

A SHI TAO v PRIVACY COMMISSIONER FOR PERSONAL DATA

ADMINISTRATIVE APPEALS BOARD
ADMINISTRATIVE APPEAL NO 16 OF 2007

B MR JAT SEW-TONG SC (PRESIDING CHAIRMAN), DR CHEUNG CHI-TONG
ALBERT AND MR CHIU SAI-CHUEN NICHOLAS (MEMBERS)
25 SEPTEMBER, 26 NOVEMBER 2007

C **Human Rights – Right to privacy – Personal data privacy – Disclosure of email account information to Mainland authorities – Disclosure made by Beijing agent of Hong Kong company under compulsion of law – Whether disclosure of ‘personal data’ – Whether breach of data protection principle – Personal Data (Privacy) Ordinance (Cap 486) ss 2(1), (3)**

D 人權 – 私隱權利 – 個人資料私隱 – 向內地當局披露電郵戶口資料 – 香港公司的北京代理以強制法律申請披露 – 是否屬披露「個人資料」 – 是否違反保護資料原則 – 《個人資料(私隱)條例》(第486章)第2(1), (3)條

E The appellant, a journalist in Mainland China, was convicted of the crime of illegally providing state secrets to foreign entities outside the People’s Republic of China (PRC) and was sentenced to 10 years’ imprisonment. The verdict of the Mainland court indicated that the appellant used his personal email account with ‘yahoo.com.cn’ (Yahoo! China) to send secret information overseas and that

F Yahoo! Holdings (Hong Kong) Ltd (YHHK) furnished account holder information to the Mainland authorities. The respondent Commissioner carried out an investigation following a complaint lodged on behalf of the appellant. YHHK explained that although it owned the yahoo.com.cn website at the material time, the website was managed separately in Beijing by two Mainland entities and the disclosure was handled by the legal teams of that website reporting directly to

G YHHK’s parent in the United States, Yahoo! Inc (which confirmed that the Beijing management team had provided the State Security Bureau of Mainland China with user registration information, Internet Protocol (IP) log-in information and certain email contents). The Commissioner concluded that the IP address of an internet account holder was not personal data within the meaning of the

H Personal Data (Privacy) Ordinance (Cap 486); that YHHK was not a data user within the meaning of the Ordinance; that the Ordinance had no extra-territorial application; that even if Data Protection Principle 3 applied to the disclosure complained of, there was no contravention of that principle; and that the exemption in s 58 of the Ordinance was not applicable. The appellant appealed to the Administrative Appeals Board, contending that the Commissioner erred in law

I in reaching these conclusions.

Held, unanimously, dismissing the appeal:

(1) The definition of ‘personal data’ in the Personal Data (Privacy) Ordinance (Cap 486) had two limbs, ie data (a) relating directly or indirectly to a living individual; and (b) from which it was practicable for the identity of the individual

to be directly or indirectly ascertained. An IP address, together with other data, could in certain circumstances constitute 'personal data'. The question in the appeal was not whether any personal data had been disclosed but whether personal data of the appellant had been disclosed by YHHK. In the present case, the IP log-in information provided by the Beijing management team, even when coupled with other information disclosed, did not constitute 'personal data'. Neither the email address nor the IP address *ex facie* revealed the identity of the appellant. The information provided only disclosed that the email was sent from a computer located at the address of a business entity, and the date and time of the transaction. It was not reasonably practicable from such information to ascertain that it was actually the appellant who used the computer identified by the IP address to send out the relevant email at the relevant time. Given that there was no certainty that the registration information provided by an email user to Yahoo! China website was authentic or reliable, the burden was on the appellant to put forward credible evidence that such registration information held with the Mainland authorities disclosed his personal data. In the absence of such evidence, one could not conclude that the registration information in relation to the email account necessarily contained personal data of the appellant. Accordingly, although the information provided to the Mainland authorities related indirectly to an individual, it was not such as would enable the identity of the appellant to be ascertained directly or indirectly with reasonable practicability. *Durant v Financial Services Authority* [2003] EWCA Civ 1746 considered. *Cinepoly Records Co Ltd & Ors v Hong Kong Broadband Network Ltd & Ors* [2006] 1 HKC 433 distinguished (paras 61, 62, 67-70).

(2) YHHK was a 'data user' as defined in the Personal Data (Privacy) Ordinance, assuming that the relevant information constituted 'personal data' under the Ordinance. It had, in the light of the corporate structure of the Yahoo! group of companies, control over the relevant information. Even if the Beijing management team disclosed the relevant information to the State Security Bureau under the compulsion of law, the Beijing management team and hence its principal, YHHK, still retained control over such information whether before or after the relevant disclosure. The fact that the Beijing management team acted under the compulsion of law did not and could not 'vitiolate' their control (paras 81, 82, 83).

(3) Section 39(1)(d) of the Personal Data (Privacy) Ordinance empowered the Commissioner to refuse to carry out or continue an investigation when the case had no connection with Hong Kong. It was not a provision dealing with extra-territorial application of the Ordinance (para 86).

