i).

(3) The School could avoid identifying the person(s) as the source of the personal data by editing out their names or other identifying particulars (if any) pursuant to s.20(1)(b) and (2).

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[4] See below

B. Grounds of Appeal

17. The School takes issue primarily with the following conclusions of the Commissioner in the Decision:

> "We are of the view that the warned behaviour of Mr. Chow in 2003, 2004 and 2014 involve the attitude and teaching methods towards students, on the surface it is inappropriate, but whether it reaches the level of 'serious' is questionable, although [the School] claim that Mr. Chow's complained behaviour constitutes 'serious misconduct', however all these years, Mr. Chow has only received verbal or written warning, which is not sufficient to reflect the seriousness of his behaviour...
>
> From the present information, the aforementioned outcomes (the undermining of investigations into staff misconduct) are only an estimate, but these estimates are not an excuse for depriving Mr. Chow of his right to access the information. We are of the view that the situations referred to by the Council must be true or have indeed happened, rather than being some assumptions that may occur. If the Office permits the data users rely on the exemption request based on some assumption, not only does it seem to be too loose but also difficult to prevent the exemption principle subject to abuse, which is in violation to the spirit of the conduct of data access request."

18. At the hearing, Mr McCoy SC framed the grounds of appeal as follows:

(1) In exercising his discretion to issue the Notice, the Commissioner failed to conduct the necessary balancing exercise between the public interest to safeguard the importance of a safe schooling environment in the best interests of the child and Mr Chow's right to access his personal data. The Commissioner was wrong to find that the allegations of misconduct were "not serious", and that disclosure of the data would be no detriment against the disciplinary process (Ground 1);

(2) The Commissioner failed to recognise the personal data in question is exempted from compliance with the Request pursuant to under section 58 of the PDPO – specifically:

(a) For the 2004 Incident: sections 58(1)(d) and (f); and

(b) For the 2014 Incident: sections 58(1)(a), (b) and (d).

(Ground 2)

C. Hearing de Novo

19. The conduct of proceedings before this Board is set out in section 21 of the Administrative Appeals Board Ordinance (Cap 442) (the "**AABO**") which provides that inter alia:

> (1) For the purposes of an appeal, the Board may -
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> ...
>
> (j) subject to subsection (2), confirm, vary or reverse the decision that is appealed against or substitute therefor such other decision or make such other order as it may think fit;
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> ...
>
> (3) The Board, on the determination of any appeal, may order that the case being the subject of the appeal as so determined be sent back to the respondent for the consideration by the respondent of such matter as the Board may order.

20. There was no dispute that an appeal before this Board is by way of a *de novo* hearing and determination, and the Board may confirm, vary or reverse the Commissioner's decision as it thinks fit, or alternatively, the Board may remit the case back to the Commissioner for reconsideration. In making its determination, the Board is required, however, to have regard to any statement of policy lodged by the Commissioner with the Secretary of the Board, after having been served with the notice of appeal pursuant to section 10 of the AABO.

> See e.g. *Li Wai Hung Cesario v. Administrative Appeals Board & Another* (unreported), CACV 250 of 2015, 15 June 2016 at paras 6.1 to 6.2.

D. The School's Contentions

Ground 1

21. The School's case on Ground 1 may be summarised as follows:

(1) The issue of an enforcement notice was not mandatory upon a finding of a breach of the PDPO, as Section 50(1)[5] merely confers on the

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[5] Section 50(1) of the PDPO provides that:

> If, following the completion of an investigation, the Commissioner is of the opinion that the relevant data user is contravening or has contravened a requirement under this Ordinance, the Commissioner may serve on the data user a notice in writing, directing the data user to remedy and, if appropriate, prevent any recurrence of the contravention.

Commissioner a discretion to do so. Section 50(2) of the PDPO further provides that:

> In deciding whether to serve an enforcement notice the Commissioner shall consider whether the contravention to which the notice relates has caused or is likely to cause damage or distress to any individual who is the data subject of any personal data to which the contravention relates.

The Commissioner, in the exercise of his discretion, was required to balance the interests of the data subject with the public interest and other relevant interests.

(2) The materials and records related to a teacher who has had a long history of complaints involving dishonesty, corporal punishment, and the humiliation of children.

(3) The retention of those records was for the purpose of any future disciplinary or even criminal investigation or prosecution, in order to deter such offences and protect children.

(4) The School is a statutory body by reason of 40AD of the **Education Ordinance** (Cap.279) (the "**EO**"). Its powers and functions and powers are stated at s.40AE and s.40AF of the EO and includes *inter alia:*

(a) Accounting to the Permanent Secretary and the sponsoring body for the performance of the school - s.40AE(2)(e);

(b) Ensuring that the education of the pupils of the school is promoted in a proper manner - s.40AE(2)(3);

(c) School planning and self-improvement of the school - s.40AE(2)(f) do anything in accordance with the vision and mission and the general educational policies and principles set by the sponsoring body of the school - s.40AF(1); and

(d) Exercises its powers in accordance with the EO and any other law - s.40AF(3)(a).

