THE GOVERNMENT MINUTE

IN RESPONSE TO

THE 25th ANNUAL REPORT OF
THE OMBUDSMAN 2013

Government Secretariat
11 December 2013

Table of Content

Part III
– Responses to recommendations in direct investigation cases

Annex

THE GOVERNMENT MINUTE IN RESPONSE TO THE 25th ANNUAL REPORT OF THE OMBUDSMAN 2013

Introduction

The Chief Secretary for Administration presented the 25th Annual Report of The Ombudsman (the Annual Report) to the Legislative Council at its sitting on 10 July 2013. This Government Minute sets out the Administration's response to the Annual Report.

ii. While The Ombudsman's Annual Report reveals that there is room for the Administration to improve in certain areas, our comprehensive responses in this Minute demonstrate our commitment to be an open and efficient government. We will continue our endeavour in this respect.

iii. This Minute comprises three parts – Part I responds generally to issues presented in the section *The Ombudsman's Review* of the Annual Report; Parts II and III respond specifically to those cases with recommendations made through The Ombudsman's full investigation, direct investigation, and reviews concluded by full investigation respectively.

Part I
– Responses to Issues presented in the section *The Ombudsman's Review* of the Annual Report

The Government has taken note of The Ombudsman's remarks and appreciates The Ombudsman's continuous efforts in raising the quality of service and standard of governance in the public sector. We welcome the recommendations and improvement measures suggested by The Ombudsman for raising the efficiency and quality of Government services. For the 217 recommendations made by The Ombudsman, save for a few exceptions, Government departments and relevant public bodies have accepted all recommendations from The Ombudsman and has taken or is taking various measures to put in place these recommendations. The Government will continue to strive for quality public services in a positive, professional and proactive manner.

2. We understand that with social and technological advancement, there is rising expectation on the quality of public services. The Government will closely monitor new trends, endeavour to assess new public demands, and remind departments to proactively handle challenges in a flexible manner. The Government also understands The Ombudsman's concern over inter-departmental co-ordination. In this regard, we shall continue to foster effective collaboration among departments through, inter alia, the lining up of inter-departmental meetings and the establishment of inter-departmental groups and offices, with a view to developing a more joined-up government for the provision of quality and efficient services to the public.

3. For cases specifically mentioned in The Ombudsman's Review, we shall set forth our responses in the corresponding parts of this Government Minute.

Part II
– Responses to recommendations in full investigation cases

Agriculture, Fisheries and Conservation Department, Transport Department and Highways Department

Case No. 2011/3426, 2012/0123B (Agriculture, Fisheries and Conservation Department and Transport Department) – Failing to implement properly the restriction on vehicular entry into a road within a country park on general holidays

Case No. 2012/0123A (Highways Department) – Failing to handle properly the installation of crash gates at the entrance of a road within a country park

Background

4. The complainant noted that traffic signs were placed at the entrance of a road within a country park (the Road), prohibiting vehicles from entering on general holidays (general holiday restriction). However, on one Sunday, he saw several vehicles (including a Government vehicle) using the road, but Agriculture, Fisheries and Conservation Department (AFCD) staff turned a blind eye to them and did not take enforcement actions.

5. The complainant alleged that there was neither a crash gate nor a watchman at the entrance of the Road to prevent vehicles from entering on general holidays.

6. Country park management, road traffic management and installation of crash gates at the entrance of the Road are the responsibilities of AFCD, Transport Department (TD) and Highways Department (HyD) respectively. This complaint, therefore, involved the three Government departments.

The Ombudsman's observations

Allegation of Failure to Implement Properly the General Holiday Restriction

7. The complainant claimed that he saw several vehicles entering the Road on a general holiday. TD confirmed that only one Government vehicle held a permit. This showed that the road signs alone could not ensure effective implementation of the general holiday restriction. Actually, the departments concerned had already decided in 2003 that crash gates were needed. However, there had been obvious inadequacies in the implementation of the arrangement.

8. As there was no independent evidence, the Office of The Ombudsman could not determine whether AFCD staff had, as alleged, turned a blind eye to offenders. In any case, AFCD has a statutory duty to manage and protect country parks, and hence a responsibility to stop any irregularities within those parks.

Allegation of Failure to Install Crash Gates at the Entrance of the Road

9. According to an agreement among the departments concerned, after the installation of the crash gates in August 2005, AFCD staff should be responsible for putting the gates into operation before and after a general holiday. Nevertheless, AFCD cited various reasons and stopped performing this duty. It also failed to devise other feasible measures to prevent violation of the general holiday restriction before relocation of the gates. This reflected its negative attitude and inflexibility in handling the problem and amounted to dereliction of duty. Besides, AFCD kept silent when TD consulted it regarding the design of the gates in 2004, only to point out the problem and ask for rectification after they had been installed. This was clearly a waste of time and resources.

10. When TD learned of AFCD's intention to stop putting up the crash gates, it should have discussed the matter with AFCD and devised a relocation works schedule. TD should also have considered taking interim measures to implement effectively the general holiday restriction.

11. TD indicated that there were divergent views among its engineers on relocation of the gates between 2006 and 2010. Nevertheless, it provided no information showing that there had been internal discussions about the issue. Such discussions were in fact

unnecessary as TD had already sought the opinions of other departments concerned in July 2006 regarding relocation of the gates.

12. The Office of The Ombudsman considered TD to have failed to provide a reasonable explanation for its failure to follow up promptly the relocation works between 2006 and 2010. Actually, without setting up a bring-up system for monitoring of non-urgent projects such as relocation of gates, these non-urgent projects could easily be neglected. In addition, the contractor's application for approval in December 2010 regarding the Temporary Traffic Arrangements was delayed for about a year because of a dispatch error on the part of TD. The Office of The Ombudsman found such delay unacceptable.

13. As for HyD's follow-up on the contractor's work, the Department only acted on TD's request and proceeded with the relocation works according to its proposal. The Office of The Ombudsman found no impropriety on the part of HyD concerning the installation and relocation of the gates.

14. The Office of The Ombudsman also found no documentary records on the jurisdiction and division of work among the departments regarding the management responsibility of the Road. Both AFCD and TD shifted the responsibility to each other. The Office of The Ombudsman considered that as AFCD staff members were responsible for putting the gates into operation and would conduct regular patrols in the country park, it should be easier for them to spot any problems and respond promptly. Therefore, it would be more appropriate for AFCD to be the coordinating department.

15. AFCD stopped taking up the responsibility of putting the crash gates into operation soon after their installation. It also failed to take any feasible measures to prevent violation of the general holiday restriction and was trying to stay away from the problem. TD also did not follow up the problem properly such that the crash gates were rendered useless. Meanwhile, the proposed relocation works were delayed because of a dispatch error. The Ombudsman considered the complaint against AFCD and TD substantiated.

16. There was no impropriety on the part of HyD regarding the installation and relocation of the crash gates. The Ombudsman considered the complaint against HyD unsubstantiated.

17. The Ombudsman made a number of recommendations to AFCD and TD. They included –

(a) AFCD to take the lead in holding discussions with other departments concerned (such as TD and HyD) to clarify the division of work among them regarding the traffic management responsibility of the Road and set up an incidents report mechanism. Any of their decisions made should be clearly recorded and properly filed;

(b) TD to devise a bring-up system for monitoring all types of works requiring follow-up action; and

(c) TD to review its internal dispatch and file records mechanism to avoid errors and omissions.

Administration's response

18. After HyD completed the relocation of the crash gates on the Road at the end of March 2012, AFCD has been operating the gates on general holidays since 1 April 2012. So far, no major operational difficulty has been encountered.

19. AFCD and TD have discussed with concerned departments the division of work regarding the traffic management responsibility of the Road and the decisions have been recorded in form of confirmed meeting minutes. In essence, the division of work is summarised as follows –

(a) AFCD would be responsible for operating the crash gates at the entrance of the Road on general holidays;

(b) HyD would repair and maintain the crash gates at the request of AFCD;

(c) Upon receipt of referral from AFCD, the Hong Kong Police Force would be responsible for law enforcement against drivers violating the traffic restriction; and

(d) TD and AFCD would work together to deal with complaints about the crash gates.

20. In addition, an incidents report mechanism involving a contact list of representatives of relevant departments has been established to facilitate the handling of enquiries, complaints and other matters related to the operation of the crash gates.

21. In response to The Ombudsman's recommendations, TD has reviewed the current bring-up system, internal dispatch and file records mechanism within the department.

22. Notwithstanding that the review has revealed that the current bring-up system, internal dispatch and file records mechanisms in TD are operating well, following The Ombudsman's recommendations, TD has issued instructions, in the form of Departmental Circular and Internal Guidelines, to colleagues of relevant divisions to remind them of the internal dispatch and filing systems, and to remind them that they should make use of the bring-up system to avoid omissions of required follow-up actions. The instructions will be circulated regularly.

23. Furthermore, in order to enhance monitoring of the works orders issued to HyD, TD will, at TD's regular works review meetings with HyD, review the progress of all works items, instead of merely reviewing the progress of major works items in the past.

Buildings Department

Case No. 2011/2080 – Failing to take enforcement action against unauthorised building works

Background

24. On 21 and 27 June 2012, the complainant complained to the Office of The Ombudsman against the Buildings Department (BD). Allegedly, BD had failed to take enforcement action against a certain temporary building, which is an unauthorised building works item.

The Ombudsman's observations

25. It could be seen that BD's lack of enforcement action against the temporary building was in line with its then enforcement policy, which, to the knowledge of the Office of The Ombudsman, had been made after wide public consultation and had the endorsement of the Legislative Council.

26. Accordingly, The Ombudsman considered that there was no maladministration on the part of BD and that this complaint was unsubstantiated.

27. The Ombudsman was pleased to note that BD would act on this case in accordance with its revised enforcement policy.

28. Although the Office of The Ombudsman considered the complaint unsubstantiated, it found that ideally, the Existing Buildings Division of BD should have conducted an inspection of the temporary building in question when it took over the case from the New Buildings Division of BD, in order to ascertain for itself the condition of the temporary building. The Office of The Ombudsman, therefore, suggested BD to consider revising its procedures such that a site inspection would be carried out when an intra-departmental referral had been received.

Administration's response

29. BD accepted The Ombudsman's recommendation and has completed the amendment of the relevant instruction in the Existing Buildings Division Manual to deal with the referral of temporary buildings without valid temporary building permit and/or temporary occupation permit from the New Buildings Division for follow-up actions.

Buildings Department

Case No. 2012/2847 – (1) Failing to answer the complainant's enquiries; (2) Unreasonably rejecting the complainant's application to join the Reporting Scheme for Unauthorised Building Works in New Territories Exempted Houses; (3) Posting a Removal Order in a plain envelope; (4) Selective enforcement against UBW; and (5) Improperly passing the complainant's information to a consulting company

Background

30. Between August and October 2012, the complainant complained to the Office of The Ombudsman against the Buildings Department (BD).

31. The complainant was the owner of a roof of a village house. In June 2011, BD issued a statutory removal order (the Order) requiring the complainant to remove unauthorised building works (UBWs) erected on roof of the village house. As the Order was not complied with, the owner was prosecuted, convicted and fined by the Court in late March 2012.

32. Subsequently, the complainant noted that the Order was delivered by registered mail but the complainant had not seen the Order. Staff of the complainant phoned BD and made enquiry on the case. However, the replies of BD's staff were "not sure" and "did not know".

33. In addition, staff of the complainant applied for participation in the Reporting Scheme for UBWs in New Territories Exempted House (NTEH) (the Reporting Scheme) on 16 July 2012 with a view to deferring removal of the UBWs but was refused by BD on the ground that a removal order had been issued against the UBWs.

34. The complainant had the following allegations against BD –

(a) As staff of BD knew nothing about the enquired matters, the complainant could not verify whether the Order was delivered to the owner in a proper manner; and

(b) it was unreasonable for BD to refuse the complainant to join the Reporting Scheme.

35. On 24 August 2012, The Ombudsman commenced preliminary investigation. BD replied the complainant and The Ombudsman in writing on 25 September 2012. On 4 October 2012, the complainant further made the following allegations –

(c) As the Order was sent by the consultant appointed by BD (the Consultant) under registered mail and the envelope did not bear BD's logo, the complainant thought the mail was not important and hence had overlooked the Order;

(d) it was unfair that BD only served removal orders against those UBWs reported by the public; and

(e) BD passed the information of the complainant to the Consultant without notifying the complainant.

The Ombudsman's observations

Allegation (a)

36. According to BD's records, BD had endeavoured to address the enquiries raised by the staff of the complainant on 25 and 30 July 2012 during their telephone conversation. It was also reasonable and fair for BD to contact the Consultant to understand the situation before giving more details to the complainant about their case. In view of this, The Ombudsman considered Allegation (a) unsubstantiated.

Allegation (b)

37. BD refused the complainant for joining the Reporting Scheme as the UBWs concerned was not eligible for joining the Reporting Scheme. BD had acted in accordance with its policy, therefore there was no maladministration. In view of this, The Ombudsman considered Allegation (b) unsubstantiated.

Allegation (c)

38. The explanation of BD as to why the envelope did not contain BD's logo was generally acceptable by the Office of The Ombudsman.

The complainant could not excuse itself for no knowledge of the Order as the Order was served by more than one means in accordance with the statutory requirement. In view of this, The Ombudsman considered Allegation (c) unsubstantiated.

Allegation (d)

39. BD had made clarification on its enforcement policy. The Ombudsman considered Allegation (d) unsubstantiated.

Allegation (e)

40. As the complainant's information (its address) was information available to the general public, it was not required for BD to notify the complainant before BD asking the Consultant to send out the Order to the complainant. The Ombudsman considered Allegation (e) unsubstantiated.

41. Overall speaking, the complaint was unsubstantiated.

42. As regards Allegation (c), the Order issued by BD was indeed a very important legal document requiring the addressee to comply with before a specified period of time. The Ombudsman therefore recommended that BD should require the Consultant to state on the envelope of the mail containing important document(s) from BD so that the addressees would be aware of the importance of prompt opening and reading the mail.

Administration's response

43. BD accepted The Ombudsman's recommendation and replied in writing to The Ombudsman on 17 April 2013 that relevant clauses had been included in the new consultant contract, requiring the consultants to provide suitable wording in the envelope to indicate that the mail contains important document(s) from BD, such as "please find enclosed the important document(s) from the Buildings Department of the Government of the Hong Kong Special Administrative Region for your immediate attention". The consultants of the existing contract have also been advised of the above requirements for mails with removal orders or other BD's documents and stamps bearing the above statement have been procured and delivered to them for use.

Buildings Department

Case No. 2012/3780 – (1) Unreasonably refusing to conduct further tests at the premises above the complainant's in a water seepage complaint; (2) Biased and inaccurate investigation report; (3) Improperly informing the owner of the premises above the complainant's that he was not liable for any compensation; and (4) Failing to use any instruments to conduct investigation

Background

44. On 25 September 2012, the complainant complained to the Office of The Ombudsman against the Joint Office (JO) of the Food and Environmental Hygiene Department and the Buildings Department.

45. The complainant lodged a complaint of water seepage with JO via the management office of the building in 2010. He alleged that JO mishandled his complaint, which resulted in the recurrence of water seepage problem in mid-2012. The complainant made the following allegations against JO –

(a) After noting that the owner of the flat on the upper floor had repaired the bathroom water pipes and water seepage in the complainant's flat had ceased in August 2010, staff of a consultancy appointed by JO merely collected some plaster samples from the ceiling of the complainant's flat for laboratory testing and refused to conduct further investigation at the flat above;

(b) the contents of the investigation report were biased and inaccurate. The report made the conclusion "the source of water seepage could not be identified" solely on the basis that the collected ceiling plaster samples did not contain any colour dye used in the colour water test, which was indicated in the testing performed by the Government Laboratory. The investigation report did not mention about the fact that the consultancy's staff had instructed the owner of the flat on the upper floor to repair the water pipe in the bathroom;

(c) while the water seepage problem in the complainant's flat had not yet been solved, JO informed the owner of the flat above that the investigation failed to identify the source of water seepage and therefore, the owner of the flat above should not be liable for any compensation to the complainant; and

(d) the reliability of the consultancy's investigation was in doubt. The consultancy's staff only conducted visual inspection without using any instruments.

The Ombudsman's observations

Allegation (a)

46. Having reviewed the relevant records, the Office of The Ombudsman was of the view that –

(a) before 14 August 2010, the consultancy had conducted the following tests –

(i) Ponding test with colour dye to the floor slab of kitchen, bathroom and shower tray at bathroom;

(ii) spray test with colour dye to the enclosing walls of shower tray at bathroom;

(iii) reversible pressure test to the fresh water supply pipes; and

(iv) reversible pressure test to the flush water supply pipes.

(b) the moisture content measured by the consultancy's staff in the complainant's flat on 14 August ranged between 65% and 74%.

47. Given that the consultancy had conducted various feasible non-destructive tests in accordance with the established procedures and there was no substantial change in the condition of the water seepage areas on that day, it was indeed not necessary for the consultancy's staff to conduct further investigation at the flat on the upper floor.

48. In view of the above, The Ombudsman considered Allegation (a) unsubstantiated.

Allegation (b)

49. Having reviewed the relevant records and the layout plans of the building concerned, the Office of The Ombudsman accepted JO's explanation for not extending the scope of investigation.

50. JO also clarified that the consultancy's staff had not instructed the owner of the flat on the upper floor to repair his bathroom water pipes. Since the consultancy's investigation did not prove that the water seepage stemmed from the water pipes in the flat on the upper floor, the Office of The Ombudsman agreed that the consultancy's staff would not have instructed the owner of the flat on the upper floor to carry out repair works on no ground. The Ombudsman, therefore, considered Allegation (b) unsubstantiated.

Allegation (c)

51. In making this allegation, the complainant only relied on the remarks made by the owner of the flat on the upper floor, which could not be accepted as fact. The Ombudsman was unable to ascertain the complainant's allegation in the absence of corroborative evidence. Therefore, The Ombudsman could not draw any conclusion on Allegation (c).

Allegation (d)

52. Having reviewed the photos taken by the consultancy's staff on 6 July, and 4 and 14 August 2010, the Office of The Ombudsman accepted that the consultant's staff did use moisture meter to measure the moisture content at the ceiling of the complainant's bathroom. The readings taken on 14 August were consistent with the information provided by JO. However, the Office of The Ombudsman noted that the readings of moisture content at a particular water seepage area as shown in the photos taken on 6 July and 4 August were 93.5% and 94.0% respectively instead of 97.4%. It revealed that although the consultancy's staff had used moisture meter to measure moisture content of the water seepage areas, the readings were not accurately indicated in the investigation report.

53. The Office of The Ombudsman considered that though JO's explanation for having the same moisture content readings had its grounds; it was not always true as seen from this case. Although it was not absolutely impossible for moisture content readings taken in

different areas and on different dates of investigation to be the same, such situation was abnormal. JO should have verified the accuracy of the data cautiously, e.g. JO should have requested the consultant to provide photos as proof. There was inadequacy on the part of JO for failing to do so in this case.

54. In view of the above analysis, The Ombudsman considered Allegation (d) substantiated other than alleged.

55. Overall speaking, the complaint against JO was substantiated other than alleged.

56. The Ombudsman urged JO to –

(a) require its consulting firms to submit photos in relation to key tests/investigations (including measurement of moisture content at seepage areas) to prove that their staff has actually conducted such tests/investigations and to justify the results of the test/investigation; and

(b) discreetly verify the contents of investigation reports submitted by its consultancies upon receipt. Should there be any doubt, JO should follow up with the consultancies promptly and consider carrying out the test/investigation again as appropriate.

Administration's response

57. JO accepted The Ombudsman's recommendations. Considering that consultancies have their own professionals to supervise and certify the investigation work as well as to provide professional judgement; and the water seepage tests/investigations involve multiple test locations and measurements, JO would request its consultancies to provide photos showing the measurement of key and representative moisture content readings. JO would also request professionals in the consultancy to enhance the supervision and verification of investigation report. Moreover, JO's staff would discreetly verify the contents of the investigation report submitted by the consultancies. Should there be any doubt, JO would follow up with the consultancies promptly and consider conducting site inspection as appropriate to confirm the content of the report.

Buildings Department and Fire Services Department

Case No. 2012/2234A (Buildings Department) – Failing to follow up a complaint against unauthorised building works

Case No. 2012/2234B (Fire Services Department) – Failing to ensure compliance with the fire safety regulations applied to a building

Background

58. On 4 October 2012, the complainant complained to the Office of The Ombudsman against the Fire Services Department (FSD) and the Buildings Department (BD).

.

59. The complainant was the owner of a domestic unit of Building A. From complaints it received back in 2003, BD had been aware of the obstruction of means of escape by the unauthorised building works (UBW) on the rooftop of the adjoining Building B. However, no improvement had been made so far. As the rooftop of Building A is connected with that of Building B, the complainant lodged complaints to FSD and BD in June and July 2012 respectively.

60. On 29 June 2012, FSD informed the complainant that no enforcement action against the subject UBW would be taken by them under their prevailing practice, but it had referred the case to BD. However, BD had not made any reply to the complainant.

61. The complainant alleged that –

(a) FSD did not ensure the fire safety of Building A, hence had failed its duties; and

(b) BD had failed to follow up his complaint seriously.

The Ombudsman's observations

Allegation (a)

62. The subject UBW should indeed be followed up by BD. FSD had handled the complaint properly according to the established division

of work and no maladministration was involved. As such, The Ombudsman considered Allegation (a) unsubstantiated.

Allegation (b)

63. The Ombudsman considered that BD had taken practical action to follow up the complaint. However, BD had allowed the problem to drag on for years despite FSD's repeated referrals of the subject UBWs since 2004. In particular, BD did not take any action against the subject UBWs from February 2009 to July 2012, which was a serious delay and ignorance of the fire escape problem of the building. Although difficulties had been encountered due to shortage of manpower and re-organisation in BD, it should not relieve BD's responsibility. In this regard, The Ombudsman considered that Allegation (b) substantiated other than alleged.

64. Overall speaking, The Ombudsman considered the complaint partially substantiated.

65. The Ombudsman urged BD to step up enforcement actions against actionable UBWs and to improve the mechanism for monitoring progress on enforcement actions so as to avoid recurrence of similar incidents.

Administration's response

66. BD accepted The Ombudsman's recommendation and has taken the follow-up actions below –

(a) BD has reviewed the existing monitoring mechanism and has proactively improved the mechanism of monitoring action progress, including issuing clearer internal guidelines; setting targets for enforcement actions at different stages with a view to closely monitoring the enforcement progress; and enhancing the information handling and internal communication between divisions, etc.; and

(b) BD will continue to make every effort to take enforcement actions against UBWs in accordance with the Buildings Ordinance and the revised enforcement policy against UBWs implemented since 1 April 2011.

Buildings Department and Lands Department

Case No. 2012/2341A&B – Shirking responsibility in handling a complaint about an unauthorised building works item

Background

67. On 12 July 2012, the complainant complained to the Office of the Ombudsman against the Buildings Department (BD) and the Lands Department (LandsD).

68. According to the complainant, her elder brother was the owner of a lot in the New Territories (Lot A). An unauthorised wall (UBW) was found erected in front of Lot A. As the land surveyor hired by the complainant and her brother (Surveyor A), and BD were of the same view that the UBW was erected on Government land, the complainant lodged a complaint with the concerned District Lands Office (DLO) of LandsD. However, DLO refused to take land control action against the UBW on the ground that it was erected on private land.