(4) Even if the relevant information were regarded as 'personal data' under the Personal Data (Privacy) Ordinance and even if YHHK were to be considered a 'data user' under the Ordinance, there had been no breach of Data Protection Principle 3 because the appellant had given prescribed consent for such disclosure when he accepted the terms of service and the privacy policy statement, which indicated that Yahoo! or Yahoo! China was authorised to make disclosure 'in accordance with legal procedure' (paras 94, 95, 99).

Cases referred to

Cinepoly Records Co Ltd & Ors v Hong Kong Broadband Network Ltd & Ors [2006] 1 HKC 433, [2006] 1 HKLRD 255 (CFI)

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- A *Durant v Financial Services Authority* [2004] FSR 28, [2004] 1 IP & T 814, [2003] All ER (D) 124 (Dec); [2003] EWCA Civ 1746 (CA)
Singh (Sirdar Gurdyal) v Rajah of Faridkote [1894] AC 670, 10 TLR 62, 11 R 340 (PC)

- B **Legislation referred to**
Administrative Appeals Board Ordinance (Cap 442) ss 6, 11(1)(a), (b)
Criminal Law of the People's Republic of China arts 111, 277
Criminal Procedure Law of the People's Republic of China art 45
Personal Data (Privacy) Ordinance (Cap 486) ss 2(1), (3), 33, 38(a), 39(1)(d), 48(2), 58(1), (2), 65(1), (2), Sch 1

- C [Editorial note: (i) See also the recent decision of Saunders J in *Wu Kit Ping v Administrative Appeals Board* [2007] 5 HKC 450 in which the Personal Data (Privacy) Ordinance (Cap 486) and the expression 'personal data' were in issue. (ii) For commentary on data protection principles see *Annotated Ordinances of Hong Kong — Personal Data (Privacy) Ordinance (Cap 486)* Pt V; for the right to privacy and the right to protection by law against interference, see *Halsbury's Laws of Hong Kong* Vol 14, Human Rights [210.180]-[210.187]; for the jurisdiction of the Administrative Appeals Board, see Vol 8, Courts and Judicial System [125.349]-[125.354].]
- D to privacy and the right to protection by law against interference, see *Halsbury's Laws of Hong Kong* Vol 14, Human Rights [210.180]-[210.187]; for the jurisdiction of the Administrative Appeals Board, see Vol 8, Courts and Judicial System [125.349]-[125.354].]

- E **Administrative Appeal**
This was an administrative appeal lodged on behalf of the appellant, Shi Tao, against the finding of the respondent, the Privacy Commissioner for Personal Data, that Yahoo! Holdings (Hong Kong) Ltd was not in breach of the Personal Data (Privacy) Ordinance (Cap 486) in respect of the disclosure of email account information to Mainland authorities that allegedly led to the appellant's arrest and conviction before a Mainland court. The facts appear in the following decision signed by the presiding chairman.

- F *Albert Ho (Ho Tse Wai & Partners) for the appellant.*
Denis Chang SC, Brenda Kwok, Margaret Chiu and KT Chan (Office of the Privacy Commissioner for Personal Data) for the respondent.
- G *Tim Mak and Cindy Au of Herbert Smith and Noelle Tai of Yahoo! Hong Kong Ltd for YHHK.*
Tim Mak and Cindy Au of Herbert Smith for Yahoo! Inc.

Administrative Appeals Board: A. INTRODUCTION

- H 1. The appellant was a journalist residing in the PRC. In October 2005, he was convicted by the Changsha Intermediate People's Court (the Changsha Court) of the crime of illegally providing state secrets to foreign entities outside the PRC, in violation of art 111 of the Criminal Law of the PRC. He was sentenced to 10 years' imprisonment.
- I 2. The appellant's conviction was widely reported by newspapers in Hong Kong. According to the news reports, Yahoo! Holdings (Hong Kong) Ltd (now known as Yahoo! Hong Kong Ltd) (YHHK) disclosed to the PRC prosecution authorities personal data of the appellant, leading to his arrest and conviction.

3. In the verdict (the Verdict) delivered by the Changsha Court on 27 April 2005, it was stated that: A

‘That night [20 April 2004] at approximately 13:32 pm, defendant Shi Tao leaked [secret] information to an overseas hostile element, taking advantage of the fact that he was working overtime alone in his office to connect to the internet through his phone line and used his personal email account (huoyan_1989@yahoo.com.cn) to send his notes on the above-mentioned summary of the main contents of CPC General Office Document No 11 (2004). He also used the alias ‘198964’ as the name of the provider.’ B

4. According to the Verdict, evidence which the Changsha Court took into account in convicting the appellant included the following: C

‘Account holder information furnished by Yahoo! Holdings (Hong Kong) Ltd, which confirms that for IP address 218.76.8.201 at 11:32:17 pm on April 20, 2004, the corresponding user information was as follows: user telephone number: 0731-4376362 located at the Contemporary Business News office in Hunan; address: 2F, Building 88, Jianxiang New Village, Kaifu District, Changsha.’ D

5. On 18 October 2005, YHHK issued a press release denying its involvement in the disclosure of the relevant user information. E

6. On 21 October 2005, the Privacy Commissioner for Personal Data (the Commissioner) raised preliminary enquiries with YHHK for the purpose of determining whether YHHK acted in violation of the Personal Data (Privacy) Ordinance (Cap 486) (the Ordinance). F

7. On 30 March 2006, the appellant, through his authorised representative, lodged a complaint with the Commissioner against YHHK alleging that YHHK had wrongfully disclosed his personal data to the PRC authorities. G

8. The Commissioner carried out an investigation pursuant to s 38(a) of the Ordinance. In a report published under s 48(2) of the Ordinance on 14 March 2007 (the Report), the Commissioner found that YHHK had not violated the provisions of the Ordinance. H

9. Dissatisfied with the Commissioner’s finding, on 24 April 2007 the appellant lodged the present appeal to this Board. H

10. Before we go into the parties’ contentions in more detail, we shall first set the relevant background by (1) looking at the corporate structure of YHHK, (2) highlighting the relevant provisions in the Ordinance and I

A (3) giving a brief summary of the findings in the Report.

B. CORPORATE STRUCTURE OF YHHK¹

B 11. YHHK is and was at all material times a Hong Kong company incorporated under the laws of Hong Kong and a wholly-owned subsidiary of Yahoo! Inc, a US company based in California.

12. YHHK confirmed that the information referred to in the Verdict was disclosed to the PRC State Security Bureau (SSB) on 22 April 2004. However, YHHK contended that it played no role in the incident.

C 13. The email account in question, huoyan_1989@yahoo.com.cn, was registered with the Yahoo! China website (yahoo.com.cn). At the material time, the Yahoo! China and Yahoo! Hong Kong (yahoo.com.hk) websites were both *owned* by YHHK. However, materials provided by YHHK indicated that these two websites were *managed and operated*
D independently of each other. A management team in Hong Kong ran the Yahoo! Hong Kong website, while a separate management team in Beijing was responsible for the Yahoo! China website.

E 14. For the purpose of having an Internet Contents Provider (ICP) licence for the operation of the Yahoo! website in the PRC, YHHK entered into an Operation Agreement with a PRC entity called Peking University Founder Group (PUFG) on 19 February 2003. On the same date, Beijing Yahoo! Consulting and Service Co Ltd (Beijing Yahoo!), a wholly owned PRC corporate entity of YHHK, entered into a Technical Services Agreement with PUFG, pursuant to which Beijing Yahoo! was to provide
F PUFG with technical services to facilitate the operation of the yahoo.com.cn website.

15. Hence, prior to 24 October 2005 the Yahoo! China website was wholly owned by YHHK but operated through PUFG and Beijing Yahoo!²

G 16. Moreover, YHHK explained that in relation to the disclosure of Yahoo! China's email user data to the SSB, it was handled by the legal teams of that website, reporting directly to Yahoo! Inc. In other words, YHHK's legal team was not involved in such disclosure at all.

H *C. THE RELEVANT PROVISIONS*

17. The relevant provisions of the Ordinance for the purpose of the present appeal are as follows.

I 1. YHHK attended the hearing as a person bound by the Commissioner's decision pursuant to s 11(1)(a) of the Administrative Appeals Board Ordinance (Cap 442).
2. Since 24 October 2005, Alibaba.com Corporation (Alibaba) became the owner and operator of the yahoo.com.cn website. YHHK and Yahoo! Inc are shareholders who together hold about 40% of the issued shares of Alibaba.

18. Section 2(1) of the Ordinance defines ‘personal data’ as any data: **A**
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- ‘(a) relating directly or indirectly to a living individual;
- (b) from which it is practicable for the identity of an individual to be directly or indirectly ascertained and **B**
- (c) in a form in which access to or processing of the data is practicable.’
19. ‘Practicable’ is further defined under the same section as ‘reasonably practicable’. **C**
20. ‘Data user’, in relation to personal data, is defined under s 2(1) of the Ordinance as ‘a person, who either alone or jointly in common with other persons, controls the collection, holding, processing or use of the data’.
21. ‘Control’ is not defined under the Ordinance, but ‘use’ is defined to include the disclosure or transfer of the data. **D**
22. Data Protection Principle 3 (DPP3) in Sch 1 to the Ordinance stipulates that:
- ‘Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than — **E**
- (a) the purpose for which the data were to be used at the time of the collection of the data; or **F**
- (b) a purpose directly related to the purpose referred to in paragraph (a).’
23. Under s 2(3) of the Ordinance, ‘prescribed consent’ means ‘express consent of the person given voluntarily which has not been withdrawn by notice in writing’. **G**
24. An exemption from DPP3 is provided for where the use of the data is for the purpose of prevention or detection of crime, and the data user has reasonable grounds to believe that failure to so use the data would be likely to prejudice the purpose. In so far as it is material, ss 58(1) and (2) of the Ordinance provide as follows: **H**
- ‘(1) Personal data held for the purposes of —
- (a) the prevention or detection of crime;
- (b) the apprehension, prosecution or detention of offenders ... are exempt from the provisions of data protection principle 6 ... **I**
- (2) Personal data are exempt from the provisions of data protection principle 3 in any case in which —

- A** (a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data are held for any of those purposes); and
- (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection, and in any proceedings against any person for a contravention of any of those provisions it shall be a defence to show that he had reasonable grounds for believing that failure to so use the data would have been likely to prejudice any of the matters.’
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25. Section 38 gives the Commissioner the power to carry out
- C** investigation into complaints:
- ‘Where the Commissioner —
- (a) receives a complaint; or
- D** (b) has reasonable grounds to believe that an act or practice —
- (i) has been done or engaged in, or is being done or engaged in, as the case may be, by a data user;
- E** (ii) relates to personal data; and
- (iii) may be a contravention of a requirement under this Ordinance,
- then —
- F** (i) where paragraph (a) is applicable, the Commissioner shall, subject to section 39, carry out an investigation in relation to the relevant data user to ascertain whether the act or practice specified in the complaint is a contravention of a requirement under this Ordinance;
- G** (ii) where paragraph (b) is applicable, the Commissioner may carry out an investigation in relation to the relevant data user to ascertain whether the act or practice referred to in that paragraph is a contravention of a requirement under this Ordinance.’
26. Section 39(1)(d) provides that the Commissioner *may* refuse to
- H** carry out or continue an investigation initiated by a complaint if *none* of the following conditions is fulfilled:
- ‘(i) either —
- I** (A) the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) was resident in Hong Kong; or
- (B) the relevant data user was able to control, in or from Hong Kong, the collection, holding, processing or use of the personal data concerned,

at any time the act or practice was done or engaged in, as the case may be; A

(ii) the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person) was in Hong Kong at any time the act or practice was done or engaged in, as the case may be; B

(iii) in the opinion of the Commissioner, the act or practice done or engaged in, as the case may be, may prejudice the enforcement of any right, or the exercise of any privilege, acquired or accrued in Hong Kong by the complainant (or, if the complainant is a relevant person, the individual in respect of whom the complainant is such a person)···.’ C

27. Sections 65(1) and (2) provide for the liability of employers and principals under the Ordinance as follows:

‘(1) 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. D

(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 this Ordinance as done or engaged in by that other person as well as by him.’ E

D. THE REPORT F

28. After a thorough investigation into the incident, the Commissioner came to 5 main conclusions in the Report.

D1. IP Address is not ‘Personal Data’ within the definition of the Ordinance G

29. First, the Commissioner found that the IP address of an internet account holder is not ‘personal data’ within the definition of the Ordinance. H

30. The Commissioner was of the view that an IP address is a specific machine address assigned by an internet service provider to the user’s computer. It is information about an inanimate computer, not an individual. Further, an IP address alone cannot reveal the exact location of the computer concerned or the identity of the computer user. Accordingly, an IP address *per se* is not ‘personal data’ under the Ordinance. I

31. The Commissioner went on to consider whether on the facts, the IP address combined with other information disclosed (as stated in the

A Verdict) constituted personal data.³ The Commissioner concluded that ‘*no safe conclusion can be drawn that the corresponding user information ex facie belong to a living individual as opposed to a corporate or unincorporated body or relates to a real as opposed to a fictitious individual*’.

B 32. Having reached such conclusion, strictly speaking it was not necessary for the Commissioner to take the matter any further. Nonetheless, the Commissioner went on to consider four other questions.

D2. *YHHK not a ‘Data User’*

C 33. The second conclusion which the Commissioner arrived at was that YHHK had no control over the disclosure of the data in question. Accordingly, it was not a ‘data user’ within the definition of the Ordinance.

D 34. Although what constitutes ‘control’ is not defined under the Ordinance, the Commissioner took the view that it can either mean the physical act of collecting, holding, processing or using the personal data or it can mean the ability of determining the purpose for which or the manner in which the data are to be collected, held, processed or used.

E 35. The Commissioner was of the view that YHHK did have control over the relevant information. This was because at the material time when such information was disclosed, YHHK (owned 100% of the shareholding of Beijing Yahoo! which operated the Yahoo! China website. The Commissioner considered that the division of labour within the Yahoo! group of companies was no more than internal and inter-companies management arrangement. Such arrangement did not affect the fact that YHHK remained a legal entity that should be held responsible for all acts carried out by YHHK itself or its agent in the PRC.

F 36. The Commissioner further reasoned that although strictly speaking, the actual physical act of collection and disclosure of the information in question might not be committed by YHHK but by Beijing Yahoo! in the PRC, it was an undisputed fact that the YHHK chop was appended onto the documents disclosing the information. Beijing Yahoo! was actually acting as an agent of YHHK. Hence, YHHK was accountable for the disclosure of such information under ss 65(1) and (2) of the Ordinance (whether because the act was done by the employees of YHHK or by Beijing Yahoo! as its agent).