(5) As such, the School must act according to the law and its obligations to act in the best interests of the child. Disclosure of the materials by the School would set a dangerous precedent generally, but also specifically jeopardise the safety of the child, and undermine the public confidence in such a complaints system.

(6) Notwithstanding whether there was a technical breach of the PDPO (and the School contends there was not), the Commissioner should have balanced the right of the data subject with the public interest in maintaining an effective system to safeguard the best interests of the child and concluded that he should not issue a Notice.

(7) The Commissioner failed to consider seriously the School's concerns in the context of considering whether to serve the Notice. Although the Commissioner refers to those concerns in the Decision, but only in the context of determining whether the Section 58 exemption was engaged,

and not as a matter of general public interest. Furthermore, throughout the Decision, the Commissioner consistently refers to the right to access personal data as if this was the only concern.

(8) Notwithstanding the international law jurisprudence on the need to consider the best interests of the child as a primary consideration, it is an obvious moral obligation to immediately recognise the severity of the allegations in this case, consider the potential detriment to vulnerable children in the care of abusive teachers.

22. Mr McCoy SC placed reliance on the following principles and authorities to demonstrate the paramount importance given by the law to the protection of children:

(1) In ***D v NSPCC*** [1978] AC 171, an anonymous complainant was made to the National Society for the Prevention of Cruelty to Children (NSPCC) regarding child abuse. The allegations were subsequently suspected to be utterly false, understandably leaving the accused parents in great distress who sought disclosure of the identity of the complainant from the NSPCC. The NSPCC refused the application. Lord Diplock at held at 219 and 221:

> "Upon the summons by the N.S.P.C.C. for an order withholding discovery of documents to the extent that they were capable of revealing the identity of the society's informant, it was for the judge to weigh the competing public interests involved in disclosure and non-disclosure and to form his opinion as to the side on which the balance fell. In a careful judgment in which he reviewed the relevant authorities Croom-Johnson J. ordered that disclosure should not be given. Upon an interlocutory summons relating to discovery this was a matter upon which the judge had a discretion with which an appellate court would not lightly interfere, but the reasoning by which his decision was supported is of wider application.

...

> For my part I would uphold the decision of Croom-Johnson J. and reverse that of the Court of Appeal. ... I would extend to those who give information about neglect or ill-treatment of children to a local authority or the N.S.P.C.C. a similar immunity from disclosure of their identity in legal proceedings to that which the law accords to police informers. The public served by preserving the anonymity of both classes of informants are analogous; they are of no less weight in the case of the former than in that of the latter class, and in my judgment are of greater weight than in the case of informers of the Gaming Board to whom immunity from disclosure of their identity has recently been extended by this House.
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> ...
>
> I see no reason and I know of no authority for confining public interest as a ground for non-disclosure of documents or information to the effective functioning of departments or organs of central government In *Conway* v. *Rimmer* [1968] A.C. 910 the public interest to be protected was the effective functioning of a county police force; in *In re D. (Infants)* [1970] 1 W.L.R. 599 the interest to be protected was the effective functioning of a local authority in relation to the welfare of boarded-out children. In the instant case the public interest to be protected is the effective functioning of an organization authorised under an Act of Parliament to bring legal proceedings for the welfare of children. I agree with Croom-Johnson J. that this is a public interest which the court is entitled to take into consideration in deciding whether the identity of the N.S.P.C.C.'s informants ought to be disclosed. I also agree that the balance of public interest falls on the side of non-disclosure."

(2) There is also now a growing acceptance that international law places obligations upon public bodies to discharge their functions bearing in mind the need to safeguard and promote the welfare of children. As Lord Kerr held at ***ZH (Tanzania) v Secretary of State for the Home Department*** [2011] 2 AC 166 at para 46:

> "It is a universal theme of the various international and domestic instruments to which Baroness Hale JSC has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless

> importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

23. The School contends, therefore, that the preservation of confidentiality over information pertaining to investigations for the purpose of protecting children is a recognised category of "public interest" which should have been considered in the balancing exercise by the Commissioner. In Hong Kong, the consideration of the "best interests of the child" is a familiar concept within the family law context but is equally applicable in all contexts, as emphasised by Article 3 of the United Nations Convention on the Rights of the Child[6] **("CRC")** to which Hong Kong is a signatory.

24. Notwithstanding that Mr Chow may already have been able to infer the identity of the complainants in each case, the blanket handover of all the materials

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[6] Article 3 provides:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

relating to his disciplinary history would undermine the disciplinary and investigatory process into his possible abusive behaviour towards his students and future complainants will be deterred. Meanwhile, he may be able to devise pre-emptive strategies to avoid further complaints. By having in possession all the complaint material - and being able to publicise that fact - future complainants, if they make complaints at all, will no doubt be less than forthcoming and frank in detailing the whole context of each complaint.

25. In the circumstances, the School submitted that the Commissioner should have asked himself whether the data subject's right to those documents outweighed the public interest in the protection of children and should have concluded that it was not.

Ground 2

26. At issue in Ground 2 is whether the incidents and the materials satisfy the criteria for public interest exemptions from disclosure in section 58(1) of the PDPO, which provides inter alia:

> Personal data held for the purposes of—
>
> (a) the prevention or detection of crime;
>
> (b) the apprehension, prosecution or detention of offenders;
>
> ...

(d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;

...

(f) ascertaining whether the character or activities of the data subject are likely to have a significantly adverse impact on any thing—

(i) to which the discharge of statutory functions by the data user relates; or

(ii) which relates to the discharge of functions to which this paragraph applies by virtue of subsection (3); or

(g) discharging functions to which this paragraph applies by virtue of subsection (3),

is exempt from the provisions of data protection principle 6[7] and section 18(1)(b) where the application of those provisions to the data would be likely to—

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[7] Data Protection Principle 6 provides that:

A data subject shall be entitled to—

(a) ascertain whether a data user holds personal data of which he is the data subject;
(b) request access to personal data—
(i) within a reasonable time;
(ii) at a fee, if any, that is not excessive;
(iii) in a reasonable manner; and
(iv) in a form that is intelligible;
(c) be given reasons if a request referred to in paragraph (b) is refused;
(d) object to a refusal referred to in paragraph (c);
(e) request the correction of personal data;
(f) be given reasons if a request referred to in paragraph (e) is refused; and
(g) object to a refusal referred to in paragraph (f).

(i) prejudice any of the matters referred to in this subsection; or

(ii) directly or indirectly identify the person who is the source of the data.

27. Mr McCoy SC submitted that there is no exemption from the exemptions in s.58 if the data subject already knows or has already been able to infer the identity of the complainant. This, he said, was consistent with the public interest nature of the exemptions. The concern was not necessarily the informing of the data subject *per se*, but the undermining of the efficacy of such complaints system if the public knew that their materials, identifying them as the complainant, would readily fall into the possession of the complainee - "*Put simply, there would be no whistle-blowers if the information passed on, originally on the basis of confidentiality, would readily fall into the hands of the offender.*"

28. In relation to the 2004 Incident, it was said that:

(1) The personal data is held by the School for the purposes of preventing, precluding or remedying (including punishment) dishonesty or malpractice by the data subject, and thus fell within section 58(1)(d). The incident clearly involved dishonesty and malpractice. The very purpose of issuing such a warning, was to prevent future similar conduct by this punishment.

(2) The School is a statutory body, and hence, the data is also held for the purposes of ascertaining whether the character or activities of the data subject are likely to have a significantly adverse impact on anything to which the discharge of the statutory functions of the School relates – the exemption in section 58(1)(f) was thus applicable.

(3) If the data access request were to be acceded pursuant to Data Principle 6 and s.18(1)(b) of the Ordinance, then this would be likely to prejudice future complaints into similar dishonest behaviour and therefore the ascertaining of activities or data which significantly impact the statutory functions of the School since the trust of confidentiality would be broken. The materials would also directly identify the person who is the source of the data. Section 58(1)(g)(i) and (ii) were thus applicable.

29. In relation to the 2014 Incident, it was said that:

(1) The data is held for the purposes of preventing or detecting crime; apprehension, prosecution or detention of offenders; and the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons. Sections 58(1)(a), (b) and (d) thus applied.

(2) The Commissioner committed a material error of law at footnote 4 of its Decision when he wrongly held that the statutory definition of "seriously improper conduct" did not apply. Section 2(9) of the PDPO states that:

"Where a person-

(a) holds any office, engages in any profession or carries on any occupation; and

(b) is required by any law, or by any rules made under or by virtue of any law, to be a fit and proper person (or words to the like effect) to hold that office, engage in that profession or carry on that occupation, then, for the purposes of this Ordinance, any conduct by that person by virtue of which he ceases, or would cease, to be such a fit and proper person shall be deemed to be seriously improper conduct."

(3) Pursuant to s.84(1) of the EO, the Chief Executive in Council may make regulations (the "**Regulations**") (Cap 279A). Section 58 of the Regulations provides that,

No teacher shall administer corporal punishment to a pupil.

(4) Regulation 101(7) specifies that a teacher who contravenes Regulation 58 commits an offence. Section 102(1) states that any person guilty of an offence under the Regulations shall be liable on conviction to a fine at level 5 and to imprisonment for one year.