69. The complainant alleged that BD and LandsD had shirked responsibilities to each other in handling the UBW.

The Ombudsman's observations

70. While there was no evidence to show that BD had deliberately shirked its responsibility, The Ombudsman was of the view that BD staff handled the matter improperly in the sense that they had failed to verify the land status with DLO before informing the complainant that the UBW was on Government land. As a result, the complainant was misled into thinking that DLO had shirked its responsibility in handling the UBW. In view of this, The Ombudsman considered the complaint against BD partially substantiated.

71. The Ombudsman took the view that DLO relied on the professional advice of the District Survey Office (DSO) when confirming to the complainant that the UBW was on private land which should fall within the purview of BD. In view of this, The Ombudsman did not consider that LandsD had shirked its responsibilities in handling the UBW.

72. However, the fact that it took about six months for DLO and DSO to sort out the status of the land on which the UBW was erected was inefficient. In fact, after DLO requested DSO again in mid-June 2012 to confirm again the status of the land, it only took DSO half a month to provide an answer on 4 July 2012. The previous delay was thus unnecessary. Based on the above analysis, The Ombudsman considered the complaint against LandsD substantiated other than alleged.

73. The Ombudsman recommended that LandsD should improve the communication between DLO and DSO to enhance workflow.

Administration's response

74. LandsD accepted The Ombudsman's recommendation and has reminded DLO and DSO to better communicate with each other so as to further improve efficiency.

Buildings Department, Lands Department and Office of Telecommunication Authority

Case No. 2011/1858 (Buildings Department) – Failing to follow up on the problems of building safety and unauthorised building works arising from telecommunications equipment installed on the rooftops of two village houses

Case No. 2011/1859 (Lands Department) – Failing to take further lease enforcement action against the breach of lease conditions caused by the installation of antennas on the rooftops of two village houses

Case No. 2011/1860 (Office of Telecommunication Authority) – Approving the application of a telecommunications company for installation of telecommunications equipment on the rooftop of a village house without ascertaining the relevant Government department's permission

Background

75. On 18 May 2011, two complainants complained to the Office of The Ombudsman against the Buildings Department (BD), a District Lands Office of the Lands Department (LandsD) and the then Office of Telecommunication Authority (OFTA) (now the Office of the Communications Authority).

76. The complainant was the owner of a ground floor unit of a village house (Village House A) in the New Territories (NT). According to him, antennas were installed on the roof of Village House A and its adjoining village house (Village House B) by some telecommunication companies since 1998. Both village houses were NT exempted houses (NTEH). In 2009, the complainant observed that more antennas were installed on the roof of Village House A. He was afraid that the antennas might affect his health. He lodged a complaint to the then OFTA. OFTA replied that there was no evidence to prove the antennas would affect the health of human being. However, when the telecommunication companies submitted their applications to OFTA for installation of antennas, they should also comply with the requirements of BD and LandsD.

77. Between September 2010 and January 2011, the complainant lodged four reports to BD alleging that the antennas installed on the roof of Village Houses A and B were unauthorised building works (UBW). In March 2011, the complainant wrote to BD again pointing out that those antennas had increased the loadings on Village House A and cracks were developed. He also knew that the installation of the antennas had contravened the lease conditions governing the lot on which Village House A stands.

78. According to another complainant (a District Councillor), she had received reports against the antennas at Village Houses A and B in the past two years. She reflected the situation to BD and LandsD. However, no action was taken by the two departments.

79. Allegations by the two complainants can be summarised as follows –

(a) BD took no action regarding the building safety and UBW after inspection;

(b) LandsD had warned the relevant village house owners that the installation of the antennas had contravened the lease conditions. However, LandsD did not take any further action when the village house owners ignored its warning; and

(c) it was improper for OFTA to approve the telecommunication companies for erecting the telecommunication installations before confirming that the companies had obtained agreement of other relevant Government departments.

The Ombudsman's observations

80. On whether the "radio base station" would have structural implication on the two Village Houses, staff of BD and its appointed consultant had carried out inspections several times and conducted professional assessment. No obvious structural danger was observed. With respect to BD's professional assessments which were not related to administrative matter, the Office of The Ombudsman would not comment on them. From administrative perspective, BD had followed up the complainant's reports properly.

81. The issue of "radio base station" was beyond BD's jurisdiction, hence it could not take any actions against the "radio antennas" and the associated installations which were not building works. Although the "concrete plinths" were considered building works which came under the control of BD, they did not pose any structural danger to the village houses. According to BD's UBW enforcement policy which had been adopted after extensive public consultation, BD would not accord high priority for enforcement action against such "concrete plinths". The Ombudsman could not say BD's decision was wrong. Based on the above analysis, The Ombudsman considered the complaint against BD unsubstantiated.

82. Above notwithstanding, BD has later put into effect an enhanced enforcement strategy against UBW in NTEH which indeed included concrete plinths for radio base stations on the rooftops of NTEH. The Office of The Ombudsman urged BD to keep in view whether the owner of Village House B would report the UBW under Reporting Scheme for UBW in NTEH in accordance with the enhanced enforcement strategy. If the owner did not report the UBW within the reporting period, BD should take enforcement action under the new policy.

83. The Ombudsman considered the complaint against LandsD and OFTA unsubstantiated.

Administration's response

84. Regarding The Ombudsman's recommendation, BD will take priority enforcement action against those unreported UBW in accordance with the enhanced enforcement strategy which came into effect on 1 April 2012.

Civil Aviation Department

Case No. 2012/2862 – Failing to handle the complainant's complaint against helicopter noise nuisance

Background

85. In May 2011, power supply engineering works were commenced near the residence of the complainant. The concerned contractor used helicopter to transport materials to and from the works area. The complainant had made several complaints to the Civil Aviation Department (CAD) about the noise nuisance caused by the helicopter when flying past the housing estate where the complainant lived. However, the problem was not resolved.

86. The complainant had lost his trust in CAD in handling his complaint. On 20 June, he started to contact the District Councillor of his District, the concerned public utility company and the responsible contractor himself. The noise problem was finally resolved within two weeks.

87. The complainant complained against CAD for not following up on his complaint about helicopter noise nuisance seriously, for providing him with incorrect and untrue information to mislead him and for using various excuses to avoid dealing with his complaint. In the absence of any help from CAD, he sought solutions by himself and quickly resolved the noise problem.

The Ombudsman's observations

88. The Ombudsman was of the view that CAD had shown the following inadequacies in dealing with this complaint case –

(a) The reasonable queries and dissatisfaction of the complainant had not been dealt with properly;

(b) there were no clear and specific guidelines on handling complaints; and

(c) it was doubtful whether staff training was adequate.

89. Overall, the Office of The Ombudsman was of the view that CAD had been very poor in complaint handling. If this had not been handled in such a way, the complainant might not have to resort to filing a complaint with The Ombudsman. Nevertheless, CAD did in fact follow up on the noise complaint and did assist in resolving the problem. After considering carefully all the available information and the comments from CAD, The Ombudsman concluded that this case was partially substantiated.

90. The Ombudsman recommended CAD to –

(a) amend and enhance the guidelines on "Handling Helicopter Noise Complaints", by clearly stating the handling procedures including the need to obtain the information required to ascertain whether there has been any noise nuisance, specific actions on how to resolve the noise nuisance and the circumstances under which the case must be referred to more senior officers for handling;

(b) provide guidance to frontline staff on how to deal with cases where the public express dissatisfaction about their services or make a complaint; and

(c) strengthen staff training in order to enrich the understanding of staff in respect of the relevant regulations, administrative measures and related technical knowledge, and to enhance the technique of staff in communicating with the public and in dealing with complaints.

Administration's response

91. CAD accepted all the recommendations made by The Ombudsman and has implemented follow-up actions as follows –

(a) The "Guidelines for Handling Aircraft Noise Complaints and Public Enquiries" have been amended and enhanced with the handling procedures clearly stated;

(b) the above Guidelines include guidance to staff on the techniques in dealing with cases where the public express dissatisfaction about their services or make a complaint; and

(c) staff training has been strengthened to enrich the understanding of staff in respect of the relevant regulations, administrative measures and related technical knowledge and enhance their techniques in communicating with the public and in dealing with complaints.

Correctional Services Department

Case No. 2011/2857 – (1) Divulging the drug addiction history of a released inmate, who was the complainant's son, while the released inmate was under the Department's statutory supervision; (2) Threatening to send the released inmate back to the rehabilitation centre if he abused drugs again; and (3) Failing to properly follow up on the complainant's telephone calls for help in respect of the released inmate's suicidal thoughts and her complaint against the officers concerned subsequent to the death of the released inmate

Background

92. According to the complainant, her son was sentenced to Hei Ling Chau Addiction Treatment Centre (HLTC) to receive compulsory drug addiction treatment due to his abuse of drugs. After his release in January 2011, he was subject to the statutory supervision of the Correctional Services Department (CSD). During the statutory supervision, the complainant knew from her son that –

> Staff A and Staff B of the Rehabilitation Unit of CSD, who were responsible for the supervision of her son, had divulged his drug addiction history and his being under statutory supervision, resulting in his dismissal after his work supervisor learnt of his situation. Staff A and Staff B also threatened her son and caused him suicidal thought.

93. The complainant's son eventually committed suicide. The complainant lodged a complaint against Staff A and Staff B with HLTC but the management refused to follow up.

94. The complainant lodged the following allegations –

(a) *Divulging her son's drug addiction history and his being under statutory supervision*

> In March 2011, when Staff A and Staff B went to the workplace of the complainant's son to collect his urine sample, they stated loudly in the presence of a few of his colleagues that he had abused drugs and was under statutory supervision, hence indirectly led to his supervisor's knowledge about this and the

subsequent dismissal of him.

(b) *Threatening her son*

In early April, when Staff A and Staff B conducted a family visit for the complainant's son, they mentioned that they would "send him back in police car to the drug addiction treatment centre on 20 April" if he used dangerous drugs again.

(c) *Handling the complainant's call and her subsequent complaints against the staff in an inappropriate way*

The complainant knew about the suicidal thought of her son stemming the above incident and made telephone calls for help to Staff A and Staff B on 11 and 12 April 2011 for assistance. However, the staff answering the calls either stated that the staff were away (being on either on leave, unreturned from outside work or off from work) or would hang up immediately every time her call was answered. The complainant was left helpless. In the morning of 14 April 2011, the complainant's son died of suicide. In early May 2011, the complainant complained to Complaints Investigation Unit (CIU) of CSD (the call was picked up by Staff C) on the inadequacies of Staff A and B. Her complaints were not followed up.

The Ombudsman's observations

Allegation (a)

95. According to Staff A and Staff B, the meeting venue where urine sample of the complainant's son was collected was not a place where the colleagues of the complainant's son frequented. Without any independent evidence, the Office of The Ombudsman was unable to ascertain the circumstances of the meeting among Staff A, Staff B and the complainant's son. Thus, it could not ascertain whether the complainant's claim of the two staff "having stated loudly in the presence of a few of her son's colleagues that her son had abused drugs and was under statutory supervision" was substantiated. Moreover, there was no evidence to show that the complainant's son was employed by the company concerned or its term contractors. The Office of The Ombudsman was unable to ascertain the employment details of her son and the reason of dismissal. As such, the Office of The Ombudsman considered Allegation (a) inconclusive.

Allegation (b)

96. According to the regime of statutory supervision, if a supervisee relapses into drug abuse, he or she may be recalled by CSD to receive treatment again. The Office of The Ombudsman considered that it was the responsibility of the staff concerned to relay the above point to the supervisee who had relapsed into drug abuse. In fact, the complainant's son was found to have relapsed into drug abuse in late January 2011. After the staff knew about the situation, it was necessary for them to tell the supervisee the consequences of breaching the conditions of supervision order. As for whether the tone of the staff was appropriate and if the complainant's son felt that he was threatened, the Office of The Ombudsman could not ascertain the truth as there was no independent evidence. As such, the Office of The Ombudsman considered Allegation (b) inconclusive.

Allegation (c)

97. As regards the complainant's calls to HLTC on her son's suicidal thought, objective evidence showed that the complainant did call the Control Room of HLTC first on 11 April 2011 followed by her calls twice to Staff B which were diverted to the Staff A's phone according to the evidence gathered. The three phone calls were made within less than half an hour and all of them had got through but each was hung up within one minute. The account of the events tallied with the version given by the complainant. The Office of The Ombudsman had reasons to believe that she was anxious to contact CSD at that time but it was very likely that her calls were not properly responded to.

98. Although the Office of The Ombudsman was not able to ascertain whether there was any mishandling on the part of the staff members answering the phone calls in the absence of phone recording, the Office of The Ombudsman expects that CSD should "make amendments in case there are mistakes and treat criticisms as reminders in case there are not any." CSD should advise the staff to learn a lesson from the incident. Apart from maintaining a friendly service attitude to all callers, the staff should also be alert and sensitive to the enquiries and requests of the callers. CSD should render appropriate assistance to the callers when necessary.

99. For the complaints on Staff A and Staff B subsequent to the

death of the complaint's son, Staff C of the CIU of CSD and the complainant both confirmed that the latter had rung the Department to lodge complaints against Staff A and Staff B. However, the versions of the complainant and Staff C differed greatly regarding the content of the conversations. Owing to the lack of telephone recording, the Office of The Ombudsman was not able to ascertain the details of the conversations. However, the Office of The Ombudsman considered that some of the statements made by Staff C did not seem logical. According to Staff C, he was already informed by the complainant that she had reported the case to the Police. If it was the case, it did not seem logical that Staff C would suggest the complainant to provide details of the case to the Police as the action would be redundant. The complainant would not change her mind and give up complaining Staff A and Staff B either. Moreover, CSD did not deny the fact that the complainant had complained to the CIU against Staff A and Staff B. But it considered that the complainant should also provide information to the Police. However, the fact is that CSD had not proceeded further to conduct an investigation into the two staff members to find out whether there was any dereliction of duty on their part in the incident. Even if the complainant had actually indicated "there was no need for the CIU to follow up the complaint for the time being", CSD should have taken appropriate follow-up action having regard to the seriousness of the incident so as to ascertain whether Staff A and Staff B had refused to answer the phone calls for help of the complainant. As the direction of the criminal investigation of the Police was different from that of the administrative investigation of CSD, CSD did not even have to wait for the completion of the investigation of the former before it initiated its own investigation.

100. The Office of The Ombudsman considered that for any organisation, upon receipt of a complaint lodged by members of the public against its staff, its management had the responsibility to follow up the case to find out if there was any fault on the part of the staff concerned. This case involves serious allegation, and there is much prima facie evidence. CSD and its CIU should not have handled the complaint lightly, no matter whether the complainant had followed up the case actively or not. Furthermore, CIU was tasked to handle complaints about the administration and staff of CSD. As an independent unit, the CIU was duty-bound to conduct investigation to find out the truth. It should take every complaint seriously and handle them prudently, and carry out thorough investigation to ensure that every case is fairly and impartially dealt with. Given the above analysis, the Office of The Ombudsman considered Allegation (c) partially substantiated.

101. In conclusion, The Ombudsman considered the complaint

partially substantiated.

102. The Ombudsman recommended CSD to consider installing audio recording facilities in the Control Room, which could prevent CSD from missing important messages and help CSD staff to check any information. The Ombudsman also recommended CSD to review the existing procedural guidelines on the retention and disposal of files and records, and consider extending the retention period of all audio and video records to no less than 30 days.

Administration's response

103. CSD has set up a working group to study the installation of audio recording facilities in the Control Room of all penal institutions.

104. Regarding extending the retention period of all audio and video records, CSD is reviewing the closed-circuit television systems in different correctional institutions and studying the extension of the retention period with the Electrical and Mechanical Services Department.

Correctional Services Department

Case No. 2012/3179 – (1) Delay in providing a complaint form to the complainant; (2) Pressuring and luring the complainant to admit breach of discipline; and (3) Taking away temporarily a copy of the complainant's witness statement about an assault case of himself that the complainant wanted to hand over to a visitor

Background

105. The complainant was an inmate. He alleged that Correctional Services Department (CSD) had the following malpractices –

(a) On 7 August 2012, the complainant requested to have a complaint form of the Office of The Ombudsman from a staff member of the Special Unit of the correctional institution (Staff A) but the staff concerned only gave him the form on 4 September;

(b) in an incident of 5 August 2012, the complainant was charged of breach of discipline. Before the disciplinary hearing on 9 August, two institutional staff (Staff B and Staff C) persistently pressured and lured him to admit breach of discipline. As such, the complainant could only plead guilty during the hearing; and

(c) the complainant had lodged a complaint about being assaulted by the staff to the Complaints Investigation Unit (CIU) and gave a statement to CIU. He had retained a copy of the statement. Given the sensitive nature of the contents of the statement and that it was not suitable to be read by staff or other persons in custody, the complainant handed over the copy of the statement to the staff of Visit Room (Staff D) on 4 September so that the latter could pass the statement to his two friends (Ms A and Ms B) who visited him. After inspecting the statement in front of the complainant, Staff D went to the seat of the officer-in-charge of the Visit Room to receive a phone call and then took away the copy of the statement from the Visit Room. After a few minutes, Staff D returned and handed over the copy of the statement to Ms A and Ms B. The handling method of Staff D was not in line with the procedures, and he was suspected of disclosing the contents of the statement to the staff involved in the assault case.

The Ombudsman's observations

Allegation (a)

106. The version of the account of the complainant was very different from that given by Staff A. Without a recording of the conversation on 7 August or other evidence, the Office of The Ombudsman was unable to ascertain whether the complainant had specifically requested for a form from Staff A on that day but was rejected. The Ombudsman considered Allegation (a) inconclusive.

Allegation (b)

107. The complainant, Staff B and Staff C stuck to their own versions of the account. Without any independent and objective evidence, The Ombudsman could not decide who was right and who was wrong. The Ombudsman considered Allegation (b) inconclusive.

Allegation (c)

108. The complainant did not make an application beforehand and only suddenly wanted to hand over the copy of his witness statement to the visiting friends on the spot. Obviously, this was neither in compliance with the statutory requirements nor in line with the institutional procedures. Staff D reported the situation to his supervisor (Staff E) first and did not immediately hand over the copy of the statement to Ms A. His way of handling was legal and reasonable. Regarding the complainant's suspicion that Staff D had disclosed the contents of the statement to the staff who had assaulted him, it was merely his own speculation. Both Staff D and Staff E denied having read the copy of the statement or disclosing its contents. There was no evidence to show that Staff D had disclosed the contents of the statement. The Ombudsman considered Allegation (c) unsubstantiated.

109. The Ombudsman recommended that CSD should formulate specific guidelines to handle situations where persons in custody attempt to hand over unauthorised documents to their relatives or friends during their visit, including the situation when a staff member suspects that a person in custody intends to hand over a document that may undermine the institutional security to his relatives and friends illegally. The staff concerned has to bring the person in custody concerned before his senior

officer when he seeks advice from the latter and inspects the document in front of the person in custody concerned.

110. The Ombudsman considered this complaint unsubstantiated.

Administration's response

111. CSD has set up a working group to review the related policy and guidelines in the light of the recommendation of The Ombudsman.

Electrical and Mechanical Services Department

Case No. 2012/1442 – Failing to monitor properly the performance of a maintenance service contractor for the air-conditioning system of a market

Background

112. The complainant was a stall operator in a market under the Food and Environmental Hygiene Department (FEHD). Since the of end of 2011, the market's air-conditioning system often malfunctioned and needed repairs. Moreover, the complainant alleged that the relevant contractor had once refused to respond to his enquiries while doing some repairs and had on another occasion failed to abide by its performance pledge for arriving at the venue within two hours for repair work. He considered that the Electrical and Mechanical Services Department (EMSD) had failed to monitor the contractor properly.

The Ombudsman's observations

113. It was within EMSD's professional judgement in using service availability for assessing the performance of air-conditioning system, so the Office of The Ombudsman would not comment on it. However, although the market's air-conditioning system was able to maintain 99% service availability at all times, it aroused complaints from stall operators almost every day in springs and summers when there is stronger need for air-conditioning. The Office of The Ombudsman considered it worthwhile for EMSD to examine whether this reflected inadequacy of the current minimum standard to meet the actual demand of stall operators, or that there were other problems. The contractor was required to make repairs every two days on average. The cost effectiveness of such maintenance services was questionable.

114. The Office of The Ombudsman's doubts about the monitoring system of EMSD was not only attributable to the data errors per se, but also its unawareness of the data errors. When the Office of The Ombudsman initiated a full investigation, EMSD initially only submitted Summary Reports as supporting document of its monitoring measures over the contractor's performance. It was only when the Office of The Ombudsman asked EMSD to peruse and comment on the Office of The

Ombudsman's preliminary investigation results that it provided supplementary information. Regarding the inconsistencies identified between its records and the data held by FEHD, EMSD simply tried to show that the relevant data in the Summary Reports were correct. EMSD was anxious to excuse itself, rather than rectifying the problem.

115. In its response to the investigation, EMSD did not even realise the many errors and omissions in the Summary Reports. The Office of The Ombudsman doubted whether EMSD had regularly cross-checked various records with due diligence to keep track of the contractor's performance, and whether such way of monitoring was effective. In view of the above, The Ombudsman considered this complaint substantiated.

116. The Ombudsman recommended EMSD to–

(a) conduct a comprehensive inspection of the market's air-conditioning system, and consider exploring with FEHD the feasibility of replacing the system, wholly or partially, taking into account the malfunction and fault reports received in future; and

(b) maintain even closer contacts with FEHD to ensure that the follow-up records submitted by the contractor were accurate and improve its existing monitoring system over the contractor.

Administration's response

117. EMSD accepted all of the recommendations and has taken the follow-up actions below –

(a) EMSD has carried out a comprehensive inspection and adjustment of the entire air-conditioning system in April and May 2013 to ensure its normal operation. Moreover, a remote fault reporting system has been put in place for monitoring the breakdown of major components of the system so as to enhance efficiency in arranging repair works. Following the implementation of these measures, there were 11 failure reports from March to July 2013, which was a noticeable improvement as compared with the 92 cases reported over the same period last year. Having regard to the system inspection and adjustment and subsequent review on the recent trend of failure reports,

EMSD in consultation with FEHD considered that there was no immediate need of entirely or partially replacing the system. EMSD would continue monitoring closely the breakdown and fault reporting trend and discuss with FEHD, as and when necessary, on the replacement of the system; and

(b) in April 2013, EMSD improved the fault reporting procedures in the sense that EMSD would verify with FEHD on details of a fault report via telephone on the next working day upon receipt of the fault report. Since July 2013, monthly fault records have been submitted to FEHD for their further verification. Moreover, EMSD's staff has increased the frequency of site inspections to monitor the performance of contractors.

Equal Opportunities Commission

Case No. 2012/0855 – (1) Refusing to take up the complainant's case on the wrongful ground that she lodged her complaint after the time bar; (2) Failing to provide evidence to support its claim that its officers had explained the relevant laws to the complainant, who chose not to lodge her complaint at that time; and (3) Being biased towards the company under complaint

Background

118. On 15 March 2012, the complainant lodged a complaint with the Office of The Ombudsman against Equal Opportunities Commission (EOC).