G 37. Having formed such a view, the Commissioner then proceeded to say that the disclosure of the information in the circumstances of the case

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The Commissioner received advice from leading counsel who advised that ‘an IP address alone is not ‘personal data’ but that ‘personal data’ can include an IP address when combined with, for example, identifying particulars of an individual. Whether or not it is part of any personal data in a particular case depends on the facts of the case and the two limbs of the definition of ‘personal data’...’: Report para 8.12.

was not a voluntary act initiated by YHHK, for it was compelled to do so under PRC law, including art 45 of the PRC Criminal Procedure Law (art 45).⁴

38. Accordingly, the Commissioner concluded that the control which YHHK had over the relevant information was vitiated by the operation of PRC law. In this sense, YHHK had no control over the data disclosure, and YHHK was accordingly not a 'data user' as defined under s 2(1) of the Ordinance.

D3. The Ordinance had no extra-territorial application

39. Thirdly, the Commissioner was of the view that since the Ordinance did not contain provisions conferring extra-territorial application, applying the *territorial principle*, the Ordinance did not extend to any act committed by a foreign party on foreign soil (for this purpose, the PRC is considered a different jurisdiction from Hong Kong).

40. The Commissioner was further of the view that the territorial principle was illustrated by s 39(1)(d) of the Ordinance, mentioned above, which the Commissioner interpreted as providing a set of conditions to be fulfilled before he can exercise his powers of investigation.

41. The Commissioner found that none of the conditions contained in s 39(1)(d) was satisfied. There was no evidence to show that the appellant was a Hong Kong resident; or that he was in Hong Kong when the act was committed or had a right accrued in Hong Kong; nor was there evidence to show that his personal data was collected, held, processed or used in Hong Kong; or that the Disclosure Order was issued to YHHK in Hong Kong; or that the disclosure in question was made in Hong Kong.

42. Of particular relevance was the condition contained in s 39(1)(d)(i)(B), which provided that '*the relevant data user was able to control, in or from Hong Kong, the collection, holding, processing or use of the personal data concerned.*' The Commissioner was of the view that it sufficed to find jurisdiction if any part of the data cycle was at the relevant time controlled by a relevant data user '*in or from*' Hong Kong.

43. However, in line with his conclusion that YHHK had no control over the data disclosure, and that YHHK was not a 'data user' in the present context, the Commissioner concluded that condition 39(1)(d)(i)(B) had not been satisfied.

4. Article 45 provided as follows (unofficial translation): 'The People's Court, the People's Procuratorates and the public security organs shall have the authority to collect or obtain evidence from the units and individuals concerned. The units and individuals concerned shall provide truthful evidence.'

A 44. Accordingly, the Commissioner concluded that the matter complained of fell outside the jurisdiction of the Ordinance.

D4. No contravention of DPP3

B 45. Fourthly, even if the Ordinance applied to the disclosure complained of, the Commissioner concluded that there was no contravention of DPP3.

46. In this connection, the Commissioner took the view that it was ‘*beyond doubt*’ that no prescribed consent had been obtained from the appellant prior to the disclosure of the relevant information to the PRC authorities.

C 47. The Commissioner then turned to consider whether the disclosure fell within the original purpose of collection or its directly related purpose.

D 48. The Commissioner accepted as a matter of fact that users of Yahoo! China’s webmail service were required to accept the Terms of Service (TOS) and Privacy Policy Statement (PPS) prior to the use of their email accounts. The Commissioner found that the TOS and PPS expressly stated that YHHK⁵ might share information in response to subpoenas, court orders and legal process, and that Yahoo! China would act in accordance with local laws in retention and disclosure of information.

E 49. Thus the Commissioner concluded that compliance with statutory requirement on disclosure of personal data was regarded as ‘use’ for a purpose consistent with the purpose of collection, and was allowed under DPP3. As such, there was no contravention of DPP3.

D5. Exemption in s 58 of the Ordinance not applicable

F 50. Finally, the Commissioner proceeded to consider whether s 58 of the Ordinance could be invoked so as to exempt or justify the disclosure in question from DPP3 for ‘*the prevention or detection of crime*’ or ‘*the apprehension, prosecution or detention of offenders*’.

G 51. After seeking independent legal advice, the Commissioner concluded that the words ‘crime’ or ‘offenders’ under ss 58(1)(a) and (b) of the Ordinance only applied to crime or offences under the laws of Hong Kong. Since the crime committed by the appellant in the PRC did not amount to a crime under the laws of Hong Kong, the Commissioner concluded that ss 58(1)(a) and (b) could not be invoked in the
H circumstances of this case.

E. GROUNDS OF APPEAL

52. The appellant in his Amended Notice of Appeal put forward four grounds of appeal:

I (1) The Commissioner erred in law in finding that the IP address of the subject internet account holder, disclosed together with the user

5. The TOS actually stated ‘Yahoo’ or ‘Yahoo! China’ rather than YHHK.

registration information, IP log-in information and certain email contents, was not ‘personal data’ within the definition of the Ordinance;

- (2) The Commissioner erred in law and in fact in finding that YHHK was not a ‘data user’ and had no control over the data disclosure of the personal data in question,
- (3) The Commissioner erred in law and in fact in finding that the Ordinance had no extra-territorial application to and had no jurisdiction over the act of disclosure of the personal data under complaint;
- (4) The Commissioner erred in law and in fact in finding that the disclosure of the personal data in question did not contravene DPP3.

F. GROUND ONE: WHETHER IP ADDRESS TOGETHER WITH RELEVANT DATA DISCLOSED CONSTITUTE PERSONAL DATA

53. According to the Report, Yahoo! Inc confirmed that Beijing Yahoo! had provided to the SSB the following information (i) user registration information; (ii) IP log-in information; and (iii) certain email contents.

54. Mr Albert Ho Chun Yan, on behalf of the appellant, submitted that the question for determination by the Commissioner was not whether an IP address *per se* constituted personal data. Rather, the question should be whether the IP address, *together with the other relevant data disclosed in this case*, constituted personal data. He forcefully argued that such information taken together served as a key to further investigation by the PRC authorities, leading to the appellant’s arrest and conviction.

55. Mr Ho submitted that according to the Verdict, the information provided by Beijing Yahoo! disclosed the telephone number and business address of the newspaper that the appellant worked for. The transaction time and date were also provided. The computer that was used to send out the relevant email was traced via the IP address provided. Mr Ho argued that it would not be difficult for one to ascertain the identity of the user of that particular computer in the office, at or during that particular period of time.

56. Mr Ho relied on *Cinopoly Records Co Ltd & Ors v Hong Kong Broadband Network Ltd & Ors* [2006] 1 HKC 433, [2006] 1 HKLRD 255 as an illustration of how an IP address might be used to track down the identity of a certain data subject.

57. In the *Cinopoly* case, the plaintiffs were music companies. They sought *Norwich Pharmacal* relief (ie, disclosure of information in the possession of the defendant relating to alleged civil wrongs committed against the plaintiff) against the defendant internet service provider, seeking the names, Hong Kong identity card numbers and addresses of 22 defendant subscribers. These subscribers were allegedly in breach of the

A plaintiffs' copyright in music works in unauthorised uploading of the same onto the Internet using 'P2P' file sharing programmes.

58. It was explained at paras 12 to 14 of the judgment that the IP address can be utilised in the following manner:

B '12. But if need be, the infringer can still be tracked down. The clue is the Internet Protocol Address (IP Address), which is a unique number to enable the subscriber's computer to communicate with other computers on the Internet. An ISP assigns to its subscriber an IP Address. Whenever a computer is connected to the Internet the ISP concerned will assign to it an IP Address. Depending on
C the ISP's practice it is possible that a different IP Address is assigned every time when the same computer is being connected to the Internet. An IP Address itself does not directly reveal the identity of the subscriber. But the ISP can track the IP Address at a specific time or period to the records of their subscribers, which include names, Hong Kong ID card numbers and addresses.

D 13. In short, by cross checking the IP Address marked at a specific time or period with the ISP's records, the identity and address of the subscriber, whose computer has been used to upload the music files on the Internet by P2P program, including the WinMX software can be revealed.

E 14. Accordingly, with the assistance of the ISPs, the cloak of anonymity can be pierced and the true identity of the infringers may be revealed.'

59. As stated above, the Commissioner accepted that an IP address, *together with other data*, could in certain circumstances constitute 'personal data'.

F 60. Mr Denis Chang SC, appearing on behalf of the Commissioner contended that the question in this appeal was not whether any personal data had been disclosed, but whether personal data *of the appellant* had been disclosed by YHHK. Mr Chang argued that in the circumstances of the present case, there was insufficient evidence to support that the two
G limbs of the definition of 'personal data' (ie data (1) relating directly or indirectly to a living individual; and (2) from which it is practicable for the identity of the individual to be directly or indirectly ascertained) had been met.

H 61. Mr Chang relied on an English Court of Appeal case, *Durant v Financial Services Authority* [2003] EWCA Civ 1746, in which there were dicta to the effect that in order for the data to relate to an individual, it should have biological significance in relation to that individual, and should also have him as the focus.

I 62. We agree with Mr Chang that on the facts of the present case, the IP log-in information provided by Beijing Yahoo!, even when coupled with other information disclosed, did not constitute 'personal data' as defined under the Ordinance.

63. The only piece of evidence which the appellant has adduced in support of his complaint against YHHK is the Verdict, However, the

Verdict does not indicate that the corresponding user information of the IP address belonged to the appellant or revealed the appellant's identity. A

64. First, as is evident from the Verdict, the information provided to the SSB only revealed that the address of the account holder was the address of a business, rather than an individual's address.

65. Further, according to the sworn testimony of Mr Michael Callahan, Senior Vice President and General Counsel of Yahoo! Inc, upon registration, users of email services provided by the Yahoo! websites would be asked to provide information such as name, gender birthday etc, but there was no guarantee that the information so provided was genuine as many users did not register with real information. B C

66. Thirdly, the user name of the Email Account registered with yahoo.com.cn was not the name of the appellant.

67. It is therefore the case that the Email Address, or the IP address, did not *ex facie* reveal the *identity* of the appellant. The information provided by Beijing Yahoo! only disclosed that the email was sent from a computer located at the address of a business entity, and the date and time of the transaction. Short of CCTV evidence, it would not be reasonably practicable from such information to ascertain that it was actually the appellant who used the computer identified by the IP address to send out the relevant email at the material time. It could have been anyone, as long as he had access to that computer (or had the necessary password if one was required at all). D E

68. According to the Verdict, the relevant email was sent under the alias of '198964'. Hence, the true identity of the appellant would not have been revealed in the contents of the email, either. F

69. As mentioned above, there is no certainty that the registration information provided by an email user to the Yahoo! China website is authentic or reliable. The burden of proof rests with the appellant, as the complainant, to put forward credible evidence that such registration information held in the hands of the SSBV disclose his personal data. In the absence of such evidence, one cannot conclude that the registration information in relation to the Email Account necessarily contains personal data of the appellant. G

70. In the light of the foregoing, we are of the view that although the information provided to the PRC authorities related indirectly to an individual, it was not such as would enable the identity of the appellant to be ascertained directly or indirectly with reasonable practicability. H

71. *Cinepoly* involves a different factual matrix. In that case, the relevant personal information of the defendant subscribers was sought from internet service providers. Such internet service providers would be in possession of verified and hence more reliable personal information (for example, names, identity card numbers and addresses) of their subscribers. Accordingly, *in the context of that case*, the relevant IP addresses when I

A coupled with the relevant personal information would, indeed, constitute ‘personal data’. From such information, the identity of an individual could be ascertained.

72. Accordingly, the first ground of appeal must fail.

B 73. It is strictly speaking unnecessary to consider the other grounds of appeal. Nevertheless, for completeness, we shall consider those other grounds.

G. GROUND TWO: WHETHER YHHK WAS DATA USER

C 74. This ground hinges on whether YHHK exercised control over the disclosure of the relevant data.

75. As already stated, a ‘data user’ is defined under the Ordinance to mean one who ‘either alone or jointly in common with other persons, controls the collection, holding, processing or use of the data’.

D 76. In the present appeal, the Commissioner maintained his stance that although YHHK *did* have control over the relevant information, such control was ‘*vitiating*’ when it was compelled by the operation of PRC law to disclose the information.

E 77. Mr Ho submits that the Commissioner’s conclusion was erroneous for two main reasons.

F 78. First, the relevant disclosure order from the SSB (the Disclosure Order) was served on Beijing Yahoo! as the agent of YHHK, precisely because YHHK was in control of the relevant personal data in question. YHHK accepted that the YHHK chop was appended onto the documents disclosing the relevant information to the SSB. Mr Ho argued that at no point was such control over the relevant document ever ‘lost’.

G 79. Secondly, Mr Ho pointed out that it transpired from the Report that there were different views from PRC lawyers as to whether refusal to provide the information to the SSB pursuant to the Disclosure Order amounted to ‘obstruction’ under art 277 of the PRC Criminal Law.⁶

H 80. Mr Ho submitted that there were various options open to the management of YHHK instead of immediate compliance with the Disclosure Order, including, amongst others, instructing lawyers to seek direction from the PRC court as to whether the material provided by SSB in support of the Disclosure Order was sufficient to show that there was a breach of state secrecy law, and engaging PRC lawyers to challenge the legality of the Disclosure Order.

I ⁶. ‘Article 277 provides that ‘... whoever intentionally obstructs officers of a State security organ or a public security organ from maintaining State security in accordance with law and causes serious consequences, though without resort to violence or threat, shall be punished...’ and will be ‘...sentenced to fixed-term imprisonment of not more than three years, criminal detention, or public surveillance and be fined.’ It is not disputed that violation of Article 277 would attract penal sanction.

81. Our view on this issue can be shortly stated. Mr Tim Mak, on behalf of YHHK and Mr Chang on behalf of the Commissioner both accepted that Beijing Yahoo! was the agent of YHHK. Mr Mak, on behalf of YHHK, also confirmed that the Disclosure Order was issued to the business address of 'Yahoo! HK Holdings Ltd Beijing Representative Office'. In the light of the corporate structure of the Yahoo! group of companies, the Commissioner's view that YHHK had control over the relevant information (despite the separate management and operations of the Yahoo! China website) must be correct.

82. We also accept Mr Ho's submission that even if Beijing Yahoo! disclosed the relevant information to the SSB under the compulsion of law, Beijing Yahoo! (and hence YHHK) still retained control over such information, whether before or after the relevant disclosure. The fact that Beijing Yahoo!/ YHHK was acting under compulsion of law did not and could not 'vitiolate' their control. Clearly Beijing Yahoo! *chose* to disclose the information. The fact that it was done in order to comply with local laws does not affect whether it was in control of the information or its disclosure.

83. Because YHHK had control over the information disclosed to the SSB, and assuming that the relevant information constituted 'personal data', we are of the view that YHHK was a 'data user' as defined under the Ordinance.

H. GROUND THREE: WHETHER THE ORDINANCE HAS EXTRA-TERRITORIAL APPLICATION

84. Mr Ho, on behalf of the appellant, accepted the Commissioner's view that '*it suffices to find jurisdiction if any part of the data cycle was at the relevant time controlled by a relevant data user 'in or from' Hong Kong*': s 39(1)(d)(i)(B) of the Ordinance. However, he argued that the Commissioner had erred in finding that this condition had not been satisfied.

85. For substantially the same reasons advanced in relation to the 2nd ground of appeal, Mr Ho submitted that the Commissioner erred with regard to the meaning of 'control'. He therefore contended that since YHHK did have 'control' over the relevant information, the condition in s 39(1)(d)(i)(B) was satisfied. Accordingly, the present incident did fall within the jurisdiction of the Ordinance.

86. We are unable to agree with Mr Ho's submissions. Section 39(1)(d) is *not* a provision dealing with extra-territorial application of the

A Ordinance.⁷ That section empowers the Commissioner to *refuse* to carry out or continue an investigation when the case has no connection with Hong Kong. It does not provide the answer as to whether the Ordinance may have extra- territorial application.

B 87. Mr Chang on behalf of the Commissioner argued that the Ordinance had no extra-territorial application. He relied on the decision of the Privy Council in *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670 to contend that in the absence of provisions in the Ordinance governing extra-territorial application, the general principle of territoriality applied. Accordingly, the Commissioner simply did not have jurisdiction over the appellant's complaint.

C 88. In support of his submission, Mr Chang highlighted the following factual findings (amongst others) by the Commissioner:

- D (1) The Email Account was subscribed by a PRC user, not a Hong Kong resident;
- E (2) The Disclosure Order was issued to the business address of Yahoo! HK Holdings Ltd Beijing Representative Office in the PRC;
- (3) The Email Account information was collected by the yahoo.com.cn website in the PRC and disclosed to the SSB in the PRC, not in Hong Kong; and
- (4) The Yahoo! Hong Kong team has no access to the user database of Yahoo! China.

F 89. We have earlier explained why we consider that YHHK did have 'control' over the relevant information at the material time, and why YHHK was a 'data user' exercising control over the information 'in or from Hong Kong'. In view of our conclusions on those issues, the Ordinance clearly applied to the instant case. It is therefore not necessary to come to any views on this interesting, but academic (for the purpose of this appeal) question.

G *I. GROUND FOUR: WHETHER DPP3 WAS CONTRAVENED*

H 90. DPP3 provides that unless with the '*prescribed consent*' of the data subject, personal data shall only be used for a purpose consistent with the original purpose of collection.

I 91. In the Report, the Commissioner came to the view that no prescribed consent had been obtained from the appellant prior to the disclosure of the information to the SSB. YHHK and Yahoo! Inc, however, contended that prescribed consent had been given by the appellant when he subscribed to the yahoo.com.cn mail service, thereby accepting the TOS and PPS in respect of that website.

7.

The relevant provision in the Ordinance dealing with extra-territoriality appears to be s 33, which is not yet in operation.

92. YHHK submitted that pursuant to the TOS, Yahoo! China might preserve and disclose a user's account information and content if required to do so by local law. The PPS further provided that personal information might be provided to a third party pursuant to a court subpoena, law, regulation, or legal procedure. A

93. There is some dispute between the parties as to whether the 2000 version or the 2007 version of the TOS applied, because the terms of the two versions were phrased somewhat differently, with the 2007 being more detailed. The appellant argued that as the appellant was a user of yahoo.com.cn service in 2004, the 2000 version should be applicable. B

94. We are of the view that the effect of the relevant clauses in the two versions is largely the same. Both versions contain a provision that Yahoo! or Yahoo! China was authorised to make disclosure '*in accordance with legal procedure*'.⁸ C

95. On the basis of the materials before us, we agree with YHHK that the appellant had given his prescribed consent when he accepted the TOS and PPS of Yahoo! China. D

96. We are unable to agree with the Commissioner's view as expressed in the Report that compliance with statutory requirement on disclosure of personal data should be regarded as a use for a purpose consistent with the purpose of collection under DPP3. It seems to us that disclosure of personal information to public prosecution authorities could not be considered to be a 'use' of the information intended by the parties when the information was collected. E

97. If there had been a contravention of DPP3, it is common ground between the Commissioner and the appellant that the exemption in s 58 of the Ordinance cannot be invoked in the present case. We accept that the crime committed by the appellant in the PRC did not amount to a crime under the laws of Hong Kong. Accordingly, it is not necessary to dwell upon the applicability of s 58 in the instant case. F

J. RESULT

98. The information disclosed by Beijing Yahoo! on behalf of YHHK to the SSB cannot be regarded as 'personal data' under the definition of the Ordinance. The Commissioner was therefore right to conclude that there had not been any breach of the Ordinance on the part of YHHK. H

99. Even if the relevant information were regarded as 'personal data', and even if YHHK were to be considered a 'data user', there has been no breach of DPP3 because the appellant had given prescribed consent for such disclosure. I

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Clause 7 of the 2000 TOS and cl 8 of the 2007 TOS.

A 100. Accordingly, this appeal must be dismissed. It only leaves us to thank the legal representatives of the parties for their most helpful assistance.

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