(5) The Commissioner failed to recognise the significance of Regulation 58 which states that corporal punishment is an offence. Any teacher in breach of that Regulation would clearly not be a fit and proper person to continue as a teacher. The data was therefore being held at the very least, for the purpose of preventing, precluding, or remedying, by the

issue of the written warning, conduct which would potentially render the teacher unfit to carry on as a teacher. As concluded in the warning letter:

> "After discussion of the said incidents, the [School] have come to the decision of issuing a written warning, to serve as serious disapproval of his conduct. The various incidents stated in this letter must be seriously attended to and the School will not tolerate any re-offense."

30. The disclosure of those materials would further prejudice those objectives above for the same reasons as in the 2004 Incident as well as identify the person(s) who is or are the source of the data.

31. In summary, therefore, the School contends that:

(1) The Commissioner's errors stem from failing to recognise:

(a) The statutory nature of the School performing public functions; and

(b) The criminality and serious nature of corporal punishment.

(2) The collection of the data subject's disciplinary materials is to ensure the smooth running of the school, pursuant to the statutory mandate of the School, and the prevention of possibly serious crimes. Mr Chow has an integrity issue which possibly renders him unfit to carry on as a teacher in the care of young children.

(3) Although the allegations of corporal punishment were the subject of only the 2014 Incident, the exemption also covers the 2004 Incident. For the purposes of detecting and preventing crime, all the complaints, including the 2003 Incident, the 2004 Incident and the 2014 Incident are relevant material since they may provide leads for further investigation and an insight into the character of the alleged offender. The law of similar fact evidence requires that all the referrable examples remain available as evidence. The exemptions for the 2014 Incident would also encompass the materials in the 2004 Incident.

(4) Pursuant to section 58, the School was therefore exempted from acceding to the data requests.

E. Ground 2

32. Given that the Commissioner's discretion to issue the Notice is premised upon a contravention of the PDPO, it is logical to address first Ground 2 of the appeal, since no question of discretion arises under section 50 if there has been no contravention by reason of any of the exemptions under section 58(1).

Section 58(1)

33. As mentioned above, section 58(1) provides for categories of exemptions to personal data held for various purposes from the provisions of data protection principle 6 and section 18(1)(b), "*where the application of those provisions to the*

data would be likely to (i) prejudice any of the matters referred to in this subsection; or (ii) directly or indirectly identify the person who is the source of the data.". The School contends that a number of these categories apply to the present situation, and therefore, it is exempt from any obligation to comply with the Request.

34. A useful starting point on the application of section 58 are the observations of DHCJ Poon (as the Chief Judge then was) in **Cinepoly Records Co. Ltd. and Others v Hong Kong Broadband Network Ltd and Others** [2006] 1 HKLRD 255 at paras 36 to 39:

> "36. The [PDPO] creates for the first time in Hong Kong statutory protections of privacy of individuals in relation to personal data. But the protections cannot be absolute. For there are obviously cases where public interest or competing private rights and interests may require such protections to be removed. Thus the Ordinance also creates certain exemptions: see Part VIII. The exemptions can basically categorized into (a) public interest exemptions and (b) competing private interests exemptions. For public interest exemptions, examples can be found in section 57 on security, defence or international relations in respect of Hong Kong; section 58(1)(a) and (b) relating to crime; section 58(1)(c) relating to tax matters; section 58(1)(f) and (3) relating to certain functions of a financial regulator including protecting the public against financial loss; and section 61 on matters relating to news. (These examples are not meant to be exhaustive.) For competing private interest exemptions, an example that it pertinent here is section 58(1)(d) which deals with prevention, preclusion and remedying of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons. Various prerequisites for the exemptions are prescribed.
>
> 37. In my view, the Ordinance strikes the balance between the administration of justice and protection of privacy relating to personal data by:
>
> (1) Creating exemptions to protection of privacy relating to personal data, thereby confirming that the protection is not absolute and can be removed where appropriate;
>
> (2) Requiring the person who seeks to invoke an exemption to satisfy the relevant prerequisites, thereby subjecting the case to careful scrutiny under the applicable statutory provisions and ensuring that the exemption may be invoked only if the prerequisites are all met.

> 38. The burden rests squarely on the person who seeks to invoke an exemption to satisfy the court that all the relevant prerequisites are met. He must support his claim with cogent evidence. Bare allegation will not be sufficient.
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> 39. In making the determination, the court will bear in mind the principal objective of the Ordinance, which is to protect privacy relating to personal data, and the careful balance that the Ordinance seeks to strike between protection of privacy and the administration of justice. The court will scrutinize the case carefully and will allow the exemption to be invoked only if the applicable prerequisites are all met."

35. We examine each of the categories in section 58(1) relied upon by the School.

Section 58(1)(d) - "seriously improper conduct"

36. As mentioned above, section 58(1)(d) provides for personal data held for the purposes of "*the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons*".

37. It is relevant therefore to consider, first, what kind of conduct falls within the category of unlawful or seriously improper conduct. This was considered in *Tse Lai Yin Lily & Others v. Incorporated Owners of Albert House & Others* [1999] 1 HKC 386, where Suffiad J held at 393C-G:

> "It is clear from s 58(2) that personal data are exempted from the provisions of data protection principle 3 where the use of the data is for any of the purposes referred to in s 58(1), and whether or not the data are held for any of those purposes. What I have to decide, therefore, is whether the use of such data in a civil action claiming for damages resulting from the collapse of this canopy falls within the ambit of s 58(1)(d) of the Ordinance which provides for, inter alia, the remedying of unlawful conduct.
>
> Firstly, I note that in s 58(1), the use of the word 'crime' in para (a) and the word 'offender' in para (b). This to my mind suggest, therefore, that the use of the words 'unlawful or seriously improper conduct' in para (d) extend beyond criminal conduct to include civil wrongs.

> Secondly, the use of the word 'remedying' in para (d) is again suggestive of the same thing. The most natural meaning that can be given to the word 'unlawful' is that it normally describes something which is contrary to some law or enactment or is done without lawful justification or excuse. (See *R v. R* [1991] 4 All ER 481 per Lord Keith of Kinkel at 488d)
>
> Since tort is a civil wrong, the bringing of a civil claim for damages in tort amounts to the remedying of unlawful or seriously improper conduct. For these reasons, I have no hesitation in coming to the conclusion that the words contained in s 58(1)(d) of the Personal Data (Privacy) Ordinance is sufficiently wide to cover claim for damages in a personal injuries and/or fatal accident case. That being the case, the use of such data in respect of such a civil claim is therefore exempted from the provisions of protection principle 3 by s 58(2) of the Ordinance."

Cited and followed by DHCJ Poon in **Cinepoly Records Co. Ltd.,** holding that unlawful or seriously improper conduct included copyright infringement.

38. The Commissioner adduced a number of additional legal authorities illustrating "serious improper conduct". Although he accepted that whether a conduct would amount to "seriously improper conduct" depends on the facts of each case, he submitted that such conduct, "always lead to grave consequences, legal or otherwise". In the present case, however, apart from the warnings, the School has not imposed any sanction or punishment upon the purported serious misconduct of Mr. Chow after the lapse of so many years. In the circumstances, Mr Chow's conduct should not be considered sufficiently serious to amount to "seriously improper conduct" within the meaning of section 58(1)(d).

39. With respect, we disagree. Whether conduct is "seriously improper" or otherwise must depend upon an objective assessment of the conduct. Similar to assessing whether conduct is unlawful or not, conduct is either seriously improper or it is not. Although the School's response to the conduct may be probative of the

actual conduct that occurred in the event of a factual dispute, the nature of the conduct itself cannot depend upon such a response.

40. That said, it has not escaped us that despite the stringent criticism now made by the School of the seriousness of Mr Chow's alleged conduct – in particular the allegations of corporal punishment which dated back to the 2003 Incident, precious little was in fact done by the School to protect its students from such conduct, other than to issue the 2003 and 2014 Warnings.

41. Neither the Commissioner nor this Board is in a position to make a finding as to whether the alleged conduct forming the 2003, 2004 or the 2014 Incidents in fact occurred, and if so, to what extent. However, as to whether Mr Chow's alleged actions forming the basis of the 2004 and 2014 Warnings amounted (if proven) are *capable* of amounting to "unlawful or seriously improper action" within the meaning of section 58(1)(d), our views are as follows.

42. The 2003 Incident, alleging as it does corporal punishment, if substantiated, was plainly unlawful by reason of Regulations 58 and 101(7). It is not entirely clear, however, whether the 2014 Incident constituted corporal punishment as such. Nonetheless, we have little difficulty in accepting that the 2014 Incidents, if substantiated, are at least abusive and capable of amounting to "unlawful or serious improper conduct" on the part of a teacher, whether or not they amount to corporal punishment.

43. We would add that registered teachers are a regulated profession under the EO. Sections 46 and 47 of the EO provides that the Permanent Secretary for Education may refuse to register, or cancel the registration of, a teacher, inter alia, if

he or she is not a fit and proper person to be a teacher. Hence, section 2(9) of the PDPO is applicable in determining whether the conduct in question is capable of amounting to seriously improper conduct. Abusive conduct by a teacher towards a primary school student, particularly one with "special needs", is obviously sufficient to render that teacher as being not fit or proper to be a teacher.

44. The 2004 Incident is obviously less serious. That said, if the allegations of dishonesty as to whether Mr Chow had performed his duties as a teacher can be substantiated, such dishonesty would likely amount to a repudiatory breach of his employment contract. We would also accept that such conduct is *capable of* amounting to "serious improper conduct, or dishonesty or malpractice" within the meaning of section 58 of the PDPO and potentially renders him not a fit or proper person to be a teacher within the meaning of sections 46 and 47 of the EO.

45. Whilst we accept that each of the Incidents should be viewed in context of his overall conduct as a teacher, we do not agree with Mr McCoy SC that the 2003 Incident is necessarily relevant to the 2014 Incident, given the period of some 11 years between the two incidents. Moreover, the 2004 Incident is plainly unrelated to the 2003 Incident, given the significant difference in nature of the complaints. Ultimately, this is perhaps of less significance given our view that each of the 2004 and 2014 Incidents is by itself capable of amounting to serious improper conduct.

Section 58(1)(f)

46. Section 58(1)(f) provides inter alia for personal data held for the purpose of ascertaining whether the character or activities of the data subject are likely to

have a significantly adverse impact on any thing - (i) to which the discharge of statutory functions by the data user relates...

47. As mentioned above, in reliance upon section 40AD of the EO, the School contends that it is a "statutory body" which discharges specified functions within the meaning of section 58(1)(f). It is said, therefore, that Compliance with the Request would thus prejudice the ascertaining of activities or data which significantly impact the statutory functions of the School since the trust of confidentiality would be broken.

48. The Commissioner disputes that the School is a statutory body within the meaning of section 58(l)(f) which explicitly mentions about the discharge of statutory functions by the data user to which it relates. He contends that neither the words "statutory functions" nor "statutory body" is defined in the PDPO or *the Interpretation and General Clauses Ordinance* (Cap 1). On the other hand, the definition of "statutory body" can be found in some other ordinances such as the **Legislative Council Ordinance** (Cap.542) and the **Competition Ordinance** (Cap.619), which define a "statutory body" as a body established or constituted by or under the authority of an ordinance. The definition of "statutory body" in the Legislative Council Ordinance in fact excludes a company, corporation of trustees, society, co-operative society and trade union registered or incorporated under different ordinances.

49. It seems to us that the definitions of "statutory body" in other ordinances provide limited assistance to the Board in deciding whether the School is a statutory body. The term "statutory body" does not appear in the PDPO. Rather, section 58(1)(f) refers to the discharge of "statutory functions" by the data user. The

question then is whether the activities of the School, including the regulation and management of its teachers, are "statutory functions" within the meaning of the subsection.

50. For reasons which will become apparent below, it is unnecessary for the Board to make a determination on this issue.

Sections 58(1)(a) and (b)

51. As to the School's contention that Mr Chow's personal data was held for the purpose of preventing or detecting crime, apprehension, prosecution or detention of offenders within the meaning of sections 58(1)(a) and (b), the School's focus appears to be on the deterrence of future misconduct generally rather than the facts of the present case. As mentioned above, the School argues that there would be no whistle-blowers if the complainant knows that his information including identity would be disclosed to the offender.

52. We do not think that it is the intention of sections 58(1)(a) and (b) to enable a blanket policy of non-disclosure of personal data so that whistle-blowers would not be discouraged from coming forward. Each case must be judged on its own facts.

53. In this regard, we agree with the Commissioner that the School has not demonstrated how compliance with the Request (i.e. the disclosure of the personal data, namely, the records for the warnings as specified in the Notice) would prejudice the whistleblowing of any future misconduct of teachers or (as the School put) offenders.

54. This is especially the case where the Notice allows the redaction of the names or other identifying particulars of any third parties (by saying subject to compliance with s.20(1)(b) and (2)). As a matter of fact, there is no secret about the complainants' identities in this case - the course co-ordinator in the 2004 Incident and the student's parent(s) in the 2014 Incident.

Sections 58(1)(i) and (ii)

55. As mentioned above, even if it can be shown that personal data is held for one or more of the purposes in sections 58(1)(a) to (g), the party seeking to rely on the exemption from principle 6 and section 18(1)(b) must still show that the application of those provisions to the data would be likely to (i) prejudice any of the matters referred to in this subsection; or (ii) directly or indirectly identify the person who is the source of the data.

56. In relation to both (i) and (ii), as mentioned above, the School argues that:

(1) If the Request were to be complied with, this would likely prejudice future complaints into similar misconduct, as the "trust of confidentiality" would be broken; and

(2) The data subject (be it Mr. Chow or other teachers) may also devise pre-emptive strategies to avoid further complaints.

57. Again, the Board is of the view that each case must be looked at on its own specific facts.

58. Insofar as (i) is concerned, we agree with the Commissioner that the School has not demonstrated any real or genuine, as opposed to a fanciful or theoretical risk, that disclosure would prejudice future complaints into similar misconduct. On the facts of the present case:

(1) The broad facts surrounding the alleged 2004 and 2014 Incidents, would already have been made known by the School to Mr Chow. It would not have been possible for the School to issue the 2004 and 2014 Warnings to Mr Chow otherwise;

(2) As mentioned above, the identities of the complainants for both the 2004 and 2014 Incidents are already well known to Mr Chow. Even had the identities of the complainants not been known, given the relatively long passage of time since the 2004 Incident and the 2014 Incident, it is difficult to see what prejudice would be suffered; and

(3) It is difficult to see, nor have any specifics been proffered by the School, as to how Mr Chow or other teachers could devise "pre-emptive strategies" to avoid further complaints had the Request been complied with.

59. Insofar as (ii) is concerned, as mentioned above, the School argues that the exemption must be applicable once it is shown that (provided that the data is held for one of the purposes in the section) the disclosure of the same would "directly or indirectly identify the person who is the source of the data", and hence, there is "no exemption from this exemption".

60. In our view, that is too narrow a reading of the section, and would potentially leave a large lacuna in the legislation. We agree with that the Commissioner that (ii) must be read and interpreted in conjunction with sections 20(1) and (2):

(1) Section 20 sets out the circumstances in which a data user "shall" refuse to comply with a data access request lodged under section 18.

(2) Generally speaking, subject to s.20(2), a data user cannot comply with the request disclosing a third party's personal data unless with the latter's consent (s.20(1)(b)). However, even though that third party's personal data includes information identifying him as the source of personal data, a data user is not excused from compliance with the request if, by omission of names or other identifying particulars or otherwise, the request may be complied with without disclosing that third party's identity (s.20(2)(a) and (b)).

(3) Section 20(3)(f) further provides that a data user "may" refuse to comply with the request if any one of the exemptions under Part 8 (which includes section 58) applies.

61. In light of the above, as submitted by the Commissioner, and we agree, redaction of the names or other identifying particulars of the third party (as stipulated under sections 20(2)(a) and (b)) must also be taken into account when considering the interpretation and application of s.58(1)(ii).

62. The Commissioner also referred us to **The Report on Reform of the Law Relating to the Protection of Personal Data issued by the Law Reform**

Commission of Hong Kong issued in August 1994 **(the "LRC Report")**, which set out the background purpose of the PDPO. When discussing section 21(4)(b) of the United Kingdom Data Protection Act 1984 (equivalent to the s.21(l)(b) of the Ordinance), the LRC commented that the limitation of access rights should be narrowly construed and one can readily comply with the request without disclosing the identity by editing out names:

> "14.38 ... The second requirement, that of reasonably satisfying the data user of the applicant's identity, is also an important one. It is necessary to protect the privacy of other data subjects. But we consider the UK formulation too broad. The provision does not make clear that data users should comply with requests insofar as it is possible to do so without disclosing the identity of the other person referred to. Often this will be readily achievable by editing out names ...
>
> 14.39 We agree with the general aim of section 21(4)(b). Its operation is elaborated on by section 21 (5). That provides that the reference to information relating to another individual includes a reference to information identifying that individual as the source of information. **We similarly recommend that there be no obligation to respond to the extent that the data [subjects'] names or otherwise explicitly identifies an individual as the source of information.** This qualification of access rights is necessarily narrow and will only entail editing out the identification. It would not defeat access where explicit identification is lacking but the source can be readily inferred ..." (emphasis added)

63. The Commissioner further submits that by allowing redaction to protect the informant's identity, the legislature intended to balance the competing interests of the protection of privacy on the one hand, and the rights of the data subject and common law rules of natural justice, i.e. to allow a data subject to see the adverse evidence laid against him.

64. In Paras. 15.51- 15.53 of the LRC Report, the LRC recommended introduction of certain public interest exemptions from the right of an individual to access and correct his personal data. In particular, in Para. 15.53 the LRC expected that there would be very few cases where judicious editing would not suffice to protect the

competing public interest of protecting the identity of sources. This compromise of supplying a redacted document was preferable to an all or nothing situation of supplying or withholding the entire document:

> "15.53 We wish to emphasise that although these are similar to the public interest categories we identified for exemption from the Use Limitation Principle, it does not follow from the limited sanctioning of passing on of data for a different purpose that access should be denied. Rather, it strengthens the need for a checking function on the resultant data, subject to the protection of the identity of sources. It is not an all or nothing test. We would expect there to be few cases where judicious editing would not suffice to protect the competing public interest. This is recognised by the common law rules of natural justice. They acknowledge, for example, that a liquor licensing appellant should be entitled to know the gist of the case against him. As an additional safeguard, **we recommend below that the Privacy Commissioner should be entitled to review the matter and release data to the extent that prejudice is not likely ...**" (emphasis added)

65. In the circumstances, when section 58(1)(ii) is read in context, the School must demonstrate that even after redaction of the informant's name or other identifying particulars, provision of the materials as directed by the Notice would still be likely to directly or indirectly identify the informant. The Commissioner submits, and we agree, that the School has failed to discharge such a burden. In any event, in the present case, the identities of the informants are known to Mr Chow.

F. Ground 2

The Commissioner's Discretion under Section 50

66. As mentioned above, section 50 of the PDPO provides that if the Commissioner is of the opinion that the data user is contravening or has contravened a requirement under the PDPO, he *may* serve on the data user an enforcement notice

directing him to remedy and, if appropriate, prevent recurrence of the contravention. The word "may" confers a discretion on the Commissioner to issue an enforcement notice, which is triggered by a contravention.

67. The section does not provide any conditions on the exercise of the discretion, save that subsection (2) provides that,

> "In deciding whether to serve an enforcement notice the Commissioner shall consider whether the contravention to which the notice relates has caused or is likely to cause damage or distress to any individual who is the data subject of any personal data to which the contravention relates."

68. There is no serious dispute between the parties as to the general principles governing the exercise of discretion by administrative authorities:

(1) There is no absolute or unfettered discretion in law;

(2) The question is whether the discretion is wide or narrow. For this purpose, everything depends upon the true intent and meaning of the empowering statute;

(3) The discretion can only be validly exercised for reasons relevant to the achievement of the purpose of the statute; and

(4) The discretion must be exercised reasonably, i.e. to take account of relevant considerations and exclude irrelevant considerations in the decision making.

(see e.g. **Tower Hamlets London Borough Council v. Chetnik Developments Limited (1988) 1 All ER 961)**

69. The Board also bears in mind that, as mentioned above, while it may approve and adopt the Commissioner's exercise of his discretion, it is entitled to and indeed required to, exercise the discretion under section 50 *de novo*.

70. The PDPO does not provide for a general public interest exemption but explicitly provides for specific public interests (as now found in Part 8) that provide exemptions from some or all of the data protection principles.

71. In the circumstances, we agree with the Commissioner that his exercise of discretion not to issue an enforcement notice under section 50 on the grounds that it would be contrary to public interest must be exercised with caution, as it would potentially supplant the provisions in Part 8, and specifically in this case, section 58(1).

72. The School relies upon, inter alia, ***D v. NSPCC*** and ***ZH (Tanzania)*** to contend that "the duty to protect children must therefore fall upon public care services" such as schools, and that the "preservation of confidentiality over information pertaining to investigations for purpose of protecting children" is a standalone category of "public interest". It is said that this category of public interest must be taken into account in the exercise of discretion under section 50.

73. The Commissioner submits that such a proposition is far too broad and unparticularised. We agree. Further, as the legislature has not seen fit to include

specific exemptions in Part 8 relating to personal data held for the purpose of investigations for the protection of children, the Commissioner (and the Board) must exercise caution in depriving the data subject of the protection of the PDPO by not to issue an enforcement notice on such ground.

74. Whilst the Board recognises the need to take into account of the fact that the protection of children is involved, we do not accept that this is an overriding or paramount consideration in the exercise of our (or the Commissioner's) discretion under section 50. Again, each case must turn on its own facts as to the weight to be given to the fact that the issue of an enforcement notice may have an impact upon the protection of children.

75. It is undisputed that the School runs a school which deals with information of children and has to look after their welfare. However, it is inaccurate to suggest that the School's status is analogous to NSPCC or any authorities in child care cases.

76. In the circumstances of the present case, we do not see that there is any circumstances of any or any sufficient weight that should cause the Commissioner to exercise his discretion against the issue of an enforcement notice, given that there has been shown to be a contravention of the PDPO by the School.

77. The PDPO expressly grants to a data subject access rights to his personal data held by a data user. Such rights should not be unnecessarily curtailed or restricted outside of the specific exemptions in the PDPO, unless justified. In particular, the rules of natural justice would require, as a matter of procedural fairness, a person should be provided with any materials in support of the adverse allegations made against him. The importance of procedural fairness is well established and can be

observed in cases involving disciplinary proceedings for the employee facing the allegation to discover documents so that he can know the case made against him and respond to it (see e.g. **Leung Fuk Wah v. Commissioner of Police** [2002] 3 HKLRD 653).

G. Conclusion

78. For the reasons above, the appeal is dismissed. Finally, the Deputy Chairman wishes to express his sincere apologies to the parties for the delay in the issue of this decision due to his other personal and professional commitments.

(signed)
(Mr Douglas Lam Tak-yip, SC)
Deputy Chairman
Administrative Appeals Board