119. The complainant lodged the following complaint with EOC on 16 May 2011 –

> During her employment with Company A, the complainant was sexually harassed by a male colleague (Mr A) in August 2010. In January 2011, she lodged a complaint to Company A . Later, she was informed by her employment agency[1] that Company A would not renew her contract upon its expiry in July of the same year. She considered that Company A made such a decision because she had lodged a sexual harassment complaint.

120. EOC categorised the complaint lodged by the complainant against Mr A as an alleged case of "sexual harassment" (Complaint 1) and her allegation that Company A did not continue to employ her as a result of the sexual harassment complaint she made as an alleged case of discrimination by way of "victimisation" (Complaint 2). EOC conducted investigation into these two cases. Regarding Complaint 1, EOC, on its completion of investigation, suggested the Complainant and Mr A to attempt conciliation but the two sides failed to reach a settlement. Regarding Complaint 2, EOC notified the complainant in writing on 30 November 2011 about its decision to discontinue the investigation as her allegation lacked substance.

121. In response to the complainant's query in her letter dated 24 November as to whether Company A should be held liable for Mr A's

[1] The complainant was hired by Company A through the employment agency.

act(s) of sexual harassment (Complaint 3), EOC replied as follows –

(a) According to the Sex Discrimination Ordinance (the Ordinance), employers are vicariously liable for the acts of sexual harassment committed by an employee in the course of his employment;

(b) EOC's case officers explained the relevant provision(s) to her in May and June respectively. And at the time concerned she said she did not intend to lodge a complaint against Company A for its vicarious liability; and

(c) as the alleged acts of sexual harassment was committed more than 12 months ago, unless she could provide sufficient justification to warrant her belated complaint, otherwise EOC would not investigate into the employer's vicarious liability in association with the sexual harassment complaint.

122. Afterwards, the complainant wrote to EOC stating that she had never given up lodging a complaint against Company A (Complaint 3). But EOC reiterated its position above (paragraph 121 above).

123. The complaint lodged against EOC by the complainant afterwards can be summarised into the following three allegations –

Allegation (a) – EOC substituted concepts and resorted to sophistries. The complainant lodged the sexual harassment complaint with EOC as early as May 2011 but EOC claimed that it was not until 24 November of the same year that she lodged Complaint 3 against Company A. EOC refused to take up her case for the reason that it was a belated complaint (beyond the 12-month time bar).

Allegation (b) – EOC argued that its case officers had already explained the provision(s) on employer's vicarious liability to the complainant and she also indicated that she did not intend to complain against Company A for its vicarious liability. However, EOC had no substantive evidence in support of its argument.

Allegation (c) – During the investigation of Complaint 2, EOC only listened to Company A's side of the story without taking her arguments into serious consideration. It was unfair that EOC conducted itself in such a manner.

The Ombudsman's observations

Allegations (a) and (b)

124. EOC could have treated the complainant's case as three individual complaints –

(1) Mr A was alleged to have sexually harassed the Complainant;

(2) it was suspected that Company A did not continue to employ the Complainant as a result of the complaint she lodged against Mr A for sexually harassing her - discrimination by way of "victimisation"; and

(3) whether Company A, as the employer, should be held vicariously liable for Mr A's acts of sexual harassment.

125. In this case, EOC handled Complaints (1) and (2) but not (3).

126. After reviewing EOC's record, the Office of The Ombudsman was satisfied that EOC Officer X and Officer Y had explained to the complainant the provision(s) pertinent to Complaint 3, including the provision(s) on employer's vicarious liability, on 25 May and 10 June 2011 respectively. In addition, Officer X had told her about the 12-month time bar for lodging a complaint, and Officer Y had asked her whether she would lodge Complaint (3) and her answer was in the negative.

127. Despite the above, the Office of The Ombudsman considered that the complainant was merely an ordinary person who might not be able to fully grasp the meaning of legal terms such as "employer's vicarious liability" and completely understand that EOC calculated the time bar for lodging each complaint on an individual basis.

128. EOC explained to the Office of The Ombudsman that there were in fact other factors accounting for why it did not exercise its discretion to take up Complaint (3). EOC told the Office of The Ombudsman that it could exercise its discretion to take up complaints lodged beyond the time bar. Regarding the Complainant's case, although EOC had only given one reason for refusing to take up Complaint 3 (i.e. she was aware of the provision(s) on employer's vicarious liability and yet she did not lodge any complaint within the 12-month time bar), EOC had in fact, before exercising its discretion to refuse to take up Complaint (3), considered in detail the case on the whole, including whether the evidence was strong enough and whether the justifications were sufficient. Nevertheless, the Office of The Ombudsman considered that EOC had never explained these reasons to the complainant and it refused to take up the complaint solely on the grounds that it was lodged beyond the time bar. Even if Complaint (3) was counted as being lodged in November 2011, it was then merely three months beyond the time bar. It was inevitable that EOC was perceived by the complainant as being unsympathetic. Besides, EOC owed her a full explanation.

129. The Ombudsman considered Allegation (a) partially substantiated and Allegation (b) unsubstantiated.

Allegation (c)

130. After reviewing EOC's replies to the complainant dated 18, 30 November and 29 December 2011, the Office of The Ombudsman considered that EOC did address the queries and arguments she raised about Complaint (2) in detail. As to how EOC investigated and analysed the evidence and arguments provided by the complainant and Company A and came to a conclusion under the Ordinance, these all fell within EOC's professional remit which was not a general administration issue. Therefore, the Office of The Ombudsman would not give any comment in respect of Allegation (c).

131. In sum, The Ombudsman considered this complaint partially substantiated.

132. The Ombudsman hoped that EOC would reconsider exercising its discretion to take up Complaint 3 lodged by the Complainant against Company A. Even if EOC, after due consideration, upheld its decision of not to take up the complaint, it should provide a detailed explanation to the Complainant accounting for the reason of its decision.

Administration's response

133. EOC accepted The Ombudsman's recommendation. Two EOC staff members met with the Complainant and her friend on 17 October 2012. At the meeting, it was explained to her in detail why EOC did not exercise its discretion to take up the complaint she lodged against Company A for its vicariously liability beyond the time bar. EOC staff members also took the opportunity to tell the Complainant again that she could directly submit her case to the court for a hearing of her allegations. And she was also reminded of the 24-month time bar for instituting legal proceedings.

134. In his letter to EOC on 20 December 2012, The Ombudsman stated that he was glad that EOC had met with the Complainant on 17 October 2012 and explained to her in detail why EOC did not exercise its discretion to take up her complaint of sexual harassment (employer's vicarious liability) against the company in question beyond the time bar. The Office of The Ombudsman was also grateful for EOC's support of its work.

Environmental Protection Department and Food and Environmental Hygiene Department

Case No. 2012/2286 (Environmental Protection Department) – (1) Faulty procedures for assessment of an air pollution complaint; and (2) Failing to take action against the improper location of the kitchen exhaust outlets of two food premises

Case No. 2012/3671 (Food and Environmental Hygiene Department) – (1) Wrongful approval of food business licences to two food premises and failing to take action against the improper location of the kitchen exhaust outlets of those food premises; (2) Failing to take enforcement action against a food premises which was in breach of the licensing requirement, and later operated without a licence; and (3) Faulty arrangement for inspection

Background

135. Between July and December 2012, the complainant made several complaints to the Office of The Ombudsman against the Environmental Protection Department (EPD) and the Food and Environmental Hygiene Department (FEHD).

136. The complainant made a complaint to EPD on 9 April 2012 against the pollution caused by oily fume emitted from two restaurants on the ground floor of the building in which he lived (Restaurant A and Restaurant B). On 29 June, EPD notified him in writing on the investigation findings: in May and June, EPD staff visited four times the car park entrance, podium and footbridge of the building concerned for air quality assessment and found no nuisance caused by oily fume emitted from the restaurants concerned. Therefore, no action could be taken under the Air Pollution Control Ordinance (APCO). Besides, EPD confirmed orally that there were defects in the design of the exhaust outlet of the restaurants concerned, but it would not take any follow-up action as no offence had been found.

137. During August and September 2012, the complainant made several complaints with FEHD against oily fume nuisance of Restaurants A and B. FEHD later sent him written replies stating that –

(1) during August and September 2012, FEHD staff inspected the two concerned restaurants several times but did not find any nuisance caused by oily fume;

(2) however, FEHD found that –

(i) Restaurant A's hydro vent could not function properly and was not in a hygienic condition;

(ii) Restaurant B's exhaust hood has oily fumes accumulation. During their inspection in September, staff of FEHD discovered that this restaurant was selling food items other than those permitted under a light refreshment restaurant licence, hence had breached its licensing condition; and

(3) subsequent to the warning by FEHD, the two concerned restaurants had sanitised their exhaust systems, which functioned properly. FEHD also cast a verbal warning to Restaurant B for its violation of licensing requirement and requested it to terminate such irregularity.

138. The complaint against EPD is summarised as follows –

(a) EPD was not objective in concluding that no nuisance had been caused by oily fume emitted from the restaurants concerned solely on the basis of the sense of smell and the short-time evaluation of its assessment staff;

(b) EPD has shirked its responsibility by confirming defects in the design of the exhaust outlet of the restaurants concerned on one hand and refusing to require those restaurants to relocate the exhaust outlet on the other;

(c) the exhaust outlets of the two restaurants concerned were installed at the same location (Location A), which was poorly ventilated and close to domestic premises. FEHD repeatedly received complaints about Restaurant A's oily fumes and found the restaurant's exhaust system unsatisfactory. The two restaurants were in breach of the requirements relating to location of restaurant and/or installation of exhaust system as set out in "A Guide to Application for Restaurant Licences" (the Guide) and the Ventilation of Scheduled Premises Regulation (the Regulation). The complainant alleged that FEHD did not

handle the licence applications of the two restaurants according to the Guide and the Regulation and that it wrongly assessed the impact of the exhaust systems' design on the surrounding environment;

(d) with regard to the problem of Restaurant A's oily fumes and exhaust system, FEHD only issued repeated warnings without taking targeted measures to tackle the root of the problem, which was the improper design of Restaurant A's exhaust system;

(e) after receiving an Air Pollution Abatement Notice (the Notice) issued by EPD on 21 August 2012, Restaurant A moved its exhaust outlet to another location (Location B). The complainant recognised that Location B released less oily fumes and was farther away from the windows of nearby domestic premises. However, in autumn and winter, regular northeast monsoons would carry the smell of the oily fumes into his flat, constituting a nuisance. Although the exhaust outlet's location had been changed, a pungent smell still came from the entrance of his building's car park. The complainant was of the view that –

(i) FEHD should advise Restaurant A to site the exhaust outlet in a direction far away from domestic premises or to extend it to a location far away from domestic premises;

(ii) EPD should work with the management office of the building concerned to conduct a survey among lower floor residents and nearby restaurants on whether the smell and oily fumes released by Restaurant A and Restaurant B caused any nuisance. EPD should also investigate the source of the smell at the car park entrance;

(f) after the relocation of exhaust outlet in Restaurant A, some of the exhaust air it produced was directly released without going through the newly installed filtering device. But FEHD did not follow up on this issue properly;

(g) the menus of Restaurant B clearly indicated that it was selling food items other than those permitted under a light refreshment restaurant licence. Nonetheless, FEHD did not realise any breach of the licensing condition despite having conducted a number of inspections. It was not until 10 September 2012

when the complainant approached the Department to enquire about the restaurant's licence that the Department became aware of the breach and took follow-up actions. The complainant suspected whether the Department had deliberately covered Restaurant B;

(h) subsequently between 11 and 15 September, when the complainant walked past the restaurant, he noticed from a menu that the restaurant was still selling food items other than those permitted under its licence. On 17 September, FEHD found once again the restaurant was in breach of the licensing condition. The complainant criticised the Department for failing to follow up the case effectively;

(i) Restaurant B was still in operation after the suspension of its licence in mid-November 2012. FEHD only prosecuted the restaurant but did not stop it from operating without a licence; and

(j) as inspections were conducted by uniformed staff of FEHD, the persons-in-charge of the two restaurants concerned could take precautions. FEHD could not detect any irregularities despite a number of inspections. The complainant criticised the Department for failing to take effective law enforcement actions.

The Ombudsman's observations

Allegation (a)

139. Based on the results of a total of five assessments conduced by more than five staff members, EPD determined whether the oily fume emitted by Restaurant A had caused air pollution. From the administrative perspective, the department had adopted reasonable measures under the current system to make the air assessment report reflect the actual situation as impartially and accurately as possible. Therefore, Allegation (a) was not substantiated.

140. Above notwithstanding, air assessment involved subjective judgment. In handling other similar cases, the Office of The Ombudsman had urged EPD to continually improve the existing mechanism to enhance the recognition of assessment work, including paying extra attention to the latest standards and guidelines adopted by

other countries or regions in this regard, strengthening training for enforcement staff, and reviewing the existing mechanism regularly.

Allegations (b) to (f)

141. If EPD's assessment showed no irregularities of the restaurant concerned, there is no way the Department could take law enforcement actions.

142. In any case, EPD had already issued a "Notice" based on more recent assessment results, ordering Restaurant A to install control equipment to abate air pollution. The restaurant had subsequently installed control equipment and relocated the exhaust outlet.

143. Although FEHD found the exhaust system of Restaurant A and Restaurant B unsatisfactory, it could not be inferred that FEHD did not follow the Guide and the Regulation when processing both restaurants' applications for a licence or that the location of their exhaust outlets did not comply with the requirement.

144. Given that FEHD did not find the restaurants concerned emitted excessive oily fumes causing a nuisance, it was not unreasonable for FEHD not to take any enforcement actions.

145. Judging from Allegations (b) to (f), the complainant obviously hoped that EPD could prevent the restaurant concerned from further emitting any odour that may spread to his premises. However, the Office of The Ombudsman considered that any enforcement actions taken by government departments must be supported by sufficient evidence and have a sound legal basis. If the restaurant concerned did not emit excessive oily fumes in such a quantity that would cause air pollution or nuisance, EPD could hardly take any law enforcement actions. Although EPD had not been able to fully satisfy the complainant's requests, it had asked the restaurant concerned to make some improvement as far as practicable. In this light, The Ombudsman considered Allegations (b) to (f) unsubstantiated.

Allegations (g) to (i)

146. There were inadequacies on the part of FEHD as it failed to detect earlier the breach of the licensing condition by Restaurant B. FEHD had apologised to the complainant and reminded its staff to make improvements.

147. Upon detection of the above irregularity, FEHD had immediately taken follow-up actions in accordance with the established procedures. The Office of The Ombudsman considered that while there was some inadvertence on the part of FEHD, there was no evidence that the Department attempted to cover up for Restaurant B.

148. Based on the above analysis, The Ombudsman considered Allegation (g) partially substantiated and Allegations (h) and (i) unsubstantiated.

Allegation (j)

149. FEHD explained that in order to prevent any person from receiving advantages by impersonating a member of staff of the Department, its staff normally wore uniform when carrying out inspection duties. Notwithstanding this, the Department would not notify the persons-in-charge of restaurants of any routine and surprise inspections in advance, lest they would take precautions and affecting the effectiveness of FEHD's operations.

150. The Office of The Ombudsman considered that FEHD's explanation was sound to a certain extent. As the Department would not notify restaurants of any inspections in advance, whether its staff wore uniform or not should not make much difference to the effectiveness of the inspections. As far as this case was concerned, the Department took follow-up/law enforcement actions against Restaurants A and B respectively for breach of licensing conditions and/or operating without a licence subsequent to the inspections. It could thus be seen that the Department's inspections were not ineffective.

151. Based on the above, The Ombudsman considered Allegation (j) unsubstantiated.

152. Overall speaking, The Ombudsman considered the complaint against EPD not substantiated, while that against FEHD partially substantiated.

153. The Ombudsman recommended that –

(a) EPD and FEHD should continue to closely follow up on the emission of oily fumes from Restaurant A and Restaurant B. If the two restaurants have violated any requirements or caused any air pollution/nuisance, decisive actions should be taken to request for rectification according to relevant laws/procedures; and

(b) FEHD should continue to monitor closely the unlicensed operation by Restaurant B, and take law enforcement actions in a rigorous and decisive manner.

Administration's response

154. EPD accepted the recommendation to continue monitoring of the emission of oily fumes by Restaurant A and Restaurant B. From mid-January to end June 2013, EPD inspected Restaurant A and Restaurant B four times, no non-compliance or air pollution/ nuisance was detected.

155. FEHD accepted The Ombudsman's recommendations. FEHD will continue to take prosecution actions against the said unlicensed restaurant under the current policy and will make an application to the Court for a closure order when appropriate. FEHD will also continue to monitor the hygiene conditions of the two restaurants and take appropriate actions.

Environmental Protection Department and Labour Department

Case No. 2012/4161A&B – Failing to adequately supervise a contractor's demolition work which involved asbestos and improperly handling a complaint against the contractor

Background

156. On 18 October 2011, the complainant lodged a complaint with the Office of The Ombudsman against Environmental Protection Department (EPD) and Labour Department (LD).

157. To facilitate the construction of Guangzhou-Shenzhen-Hong Kong Express Rail Link (Hong Kong section), the Government resumed a piece of land in the New Territories and MTR Corporation was responsible for the necessary demolition works including removal of structures containing asbestos (the concerned works). According to the complainant, employees of the complainant found a number of suspected corrugated asbestos cement sheets on site of the concerned works on 25 January, 14 February, 16 and 19 March 2011. They sent one of the pieces to a laboratory for testing and the result showed the piece contained asbestos.

158. In April the same year, the complainant lodged a complaint to both LD and EPD about suspected corrugated asbestos cement sheets being disposed of haphazardly at the site of the concerned works which might affect the health of workers and nearby residents. EPD and LD later on replied that as no non-compliance was found and because of difficulties in the collection of evidence for prosecution, they refused to continue the investigation.

159. The complainant accused EPD and LD for not overseeing the concerned works proactively, for handling their complaint perfunctorily, and for failing to prosecute the offender.

The Ombudsman's observations

160. The Office of The Ombudsman pointed out that according to Section 8 and Schedule 2 of The Ombudsman Ordinance, The Ombudsman shall not conduct an investigation into the decision to prosecute or not any person for any offence. Therefore, this investigation of the Office of The Ombudsman was to examine whether there was maladministration on the part of EPD and LD in overseeing the concerned works and in handling the complaint, but not to comment on whether the two departments should prosecute any person.

161. The replies of EPD and LD showed that the two departments had inspected the site many times in the course of the concerned works. Besides, after receiving the complaint made by the complainant, the two departments conducted site inspections on 7 and 26 April and 26 May, and no irregularity was found.

162. Thus, it was not the case that EPD and LD did not oversee the concerned works or not follow up the subject complaint.

163. As the inspection dates of EPD and LD were different from that of the complainant, it would not be surprising to see different results of the inspections. The Office of The Ombudsman considered there was no case to accuse the two departments as their follow-up actions were based upon their investigation results. In view of above, The Ombudsman considered that this complaint was unsubstantiated.

164. In this case, the complainant had submitted photos, draft drawing, evidence, laboratory testing report, etc. to EPD and one would naturally question why EPD did not prosecute the suspected offender. On this, The Ombudsman would recommend EPD to review their procedures for prosecution, including seeking early advice from Department of Justice (DoJ) upon receipt of similar complaints in future, to allow evaluation from the professional legal angle of the sufficiency of evidence provided by the complainant leading to a prosecution.

165. The Ombudsman considered it appropriate for LD to review the procedures for initiating prosecution, which included early consultation with the DoJ upon the receipt of similar reports in future, so that DoJ could evaluate from the perspective of legal profession whether the evidence provided by the informer was sufficient to initiate prosecution.

Administration's response

166. EPD accepted the recommendation and has reminded their enforcement staff to continue to be vigilant, professional and responsible in handling suspected offence cases and, through their Central Prosecution Unit, to seek advice from DoJ when appropriate.

167. LD accepted the recommendation and considered that when there was doubt about the sufficiency of evidence in the course of case investigation, it would, on the merits of individual cases, seek legal advice from the DoJ so as to determine whether any prosecution should be initiated.

Employees Retraining Board

Case No. 2011/4988 – (1) Amiss in its supervision of an appointed training body; (2) Failing to address a complaint about the teaching quality of a course trainer; and (3) Unreasonably rejecting the complainant's request for transfer to a more advanced course and requiring her to continue attending the course not suitable for her

Background

168. On 6 December 2011, the complainant complained to the Office of The Ombudsman against the Employees Retraining Board (ERB). In September 2011, the complainant enrolled in an English course (Course A) offered by a training body (the Centre) appointed by ERB. According to the complainant, she had asked to enrol in another course (Course B) in the first place. However, since Course B would not be opened in the near future, a staff member of the Centre (Ms X) recommended her to take Course A. After attending the first session of Course A, the complainant found the course level and the teaching quality of the trainer way below her expectation. She did not attend the remaining sessions. The complainant wrote to ERB to lodge a complaint and requested to be transferred to a more advanced course. ERB replied to her in December 2011 and informed her that if she failed to attain an 80% attendance rate for Course A, it would ask her to pay the course fee; if she did not pay the course fee as scheduled, she would be prohibited from taking any course of ERB for one year.

169. The complainant's complaint against ERB is summarised as follows –

(a) The Board had been amiss in its supervision of the Centre, which had overlooked her English proficiency and misled her to enrol in Course A;

(b) the Board had failed to address her complaint about the teaching quality of the trainer of Course A; and

(c) the Board had unreasonably rejected her request to be transferred to a more advanced course and, even though Course A was not suitable for her, required her to attain the minimum attendance rate for that course, failing which, she would have to pay the course fee.

The Ombudsman's observations

Allegation (a)

170. Without independent corroborative evidence, the Office of the Ombudsman could not ascertain the contents of the conversation between the complainant and Ms X. The Ombudsman therefore would not adjudge whether the latter had misled the former to enrol in Course A.

171. While the Office of The Ombudsman agreed that it was an applicant's responsibility to comprehend the course information so as to decide which course suited his/her background and specific needs, the course provider nonetheless had the duty to evaluate with due care whether the course selected by the applicant matched his/her level of competency in that subject. Any mismatch, whether the applicant is under- or over-qualified for the course, would result in waste of public funds.

172. The Centre had apparently overlooked the complainant's English proficiency. However, in all likelihood, the case was an isolated incident and ERB could not be reasonably expected to have established a mechanism beforehand to prevent it from happening. In other words, the incident was not attributable to a deficiency in the Board's supervision of the Centre. Allegation (a) was unsubstantiated.

Allegation (b)

173. After receiving the complaint, ERB called the complainant on 25 October 2011. In the course of that and subsequent telephone conversations, the complainant and her husband repeatedly stressed that she had been misled by the Centre to take Course A and that she wanted to be transferred to an advanced course. ERB, therefore, focused on addressing those two issues in its reply to the complainant in December 2011. The Ombudsman accepted ERB's explanation. Allegation (b) was unsubstantiated.

Allegation (c)

174. To ensure proper use of public funds and fairness to other trainees, The Ombudsman considered it reasonable of ERB, under normal circumstances, to ask trainees not meeting the minimum attendance rate to pay back the course fee, as well as not acceding to their requests for class transfer.

175. However, in this particular case, it was obvious that there was a mismatch between Course A and the complainant's English proficiency, primarily due to the Centre's oversight. The Ombudsman could not see any benefit in requiring the complainant to finish the course, which would amount to a waste of both her time and public funds. Under such circumstances, The Ombudsman found it bureaucratic of the Board to insist on the complainant paying back the course fee due to her failure to attain the minimum attendance rate or to prohibit her from enrolling in another of the Board's courses for one year. Allegation (c) was substantiated.

176. In sum, The Ombudsman considers the complainant's complaint partially substantiated. The Ombudsman recommended that ERB should –

(a) take reference from this case and remind training bodies to avoid recommending courses to over-qualified applicants and to alert applicants if the level of a course selected is clearly below their standard; and

(b) waive the requirement for the complainant to pay back the fee for Course A and allow her to enroll in another of the Board's courses that suits her.

Administration's response

177. ERB accepted and has implemented The Ombudsman's recommendations as follows –

(a) On 20 April 2012, ERB issued a circular to all training bodies advising them not to recommend to any applicants any training courses that were obviously incongruous with the applicants' qualifications. The circular also advised that if and when the courses, in terms of training contents and levels, selected by

applicants were found to be incongruous with their qualifications, training bodies should draw such incongruity to the attention of the applicants to ensure that the applicants were aware of it; and

(b) on 18 April 2012, ERB informed the complainant that she was granted fee waiver and became eligible for enrolment in another ERB course that suits her needs.

Food and Environmental Hygiene Department

Case No. 2012/0245 – Failing to take effective enforcement action to tackle the problem of street and passageway obstruction caused by some candy stalls

Background

178. On 19 January and 6 February 2012, the complainant complained to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD).

179. The complainant complained to FEHD that some candy stalls in a street and its vicinity had illegally extended their business areas causing obstruction. FEHD later wrote to inform the complainant of its actions taken. However, the street and passageway obstruction persisted. The complainant considered FEHD's actions ineffective.

The Ombudsman's observations

180. The Office of The Ombudsman noted that FEHD did take enforcement actions against the illegal extension of business areas of the three stalls. However, the problem of street and passageway obstruction had persisted. This showed that the Department's actions were indeed not effective or stringent enough to tackle the problem.

181. Site visits by the Office of The Ombudsman confirmed that though there was improvement on the illegal extension of business areas of the three stalls, those stalls had indeed made their business areas several times larger than their approved dimensions, and caused obstruction. This went against the condition for tolerating extension of business area during operation hours, viz., passageways should remain unimpeded. The Office of The Ombudsman considered that FEHD should at least try exercising all its statutory powers to curb the problem, including the power of seizure under section 86(1) of the Public Health and Municipal Services Ordinance which the Ombudsman believed would have greater deterrent effect on illegal extension of business areas by hawkers.

182. In view of the above, the complaint was substantiated.

183. The Ombudsman urged FEHD to continue to monitor the situation closely and step up enforcement actions against the stalls invoking all its statutory powers as necessary if their obstruction of streets and passageways persists.

Administration's response

184. FEHD accepted the recommendation and has increased the inspection frequency from monthly to weekly. In addition, FEHD will continue to take stringent enforcement actions if the situation warrants.

Food and Environmental Hygiene Department

Case No. 2012/0629 – Failing to conduct tests in a proper manner when handling a complaint about vapour condensation on the floor of the complainant's flat, allegedly caused by an air-conditioner at the flat below

Background

185. On 21 September 2011, the complainant lodged a complaint with the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD).

186. According to the complainant, in June 2011, she made a complaint to FEHD through 1823 Call Centre that the air-conditioner of the flat downstairs was engaged in low-temperature operation with the louvers fixed upward towards the ceiling persistently, resulting in water condensation on the floor of her bedroom. On 20 August of the same year, FEHD staff visited the flat downstairs for a test. They adjusted the temperature to 25˚C and engaged the air-conditioner in swing mode, instead of the usual 17 or 18˚C with upward blowing mode. As such, the result of the test concluded that the air-conditioner was in normal operation. The complainant alleged that FEHD had adopted an improper test method of test, making the test result unable to reflect the real situation.

187. On 10 February 2012, the Office of The Ombudsman completed the investigation and informed the complainant of the result in writing that FEHD staff did not change the operation mode of the air-conditioner of the flat downstairs during the test, and, regarding the water droplets on the floor of the complainant's flat, the case had been referred to the Buildings Department (BD) to see whether it involved the structure of the building.

188. During 20 to 27 February of the same year, the complainant phoned and wrote to the Office of The Ombudsman, claiming BD had confirmed that her flat got no structural problem. She therefore reinstated the complaint against FEHD for adopting an improper test method and refusing to follow-up on her case.

The Ombudsman's observations

189. The complainant was of the opinion that the water droplets on the floor of her flat were caused by the abnormal operation of the air-conditioner in the flat downstairs as –

(a) the droplets on the floor appeared only after the occupant of the flat downstairs moved in;

(b) the droplets appeared only in spring, summer and autumn; and

(c) BD confirmed that the droplets had nothing to do with the structure of the building.

190. Though that was only the speculation of the complainant, the Office of The Ombudsman considered that her suspicion was not totally groundless.

191. As FEHD staff had visited the flat downstairs to conduct inspection without an appointment, observation of the staff should have been able to reflect the actual situation of the case. Regrettably, FEHD staff had not measured the temperature of the flat downstairs on site. Instead, they claimed that the room temperature was normal simply on account of the reading on the remote control and their own personal feeling. This showed that there was deficiency in FEHD's investigation, for not being able to effectively eliminate the reasonable doubt mentioned above, i.e. the air-conditioner of the flat downstairs had been operating in low temperature before the visit of FEHD staff, causing water droplets on the floor of the complainant's flat.

192. Although FEHD had carried out a subsequent test and measured the room temperature of the complainant's flat and the flat downstairs both before and after the operation of the air-conditioner. However, the test was not conducted during low temperature operation of the air-conditioner, and the findings of the test could not prove that water droplets were still found in the complainant's flat when the air-conditioner downstairs was not operated at a low temperature. The Office of The Ombudsman considered that the subsequent test conducted could not eliminate the reasonable doubt mentioned above.

193. In view of paragraphs 190 and 191 above, The Ombudsman considered that the complaint against FEHD partially substantiated.

194. Besides, while it was possible that the water droplets on the floor was due to deficiency in the heat-proof capability of the floor of the building, BD had indeed confirmed that there was no structural problem in the floor of the building. Hence the Office of The Ombudsman was skeptical of whether the owner of the flat downstairs could make reasonable justifications for his air-conditioner causing water droplets on the floor of the flat upstairs. FEHD could take the opportunity in consulting the Department of Justice to probe whether in law such situation could be seen as "nuisance" so that FEHD could take law enforcement actions.

195. The Ombudsman recommended that –

(a) FEHD should make arrangement as soon as possible for staff to inspect the flat downstairs without an appointment and measure the room temperature as soon as water droplets are found again on the floor of the complainant's flat, so as to investigate whether the problem of water droplets is related to the low temperature operation of the air-conditioner of the flat downstairs; and

(b) FEHD should seek legal advice on the problem mentioned in paragraph 194 above.

Administration's response

196. FEHD accepted the recommendations and has taken the following actions –

(a) FEHD had received no more complaints on water droplets on the floor of the complainant's flat since the receipt of a reply from the Ombudsman on 22 August 2012. FEHD contacted the complainant on 18 October 2012 and 15 November 2012, and was told that no more water droplets were found on the floor of her flat. FEHD had suggested the complainant to contact the department for follow-up action as soon as possible if water droplets were found again on the floor of her flat; and

(b) legal advice sought by FEHD indicated that the investigation conducted by FEHD could not prove that the water droplets on the floor of the complainant's flat were caused by the operation of the air-conditioner of the flat downstairs. Therefore, no enforcement action should be instigated under the Public Health and Municipal Services Ordinance (Cap. 132).

Food and Environmental Hygiene Department

Case No. 2012/0875 – (1) Delay in responding to a food complaint; and (2) Failing to take actions on the complaint

Background

197. In mid-January 2012, the complainant lodged a complaint with the Food and Environmental Hygiene Department (FEHD) against a shop (Shop A) for selling pre-packaged food without labels, thereby violating the laws on food labelling.

198. On 14 February, FEHD staff replied to the complainant that they had found during their site inspection that morning some pre-packaged food without labels and had accordingly asked the shop to withdraw the food. Yet, that very afternoon and on subsequent occasions, the complainant could still see food without labels on sale at the shop.

199. The complainant alleged that there had been delay on the part of FEHD as it had only responded to his complaint after nearly a month (Allegation (a)). He also suspected that the Department had never actually followed up on his complaint (Allegation (b)).

The Ombudsman's observations

Allegation (a)

200. That staff of FEHD's District Environmental Hygiene Offices (DEHO) had treated the food complaint as just an ordinary complaint reflected their lack of understanding of the definition of and handling procedures for food complaints. The fact that they did not conduct a site inspection until almost three weeks after receipt of the food complaint was an indication of their sluggishness.

201. Furthermore, the DEHO staff should have tried to contact the complainant by email when they could not reach him by telephone, as it was not the only means of communication with the complainant. It was also improper of them not to notify him of case progress between mid-February and late March.

202. The Ombudsman considered that there had indeed been delay in FEHD's response to the complainant's food complaint. Allegation (a) was, therefore, substantiated.

Allegation (b)

203. It was not true that FEHD had not taken any action on the case. Nevertheless, the Office of The Ombudsman found it disappointing that even after its intervention, the Department had remained sluggish and still failed to promptly deal with the complainant's food complaint. For example, the complainant complained again in early May. DEHO staff did not inspect the shop in accordance with the procedures and just referred the case to the Centre for Food Safety (CFS) four days later, while CFS staff again waited for more than ten days before conducting an inspection and taking enforcement actions.

204. In the light of the above, The Ombudsman considered Allegation (b) partially substantiated.

205. Overall speaking, the complaint was substantiated. FEHD has since apologised to the complainant for its delay in handling his food complaint and failure to inform him of the progress of its investigation. The Ombudsman urged FEHD to remind staff periodically that they must follow its operation guidelines to handle food complaints promptly and conscientiously. Moreover, they should keep complainants informed of case progress and outcome in a timely way.

Administration's response

206. FEHD accepted The Ombudsman's recommendation and has taken the following action – upon receipt of The Ombudsman's recommendation on 28 September 2012, FEHD instructed its staff via an email on 9 October 2012 to promptly and diligently investigate food complaints and to inform the complainants of the progress as well as results of investigation in a timely manner in accordance with relevant food complaint handling guidelines.

Food and Environmental Hygiene Department

Case No. 2012/1182 – Delay in processing the complainant's claim for damages caused by a water-pipe burst to their market stalls

Background

207. On 17 April 2012, four complainants (market stall tenants and assistants respectively) lodged a complaint with the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD).

208. On 16 February 2010, the main water pipe on the first floor of the market concerned burst, affecting the stalls concerned. The four complainants claimed damage to their properties with FEHD. However, FEHD had not been able to give them a reply on the issue of compensation for more than one year thereafter.

209. On 24 March 2011, they lodged a complaint with the Office of The Ombudsman against FEHD. During the inquiry by the Office of The Ombudsman, FEHD admitted a delay in responding to their claims and apologised to them. On 27 June, The Ombudsman completed the inquiry and urged FEHD to expedite the processing of their claims.

210. On 17 April 2012, the four complainants lodged another complaint against FEHD with the Office of The Ombudsman. They claimed that subsequent to the completion of inquiry by the Office of The Ombudsman, although FEHD met with them several times and had had correspondences with them, it still could not complete the processing of the aforesaid claims of water pipes burst.

The Ombudsman's observations

211. In the early stage of processing the claims, the staff in FEHD did delay the case for months after receiving the claims. FEHD admitted this upon the inquiry of the Office of The Ombudsman. Later on, FEHD kept in touch with the Department of Justice (DoJ) and the four claimants. Once receiving any information from the claimants, FEHD forwarded the information to DoJ without delay.

212. In this case, FEHD took a long time to process the claims because the claimants could not produce sufficient supporting documents and they had a long list of claim items. FEHD therefore needed rounds of correspondence with DoJ and claimants respectively to clarify all the details of the claims.

213. As the compensation would involve the use of public money, it was the responsibility of DoJ to carefully assess each and every claim item and to make numerous requests to FEHD for providing supplementary information and comments for their reference. FHED was not an expert in handling claims, it was therefore understandable that FEHD took some time for collecting and studying the information.

214. The Office of The Ombudsman noted that FEHD's operational guidelines on public claims were not of much help for the staff's actual processing of applications as they only covered general principles without mentioning any detailed procedures in handling claims. Also, as FEHD was not fully aware of their responsibility and role, this points to the inadequacies of its operational guidelines. The Office of The Ombudsman trusted that after this incident, FEHD should have learnt a lesson and grasped the necessary details and specific information required in handling claims.

215. As FEHD had been duly handling the claims of the four complainants since June 2011, The Ombudsman considered that the complaint against FEHD unsubstantiated.

216. The Ombudsman recommended that FEHD should –

(a) formulate a practical guide on handling of public claims to provide staff with specific instructions, elucidating what they should pay attention to and what important information and details they should look for; and

(b) consider engaging professionals to help handling public claims.

Administration's response

217. FEHD accepted The Ombudsman's recommendation regarding the formulation of a practical guide on handling of public claims to provide staff with specific instructions. In consultation with DoJ, FEHD has started drafting detailed internal guidelines which aim to remind staff of the issues and information they should pay attention to and collate when handling claims, with a view to helping staff in handling similar cases in an efficient manner in future. FEHD is now studying DoJ's proposed amendments. FEHD will submit the revised guidelines to DoJ for further comments.

218. FEHD did not accept The Ombudsman's recommendation of engaging professionals to help handling public claims. FEHD planned to step up staff training (e.g. briefings and experience-sharing sessions on previous claim-handling cases) in order to render them a better grasp of the relevant procedures and key points-to-note. FEHD believed that, together with the legal advice and assistance of DoJ, the work of its staff in processing claims would be facilitated by improving working guidelines and enhancing staff training. FEHD would keep in view the effectiveness of these measures after implementation. At this stage, the engagement of professionals to help handle public claims is not considered. The Ombudsman accepted the measures taken by FEHD.

Food and Environmental Hygiene Department

Case No. 2012/1416 – (1) Failing to take enforcement action against the unauthorised roadside banners displayed by some District Councillors at a certain location; (2) Wrongly requiring the complainant to pay for the removal cost for an authorised roadside banner; (3) Failing to give notice before removing the said banner; (4) Delay in mailing to the complainant the demand note for the removal cost for the banner; and (5) Failing to account for the calculation of the removal cost for the banner

Background

219. On behalf of a building's organisation (the Organisation), the complainant lodged a complaint with the Office of the Ombudsman on 4 May 2012 against the Food and Environmental Hygiene Department (FEHD) for improper removal of a banner (the subject banner) that the Organisation displayed on the railing on a street (the subject location) and requiring the complainant to pay for the removal cost. The complainant considered FEHD's handling of the case improper and details were as follows –

(a) Over the past few years, District Councillors had all along displayed publicity materials at the subject location, but FEHD failed to take enforcement actions against them. The complainant queried if there were any precedents regarding FEHD's recovery of removal cost from her for the subject banner;

(b) the subject banner was displayed in the name of the Organisation, but FEHD issued a demand note to the complainant for recovery of the removal cost;

(c) FEHD failed to give notice to the complainant or the Organisation before removing the subject banner;

(d) the "Due Date" stated on the demand note was 19 April 2012, but the demand note was also sent by FEHD on the same day, making it impossible for the complainant to pay before the "Due Date"; and

(e) as banner removal cost was not a statutory fixed penalty, the amount involved might vary from case to case. Nevertheless, FEHD failed to explain to the complainant on the calculation of removal cost, and she could hardly know if the charges imposed were reasonable or not.

The Ombudsman's observations

Allegation (a)

220. As the subject banner was on unauthorised display, it was legitimate for FEHD to remove it according to legislations and policies. In fact, FEHD had taken enforcement actions against District Councillors and other persons for unauthorised display of banners at the subject location and recovered removal cost from them. The Organisation had not been treated unfairly. In view of this, The Ombudsman considered Allegation (a) unsubstantiated.

Allegation (b)

221. FEHD admitted that the staff had wrongly recovered the removal cost from the complainant instead of the Organisation because initially they had not considered with due care who the principal beneficiary of the subject banner should be. In view of this, The Ombudsman considered Allegation (b) substantiated. The Office of The Ombudsman was pleased to note that FEHD had taken prompt rectification measures after reviewing the case.

Allegation (c)

222. Unauthorised display of publicity materials in public places was an offence. FEHD had no statutory duty or obligation to notify the offender before taking enforcement actions. In view of this, The Ombudsman considered Allegation (c) unsubstantiated.

Allegation (d)

223. The Office of The Ombudsman agreed that the "Due Date" had expired when the complainant received the demand note. At that time, the complainant did not know that FEHD would cancel the charges, even though she still had time to make payment to avoid the surcharge. The delay in mailing the demand note showed FEHD's disregard for the "Due

Date" fixed by itself and its lack of consideration for those willing to make punctual payment. In view of this, The Ombudsman considered Allegation (d) substantiated.

Allegation (e)

224. Although the demand note provided no detailed account on the calculation of removal cost for the banner, the complainant could contact FEHD for enquiries. The Office of The Ombudsman also noticed that in the letter which FEHD sent to the complainant together with the demand note, it had been mentioned that the amount to be paid by the complainant included "labour, transportation or material and administration cost". The Ombudsman thus considered FEHD's arrangement appropriate. In view of this, The Ombudsman considered Allegation (e) unsubstantiated.

225. Overall speaking, the complaint was partially substantiated.

226. The Ombudsman urged FEHD to review the procedure for mailing demand notes to avoid delay. When fixing the "Due Date", the Department should take into account public holidays that fall within the relevant period to allow sufficient time for payment before the due date.

Administration's response

227. FEHD accepted The Ombudsman's recommendations and has revised the calculation of "Due Date" from 14 calendar days to 10 working days from the date of issue of the demand note to allow sufficient time for payment before the due date. Also, FEHD has reminded District Environmental Hygiene Offices that demand notes must be mailed in a timely manner in accordance with the operational guidelines and the "Due Date" on the demand note should be revised when necessary.

Food and Environmental Hygiene Department

Case No. 2012/2053 – (1) Unreasonably forbidding filming in a crematorium; and (2) An officer failing to wear his uniform and produce his staff identity card while on duty and showing poor manners

Background

228. The complainant was hired by a family to film the funeral of their deceased member in the hall of a crematorium managed by the Food and Environmental Hygiene Department (FEHD). While he was filming, a person who claimed to be an FEHD officer intervened and asked him to leave.

229. The complainant considered that FEHD should have allowed the family to apply for permission on the spot to film the funeral instead of stopping him from filming without consulting the family (Allegation (a)). He also complained against the officer concerned for not wearing his uniform while on duty. Furthermore, the officer had not produced his staff identity card and was rude (Allegation (b)).

The Ombudsman's observations

230. FEHD exercises control over photography and filming in crematoria to maintain order and prevent disturbance to funerals. However, in this incident, the officer, instead of trying to resolve the issue in a reasonable manner, merely insisted that the complainant stop the filming. The consequential dispute between him and the complainant caused even greater disturbance to the funeral.

231. The Office of The Ombudsman attributed the incident to FEHD staff's inadequate understanding of the rationale behind the Department's regulation of photography and filming in crematoria. Without any written guidelines, staff could only interpret the relevant rules in their own ways, resulting in mishandling problems. Furthermore, FEHD had not provided any information to let facility users know that application could be made on the spot.

232. In view of the above, The Ombudsman considered Allegation (a) substantiated.

233. As regards the allegation of the officer's poor manners, the complainant's edited video clip showed that the officer had at some points spoken loudly and disrupted the solemn proceedings of the funeral. Though his attitude could not be described as rude, his handling of the situation was clearly improper. Besides, it is true that he was not in uniform while on duty. Nor was he wearing his staff identity card.

234. The Ombudsman, therefore, considered Allegation (b) partially substantiated.

235. Overall speaking, The Ombudsman considered the complaint substantiated.

236. The Ombudsman recommended FEHD to –

(a) promptly include in its operational guidelines the arrangements for photography and filming of funerals in crematoria to inform frontline staff of the relevant policy and handling methods; and

(b) provide information to the public on how funeral organisers and families of the deceased can seek permission for photography and filming in crematoria.

Administration's response

237. FEHD accepted all the recommendations made by The Ombudsman in the investigation report and the following improvement measures have been implemented –

(a) The arrangements for photography and filming in crematoria have been incorporated in the Operational Manual concerned to inform frontline staff of the relevant arrangements and handling methods; and

(b) notices have been put up at its crematoria and cremation booking offices to inform the public that if they would like to take photographs or conduct filming in a crematorium, they need to make an application to FEHD staff in advance or on the cremation day. Relevant information has been uploaded onto the FEHD website for public reference.

Food and Environmental Hygiene Department

Case No. 2012/2130 – (1) Failing to take enforcement action on the distribution of free newspapers at certain locations; and (2) Failing to respond to the complainant's enquiry

Background

238. Between 25 June and 16 July 2012, the complainant sent emails to the Office of The Ombudsman to complain against the Food and Environmental Hygiene Department (FEHD).

239. The complainant alleged that distribution of free newspapers on the streets has been causing obstruction to pedestrians. He cited Location A and Location B as examples. He had repeatedly complained to FEHD since 2011. However, FEHD did not -

(a) take enforcement action; or

(b) respond to his query of 15 March 2011.

240. According to FEHD's records, apart from Locations A and B, the complainant also lodged a complaint earlier about obstruction caused by distribution of free newspapers at Location C.

The Ombudsman's observations

Allegation (a)

241. The Office of The Ombudsman noted that FEHD had indeed taken follow-up actions on the complainant's complaints, including site visits and referrals to relevant departments.

242. The Office of the Ombudsman accepted FEHD's explanation that activities in Locations A, B and C did not -

(a) amount to hawking, as no sale is involved; or

(b) obstruct the scavenging operation of FEHD.

FEHD, therefore, could not take enforcement action under the Public Health and Municipal Services Ordinance.

243. Under the Summary Offences Ordinance (SOO), newspaper, being "matters or things", if set out or left and obstructing or inconveniencing any person in a public place, are subject to enforcement action by FEHD and the Police.

244. At Location A, the Office of The Ombudsman noted that, though distribution activity and the clustering of people obtaining free newspapers somewhat slowed down the pedestrian flow, most of the stacks of newspapers were put on the window ledges of a private building rather than on the public pavement. Since there was no obstruction of the public pavement by the stacks of newspaper per se, SOO could not have been invoked.

245. At Locations B and C, stacks of newspapers were indeed put on the ground. However, no obvious obstruction was caused by the newspapers and they were there only for a short period of time. The Office of The Ombudsman, therefore, does not find the situation a blatant offence against which FEHD should have taken prosecution action under SOO.

246. The Office of The Ombudsman found it appropriate for FEHD to refer the matter to relevant departments for action necessary within their purview. In particular, if public order or safety is at risk, FEHD should inform the Police.

247. In the light of the above, The Ombudsman considered Allegation (a) unsubstantiated.

Allegation (b)

248. The Office of The Ombudsman had in particular examined the complainant's email of 15 March 2011 to FEHD. It was one of the many emails in which the complainant expressed his concern and opinion about the subject. In FEHD's reply of 21 March 2011, while not responding to the complainant's viewpoints one by one, FEHD assured the complainant that it would continue to monitor the situation and take action as appropriate. Overall, the Office of The Ombudsman considered FEHD had replied to the complainant's complaints in a timely and proper manner.

249. In the light of the above, The Ombudsman considered Allegation (b) unsubstantiated.

250. The Ombudsman recommended that FEHD should continue to closely monitor the obstruction problem that distribution of free newspapers might cause and take enforcement action in accordance with the relevant legal provisions as and when necessary.

Administration's response

251. FEHD accepted The Ombudsman's recommendation and will continue to keep the locations concerned under close observation. If the distribution of free newspaper there is found contravening any legal provisions of which FEHD is the enforcement authority, FEHD will take prosecution action against the offender as appropriate.

Food and Environmental Hygiene Department

Case No. 2012/2146 – (1) Failing to take enforcement action against a fruit shop which had caused street obstruction; and (2) Failing to respond to the complainant's repeated complaints

Background

252. On 27 June 2012, the complainant complained to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD).

253. The complainant lodged a complaint with FEHD against a shop with food business licence on a street (the shop) for causing obstruction to pedestrians by frequently placing fruits for sale on the pavement in front of the shop. Although FEHD staff had made a series of inspections and taken out prosecutions against the shop, the problem of street obstruction remained without any improvement. In view of this, the complainant alleged that FEHD failed to take effective enforcement actions and therefore the problem persisted (Allegation (a)).

254. Besides, the complainant had repeatedly lodged complaints with FEHD against the shop for street obstruction, but FEHD staff failed to reply to him (Allegation (b)).

The Ombudsman's observations

Allegation (a)

255. FEHD had actually taken follow-up actions on the problem of street obstruction caused by the shop. However, there were inadequacies in its follow-up actions as set out below.

256. The Office of The Ombudsman noted from FEHD that the staff of the Hawkers Section and the Health Inspectors of the Environmental Hygiene Section took enforcement actions against illegal street obstruction caused by the shop under their respective purviews –

(a) Staff of the Hawkers Section only initiated prosecution under Section 4A of the Summary Offences Ordinance (Section 4A); and

(b) Health Inspectors were responsible for monitoring the operation of licensed food premises. Apart from taking out prosecution under Section 4A, warning letters could be issued under the Warning Letter System against shops for breaches of licensing conditions.

257. The Office of The Ombudsman noted that FEHD had issued two warning letters to the shop during the operations in August, September and November 2011. If the shop continued to breach the licensing condition leading to an accumulation of three warning letters, FEHD could consider cancelling the licence. However, subsequent follow-up actions were only taken by staff of the Hawkers Section in January and February 2012. Since staff of the Hawkers Section could only prosecute but not issue warning letters, the shop was not issued with the third warning letter and hence not subject to the subsequent sanction of cancellation of licence. In respect of the prosecutions initiated by the Hawkers Section, the shop was only imposed a fine. The Ombudsman considered that the deterrent effect to the offending shop was limited.

258. FEHD admitted that there was a lack of communication between the staff of the Hawkers Section and the Health Inspectors of the Environmental Hygiene Section in following up the case. In addition, the staff concerned should not only refer the complaints lodged by the complainant in January and February 2012 to the Hawkers Section without referring it to the Health Inspectors of the Environmental Hygiene Section who were responsible for monitoring food premises. Besides, without taking into consideration that the shop was a licensed food premises, the Hawkers Section had not referred the case to the Environmental Hygiene Section for follow-up actions.

259. It showed that the staff of the Hawkers Section and the Health Inspectors of the Environmental Hygiene Section were taking enforcement actions separately under their respective purviews without communication and collaboration. As a result, the enforcement actions taken against the shop were not the most effective.

260. In addition, according to the interpretation provision under the Public Health and Municipal Services Ordinance (PHMSO), "hawker" includes any person who exposes any goods for sale in any public place.

261. The Office of The Ombudsman queried FEHD on why it did not attempt to take prosecution against the shop for selling fruits on the pavement under Section 83B of the PHMSO in any previous inspections. FEHD explained that as its staff did not find any evidence of "selling" and "buying" activities, they could not take prosecution against the shop for the offence of illegal hawking under Section 83B.

262. The Office of The Ombudsman could hardly accept the above explanation given by FEHD on the following grounds –

(1) According to the interpretation provision under the PHMSO, the act of any person who exposes any goods for sale in any public place, even though there is no actual transaction of goods, constitutes a hawking activity. As seen from the photos taken by FEHD staff during their inspections, the shop apparently displayed fruits only for the purpose of sale. On the basis of the legal provision and objective evidence, FEHD could have made an attempt to take prosecution against the shop for hawking without a licence. That FEHD had turned a blind eye to such obvious illegal hawking activities revealed that the Department did not measure up to public expectations; and

(2) should FEHD really consider it necessary to exercise caution by collecting evidence of "selling" and "buying" activities, The Ombudsman believed that FEHD staff could have collected such evidence if they had stayed on and observed for a longer period. The Ombudsman had serious doubt as to whether FEHD staff had done their best in collecting evidence during their inspections which were made in more than a year.

263. In sum, The Ombudsman considered that Allegation (a) partially substantiated.

Allegation (b)

264. The complainant alleged that FEHD had not replied to a number of complaints he made between May and late June 2012. According to its records, FEHD did not receive any complaints from the complainant against the shop between February and May 2012. It was not until June 2012 that FEHD received the complaint referred by 1823 Call Centre. The Department gave a reply to the complainant on 29 June 2012 after investigation.

265. According to its records, FEHD gave timely reply to the complainant. Therefore, The Ombudsman considered that Allegation (b) unsubstantiated.

266. Overall speaking, The Ombudsman considered the case partially substantiated.

267. The Ombudsman recommended that FEHD should review the existing procedures on the handling of complaints against street obstruction by food premises/shops among its various sections, so that the complaints could be followed up jointly by the relevant sections or by individual sections as appropriate.

Administration's response

268. FEHD has conducted a review. The existing guidelines on handling complaints that may involve different sections of a district have already stipulated that district staff should ensure sufficient coordination and liaison among the concerned sections in handling the complaints. FEHD has reminded its staff to follow the guidelines and to strengthen coordination and liaison among different sections in handling complaints of similar nature.

Food and Environmental Hygiene Department

Case No. 2012/2476 – (1) Delay in relocating three portable toilets near a road junction which had allegedly blocked drivers' sightline; and (2) Making false claim about the local villagers' objection to relocation of the portable toilets

Background

269. On 20 July 2012, the complainant complained with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD). Allegedly, since 7 June 2012, the complainant had repeatedly complained to FEHD that the portable toilets at Site A obstructed drivers' sightline. He requested FEHD to relocate the toilets. On 10 July, he proposed to FEHD a site for relocation (Site B). Eventually FEHD removed the toilets on 17 July.

270. The complainant had the following allegations –

(a) FEHD had delayed taking action on his case; and

(b) FEHD's claim that "local village representatives (VRs) found the location (Site B) too distant from the villages and inconvenient" was false, since a residential estate in the vicinity had in fact not been consulted by FEHD on his proposal.

The Ombudsman's observations

Allegation (a)

271. As the complainant's case concerned traffic safety, the Office of The Ombudsman considered that FEHD should have accorded higher priority to the case and at the outset consulted the Transport Department (TD) on the alleged blocking of drivers' sightline by the portable toilets.

272. The Office of The Ombudsman noted that the portable toilets actually did not occupy much space whereas the Government footpath on which the portable toilets were placed stretches for quite a long distance. It was, therefore, hardly convincing that FEHD's two site inspections should reveal that there was no suitable Government land nearby for

relocating the portable toilets. The records of FEHD's two site inspections did not mention what sites had been considered and why they were considered unsuitable. This somewhat reflected the staff's lax attitude and procrastination in handling the complainant's case.

273. FEHD had indeed delayed processing this complaint. The saving grace was the advice that the Department retrospectively obtained from TD that Site B was an acceptable location for the portable toilets.

274. Based on the above, The Ombudsman considered Allegation (a) substantiated.

Allegation (b)

275. FEHD's explanation to the complainant that "VRs found the location (Site B) too distant from the villages and inconvenient" was based on an opinion previously expressed by the VR. That explanation was not false or ungrounded. It lacked precision, though.

276. The site inspection carried out by the Office of The Ombudsman revealed that compared with Site A, Site B was in fact closer to some houses of the village that the portable toilets were supposed to serve. Furthermore, most of the houses there were quite modern in appearance. Presumably, they were equipped with flush toilets. The Office of The Ombudsman did not see the villagers having a heavy reliance on the portable toilets. FEHD had failed to properly access the gravity of the villagers' views and consequently gave the complainant an imprecise explanation.

277. Accordingly, The Ombudsman considers Allegation (b) substantiated other than alleged.

278. Since the crux of the complaint lied in Allegation (a), The Ombudsman, overall, considered the complaint substantiated. The Ombudsman recommended that FEHD should –

(a) accord higher priority to complaints/cases that involve public safety;

(b) consult TD promptly when traffic safety is in question; and

(c) remind staff to respond to public enquiries/queries in a precise manner.

Administration's response

279. FEHD accepted the recommendations and has taken the following actions –

(a) Staff have been briefed and reminded to accord higher priority to complaints/cases that involve public safety;

(b) staff have been reminded to consult TD promptly when traffic safety is in question; and

(c) staff have been reminded to respond to public enquiries/queries in a precise manner.

Food and Environmental Hygiene Department

Case No. 2012/2601 – (1) Failing to take enforcement action against nuisances caused to the complainant's premises by the emission of hot air from a nearby air-conditioner; (2) Measuring the temperature of the complainant's premises at inappropriate locations; (3) Improper procedures in conducting investigation into the complainant's complaint against emission of hot air from a nearby air-conditioner; and (4) Delay in handling the complainant's complaint

Background

280. On 28 July 2012, the complainant complained to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD).

281. According to the complainant, he lodged several complaints to FEHD since 2010 about emission of hot air from the premises downstairs causing a rise in the room temperature of his premise and hence nuisance to him. FEHD however did not properly follow up on the complaint, leaving the problem unresolved. The complainant's allegations against FEHD include –

(a) as stipulated in section 12(1)(g) of the Public Health and Municipal Services Ordinance (the Ordinance), "the emission of air either above or below the temperature of the external air from the ventilating system in any premises in such a manner as to be a nuisance" shall be a nuisance. The complainant was dissatisfied that FEHD adopted the "two degrees Celsius temperature difference" as an indicator for enforcement actions. The complainant considered it unreasonable for FEHD not to take any enforcement action because the temperature of the hot air emitted from the air-conditioner in question when it was in operation caused the air of the complainant's flat to rise by less than two degrees Celsius;

(b) the complainant considered that FEHD staff should measure the temperature outside the windows of his premises and the temperature at the air vent of the air conditioner in question in order to assess whether the temperature of the hot air emitted

from the air-conditioner was higher than "outdoor temperature". The complainant considered it inappropriate for FEHD to measure the indoor temperature on his premises in order to assess whether the hot air emission had constituted a nuisance;

(c) the complainant alleged that the hot air emitted from air-conditioners was most intense when they had just been turned on. During the investigation on 29 August 2011, FEHD staff did not go to the most affected area (balcony windows) to measure the temperature immediately after the air-conditioner in question was turned on. Rather, they measured the temperature at other unaffected locations (bedrooms and bathrooms). As such, they failed to accurately record the impact of the hot air on his premises. The complainant considered the investigation procedures of FEHD inappropriate; and

(d) the complainant alleged that since 2010, he had repeatedly complained to FEHD. On 26 September 2011, FEHD wrote to him, stating that FEHD was handling his case and would give him a reply as soon as possible. However, FEHD did not follow up on the case. In April 2012, he complained to FEHD again. In June 2012, FEHD staff visited the premises below for investigation. However, the staff could not enter the premises. FEHD had not taken any follow-up action since then. The complainant complained that there were delays in FEHD's handling of his case.

The Ombudsman's observations

Allegations (a) and (b)

282. The Office of The Ombudsman understood the complainant's request. However, the Ordinance does not define a standard on the difference in temperature that would constitute a nuisance. FEHD continues to adopt the two degrees Celsius temperature difference laid down by the former Urban Services Department after consulting the Department of Health and legal advice and based on experience of handling similar cases as an indicator for actions to handle complaints. FEHD would measure the room temperature of the affected living area of the complainant (not the temperature outside the windows of the complainant's premises and the temperature at the air vent of the air conditioner in question) in order to assess whether the hot air emitted

from the air-conditioner in question had constituted a nuisance to the complainant. The Ombudsman considered that FEHD had tried its best and its actions were not unreasonable.

283. In this light, The Ombudsman considered Allegations (a) and (b) unsubstantiated.

Allegation (c)

284. The Office of The Ombudsman agreed that in assessing whether the hot air emission had constituted a nuisance, the focus was on the ongoing impact on the complainant's premises after the air-conditioner in question had been turned on. Therefore, at which location FEHD staff should measure the temperature first was not the key point. In fact, the result of the third test conducted by FEHD revealed that at most of the tested locations, the temperature after the air-conditioner in question had been turned on for 30 minutes was slightly higher than the temperature after it had been on for 15 minutes. The complainant suspected that the longer the air-conditioner had been in operation, the lower the temperature at the tested locations would be; and that the impact of hot air emission on his premises was inaccurately recorded. However, there was no concrete evidence supporting this.

285. In this light, The Ombudsman considered Allegation (c) unsubstantiated.

Allegation (d)

286. The Office of The Ombudsman considered that there were delays in FEHD's handling of the complainant's complaint –

(a) FHED did not take any action after issuing an interim reply on 26 September 2011 in response to the complaint letter dated 21 September. In April and May 2012, the complainant wrote to FEHD again. It was only after that did FEHD reply to the complainant on 17 May (after almost eight months), saying that FEHD staff would visit his premises again; and

(b) after failure to gain entry into the premises below in June 2012, FEHD staff did not take follow-up actions in a timely manner. It was only after the intervention of The Ombudsman did FEHD contact the occupant of the premises below and conduct the third test in September 2012.

287. In this light, The Ombudsman considered Allegation (d) substantiated.

288. Overall speaking, The Ombudsman considered the complaint partially substantiated.

289. The Ombudsman recommended that FEHD should remind all staff to take follow-up actions on complaints and to reply to complainants in a timely manner.

Administration's response

290. FEHD accepted The Ombudsman's recommendation and has warned the staff concerned who failed to give a written reply on all the complaints made by the complainant and contact the complainant to follow-up the case in a timely manner. On 10 September 2012, the staff concerned apologised to the complainant for the inadequacies in his handling of the case.

Food and Environmental Hygiene Department

Case No. 2012/2704(I) – Refusing to release information of the affected premises in a water seepage complaint in which the complainant's premises was the suspected source of seepage

Background

291. On 24 August 2012, the complainant complained to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD).

292. According to the complainant, in early August 2012, FEHD posted a notice at the door of his premises, stating that FEHD had received a complaint about water seepage in another premises and thus FEHD staff needed to enter his premises in order to identify the source of the water seepage. He left a message for Staff A at the phone number listed on the notice, saying that he wanted to know the details of the complaint. However, he did not receive any reply. On the same day, he contacted Staff B, supervisor of Staff A. Staff B told him that only Staff A knew the details of the seepage case and asked him to wait for Staff A's reply. Staff B refused to provide information on the premises having seepage problem on the ground of privacy. Two days later, Staff A returned his call and furnished him with information on the premises having seepage problem. Subsequently, he allowed FEHD staff to enter his premises to carry out tests.

293. The complainant complained that Staff B refused to provide him with details of the seepage complaint and information on the premises with seepage problem.

The Ombudsman's observations

294. The Office of The Ombudsman considered that it was understandable for the complainant as the owner/occupier of the premises under investigation to obtain more information on the seepage case so that he could decide on how to facilitate FEHD's investigation work. Of course, FEHD had a responsibility to protect the privacy of the owner/occupier of the premises having seepage problem. Therefore, Staff B's refusal to provide the personal data of the owner/occupier to the

complainant should be understandable. However, FEHD had a guideline requiring its staff to make reference to the Code on Access to Information (the Code) in handling complaints. The basic principle of the Code was to encourage Government departments to make available to the public information they request for.

295. The Code specifies the categories of information to which public access may be allowed, including –

(a) disclosure is consistent with the purposes for which the information was collected; or

(b) the subject of the information, or other appropriate person, has given consent to its disclosure.

296. In this case, the Office of The Ombudsman considered that although disclosing to the complainant which premises having seepage problem and the water seepage condition would indirectly disclose the identity of the person making the seepage complaint, such disclosure was consistent with the purposes for which the information was collected, i.e. to investigate the source of the seepage and according to investigation findings, to request the owner/occupier of the premises causing the seepage problem to abate the nuisance.

297. If FEHD had doubt about the disclosure, it could consult in advance the owner/occupier of the premises having seepage problem. If he/she agreed to the disclosure, FEHD could then disclose the information to the complainant or even encourage both parties to communicate direct in order to solve the seepage problem as soon as possible.

298. In fact, it had been FEHD's usual practice in handling water seepage complaint cases to release information on the seepage location at the request of the occupier of the premises under investigation. It was considered unreasonable for the staff concerned to refuse to release information on the seepage location to the complainant.

299. More importantly, if FEHD eventually confirmed that the complainant's premises was the source of the seepage and issued a Nuisance Notice to him requiring him to abate the nuisance in accordance with the Public Health and Municipal Services Ordinance (the Ordinance), FEHD must then describe "the premises where nuisance exist" (i.e. the premises affected by the seepage) and describe "the nuisance" (i.e. the

seepage condition) in the Notice under the Ordinance. Such information was in fact the information requested by the complainant. As such, The Ombudsman considered that FEHD had no ground for refusing to release the requested information to the complainant.

300. Based on the above analysis, The Ombudsman considered this complaint substantiated.

301. The Ombudsman recommended that FEHD should spell out in the procedural guidelines that staff should reveal the location of nuisance and seepage condition to the liable owner/occupier upon request in the course of investigation.

Administration's response

302. FEHD accepted the recommendation and has implemented it on 6 February 2013. FEHD has specified in the guidelines for water seepage investigation that staff should release information on the location of seepage at the request of the owner/occupier of the premises under investigation.

Food and Environmental Hygiene Department

Case No. 2012/2725 – (1) Failing to respond to an enquiry about the safety of a bottle of juice; and (2) Inconsistency in replying whether it would take enforcement action against the manufacturer which purportedly breached the food safety regulations

Background

303. The complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) on 9 August 2012.

304. According to the complainant, he complained to the Centre for Food Safety (CFS) of FEHD on 22 March 2012 about a recently bought bottle of juice containing foreign matter. CFS replied later that testing had confirmed the presence of mould in the juice. The complainant repeatedly enquired whether the mould would cause any adverse health effect. CFS, however, replied that it was not necessary to inform the public and refused to give a definite answer (Allegation (a)).

305. Moreover, staff A of CFS had indicated that the manufacturer concerned would be prosecuted. However, CFS informed the complainant in a written reply dated 11 July that no legal actions would be taken. The complainant accused CFS of contradictory response (Allegation (b)).

The Ombudsman's observations

Allegation (a)

306. The primary function of CFS is to protect public health. The Office of The Ombudsman considered it reasonable for the public to seek CFS's view on the health effects of a foreign matter in food. If FEHD had known all along that the mould posed low health risk to the average consumers, it would perhaps be understandable that the scope of testing did not cover the evaluation of the health risk of mould. However, if this was the case, CFS had no reason not to give advice to the complainant on the health risk of the mould in the juice.

307. It would be inexcusable if FEHD had never made effort to apprise CFS staff of the level of health risk posed by mould. Based on the above analysis, The Ombudsman considered Allegation (a) substantiated.

Allegation (b)

308. Staff A denied that she had indicated that prosecution action would be taken in this case. As there was a lack of independent supporting evidence, the Office of The Ombudsman could not determine the details of their conversation. However, as staff A did not have the authority to decide whether or not to prosecute, the Office of The Ombudsman inferred from common sense that she would not have told the complainant that the manufacturer would be prosecuted. The Office of The Ombudsman would not rule out the possibility that there was some misunderstanding in the communication. In view of this, The Ombudsman considered Allegation (b) unsubstantiated.

309. Overall speaking, The Ombudsman considered the complaint partially substantiated.

310. Moreover, the Office of The Ombudsman noticed that CFS received referral of the case from District Environmental Hygiene Office on 28 March 2012 but did not reply to the complainant until 18 April (21 days later). This was a violation of the operation guideline that an interim reply should be sent to the complainant within 10 days.

311. The Ombudsman urged FEHD to instruct and remind staff that they must respond to public complaints/enquiries promptly and positively.

Administration's response

312. FEHD accepted The Ombudsman's recommendation and advised that the following action has been taken –

(a) FEHD replied to the complainant on 18 June 2012, advising that from the perspective of food safety, food containing foreign matters is in general not suitable for consumption; and

(b) upon receiving the Office of The Ombudsman's report dated 8 January 2013, FEHD instructed and reminded staff again that they must respond to public complaints/enquiries promptly and positively.

Food and Environmental Hygiene Department

Case No. 2012/3952 – (1) Unreasonably refusing to expedite investigation for a water seepage complaint; and (2) Ineffective investigation methodology

Background

313. On 4 October 2012 and 16 November 2012, the complainant lodged to the Office of The Ombudsman a complaint against the Joint Office on Water Seepage (JO) formed by the Food and Environmental Hygiene Department (FEHD) and the Buildings Department (BD).

314. According to the complainant, on 9 August 2012, he made a complaint to JO via the 1823 Call Centre (the Call Centre) that water seepage was detected on the ceiling of the bathroom of his premises. On 8 and 25 September 2012, JO sent officers to the premises and the premises above for investigation (including colour water test at the drainage outlets). The seepage deteriorated very fast afterwards (expansion of the affected area and dampening of the electrical point). On 3 October 2012, the complainant's wife called Staff A of JO, asking the office to speed up their investigation and conduct inspection in the premises again. However, Staff A turned down the request of the complainant's wife, claiming that no further action could be taken until the investigation report was ready. Moreover, she told the complainant's wife to seek assistance from a private consultant.

315. The complainant said that JO was indifferent to the safety of his whole family, and that JO had unreasonably refused to speed up the investigation process. He also said that Staff A had made an improper suggestion that he should seek assistance from a private consultant (Allegation (a)).

316. In November the same year, JO was still unable to identify the source of the seepage. The complainant believed that if he hired a private consultant for investigation, the source of the seepage would have been found in a short period of time. He questioned the effectiveness of the investigation method of JO (Allegation (b)).

The Ombudsman's observations

Allegation (a)

317. As early as 25 September 2012, Staff A concluded that there was no trace of the water dye used for the colour water test at the drainage outlet in the premises above on the ceiling in the premises. However, the seepage persisted. According to the procedures, JO should have conducted professional investigation into the case. The Office of The Ombudsman considered that even though Staff A agreed to collect samples from the ceiling and deliver such samples to the laboratory in order to allay the complainant and his wife's concerns, JO did not need to delay its professional investigation because of it.

318. After receiving the call for assistance from the complainant's wife on 3 October, JO had no reason not to start professional investigation right away. No matter whether the complainant's wife mentioned the expansion of the affect area to the electrical point, and/or asked JO to visit their premises, the indisputable point remains that during the telephone conversation, the complainant's wife pointed out clearly that the affected area had expanded and asked them to start professional investigation as soon as possible. Moreover, from the telephone conversation, Staff A could sense that the complainant's wife was "very worried about the seepage". However, Staff A still turned down the request on the ground that they had to wait for the laboratory report. Staff A did not even suggest inspecting the condition at the scene, which was the basic thing to do. Instead, Staff A recommended that she should consider hiring a private consultant to trace down the source of the seepage as soon as possible. The Office of The Ombudsman considered that there was inadequacy in the service attitude of Staff A, who failed to put herself in the citizens' shoe. No wonder the complainant's wife thought that JO would not follow up on her seepage case. In this light, The Ombudsman considered Allegation (a) substantiated.

Allegation (b)

319. JO deployed 'non-destructive testing' according to the established procedures to avoid damage to private properties. The effectiveness of this approach was unavoidably limited as JO might not necessarily be able to identify the source of seepage. Nonetheless, this was considered not unreasonable. Moreover, there was no evidence to prove that a private consultant would be able to find out the source within a short period of time. In this light, The Ombudsman considered Allegation (b) unsubstantiated.

320. Overall speaking, The Ombudsman considered the complaint partially substantiated.

321. The Ombudsman recommended that JO should continue to closely follow up the complainant's seepage complaint and keep the complainant posted of the progress/result.

Administration's response

322. JO accepted The Ombudsman's recommendation and had continued to follow up the complainant's seepage complaint and kept the complainant posted of the progress. The investigation conducted by JO on 6 March 2013 showed that the water seepage had ceased.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2011/5219A&B – Delay in handling a water seepage complaint

Background

323. On 20 December 2011, the complainant lodged a complaint to the Office of The Ombudsman against the Joint Office (JO) set up by the Food and Environmental Hygiene Department (FEHD) and the Buildings Department (BD).

324. In July 2011, the complainant complained to JO about water seepage in his premise. That month, FEHD informed him that the case had been referred to BD. However, it was not until November that year did BD conduct tests on the flat roof. The complainant was discontent of JO for the delay in handling his case, whilst water seepage in his premise persisted.

The Ombudsman's observations

325. As JO did not duly follow up with the complainant's water seepage report in 2008, the Office of The Ombudsman considered that JO should have handled promptly the water seepage report received again in July 2011 to rectify the deficiency. However, upon receipt of the complaint in July 2011, JO did not take any concrete actions until November 2011 to trace the source of water seepage. The Office of The Ombudsman considered that the working attitude of FEHD and BD was indeed laid-back.

326. First, FEHD did not include in the initial case referral to BD the case file regarding the complainant's previous complaint in 2008. Hence, BD had spent time to examine the case afresh. FEHD did not provide the relevant case file to BD until September 2011 after BD made the request in mid-August 2011. As BD noted from the previous case file that FEHD had issued a Nuisance Notice (NN) in 2008, BD had to seek FEHD's clarification on the validity of the NN. In the above process, FEHD and BD had spent much time and manpower in delivering the case files, and re-examining and verifying the information on the files.

327. Second, BD and FEHD had conducted numerous discussions and carried out respective inspections to confirm if the there was any drainage system on the flat roof on the floor above. In fact, it should be an obvious matter whether there was any drainage system; to check the presence of a drainage system should also be a standard procedure familiar to JO. If FEHD and BD have different views after their inspections and fail to confirm the presence of the drainage system, both departments should forthwith arrange a joint inspection to resolve the doubts so as to expedite the follow up on the case. Regrettably, it took more than two months for the two departments to clarify such a simple matter. This incident showed that the two departments acted in their own ways without coordination, hence led to the delay in public complaints.

328. With regard to the non-compliance of the NN, FEHD requested BD to conduct the confirmatory test in mid-March 2012 for consideration of prosecution action. However, BD failed to arrange for the confirmatory test until early May due to delay in the tendering of the new contracts for the outsourced consultants. This caused further delay in handling of the case.

329. To sum up, FEHD and BD delayed their handling of the complaint's case. The Office of The Ombudsman therefore considered this complaint substantiated.

330. The Ombudsman recommended that –

(a) FEHD should remind its staff to properly transfer all relevant files and documents when referring a case to BD;

(b) BD should arrange for the tendering of new consultancy contracts earlier so as to avoid the termination of the consultant's service which may affect the progress of the follow up on cases; and

(c) BD and FEHD should strengthen their communication. In case of different views on a seepage case, both departments should carry out a joint inspection immediately in order to resolve the problem promptly.

Administration's response

331. FEHD and BD have accepted all The Ombudsman's recommendations and taken follow-up actions as follows –

(a) BD completed the review in July 2012 on the time required for the tendering of new consultancy contracts for JO. In the next round of tendering, sufficient time will be allowed for the tendering of new contracts so as to avoid termination of the consultant's service which may affect the progress of the follow-up of cases;

(b) JO has reminded the staff of BD and FEHD in JO that in case of different views on a seepage case, they should exchange their views immediately on telephone or at a face-to-face meeting instead of on file. If necessary, joint inspections should be carried out to resolve the problem promptly. In addition, experience sharing forums have been held regularly amongst the staff of BD and FEHD in JO in order to strengthen the communication and mutual understanding so that they can coordinate with one another more smoothly; and

(c) FEHD has issued guidelines to all district offices by email on 19 June 2012 to remind the staff in JO that all relevant files and documents should be properly transferred to BD in a case referral.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2012/3883 (Food and Environmental Hygiene Department) – Mishandling a water seepage complaint

Case No. 2012/3922 (Buildings Department) – (1) Mishandling a water seepage complaint; and (2) Mishandling a complaint about unauthorised building works

Background

332. On 3 and 4 October 2012, two complainants lodged a complaint to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and the Buildings Department (BD).

333. The two complainants (one of them being the owner of Flat X of a building) noted water seepage on the ceiling of Flat X since there was subdivision of the premises on the floor upstairs (the upper floor premises) into several flats (subdivided flat). Since 2004, the complainants have lodged repeated complaints to FEHD and BD. Nevertheless, both FEHD and BD have not taken any enforcement action against the owner of the upper floor premises. Between March and June 2012, the complainants lodged complaint against the unauthorised building works (UBW) of the upper floor premises to BD. Nevertheless, BD did not take any enforcement action against the UBW. In April 2012, FEHD staff carried out colour water tests at the upper floor premises again in response to the complainants' water seepage complaint. As no colour dye of the tests was observed on the seepage area of Flat X, FEHD ceased further investigation.

334. The complainants lodged the following complaints against FEHD and BD –

(a) FEHD and BD mishandled the two complainants' water seepage complaint, including failure to carry out colour water tests seriously; and

(b) BD did not handle their complaints about the UBW of the upper floor premises diligently.

The Ombudsman's observations

Allegation (a)

335. Regarding the complaint about water seepage in Flat X lodged in 2004, BD took follow-up actions on the part within its jurisdiction and referred the case to FEHD, which was responsible for handling water seepage complaints at that time. After BD had confirmed that the water seepage did not involve structural safety of the building, an advisory letter was issued to the owner of the upper floor premises and BD ceased further follow-up actions. The Office of The Ombudsman considered that the practice of BD was appropriate.

336. Nevertheless, for unknown reasons, FEHD did not have a record of the above complaint. The Joint Office (JO), formed by FEHD and BD thereafter, lost the file of the complaint about water seepage in Flat X lodged in 2006. The Ombudsman considered the circumstances unacceptable.

337. Regarding the water seepage complaint lodged by one of the complainants in 2011, JO has carried out all the non-destructive tests according to the established procedures. Although the effectiveness of non-destructive tests in ascertaining the source of water seepage may inevitably be limited, the Office of The Ombudsman agreed that JO could not carry out any destructive test which would damage the property of the public.

338. Based on the above analysis, The Ombudsman considered that Allegation (a) against FEHD partially substantiated; and that against BD unsubstantiated.

Allegation (b)

339. Regarding the complaints lodged by the two complainants against the UBW of the upper floor premises, BD had carried out investigations and taken follow-up actions in accordance with the established enforcement policy and guidelines prevailing at that time. The way of handling the UBW complaints was generally appropriate.

340. For the unauthorised structure on flat roof of the upper floor premises, it is understandable that prompt enforcement action had not been taken by BD because of the need to handle works arising from the outbreak of the Severe Acute Respiratory Syndrome. However, given

that BD only issued the warning notice (WN) for the remaining UBW on the flat roof of the upper floor premises one year (in November 2006) after the withdrawal of the removal order in November 2005 and only sent to the Land Registry for registration after another 10 months (in September 2007), there were in fact delays in the serving and registration of WN.

310. Based on the above analysis, The Ombudsman considered Allegation (b) partially substantiated.

342. Overall speaking, The Ombudsman considered the two complainants' complaint against FEHD and BD partially substantiated. The Ombudsman made the following recommendations to FEHD and BD –

(a) JO should instruct staff to keep file records of all water seepage complaints properly; and

(b) BD should timely follow up all reported cases of UBW.

Administration's response

343. JO and BD accepted the recommendations of The Ombudsman and have taken the following actions –

(a) in respect of recommendation (a), JO has instructed staff to keep file records of all water seepage complaints properly; and

(b) regarding recommendation (b), a Progress Monitoring Committee has been set up in BD for regular monitoring of the progress in handling reported cases of UBW and related enforcement actions. The subject building has also been included in the list of target buildings for the "Clearance Operation on Unauthorised Roof Structures Ensemble 2013"

Food and Environmental Hygiene Department, Buildings Department and Lands Department

Case No. 2011/4312A (Buildings Department) – Failing to take enforcement action against some unauthorised building works

Case No. 2011/4312B (Food and Environmental Hygiene Department) – Failing to take enforcement action to curb the street obstruction problem caused by some unauthorised building works

Case No. 2011/4312C (Lands Department) – Failing to take enforcement action against some unauthorised building works on Government land

Background

344. Since 2009, the complainant had repeatedly complained to the Buildings Department (BD) and the Food and Environmental Hygiene Department (FEHD) respectively against the owner of a ground-level shop (Shop A) of a building for illegally constructing two shops (Shops B and C) along the side wall of the shop and encroaching on the pavement, and against the operators of Shops B and C for placing their merchandise on the pavement such that pedestrians had to take the risk of stepping out onto the carriageway.

345. Later on, in November 2011, the complainant also sought assistance from the Lands Department (LandsD), but LandsD expressed that the problem should be followed up by FEHD and BD. He therefore complained to the Office of The Ombudsman against the three departments: FEHD for failing to handle the problem effectively resulting in the situation of obstruction of public pavement; BD for not taking enforcement action against the two unauthorised building works (UBW) items, i.e. Shops B and C; and LandsD for shirking its responsibility and failing to take enforcement action against the two shops for unlawful occupation of Government land.

The Ombudsman's observations

FEHD

346. Shops B and C looked like ordinary shops. Consequently, before the complainant took the matter to the Office of The Ombudsman in October 2011, FEHD staff did not notice during inspections that their operators were actually engaged in unlicensed hawking on the street and so only took action on the obstruction of the pavement by their merchandise. The Office of The Ombudsman found this excusable.

347. The Ombudsman, therefore, considered the complaint against FEHD unsubstantiated.

348. Nevertheless, after receiving referral of the case from the District Lands Office (DLO) of LandsD in November 2011, FEHD should realise that Shops B and C were actually unauthorised structures on the pavement. It, however, still continued to take enforcement action against street obstruction, instead of instituting prosecution against unlicensed hawking on the street. This showed inadequate alertness on the part of FEHD.

BD

349. That BD decided not to take enforcement action against the UBW items in 2008 was in accordance with its policy at that time. The Ombudsman considered the complaint against BD unsubstantiated.

350. In end 2011, BD conducted another site inspection and discovered that Shops B and C actually comprised six UBW items (items A to F). Among them, items A, B and C (which included platforms) were erected on the pavement while items D, E and F (which included the retractable canopies) were projections from the external wall of the building. The pavement had become much narrower as a result of encroachment by the two shops with UBW. BD decided to take immediate enforcement action against items D to F in accordance with its enhanced policy, while asking DLO to remove items A to C in tandem. Its handling of the case was considered reasonable and practical.

LandsD

351. LandsD is empowered by law to deal with occupation of public pavements by UBW items and should have cooperated with BD in resolving the problem. Nevertheless, after receipt of complaints, DLO obviously ignored its own duty and merely referred the case to other departments.

352. The Ombudsman, therefore, considered the complaint against Lands D substantiated. The fact that DLO had subsequently taken land control action against items A to C was regarded as having remedied the situation.

353. The Ombudsman made the following recommendations –

(a) BD and LandsD should monitor closely the demolition of the UBW items; and

(b) FEHD should step up training and supervision of its frontline staff to ensure strict enforcement against unlicensed hawking that involves UBW.

Administration's response

354. FEHD accepted the recommendation and has reminded frontline enforcement staff to take strict enforcement actions against unlicensed hawking that involves UBW on streets. FEHD will also strengthen training and supervision of frontline staff in this regard.

355. BD accepted The Ombudsman's recommendation and has taken the following actions –

(a) As regards the District Survey Office's survey report on the correct locations of UBW items B and C, BD was informed by the District Survey Office on 4 May 2012 that there was discrepancy in its previous survey report in the sense that the lot boundary of the building was generally in line with the external wall of the building, hence UBW items B and C should be entirely located on Government land. BD informed DLO on 8 May that no follow-up action would be taken by BD for items B and C as they were located on Government land.;

(b) subsequent to the serving of statutory removal order under the Buildings Ordinance on 15 March 2012 for the removal of the unauthorised projections and retractable canopies (i.e. UBW items D to F) within 60 days of the date of the order, staff of BD had contacted the owner and occupants concerned several times in April to May 2012 so as to provide advice and response to questions related to the removal works; and

(c) BD was informed by the owner of the concerned ground-level shop on 10 May 2012 that relocation of the electrical wiring and installations for traffic light attached to the external wall of the building was necessary in order to carry out the removal works of UBW items B and C. Staff of BD contacted staff of DLO and conducted a joint site inspection with the concerned owner and staff of the Highways Department on 16 May 2012 to discuss the necessary arrangement for the traffic light relocation and the UBW removal works. Thereafter, a site inspection by staff of BD and DLO on 18 June 2012 revealed that all the concerned UBWs had been removed.

356. LandsD accepted The Ombudsman's recommendation. With the close monitoring by LandsD and BD over the demolition work of the concerned UBWs, UBW items A to F have been demolished by the owners of the two shops.

Food and Environmental Hygiene Department and Lands Department

Case No. 2012/1764A&C – (1) Failing to take enforcement action and shifting responsibility when handling a complaint about pavement obstruction and environmental nuisance caused by a recycling shop; and (2) Failing to keep the complainant informed of the case progress

Background

357. On 29 May and 13 June 2012, the complainant complained to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

358. According to the complainant, he complained to FEHD in February 2012 about a recycling shop (Shop A) placing recyclable items and metal cages containing such items on the pavement and carriageway, which caused road obstruction and environmental hygiene problems. FEHD replied to the complainant that the environmental hygiene condition of the subject location was acceptable, and that since the issue of road obstruction was not within its purview it had referred the case to LandsD for follow-up action. However, the road obstruction problem persisted. Moreover, FEHD and LandsD did not inform the complainant about the progress of the case. In late May 2012, the complainant made another enquiry and FEHD told him again that the case had been referred to other departments for action.

359. The complainant alleged that FEHD and LandsD –

(a) had delayed in taking action and shirked responsibility as a result of which the road obstruction problem at the subject location remained unsolved; and

(b) had failed to inform him of the progress of the case.

The Ombudsman's observations

Allegation (a)

360. Upon receipt of the complaint, FEHD did take appropriate follow-up actions, including inspecting the subject location, issuing warnings and/or initiating prosecution against the operator of Shop A after identifying irregularities, arranging for contractors to clean up the streets more frequently and referring those issues beyond its purview to other relevant departments for follow up. In view of this, Allegation (a) against FEHD was unsubstantiated.

361. The Office of The Ombudsman however noticed that the District Lands Office (DLO) under LandsD had repeatedly informed FEHD that it would not take any follow-up action upon receipt of referrals from the latter. The fact that FEHD kept referring the case to DLO and told the complainant that referrals had been made to LandsD inevitably gave the complainant an impression that the two were shirking responsibility to each other. The Office of The Ombudsman was of the view that if FEHD had doubts over DLO's decision or would like to seek the assistance of DLO in addressing the obstruction problem in question, it should have invited DLO to discuss the case rather than making repeated referrals which served no purpose at all. Based on the above analysis, The Ombudsman was of the view that Allegation (b) against FEHD was substantiated other than alleged.

362. While LandsD was vested with the statutory power to deal with cases concerning illegal occupation of government land, the Office of The Ombudsman's inspection revealed that the occupation of the pavement by Shop A actually did not involve any illegal structure affixed to Government land. Neither was the situation so serious as to warrant DLO taking exceptional enforcement actions regardless of the established division of responsibilities. As such the approach taken by DLO in this case was understandable. The Ombudsman was of the view that Allegation (a) against LandsD was unsubstantiated.

Allegation (b)

363. After studying the relevant records, the Office of The Ombudsman was satisfied with the views of FEHD. In following up the complaint, the District Environmental Hygiene Office of FEHD in concern gave a timely reply to the complainant about the progress of the case, including its investigation results and the actions taken. Hence, The Ombudsman was of the view that Allegation (b) against FEHD was not substantiated.

364. FEHD, in making referrals to DLO, had explicitly asked DLO to give the complainant a direct reply. Hence, DLO should have informed the complainant of its decision directly or asked FEHD specifically to convey the message on its behalf. To keep the complainant waiting for so long was undesirable. In view of the above, The Ombudsman was of the view that Allegation (b) against LandsD was substantiated.

365. The Ombudsman has recommended that –

FEHD

(a) should continue to closely monitor the irregularities of Shop A and, where resources permit, conduct inspections more frequently. If the metal cages and other objects of Shop A are found to have caused obstruction to the pedestrians, decisive enforcement action under the relevant legislation should be taken; and

(b) should liaise more effectively with the relevant departments when making referrals so as to avoid recurrence of similar situations.

LandsD

(c) should give the complainant a timely reply of how the complaint has been followed up after receiving a referral from other departments. Should LandsD consider it not appropriate to make a direct reply, it should so inform the originating department.

Administration's response

366. FEHD has accepted The Ombudsman's recommendations and has taken the following actions –

(a) Over the past few months, FEHD staff had on one occasion found that the shop placed a metal cage on pavement which obstructed FEHD's street cleansing operation. FEHD immediately instituted prosecution against the person in charge. FEHD will continue to closely monitor the situation of the shop and take appropriate actions; and

(b) for better communication and more effective handling of the case, FEHD would invite relevant departments to participate in joint site inspection or enforcement action, where appropriate, when handling complaints requiring referrals to other departments.

367. LandsD accepted The Ombudsman's recommendation and has reminded its DLO staff to give timely reply to the complainant on the follow-up actions taken when handling similar cases.

Food and Environmental Hygiene Department and Lands Department

Case No. 2012/2363A (Food and Environmental Hygiene Department) – Failing to effectively control the unauthorised extension of business area by a licensed stall

Case No. 2012/2363B (Lands Department) – Failing to effectively control the illegal occupation of Government land by the operator of a stall

Background

368. On 27 June and 20 September 2012, the complainant lodged complaints with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and the Lands Department (LandsD).

369. In December 2009 and July 2011, the complainant lodged two complaints with the Office of The Ombudsman against FEHD, LandsD and Buildings Department (BD). According to the complainant, the owner of a stall (the subject stall) erected against the external wall of a building had illegally extended the business area of his stall by erecting two additional stalls for sale of non-licensed goods. Erection of unauthorised structures and occupation of pavement were also involved.

370. The Office of The Ombudsman completed an inquiry and a full investigation of the case in June 2010 and March 2012 respectively. In general, the Office of The Ombudsman was of the view that FEHD had ignored the illegal extension of business area and unlicensed on-street hawking activities of the subject stall over the years. The Ombudsman considered that FEHD should take stringent enforcement actions while LandsD and/or BD should remove all unauthorised structures at the subject location as soon as possible.

371. The owner of the subject stall had changed the business of his fixed-pitch stall to general merchandise since April 2012, with his photocopier(s), working cabinet(s) and glass cabinet(s) pushed beyond the area of the stall every day. A wooden platform had also been erected on the pavement with wooden table(s) and chair(s) placed next to it, occupying Government land illegally. The complainant accused FEHD and LandsD of being ineffective in their enforcement actions.

The Ombudsman's observations

372. The Office of The Ombudsman was of the view that, though FEHD had followed up on the illegal extension of business area of the subject stall, including instituting prosecutions, its enforcement efforts were inadequate and ineffective. The stall had been illegally extended for many years. Notwithstanding that the unauthorised structures on Government land had been demolished, the illegal extension of business area persisted. During the four-month period from April to July 2012, FEHD only instituted several prosecutions under the offence of "extension beyond the approved area of the stall", while the irregularities of the subject stall persisted. The enforcement action of FEHD obviously failed to have the necessary deterrent effect.

373. In addition, the subject stall placed a number of paraphernalia outside the approved area prescribed by the licence, blatantly occupying the public pavement. FEHD was not proactive in its enforcement efforts because it initiated prosecution against the owner of the stall only after The Ombudsman's involvement. Regarding FEHD's tolerance to the limited extension of business area beyond the approved area, The Ombudsman was of the view that it would easily lead to inconsistency in law enforcement given the lack of consistent criteria.

374. The Ombudsman took the view that FEHD's approach of "warning before enforcement" and "tolerance" should only be applicable to first-time offenders. Despite the persistent and obvious irregularities in this case, FEHD still considered the non-compliance not serious. The Ombudsman was of the view that FEHD was too lenient in enforcement by tolerating and condoning the irregularities.

375. Moreover, the size requirement of the subject stall was only 304 cm x 152cm. Yet approval was given by FEHD for the owner to operate a "photo shop", sell "tea leaf" and "baby products" (a newly added item for months ago) in such a small space. Such a disregard of the actual circumstances was tantamount to indirect encouragement of illegal extension of the subject stall. Based on the analysis, The Ombudsman considered the complaint against FEHD substantiated.

376. LandsD did follow up on the erection of a wooden platform in accordance with its current interpretation of the legislation being enforced. However, a new notice had to be issued under the legislation every time before further action could be taken. As a result, the owner of the subject stall only made rectification for a short while and then reverted to the old practice, which was in fact feigned compliance.

377. The Office of The Ombudsman understood that the present mode of enforcement adopted by LandsD was based on the legal advice previously obtained. However, it was a fact that the subject stall had occupied the public pavement with the wooden platform for a long time, causing illegal occupation of Government land. The stall owner only removed the platform for a short while after LandsD posted a notice and then put the platform back to the original place afterwards. It was unreasonable for LandsD to regard such feigned compliance as rectification of irregularities in accordance with the notice. Despite the gravity of the irregularities in question, LandsD had not made adequate efforts to address the problems, and continued to rely on the legal advice obtained years ago and did not seek further advice in the light of the actual circumstances. Furthermore, given the prevalence of such problems in Hong Kong, LandsD should have reviewed the enforcement issue long ago. The Ombudsman, therefore, considered the allegation against LandsD partially substantiated.

378. The Ombudsman recommended that –

(a) FEHD should step up inspection and take stringent enforcement action, including instituting prosecution without further warning and even revoking the licence; and

(b) LandsD should promptly follow up on the legal issues mentioned in the investigation report and step up enforcement action against illegal occupation of Government land by the subject stall.

Administration's response

379. FEHD accepted the recommendation and has stepped up inspection of the stall concerned and issued stern warnings to the licensee, informing him that prosecution would be initiated against him without prior warning for placing paraphernalia outside the stall. During an inspection on 26 January 2013, FEHD found that the licensee had removed the wooden platform, plastic chairs and wooden cupboard. A total of 23 inspections had been conducted at the stall between 28 January and 26 April. Articles were found outside the stall during the inspection on 28 March. For that, the licensee was prosecuted immediately and asked to rectify the irregularity. FEHD will continue to step up inspection of and take strict enforcement actions against the stall concerned, and will consider cancelling its licence as appropriate.

380. LandsD accepted The Ombudsman's recommendation and has taken the following follow-up actions –

(a) LandsD conducted a total of 15 inspections between December 2012 and late July 2013 and the repeated placement of the wooden platform was no longer found; and

(b) LandsD has written to the Department of Justice for advice on the legal issues concerned and would notify The Ombudsman on receipt of the reply in due course.

Food and Environmental Hygiene Department and Lands Department

Case No. 2012/2741A (Food and Environmental Hygiene Department) – Failing to take effective enforcement action against a licensed food establishment which had caused street obstruction

Case No. 2012/2741B (Lands Department) – Failing to take effective enforcement action against a food establishment which had illegally occupied Government land

Background

381. On 10 August 2012, the complainant lodged a complaint to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and the District Lands Office (DLO) under the Lands Department (LandsD).

382. According to the complainant, a light refreshment food premises (the subject food premises) often put a trolley on a metal platform with a width of one metre for cooking food and the latter was placed on the pavement in front of the subject food premises, causing road obstruction. He had repeatedly complained to FEHD since May 2012. However, FEHD only gave verbal advice to the operator of the subject food premises and said that it would not institute any prosecution as the obstruction problem was not serious. FEHD also advised that the case had been referred to DLO for follow-up.

383. The complainant then called DLO to enquire about the case progress. DLO replied that the operator of the subject food premises had promised to remove the platform. However, the complainant later found that the situation persisted and therefore he called DLO again to make a complaint. According to DLO, as the subject food premises had changed to use a movable platform, it could no longer follow up the case and had to refer it back to FEHD.

384. The complainant alleged that both FEHD and DLO had not taken proper follow-up actions in respect of the road obstruction and the unauthorised erection of platform, rendering the problems remained unsolved.

The Ombudsman's observations

Allegations against FEHD

385. The Office of The Ombudsman would not dispute FEHD's justification for not taking enforcement actions against the restaurant concerned by invoking the relevant legislation on the ground that the platform had not caused obstruction to the street cleansing service.

386. On the other hand, only after the Office of The Ombudsman had launched an investigation did FEHD start to assess whether the platform would cause street obstruction under the current prosecution guidelines. This demonstrated that FEHD was not vigilant enough and had failed to probe into the case with due diligence in the first instance.

387. The preparation of food in a cooked food trolley on a platform in an open space by the subject food premises might create public health problems. FEHD admitted that there might have been negligence of duty on the part of the inspection staff at the early stage. In other words, FEHD had failed to monitor the irregularities committed by the subject food premises in an effective manner. The Ombudsman considered that the allegation against FEHD partially substantiated.

Allegation against LandsD

388. According to LandsD, whether LandsD or FEHD should take enforcement action depends on whether the object/structure occupying Government land was fixed or not. Irrespective of whether this division of responsibilities was recognised by the Steering Committee on District Administration or whether it was agreeable to other departments (including FEHD), it can be seen from the case that the two departments clearly had no consensus as to which department should take enforcement action against the platform in front of the subject food premises. Hence, repeated referrals were made and the problem remained unresolved.

389. On the other hand, the Office of The Ombudsman opined that if the subject food premises had placed a platform in the shop-front for a prolonged period, there was no reason for the case not to be treated as illegal occupation of Government land. In handling similar cases involving movable shop-front platforms, the Office of The Ombudsman noted that even if a notice requiring the occupier to cease occupation of Government land was posted by LandsD under the Land (Miscellaneous

Provisions) Ordinance, LandsD would consider the irregularities to have been rectified in accordance with the notice if the platform was removed for just a short while, and that the notice would cease to have effect automatically. The Office of The Ombudsman took the view that those occupiers have only feigned compliance without actually ceasing to occupy Government land. LandsD was responsible for regulating the illegal occupation of Government land, but the present mode of enforcement had not only defied common sense but had also failed to protect Government's interests in the land effectively. Such practices were common in Hong Kong. The Office of The Ombudsman was of the view that LandsD should have conducted a comprehensive review of its enforcement mode long ago so as to prevent such practices from becoming prevalent. The Ombudsman, therefore, considered the allegation against LandsD partially substantiated.

390. The Ombudsman recommended that –

(a) FEHD should task its staff to take stringent enforcement action in handling similar cases; and

(b) LandsD should take stringent enforcement action against any possible recurrence of illegal occupation of Government land by the subject food premises, and promptly follow up on the legal issues related to the current mode of enforcement.

Administration's response

391. FEHD accepted the recommendation of The Ombudsman and has reminded all staff to take strict law enforcement actions in situations similar to this case. Supervisory staff have also been instructed to monitor more closely the enforcement actions taken by frontline law enforcement staff.

392. LandsD accepted The Ombudsman's recommendation and has taken the following follow-up actions –

(a) DLO conducted five inspections between February and late July 2013 and no platform was found in front of the subject food premises; and

(b) LandsD is seeking Department of Justice's advice again on the legal issues referred to in the report.

Food and Environmental Hygiene Department, Lands Department, Planning Department and Environmental Protection Department

Case No. 2012/0954A (Food and Environmental Hygiene Department) – Unreasonably granting offensive trade licences to the operators of two factories and failing to take action against the environment nuisances created by the two factories

Case No. 2012/0954B (Lands Department) – Unreasonably granting short-term tenancies to two offensive trade factories

Case No. 2012/0954C (Planning Department) – Taking selective enforcement action against the hoardings on the complainant's land, but not the altered use of land by an offensive trade factory

Case No. 2012/0954D (Environmental Protection Department) – Failing to take enforcement action against the environmental nuisances created by two offensive trade factories

Background

393. On 23 March 2012, the complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD), District Lands Office (DLO) under the Lands Department (LandsD) and the Planning Department (PlanD). On 13 April, the complainant confirmed with The Ombudsman that he also intended to lodge a complaint against the Environmental Protection Department (EPD). He later provided supplementary information.

394. According to the complainant, the then District Office (DO) under the then City and New Territories Administration granted two land licences to two bone crushing mill factories (Factories A and B) in a village many years ago. Under the licences, the two factories were required to comply with the licensing requirements and conditions to avoid affecting the residents nearby. Notwithstanding continuous breaches of requirements and conditions by the two factories, the Government departments concerned had not taken any action. The factories mentioned above were subsequently converted into a lard boiling factory and a tile factory respectively. The breaches became even more serious. For the lard boiling factory, it failed to take effective measures in maintaining environmental hygiene. For the tile factory, its construction materials were indiscriminately disposed of in the green belt.

Worse still, the tenant of the tile factory even disassembled old computers inside the factory, leading to pollution of the environment by the harmful substances released in the disassembling process.

395. The complaint is summarised below –

(a) FEHD should not grant licences to the factories concerned for their operation of offensive trades. Thereafter, FEHD failed to take heed of complaints lodged by the villagers and allowed Factory A to convert into a lard boiling factory. The Department also failed to take effective law enforcement actions to regulate the factory after granting the licence;

(b) DLO should not grant tenancies to the factories concerned for their operation of offensive trades which polluted the environment and affected the residents nearby;

(c) PlanD failed to show due impartiality in requiring the complainant to remove the hoardings on his land but not taking any law enforcement actions against the storage of large numbers of containers in the lard boiling factory and the indiscriminate disposal of junk by the tile factory; and

(d) EPD had not taken any law enforcement actions against the environmental pollution problems created by the lard boiling factory, the tile factory and their tenants.

The Ombudsman's observations

Allegation (a)

396. FEHD and its predecessor(s) had followed the established procedures in processing the application for an offensive trade licence by Factory A. Additional requirements and conditions had also been imposed upon issue of the licence in a bid to minimise the environmental impacts which the factory might create. The Office of The Ombudsman noted that during the licensing process, FEHD had addressed the villagers' concerns and instituted prosecutions on several occasions against the factory for illegal operation of the lard-boiling business. After the licence was issued, staff of FEHD had also conducted regular inspections to the factory.

397. Although FEHD lacks information on Factory B and a complete record of inspections of the two factories concerned by the then New Territories Services Department, the Office of The Ombudsman noted from early correspondences between Government departments that there were serious irregularities committed by these two factories in early years. Despite numerous prosecutions instituted against Factory A for illegal operation of lard-boiling business by FEHD, the factory had been operating illegally for at least eight consecutive years since 1995. Judging from the above, the law enforcement actions taken by the departments in early years were not effective to deter the offenders.

398. As such, The Ombudsman considered the complaint against the FEHD partially substantiated.

Allegation (b)

399. The reasons for granting land to the two factories by DO at that time could no longer be traced as it happened a long time ago.

400. However, the Office of The Ombudsman noted that the application for changing the use of the short term tenancies (STT) to lard factory by Factory A in 1992 was rejected nine years later (i.e. 2001) by DLO on the ground that the application was objected by the villagers and the factory had not been granted an Offensive Trade Licence by FEHD. Soon afterwards, Factory A made another application but no decision had ever been made by DLO. Save for the period between August 2002 and April 2005, the factory continued its lard boiling business for years, which was in breach of the terms of the STT. Initially DLO only issued warning letters to the tenant once every two years, i.e., in 1992, 1994 and 1996. Subsequently, warning letters were sent to the tenant in 2001, 2008, 2010 and 2012, requiring him to change the use back to bone crushing. The Office of The Ombudsman took the view that DLO had failed to take lease enforcement actions effectively. The tenant was allowed to submit applications time and again while having been in breach of land use over a long period of time. Concurrently Factory A was also in breach of environmental and hygiene legislation, planning requirements and licensing conditions.

401. For the breach of land use under STT by Factory B, DLO staff mistakenly believed that the unauthorised use was permitted under the tenancy during an inspection of the factory in 2006. Although the tenant was given a verbal warning right away requiring him to rectify the irregularities upon DLO discovered the mistake in 2010, the officer concerned failed to bring up the case for action as he was busy with other more urgent cases and had also taken up an acting appointment of another post.

402. The Office of The Ombudsman was of the view that DLO performed its duties perfunctorily and had not taken active and prompt enforcement actions against the irregularities of the two factories. There was obvious delay in its handling of the application for changing the land use of the STT in the case of Factory A and the delay had resulted in a prolonged stalemate. The Ombudsman therefore considered the complaint against LandsD substantiated.

Allegation (c)

403. The Office of The Ombudsman considered that PlanD had indeed handled the unauthorised development concerning the factories, the complainant's land and its adjoining area in accordance with the relevant ordinance and procedures. No partiality was found. The Ombudsman therefore considered the complaint against PlanD unsubstantiated.

Allegation (d)

404. It could be seen from the information and responses provided by EPD that EPD had indeed followed relevant procedures in issuing a specified process licence to Factory A, and had been conducting inspections on the factory from time to time to ensure its compliance with the licensing conditions and relevant environmental legislations. Enforcement actions were taken when non-compliance was found. For Factory B, although EPD received complaints only recently, it had deployed staff to conduct site inspection promptly. According to the available information, EPD had handled the complaints against Factories A and B appropriately.

405. Based on the above, The Ombudsman considered that the complaint against EPD unsubstantiated.

406. The Ombudsman recommended that –

(a) to avoid procrastination of matters, LandsD should expedite consultations with the departments concerned and make a prompt decision on whether to approve the applications for STT so as to address the villagers' demands; and
(b) FEHD, EPD and PlanD should continue to monitor closely the two factories concerned and conduct inspections to them from time to time to prevent recurrence of irregularities in future.

Administration's response

407. FEHD accepted the recommendations and will continue to monitor closely the two concerned factories, conduct regular inspections and take appropriate actions when necessary to maintain environmental hygiene.

408. LandsD accepted The Ombudsman's recommendation and has taken the following actions –

(a) <u>Application for changing Factory A to a Lard Boiling Factory</u>

(i) After consulting the relevant departments, DLO issued a letter to the tenant on 2 April 2013 stating that EPD had indicated that the operation of the lard boiling factory did not comply with the requirements of the Code of Practice on Handling Environmental Aspects of Temporary Uses and Open Storage Sites (CoP) and that the tenant had to cease the unauthorised use as a lard boiling factory within three months from the date of the letter, or the tenancy would be terminated;

(ii) the representative of the tenant subsequently approached EPD. EPD stated that if the tenant wished to pursue the CoP matter further, it was prepared to review its position provided that there was new information that could substantiate/demonstrate that the lard boiling factory would not cause adverse environmental impact (including but not limited to noise, dust and odour) on nearby residents; and

(iii) in June 2013, DLO received an application submitted by the representative of the tenant for extending the deadline of termination of the STT for three months until October 2013. Since the tenant had appointed the Hong Kong Productivity Council to conduct an environmental technical assessment and would submit the same to EPD for approval, DLO agreed in writing in June 2013 to extend the deadline until 2 October 2013.

(b) Application for changing Factory B into a Warehouse

(i) The tenant had ceased the unauthorised use. The tenant subsequently made an application to the Town Planning Board (TPB) to use the site as a temporary warehouse for storage of construction materials and metalware. The planning application was approved by TPB with conditions attached. However, as the tenant failed to comply with some of the conditions of the planning permission, the permission was revoked on 20 January 2013;

(ii) as the planning permission was revoked, DLO issued a letter in February 2013 to inform the tenant that it did not accept his application for changing the use of the STT; and

(iii) subsequently, the tenant made a new application to TPB for planning permission to use the site as a temporary warehouse (construction materials and metalware). The application was approved with conditions attached. DLO issued a letter in May 2013 to remind the tenant to submit a new application to DLO if he wished to change the use of the STT notwithstanding that he was given planning permission by TPB. LandsD has not received any application from the tenant so far.

409. On 6 November 2012 and 7 January 2013, PlanD's Central Enforcement and Prosecution Section visited the sites of Factory A and Factory B again. During the two visits, it was found that the site of Factory A was still used as a workshop for the lard boiling factory and the operation area had not exceeded the site boundary permitted under the planning approval, whereas the site of Factory B was largely vacant with no unauthorised storage use. No unauthorised development under the Town Planning Ordinance was found at both sites.

410. EPD accepted The Ombudsman's recommendation and has continued with inspections on the lard boiling factory to closely monitor its compliance with the requirements of the licence and relevant environmental legislation. As regards the tile factory, as indicated in EPD's response to the Office of The Ombudsman on 7 September 2012, the site of the tile factory had been vacated.

411. EPD reported the above progress to the Office of The Ombudsman on 10 January 2013.

Food and Environmental Hygiene Department, Water Supplies Department, Buildings Department and Housing Department

Case No. 2012/3862A (Food and Environmental Hygiene Department) – (1) Shifting responsibility when investigating a water seepage complaint; and (2) failing to use any instruments to test a fresh water supply pipe

Case No. 2012/3862B (Water Supplies Department) – (1) Contradicting conclusions about whether a fresh water supply pipe had leakage; and (2) overruling the findings of another Government department without conducting thorough tests

Case No. 2012/3862C&D (Buildings Department and Housing Department) – Denying responsibility for investigating a water seepage complaint simply after a 15-minute observation without conducting any tests

Background

412. The complainant resided in a Home Ownership Scheme court. According to the complainant, he lodged a complaint in June 2011 against the Joint Office (JO) set up by the Food and Environmental Hygiene Department (FEHD) and the Buildings Department (BD) about water seepage from the flat on the floor upstairs to the common pipe duct in the bathroom of his premises. FEHD referred the case to BD, and subsequently the Housing Department (HD) and the Water Supplies Department (WSD) for action. However, the departments shifted responsibility to one another without taking follow-up action properly leading to failure in identification of the source water seepage.

413. The complainant made the following allegations against the above departments –

FEHD

(a) Despite confirmation of leakage from the fresh water supply pipe in the floor upstairs by reversible pressure test, the case was referred to the WSD for follow-up;

(b) no instrument (e.g. manometer) was used to ascertain whether there was leakage in the fresh water supply pipe in the floor upstairs;

BD

(c) denying the responsibility for investigating a water seepage complaint simply after a 15-minute visual inspection of the drainage pipe connections in The floor upstairs;

HD

(d) denying the responsibility for investigating a water seepage complaint simply after a 15-minute visual inspection of the drainage pipes in the floor upstairs;

WSD

(e) first stating that there was evidence of leakage from the fresh water supply pipe in the floor upstairs, but thereafter confirming no leakage from the pipe concerned; and

(f) overruling the findings of the reversible pressure test conducted by JO which demonstrated leakage from the fresh water supply pipe in the floor upstairs, despite only substandard tests conducted.

The Ombudsman's observations

Allegation (a)

414. The Office of The Ombudsman accepted JO's explanation. Leakage of fresh water being "water wastage" in nature instead of a "sanitary nuisance" was outside JO's purview. WSD was responsible for dealing with water wastage. It was right and proper for JO to refer the case to WSD according to the established procedures. In this light, The Ombudsman considered Allegation (a) unsubstantiated.

Allegation (b)

415. JO explained that reversible pressure test was a "non-destructive test" it usually adopted in judging whether there was any leakage in fresh

water supply pipes. Such test did not require the assistance of any instruments. JO also pointed out that its staff followed established procedures in conducting the reversible pressure test for the fresh water supply pipe in the floor upstairs.

416. Noting that JO had provided reasonable explanation, The Ombudsman considered Allegation (b) unsubstantiated.

Allegation (c)

417. Having checked the relevant records, the Office of The Ombudsman accepted BD's representations. The Ombudsman believed that the "BD" referred to by the complainant was in fact JO/BD staff. Given that leakage of sewage pipe was out of the purview of JO, JO referred the case to HD, which was responsible for such problem in Home Ownership Scheme estates. JO's action was in accordance with the established procedures and appropriate. In this light, the Ombudsman considered Allegation (c) unsubstantiated.

Allegation (d)

418. In this case of water seepage, by only conducting a visual survey, staff of the Checking Unit of HD easily found that the sewage pipe of the flat immediately above had a seepage problem. This showed that visual surveys were an effective means of assessment. The Ombudsman, therefore, considered Allegation (d) not substantiated.

419. Nonetheless, the Office of The Ombudsman considered that the investigation of the Checking Unit of HD could have been more prudent. In their first two visits to the complainant's premises (between February and June 2012), the staff found that the ceiling inside the pipe duct and the bathroom ceiling near the pipe duct had signs of water seepage. However, they had not thoroughly considered that the seepage might be caused by a defective sewage pipe inside the pipe duct in the premises above and the scope of investigation should be extended to cover the premises above. On the contrary, they stopped the investigation after confirming that the sewage pipe of the complainant's premises had no signs of water seepage. If they could give more thoughts, they might have been able to find out the source of the seepage (i.e. the sewage pipe of the premises above) earlier.

Allegations (e) and (f)

420. WSD initially accepted the investigation result of JO but later on it overturned the result. Understandably, the complainant raised questions. In fact, it was only after the seepage condition had changed and completion of the salt content test and "observe the reading on the water meter for 30 minutes" test did WSD overturn the investigation result of JO.

421. As to why contrary investigation results emerged within a month or so (from 27 April 2012 to 7 June 2012), The Ombudsman was unable to further inquire about it. In any event, WSD did handle this seepage case based on objective test results and in accordance with established procedures. From the administrative point of view, there was no maladministration on the part of WSD. The Ombudsman considered Allegations (e) and (f) unsubstantiated.

422. To conclude, this complaint was unsubstantiated.

423. The Ombudsman called for the concerted efforts of JO, HD and WSD to continue to follow up with this case, and to carefully consider all possible causes of the water seepage with a view to resolving the complainant's seepage problem early.

Administration's response

424. FEHD, BD, HD and WSD accepted The Ombudsman's recommendation and have taken follow-up actions as follows –

(a) JO has taken close follow-up actions and noted signs of seepage in a number of flats on the floors above the complainant's premises. Despite having conducted colour water tests at the drainage of these premises, the tests failed to identify the source of water seepage. As seepage in the complainant's flat persisted, JO has arranged to carry out professional investigation at the premises concerned. JO would continue to follow up with this case and liaise closely with HD and WSD so as to identify the source of water seepage;

(b) the Checking Unit of HD has coordinated with JO and broadened the scope of investigation to cover a number of premises upstairs to ascertain any water seepage of the drainage

pipes inside the pipe ducts. The findings showed no signs of seepage from the pipes inside the pipe ducts of all those flats. Hence, the Checking Unit of HD did not plan to take any further action, and has informed JO of the findings via a memo in end May 2013; and

(c) WSD accepted the recommendation of The Ombudsman and will continue to follow up on this case together with JO and HD and carefully consider all possible factors causing water seepage. JO is conducting investigation of the potential source of seepage. Should there be sufficient evidence showing that other units are involved in wastage of water, WSD will request the consumers concerned to repair the inside service with leakage problem according to the Waterworks Ordinance so as to solve the seepage problem in the complainant's premises.

Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit), Food and Environmental Hygiene Department and Registration and Electoral Office

Case No. 2012/2803A&C (Food and Environmental Hygiene Department and Registration and Electoral Office) – Delay in handling a complaint about the display of unauthorised roadside election banners

Case No. 2012/2803B (Efficiency Unit) – Failing to refer a complaint about the display of unauthorised roadside election banners to relevant departments for follow-up action

Background

425. The complainant initially lodged a complaint with the Office of The Ombudsman on 15 August 2012 against 1823 Call Centre (the Call Centre) of the Efficiency Unit (EU) and the Food and Environmental Hygiene Department (FEHD).

426. The complainant alleged that display of unauthorised election banners at a number of roadside spots might cause danger to road users. He had lodged a complaint through the Call Centre but his complaint was carelessly referred to various government departments. Subsequently, the Call Centre told him that follow-up actions had been jointly carried out by FEHD and the Lands Department. However, the complainant later found that the problem had persisted due to FEHD's delay in handling his complaint.

427. Upon preliminary inquiries, the Office of The Ombudsman considered that the case involved duties of the Registration and Electoral Office (REO), and therefore included REO as one of the organisations under complaint with consent of the complainant.

428. The complainant's allegations can be summarised as follows –

EU

(a) The Call Centre failed to properly refer his complaint to the appropriate government department(s) for follow-up actions, delaying subsequent follow-ups by related department(s); and

FEHD and REO

(b) delay in handling his complaint about the display of roadside election banners, leaving the problem unsolved for a long time.

The Ombudsman's observations

Allegation against EU

429. While the Call Centre did make a mistake in referring the complainant's complaint to the REO initially (i.e. before the election period), it is understandable that the Call Centre had referred the complaint to the REO based on the nature of the complaint before it was notified by relevant departments on the referral arrangements concerning election advertisements. It rectified the mistake the following day after clarifying the responsibility of the case and referred the complaint according to cases on roadside publicity materials, so the mistake did not seriously delay follow-up actions by the relevant departments.

430. However, the Office of The Ombudsman noticed that after the start of the election period, FEHD and the Lands Department had informed the Call Centre of the complaint referral arrangements regarding election advertisements in late July and early August respectively. Although the Call Centre had contacted the Home Affairs Department on 7 August to clarify the responsibilities, FEHD still received further "wrong referrals" from the Call Centre. This showed that the communication in the Call Centre was chaotic, and the handling was not satisfactory.

431. The Ombudsman considered the complaint against EU partially substantiated.

Allegation against REO

432. The Office of The Ombudsman observed that when REO came to know that the referrals had been wrongly made by the Call Centre, it took the initiative to clarify with the Call Centre without any delay. However, given the fact that the election period was approaching and the distribution of work as set out in the "Action Checklist" would soon be implemented, the more appropriate approach would be for the REO, the department responsible for coordinating election-related matters, to inform the Call Centre of the above-mentioned distribution of work,

when pointing out the wrong referral, so that the subsequent chaos in the referral could have been prevented.

433. The Office of The Ombudsman considered the Call Centre a well-known channel for the public to enquire and complain about government services. Given the fact that the Call Centre had received many election-related complaints during previous elections, REO should have envisaged that the Call Centre would likely receive election-related enquiries or complaints in the upcoming election. However, in its conduct of the 2012 Legislative Council Election, REO did not consider that the Call Centre had any role to play in processing election advertisements and further took it as a matter of course that the Call Centre would appropriately refer the cases for action, and hence gave no information nor any clear instruction to the Call Centre on how to handle election-related complaints. This showed a lack of thorough consideration on the part of REO.

434. Though there was no delay on the part of REO in handling the complaint lodged by the complainant, it had failed to give due consideration to the overall arrangements for handling enquiries and complaints relating to election advertisements, especially after taking into account its capacity as the administrative arm of the Electoral Affairs Commission (and its role in preparing the "Action Checklist"). Since REO had neither communicated with the Call Centre in advance nor included the Call Centre in the distribution list of the "Action Checklist", the Call Centre had to spend time on clarifying the referral arrangements, which indirectly affected its effectiveness in handling complaints.

435. The Ombudsman considered the complaint against REO substantiated other than alleged.

Allegation against FEHD

436. Upon checking of relevant enforcement records and documents, the Office of The Ombudsman considered that FEHD had taken actions to follow up the complaint. Apart from conducting inspections and removal of unauthorised publicity materials in joint operation with other departments, FEHD had provided information at its own initiative to facilitate the Call Centre in making proper referrals, which were appropriate actions.

437. The reason for FEHD failing the complainant's wish to conduct prompt removals was likely that it was time-consuming to plan for

inter-departmental operations. In fact, according to demarcation of responsibilities for handling roadside display of non-commercial publicity (including election banners) during election and non-election periods, FEHD has to confirm with relevant departments to see if the publicity materials are authorised or not before taking further removal actions. It was understandable that such a process would take time.

438. The Ombudsman considered the complaint against FEHD not substantiated.

439. The Ombudsman recommended that –

(a) EU should instruct the Call Centre to clarify referral arrangements with relevant departments as soon as possible when a similar situation arises. The Call Centre should also provide staff with the latest information in internal briefing sessions, so as to avoid affecting follow-up actions due to wrong referral;

(b) regarding the handling of election-related complaints, REO should keep close contact with the Call Centre and the relevant departments so as to ensure efficient handling of complaints; and

(c) FEHD should keep a close watch on unauthorised display of election banners and cooperate with related departments in carrying out stringent enforcement actions.

Administration's response

440. EU accepted The Ombudsman's recommendation on clarifying referral arrangements with relevant departments as soon as possible when a similar situation arises; and on providing latest updates to staff through internal briefings.

441. REO accepted The Ombudsman's recommendation and –

(a) has developed a procedure which specifies that the Call Centre must be informed of the referral arrangements in relation to election-related complaints and be provided with a copy of the "Action Checklist" for reference before the commencement of an election;

(b) is preparing a "Guide on Referring Election-related Complaints" to facilitate more efficient referral by the Call Centre of the cases to the appropriate department(s) for follow-up actions; and

(c) will enhance the communication among departments and will take steps to brief the Call Centre of the complaint-handling and referral arrangements prior to large-scale elections so as to ensure effective implementation of the relevant arrangements.

442. FEHD accepted the recommendation of The Ombudsman and will keep a close watch on unauthorised display of election banners and cooperate with related departments in carrying out stringent enforcement actions during election periods.

Government Secretariat – Chief Secretary for Administration's Office (Government Records Service)

Case No. 2012/2621 – Failing to provide clear information to the public on the different arrangements for reproduction of archival materials

Background

443. The complainant was a postgraduate student who frequently visited the Public Records Office Search Room under the Government Records Service (GRS) for research purpose. She claimed to have seen from time to time Search Room users taking photographs of archival materials themselves without paying a fee. However, GRS staff did not inform users that they could do so. Nor was there any notice on GRS website or in the Search Room in this regard. In early July 2012, she told GRS staff what she saw and suggested that notices be posted to publicise the free self-serve photography service. However, GRS took no action even by the end of July.

444. Later, the complainant asked GRS staff for permission to photograph some 2 000 pages of materials contained in eight Government record files, but the staff in the Search Room told her without justification that where ownership of copyright was not clear, photography was prohibited but photocopying (at a fee of $3.7 per page) was allowed.

445. The complainant subsequently discussed with two other GRS staff (Ms A and Mr B) several times regarding photocopying/photography of archival materials, photocopying fee, copyright and royalty. Nevertheless, the two staff's opinions differed. Eventually Mr B said that the photocopying fee, charged at a level determined by the Treasury, was royalty payment; and that whether a piece of archival material could be photographed had nothing to do with its copyright. He also indicated that users could not photograph non-Government materials. If a copy was needed, only photocopying was allowed. The complainant argued that under the Copyright Ordinance, taking photographs of materials for research purpose would not constitute an infringement of copyright. Mr B replied that he was not conversant with the Ordinance.

446. The complainant was dissatisfied that the administration of GRS was confusing and that GRS staff members were not familiar with legislation related to their work. Furthermore, the way GRS handled users' requests for photographing archival materials might jeopardise the rights of researchers to reproduce such materials.

The Ombudsman's observations

447. GRS issued the internal guidelines in 2009 but did not revise the Public Records Office Search Room (the Rules) in tandem. As a result, users would not know that they might use their own equipment to photograph archival materials. In fact, the Rules were essentially guidelines on using the Search Room. Their revision might not help much in drawing the attention of users to the self-serve photography service.

448. As alleged by the complainant, neither GRS staff and website nor Search Room notices informed users of the self-serve photography service. Consequently, they might have to spend money on photocopying. Although the service would be mentioned at GRS workshops, only participants would learn about it. That was unfair to the general public.

449. Mr B's explanation on the self-serve photography service was in line with GRS's prevailing internal guidelines. The fact was that GRS imposed its restrictions on photography service without noticing that both photocopying and photography of archival materials would have copyright implications. They only consulted the Intellectual Property Department (IPD) when the complainant raised her queries. Given the GRS management's lack of full understanding of the copyright issue, it was only to be expected that its frontline staff would not be able to explain it clearly to the complainant.

450. GRS had failed to use appropriate channels to inform Search Room users of all the legal methods to reproduce archival materials, such that they might not be aware that they could use their own equipment to photograph materials. Furthermore, GRS consulted IPD on copyright issues only upon the complainant's enquiries. That was clearly an oversight.

451. Overall, The Ombudsman considered this complaint substantiated.

452. The Ombudsman recommended GRS to publish a separate set of guidelines covering all the methods of reproducing the images of archival materials. This would help publicise the related services among users and make it easier for frontline staff to explain them to the public such that similar complaints could be avoided.

Administration's response

453. GRS accepted The Ombudsman's recommendation. GRS compiled the Guidelines on Reference and Public Services in April 2013. It outlined in detail the various reference and public services provided by GRS, including reproduction of archival materials services, in order to facilitate the effectiveness of obtaining information needed by the public. The Chinese and English versions of the Guidelines were placed at the service desk and in the Search Room of GRS for users' reference. The public could also refer to the Guidelines on the GRS website.

Government Secretariat – Education Bureau

Case No. 2011/4434 – (1) Unreasonably keeping the complainant waiting on the line for one and a half hours before the line suddenly went dead; and (2) Unreasonable refusal by an officer to disclose his name to the complainant and suddenly hanging up when the complainant was still talking

Background

454. During a telephone discussion about a complaint with Officer A of Education Bureau (EDB), the complainant requested to speak to Officer A's supervisor. The complainant said that she could hold the line and Officer A agreed to transfer the call. She then waited for about one and a half hours, but nobody picked up the telephone. The line then suddenly went dead.

455. The next day, the complainant called Officer A again and requested to speak to her supervisor. Officer B picked up the telephone, but refused to disclose his name. He even hung up abruptly while the complainant was still talking.

The Ombudsman's observations

456. According to the recording of the telephone conversations, Officer A's response could lead the complainant to believe that her call would be transferred to a senior officer. Even if Officer A did not know how to deal with the complainant's reaction, she could have told the complainant that she needed to consult her supervisor before coming back to the complainant.

457. As Officer B was neither a member of the Complaint Handling Unit nor Officer A's supervisor, Officer A should not have let him answer the call at all, nor should he have answered it. As a public officer, he should not have refused to disclose his name when answering a call from the public. Moreover, the recording revealed that Officer B had really been rude.

458. The Ombudsman considered this complaint substantiated. The Ombudsman urged EDB to –

(a) closely monitor staff's compliance with its instructions to avoid occurrence of similar incidents; and

(b) apologise to the complainant for the improper behaviour of Officer A and Officer B.

Administration's response

459. EDB accepted the recommendations and has instructed its frontline staff that when facing similar situations in future, they should promptly inform the callers clearly and provide explanations if their requests cannot be acceded to. Moreover, EDB has also reminded frontline staff that they should not refuse to disclose their names and post titles when answering a call from the public for proper follow-up actions in future. Meanwhile, EDB has stepped up staff training in handling complaint calls to avoid occurrence of similar incidents. EDB also apologised to the complainant on 28 May 2012 for the improper behaviour of the relevant officers.

Government Secretariat – Education Bureau

Case No. 2012/2183(I) – (1) Failing to follow up the complainant's complaint against her husband for providing false information in her son's application form for admission to Primary 1 and to declare the application form void; (2) Wrongly refusing to treat the application form for admission to Primary 1 completed by the complainant as valid and to allocate a place to her son; and (3) Unreasonably refusing to provide the complainant with a copy of the application form

Background

460. According to the complainant, she and her husband, Mr A, separately submitted application forms for Admission to Primary One 2012 to two schools for their son in September 2011 when they were undergoing divorce proceedings. When Mr A filled in the application form for submission to the school concerned (School A) for his son, he claimed that his son was a "first-born child", which was not factually correct. The complainant considered that Mr A might be giving "false" information. The complainant was also informed that School A, before submitting the application form to Education Bureau (EDB), had corrected the "false" information in the application form (two copies from the triplicate application form, i.e. the copy submitted to the school and the copy submitted to EDB ("Application Form") on its own.

461. In mid-June 2012, the complainant made a phone call to Mr B, an EDB staff, to obtain a duplicate copy of the "Application Form". However, Mr B turned down her request on the grounds that she was not the person filling in the "Application Form".

462. Besides, her son's application for admission to Primary 1 was cancelled by EDB due to multiple applications lodged by the complainant and Mr A. That thus led to a delay in the allocation of a Primary 1 place to her son.

463. The complainant's complaint against EDB could be summarised as follows –

(a) Failing to follow up the "false" information filled in by Mr A in the "Application Form" and declaring that form void;

(b) wrongly refusing to treat the application form submitted by the complainant as valid and to allocate a school place to her son; and

(c) unreasonably turning down the complainant's request for information.

The Ombudsman's observations

Allegation (a)

464. Regarding the accusations made by the complainant, the Office of The Ombudsman considered that EDB had already given a clear reply with reasonable explanations, and thus considered Allegation (a) not substantiated.

Allegation (b)

465. Regarding the reasons why the application form submitted by the complainant was rejected and why her son was not allocated a school place through Central Allocation, the Office of The Ombudsman considered that EDB had also given a clear reply with reasonable explanations, and thus considered Allegation (b) not substantiated.

Allegation (c)

466. The Office of The Ombudsman noted that the complainant had already been given a "revised" application form, but what she really wanted was the photocopy of the original "Application Form". The use of the photocopy to her or her son was not a factor that EDB had to consider.

467. The Office of The Ombudsman considered that since the "Application Form" was submitted to EDB by School A and the personal data of Mr A was contained therein, Mr B, after knowing that the complainant would like to get a photocopy of the "Application Form", should have asked School A and Mr A if they would agree to disclose the information in accordance with paragraphs 2.14(a) and 2.15(b) of the Code on Access to Information (the Code), rather than suggesting the complainant to obtain Mr A's consent on her own.

468. Furthermore, after Mr B had decided not to provide the complainant with a photocopy of the "Application Form", he failed to inform the complainant that she could file a request for review by EDB and lodge a complaint with the Office of The Ombudsman in accordance with the requirements as set out in paragraph 2.1.2 of the "Guidelines on Interpretation and Application" of the Code.

469. In view of the fact that EDB had failed to comply with the requirements of the Code in handling the complainant's request for information, the Ombudsman considered Allegation (c) substantiated.

470. Overall, the complaint was partially substantiated. The Ombudsman recommended that EDB should –

(a) re-process the complainant's request for a photocopy of the "Application Form" in accordance with the requirements of the Code; and

(b) strengthen staff training to enable their staff to properly handle the public's requests for information strictly in accordance with the requirements as set out in the Code, so as to prevent recurrence of similar cases.

Administration's response

471. EDB accepted all the recommendations put forward by The Ombudsman.

472. Regarding the recommendation on re-processing the complainant's request for a photocopy of the "Application Form" in accordance with the Code, EDB wrote to the data subjects (i.e. School A and Mr A) on 14 January 2013 to seek their consent to the complainant's request. But both School A and Mr A refused to disclose the relevant information. EDB informed the complainant of the result in writing on 5 February 2013 and have not received any further request or appeal from the complainant since then.

473. Regarding the recommendation on strengthening staff training, EDB conducted a briefing session on the Code with sharing of cases for all the staff of the School Places Allocation Section on 7 May 2013. EDB will conduct similar briefing sessions for the staff of the School Places Allocation Section on a regular basis in future to enable them to properly handle the public's requests for access to information strictly in accordance with the Code.

Government Secretariat – Education Bureau

Case No. 2012/2415 – (1) Granting/renewing agreements for the operation of two national education centres without going through open tender; (2) Leasing a vacant school premises to an organisation for the operation of a national education centre at a nominal rent without publishing the related principles and process; and (3) Improper tender arrangements for the operation of a national education centre

Background

474. On 17 July 2012, an organisation lodged a complaint with the Office of The Ombudsman against the Education Bureau (EDB).

475. According to the complainant, the then Education and Manpower Bureau (EMB) (i.e. now EDB) granted the right of operating the "National Education Centre" (Centre A) to Organisation A in 2004 (Incident 1) without going through open tender. In addition, EMB leased a vacant school premises to Organisation A for the operation of Centre A at a nominal rent (Incident 2) without publishing the related principles and process. Upon expiry of the aforementioned right of operation, EMB renewed the contract for the right of operation with Organisation A (Incident 3), again without going through open tender. In 2007, EMB granted Organisation A the right of operating the "National Education Services Centre" (Centre B) which was to be set up at another vacant school premises through open tender, but such tender was not gazetted according to the usual procedure, and the tender period was only about half a month (Incident 4). Also, upon expiry of the right of operating Centre B, EMB renewed the contract for the right of operation with Organisation A without going through open tender (Incident 5).

476. The complainant complained against EDB for –

(a) not going through open tender in Incidents 1, 3 and 5, thus causing unfairness to others (including the complainant) who were interested in applying for the right of operation;

(b) not publishing the related principles and process in Incident 2, thus causing unfairness to others (including the complainant) who were interested in renting the vacant school premises; and

(c) being unreasonable in not gazetting the tender according to the usual procedure and setting the tender period very short in Incident 4.

The Ombudsman's observations

Allegation (a)

477. EDB considered that sponsorship was more suitable than procurement of services through tender for the operation of Centres A and B. The Office of The Ombudsman considered that both were feasible and in compliance with the procedures. EDB opted for sponsorship and its explanations were reasonable.

478. In "Incident 1", when Organisation A applied for sponsorship in 2005, it was already the operator of Centre A. EMB only considered Organisation A's sponsorship application and did not openly invite Expression of Interest. The Office of The Ombudsman considered such practice not unreasonable. Moreover, at that time, national education was only at the commencement stage, it was justifiable for EMB to provide sponsorship for the forerunner.

479. However, when the Service Agreement signed with Organisation A came to expire in March 2007, EMB had not yet openly invited Expression of Interest but renewed the contract with Organisation A only due to the following reasons –

(a) During the period when the Service Agreement was in effect, services provided by Centre A were well received by schools and more than 16 000 teachers and students had participated in the activities;

(b) in view of the increasing demand from schools for the activities concerned (including the Flag-raising Ceremony and Talks on Our Country's State of Affairs), the renewal of the Agreement helped Centre A maintain the momentum of promoting national education and its flexible development;

(c) the size of the school premises in which Centre A was accommodated was that of a village school and the premises was not conveniently located. Its existing facilities might not meet the needs of other operators. It was unlikely that other operators would be attracted; and

(d) a new operator might require EMB to carry out large-scale alterations before it could provide services.

480. The Office of The Ombudsman considered that to uphold the principle of fairness and openness, EMB should take active steps to openly invite Expression of Interest so as to ascertain whether there were other organisations which were capable of and interested in promoting national education, rather than assuming that other organisations would not be interested in operating Centre A or would have difficulties in operating the Centre. If eventually no other organisations were interested as expected by the Bureau, the renewal of the contract with Organisation A would then be fully justified. If Expression of Interest was received from Organisation A and other organisations, the Bureau could make an appropriate choice. In this incident, when EMB renewed the contract with Organisation A in March 2007, it had already decided to select an operator in an open and competitive manner. However, it was not until December 2010 that it decided again to openly invite Expression of Interest in the operation of Centre A. It still had not taken any concrete action in 2012 to implement the decision. The Ombudsman considered such progress too slow and did not meet the public's expectation.

481. In the light of the above analysis, The Ombudsman considered Allegation (a) partially substantiated.

Allegation (b)

482. EMB granted the lease of the school premises concerned to Organisation A for the operation of Centre A based on established policies and procedures. Any non-profit-making organisations could apply to EMB for renting vacant school premises at a nominal rent for purposes in line with EMB's policy objectives. Although it was not widely publicised by EMB, it did not cause any unfairness.

483. The Ombudsman, therefore, considered Allegation (b) unsubstantiated.

Allegation (c)

484. The Ombudsman considered that since EMB had adopted the sponsoring practice, it did not have to gazette tender as in the case of procurement of services. The period set for submission of Expression of Interest was not very short. Therefore, Allegation (c) was unsubstantiated.

485. However, EMB invited Expression of Interest only by publishing a "notice" at its homepage. It seemed less desirable when compared with the common practice. In fact, many government departments and public bodies often placed in newspapers small advertisements to invite Expression of Interest. Moreover, EMB did not mention in its "notice" that apart from being allocated a school premises for promoting national education, selected organisation could also apply to EMB for sponsorship for organising related activities. It seemed to cause the invitation less attractive. Although EMB might not need to provide sponsorship to the selected organisation, The Office of The Ombudsman considered that EMB should inform all the interested organisations of the possibility of receiving sponsorship.

486. The Ombudsman therefore considered Allegation (c) substantiated other than alleged.

487. In the light of the above, The Ombudsman considered this complaint partially substantiated.

488. The Ombudsman recommended EDB that in future, when inviting organisations again to submit Expression of Interest, more effective means should be employed to publicise the notice (e.g. placing small advertisements in newspapers) and all relevant information should be listed out in the notice for interested organisations to take note of.

Administration's response

489. EDB accepted the recommendation of The Ombudsman. In future, when inviting organisations again to submit Expression of Interest, in addition to making announcement at EDB's homepage, EDB will use other means such as placing advertisements in newspapers with relevant information listed out in detail.

Government Secretariat – Education Bureau

Case No. 2012/5425 – (1) Inconsistent explanation of the selection criteria of School Principal's Nominations; (2) Unreasonably including "School Services" as a selection criterion; (3) Refusing to disclose the names of the members of the Selection Committee; (4) Impropriety in placing teachers who had taught candidates to write self-recommendation letters in the Selection Committee; (5) Lack of meeting minutes of the Selection Committee; and (6) Fabrication of a document

Background

490. On 28 November 2012, the complainant filed a complaint with The Ombudsman against Education Bureau (EDB).

491. According to the complainant, his daughter applied for the School Principal's Nominations ("Nominations") in her government secondary school in early 2012 in hopes of attending a university with the nomination by her principal. They inquired the school about the results several times, but the school only told them to wait for notice. In June 2012, the complainant learned that his daughter's application failed and another applicant, who had received "attentive" guidance from a teacher of the same school on writing a self-recommendation letter, was successfully nominated. The complainant argued that the school's selection procedure of the Nominations was unfair and lacked transparency, and therefore lodged a complaint in July.

492. With regard to the said complaint, EDB explained the selection procedure to the complainant on 11 September 2012 ("the first reply") and 19 October 2012 ("the second reply").

493. In its first reply, EDB stated –

"…the Committee has reviewed information of all applications and considered the overall performance of each applicant in non-academic areas, such as sports, music, social services, other cultural activities and leadership."

494. In its second reply, EDB explained –

"…after a detailed discussion and the assessment of each applicant's overall performance, the Selection Committee decided that five of the applicants were nominated for their outstanding performance in leadership, school and social services and external competitions."

495. The complainant did not accept EDB's explanation. His complaint against EDB was summarised as follows –

(a) EDB was inconsistent in its explanation of the selection criteria for the Nominations in the first reply and second reply;

(b) the school included "participation in school services" in the selection criteria without reasons;

(c) the school did not make public the names of the members of the Selection Committee;

(d) the school did not take into account any conflict of interest which might result from appointing a teacher who guided students to write self-recommendation letters as a member of the Selection Committee;

(e) the school did not keep meeting minutes and documents related to the selection; and

(f) the school was suspected of compiling a summary of applicants' information only after the complaint was made.

The Ombudsman's observations

Allegations (a) and (b)

496. The Office of The Ombudsman accepted EDB's explanation. It was not inappropriate for the school to select nominees based on the Joint University Programmes Admissions System Office's guidelines, including the consideration of the quality and quantity of applicants' school services. There was no contradiction between the first reply and second reply.

497. Therefore, The Ombudsman considered Allegations (a) and (b) unsubstantiated.

Allegation (c)

498. The Office of The Ombudsman believed that the school should not be blamed for not taking the initiative to announce the names of the members of the Committee in advance. However, the school was slightly inappropriate in not providing the complainant with the names of the members of the Committee immediately after receiving his call for inquiry.

499. