

**ADMINISTRATIVE APPEALS BOARD**  
**ADMINISTRATIVE APPEAL NO. 17 OF 2014**

---

**BETWEEN**

**TL**

**Appellant**

**and**

**PRIVACY COMMISSIONER**

**FOR PERSONAL DATA**

**Respondent**

---

Coram: Administrative Appeals Board  
Mr LIU Man-kin (Deputy Chairman)  
Ms Joan HO Yuk-wai (Member)  
Mr LAW Chi-yuen (Member)

Date of Hearing: 3 June 2015

Date of Handing down Written Decision with Reasons: 14 August 2015

---

**DECISION**

---

**A. Introduction**

1. By a notice of appeal dated 7 April 2014, the Appellant lodged with the Administrative Appeals Board (“the Board”) this appeal (“the Appeal”) against

the decision made by the Respondent on 18 March 2014 of not pursuing his complaint against the Party Bound further (“the Decision”).

2. The Party Bound is legally represented in the Appeal but chose not to attend the appeal hearing.

3. The Appellant has made an application for an anonymity order and for referring his full name as “TL” in this appeal. The Respondent has no objection to this application but the Party Bound has objection.

4. After considering the parties’ submissions, we now make the following anonymity order (“the Anonymity Order”):

- (a) The names of the persons and organizations specified in the 1<sup>st</sup> column in the table below shall be replaced by the abbreviations set out in the 2<sup>nd</sup> column in the same table in any report of this appeal:

<i>Persons/Organizations</i>	<i>Names and/or Abbreviations</i>
Appellant	Appellant or TL
Party Bound	Incorporated Management Committee of the School or the IMC
The school mentioned in Part B below	The School
The teacher in the School having discussion with the Appellant in respect of Refund Request as set out in Part B below	A

(b) The name of the Appellant shall appear as “TL” in the titular page of the Board’s Decision released to the public.

(c) The naming or identification of the persons and organizations as set out in the table above in the context of any report is prohibited.

5. Reasons for the Anonymity Order will be given in the later part of this Decision.

## **B. The Facts**

6. TL is an ex-employee of the IMC. The employment ceased on 21 December 2012.

7. On 21 December 2012, the School gave a letter to TL (“the Certificate”), in which the School certified the duration of the employment and the last salary of TL. The letter is “To Whom It May Concern”. The last paragraph of the Letter is as follows:

“Should you require any further information, please feel free to contact the school at [telephone no.]” (“the Sentence”)

8. On 25 December 2012, TL sent an email to the IMC and made a data access request to the School for, *inter alia*, copies of the “any further information” referred to in the Certificate.

9. By a letter dated 26 December 2012 from TL to the School, TL requested the School to delete the Sentence from the Certificate (“Correction Request”). TL said that the School had failed to respond to the Correction Request.

10. In the same letter, TL also requested the IMC to provide him with their codified policies and practices in relation to the employees’ personal data, and to inform him of the kind of his personal data held by the IMC together with the main purposes for which his personal data held by them was or would be used (“the Requested Information”).

11. On 28 December 2012, TL made a call to A and requested for refund of HK\$100 which was paid by TL (“the HK\$100”) and collected by A for the “Staff Welfare” (“the Refund Request”).

12. On 7 January 2013, on behalf of the “Staff Welfare”, A sent an email (“the Email”) to TL to explain the issues concerning the HK\$100 and copied the Email to 4 other members of the “Staff Welfare” (“the 4 Recipients”). In the Email, A told TL that the “Staff Welfare” would return HK\$40 to TL, and A would personally give the balance of HK\$60 to TL. The penultimate paragraph of the Email is as follows:

“Please be notified that this email (not your previous emails) may also be sent to all staff as there is a very special change in the balance of the Staff Welfare Account. All the staffs have the right to know the reason why the balance has suddenly changed.”

13. On 1 February 2013, TL received a letter from the legal representatives of the IMC. IMC responded that “*any further information*” in the Certificate was not personal data or personal data not belonging to the Appellant.

14. On 6 February 2013, TL lodged a complaint to the Respondent against the IMC (“the Complaint”). On 6 June 2013, the Respondent accepted the Complaint under the Personal Data (Privacy) Ordinance (“PDPO”) s.37.

15. There are in total 5 items in the Complaint.

- (a) First, TL was not satisfied with the IMC’s answer in respect of the “*any further information*” in the Letter. This is called “Allegation 1” in the Decision. On 23 May 2013, TL sent an email to the Respondent and stated that he would not insist on pursuing Allegation 1. Accordingly, Allegation 1 is not an issue in the Appeal.
- (b) Second, TL complained that the IMC had failed to respond to the Correction Request. This is called “Allegation 2” in the Decision.
- (c) Third, TL complained that the IMC had failed to provide him the Requested Information. This is called “Allegation 3” in the Decision.
- (d) Fourth, TL said that during his employment with the IMC, the IMC had collected the HK\$100 together with his personal data (“the Data”) from him without informing him of the purpose of such collection of the data. This is called “Allegation 4” in the Decision.

- (e) Lastly, TL was dissatisfied that the Refund Request was disclosed to the 4 Recipients without his consent. This is called “Allegation 5” in the Decision.

16. On 18 March 2014, the Respondent sent the Decision to TL.

17. The Respondent’s position on Allegations 2 to 5 as per the Decision is as follows:

- (a) Allegation 2 – Under PDPO s.22(1)(a), a data correction request can only be made in relation to personal data which has been supplied to a data subject in compliance with a data access request. A data subject therefore has no right to make a correction request in relation to his personal data if the data is not obtained pursuant to a data access request. Since the Certificate was not supplied to TL pursuant to a data access request, TL has no right to make a data correction request in relation to the Certificate. Further, the Sentence itself contains no personal data of TL.
- (b) Allegation 3 – The IMC failed at first to make known to the public the Requested Information. The Respondent has followed up the matter. After the Respondent’s intervention, the IMC has devised their own privacy policy statement (“PPS”) and uploaded the same on their website to inform the public of the same. The PPS covered the kind of personal data the IMC held, the purpose of collecting the personal data and how such data would be used. TL was also notified of such uploading by the Respondent in the Decision. In view of all these, the Respondent considered the matter has been resolved and further pursuit of the same cannot

reasonably be expected to bring about a more satisfactory result. Nonetheless, the Respondent has also issued a letter dated 19 March 2014 to the IMC reminding them of their obligations under the PDPO and in relation to Data Protection Principle (“DPP”) 5.

- (c) Allegation 4 – “Staff Welfare” was an organization formed voluntarily by the interested staff members of the School. It is not the IMC. “Staff Welfare” is not a party against which the complaint was lodged. Further, different versions of facts were provided by TL and A. The Respondent is unable to conclude that whether there is any prima facie case of contravention of PDPO on the part of “Staff Welfare”.
- (d) Allegation 5 – According to A, it would be necessary for A to inform the 4 Recipients of the way he had handled the Refund Request since the 4 Recipients were members of “Staff Welfare” and were involved in handling the Refund Request. The Respondent takes the view that the disclosure of the Refund Request is directly related to the original collection purpose of the Refund Request, i.e. for handling such request made by TL.

18. By a notice of appeal dated 7 April 2014 and received by this Board on 8 April 2014, TL lodged the Appeal.

19. As per the notice of appeal, there are 4 grounds of appeal:

- “(I) Lack of remedies provided under Data Protection Principles (“DPP”) 5 of the PDPO;
- (II) In the absence of taking into account section 65 of the PDPO;

- (III) Misinterpretation on the DPP 6(e) of the PDPO;
- (IV) The Respondent's decision as to its misconstruction of the legal principles."

### **C. Analysis**

#### Allegation 2

20. Appeal Ground No. 3 is related to Allegation 2. TL argued that the Correction Request was made pursuant to DPP 6(e) instead of PDPO s.22, and hence there would be no need for the Correction Request to be preceded by a data access request.

21. The short answer to this submission is that there is no personal data of TL in the Sentence. To use a data correction request to ask for deletion of the Sentence from the Certificate is therefore misconceived. Whether DPP 6(e) has the effect as contended by TL is irrelevant.

22. Since the parties have made submissions on DPP 6(e) and PDPO s.22, for the sake of completeness, we also set out our view on DPP 6(e) here.

23. DPP 6(e) provides:

“A data subject shall be entitled to-  
(e) request the correction of personal data;”

24. As defined in PDPO, s.2(1), “data correction request” means a request under s.22(1).



25. PDPO s.22(1) provides:

“Subject to subsections (1A) and (2), where-

(a) a copy of personal data has been supplied by a data user in compliance with a data access request; and

(b) the individual, or a relevant person on behalf of the individual, who is the data subject considers that the data is inaccurate, then that individual or relevant person, as the case may be, may make a request that the data user make the necessary correction to the data.”

26. No doubt that a data subject is entitled to request for the correction of personal data. However, the way to exercise such right is prescribed in PDPO.

27. To exercise such right, the data subject has to follow the mechanism set out in PDPO s.22(1). Clearly, a “data correction request” has to be preceded by a “data access request”.

28. In this case, the Sentence in the Certificate is not a copy of personal data supplied by the School in compliance with a data access request made by TL. Thus, TL cannot make the Correction Request. There is simply no personal data for correction.

29. In our view, the Respondent’s decision on Allegation 2 is correct.

### Allegation 3

30. Appeal Ground No.1 is related to Allegation 3. TL argued that the IMC had not informed him of the PPS, and hence no remedy was provided to him notwithstanding the IMC’s breach of DPP 5.

31. DPP 5 provides:

“All practicable steps shall be taken to ensure that a person can-

- (a) ascertain a data user's policies and practices in relation to personal data;
- (b) be informed of the kind of personal data held by a data user;
- (c) be informed of the main purposes for which personal data held by a data user is or is to be used.”

32. As set out above, at the time of receipt of TL’s complaint by the Respondent, the IMC had not complied with DPP 5. The Respondent intervened. The IMC thereafter took remedial measures by devising their own PPS and uploading the same on their website to inform the public. TL was also notified of such remedial measures taken by the IMC by the Decision. The Respondent has also sent a letter dated 19 March 2014 to the IMC reminding them of their obligations under PDPO and DPP 5.

33. Hence, remedial measures have been taken by the IMC as a result of TL’s complaint. These remedial measures were made known to TL by the Decision.

34. TL did not point out what further the Respondent can do in relation to Allegation 3. The Respondent’s decision on Allegation 3 is correct.

#### Allegations 4 and 5

35. Appeal Grounds Nos.1 and 2 are related to Allegations 4 and 5.

36. In essence, TL’s case is as follows:-

- (a) By collecting the Data together with the HK\$100 from TL without informing him the purpose of the collection of the Data, the “Staff Welfare” has breached DPP 5.
- (b) By disclosing the Refund Request to the 4 Recipients without TL’s consent, the “Staff Welfare” has acted contrary to PDPO.
- (c) By the operation of PDPO s.65, the IMC is vicariously liable for the aforesaid wrongdoings of the “Staff Welfare”.

37. We are unable to accept TL’s case.

38. The Respondent has made enquiries with TL and A respectively.

39. According to TL, it was not A but another teacher (male) collected the HK\$100 and the Data from him. However, TL did not name this male teacher.

40. According to A, he only collected the HK\$100 but not any personal data from TL.

41. The Respondent took the view that since different versions of facts were provided, in particular whether the Data had been collected or not, the Respondent would not be able to determine whether there was any prima facie contravention of the PDPO by the “Staff Welfare”.

42. We agree with the Respondent. The common ground between TL and A is that A has not collected the Data from TL. TL’s version is that the Data was collected by another teacher (male), but TL did not identify the teacher. In these circumstances, it would not be possible for the Respondent to do any

further follow up action. The Respondent would not be able to contact an unidentified teacher. Further whether this unidentified teacher was a member of the “Staff Welfare” at the material time is also unknown. There is no prima facie case that the “Staff Welfare” has contravened the PDPO.

43. As to Allegation 5, we also agree with the Respondent that the disclosure of the Refund Request by A to the 4 Recipients is directly related to the original collection purpose of the Refund Request, i.e. for handling such request made by TL, and hence there is no contravention of the PDPO.

44. TL did not lodge any complaint to the Respondent against the “Staff Welfare”, and the “Staff Welfare” is not a party to this appeal. TL argued that the IMC would be vicariously liable for what the “Staff Welfare” has done by the operation of PDPO s.65. Since we have concluded that the “Staff Welfare” has not done anything wrong in Allegations 4 and 5, this would be sufficient to dispose of these allegations. For the sake of completeness, we briefly set out our view on PDPO s.65 below.

45. PDPO s.65(1) provides:

“Any act done or practice engaged in by a person in the course of his employment shall be treated for the purposes of this Ordinance 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.”

46. In order to engage PDPO s.65(1), TL must show that what A has done is done by A in the course of his employment.

47. The “Staff Welfare” is a fund contributed by the interested staff members, and would be used to purchase wedding gifts, presents to new born babies, and funeral wreaths. The IMC does not control and does not manage the “Staff Welfare”.

48. We conclude that collection of the HK\$100 from TL and handling the Refund Request are not acts or practice engaged by A in the course of A’s employment, and therefore PDPO s.65(1) has no operation.

Appeal Ground No. 4

49. Appeal Ground No. 4 is a general ground. For the reasons set out above, we do not see the Respondent erred in construing any legal principle in handling Allegations 2 to 5.

50. TL made a submission on PDPO s.39(3) and we deal with this submission here.

51. PDPO s.39(3) provides:

“Where the Commissioner refuses under this section to carry out an investigation initiated by a complaint, he shall, as soon as practicable but, in any case, not later than 45 days after receiving the complaint, by notice in writing served on the complainant accompanied by a copy of subsection (4), inform the complainant-

(a) of the refusal; and

(b) of the reasons for the refusal.”

52. TL submitted that the Respondent did not provide him the Decision within the 45 days specified in PDPO s.39(3), and therefore has breached the section.

53. The Respondent did not dispute this. The Respondent explained that TL's complaint was complicated and therefore the Respondent would need a longer time to handle the complaint.

54. However, the 45-day period in PDPO s.39(3) is a fixed period. The section does not allow the Respondent to have a longer period if the complaint is a complicated one.

55. So no doubt that the Respondent has breached PDPO s.39(3). The question is whether this Board can grant TL any relief as a result of that breach.

56. As a matter of law, the answer is "No."

57. Administrative Appeals Board Ordinance ("AABO") s.3 provides:

"This Ordinance applies to-

- (a) the Ordinances mentioned in column 2 of the Schedule in relation to any decision of the description mentioned in column 3; and
- (b) any other decision in respect of which an appeal lies to the Board."

58. Item 29 of the Schedule to AABO ("the Schedule") concerns PDPO. In accordance with that item, the following decisions of the Respondent are subject to appeal to this Board:

“A decision of the Privacy Commissioner for Personal Data-

- (a) to impose conditions on his consent to the carrying out of a matching procedure under section 32(1)(b)(i);
- (b) to refuse to consent to the carrying out of a matching procedure under section 32(1)(b)(ii);
- (c) to refuse under section 39(3) to carry out an investigation initiated by a complaint;
- (ca) to terminate under section 39(3A) an investigation initiated by a complaint;
- (d) not to delete under section 46(5) a matter from a report under the Ordinance;
- (e) not to serve an enforcement notice under section 47;
- (f) to serve an enforcement notice under section 50.”

59. Failure to observe the 45-day time limit in PDPO s.39(3) is not a matter covered by Item 29 of the Schedule. Accordingly, this Board does not have jurisdiction to entertain an appeal against such a failure under AABO s.3(a).

60. Further, s.39(3) itself does not provide a right to appeal to this Board in respect of a failure to comply with the 45-day time limit by the Respondent, and we are unaware of any other legislation providing such right. Accordingly, this Board also cannot derive any jurisdiction to deal with a failure to comply with the 45-day time limit under AABO s.3(b).

61. Accordingly, notwithstanding the clear breach of PDPO s.39(3) by the Respondent, we have no jurisdiction to grant TL any relief. We note that in *Doris Yiu v. Privacy Commissioner for Personal Data* (Administrative Appeal

No. 22 of 2007, Date of Decision: 25 January 2008), the Board in that appeal also arrived at the same conclusion.

62. We take this opportunity to remind the Respondent that the 45-day time limit in PDPO s.39(3) is a statutory time limit which must be observed. Although we have no jurisdiction to grant TL any relief as a result of the Respondent's failure to observe the statutory time limit, being a responsible public authority, the Respondent should always remind himself the duty to comply with the statute and to obey the law.

#### **D. The Anonymity Order**

63. We now give reasons for the Anonymity Order made in paragraph 4 above.

64. The principles concerning anonymity order has been set out recently by the Court of Appeal in *Re BU* [2012] 4 HKLRD 417. In that case, Cheung CJHC said:

*“10. The starting point and general rule, both in theory and in practice, is that judicial proceedings are held in public and the parties are named in judgments. ....*

.....

15. .... it has to be appreciated, however, that when [an anonymity order] is made and the principle of open justice is thereby compromised, third parties' (particularly the media's) right to freedom of expression guaranteed under article 16 of the Hong Kong



Bill of Rights, which includes freedom to seek, receive and impart information, is necessarily curtailed. The right to freedom of expression is not absolute. It may be restricted for respect of the rights or reputation of others or for the protection of national security or of public order, or of public health or morals: article 16(3).

16. Fourthly, different rights are therefore in play. As a very general statement, the right to life and the freedom from torture [etc] should, of course, take precedence over the right to freedom of expression and the freedom of the press. As Lord Rodger of Earlsferry JSC observed in *In re Guardian News*, para 27, “a newspaper does not have the right to publish information at the known potential cost of an individual being killed or maimed”. But that is so only when stated in very general terms. Much will depend on the circumstances of each case. *A remote risk of danger to life or safety may well not be sufficient to justify the curtailment of the freedom of the press to name the parties involved in court proceedings held publicly in Hong Kong. ....*

17. Finally, *each application must therefore be examined on its own facts and issues. ....*” (Emphasis added)

65. Applying the principles set out in *Re BU*, we have to see whether there is any special factor in this case justifying a departure from the general rule (i.e. parties are named in judgments).

66. No doubt that this appeal is an appeal concerning PDPO and privacy. However, we do not think that this factor alone would be sufficient to justify a

departure from the general principle. If this factor alone would be sufficient for an anonymity order, then simply all appeals to this Board concerning PDPO should be covered by anonymity orders. This cannot be right. As said by the Court of Appeal in *Re BU*, each application must be examined on its own facts.

67. We make the Anonymity Order because of TL's health condition mentioned by TL during the hearing. TL in the hearing undertook to supply medical evidence to this Board after the hearing to prove the medical condition, and subsequently TL provided the medical evidence. In the light of TL's health condition as shown in the medical evidence, we are satisfied that the Anonymity Order should be made in this case, and we so order.

#### **E. Conclusion**

68. For the reasons above, we agree with the Decision and dismiss the Appeal.

69. No party applies for costs, and we make no order as to costs.

70. Lastly, we thank the parties for the assistance rendered to this Board.

(signed)

(Mr Liu Man-kin)

Deputy Chairman

Administrative Appeals Board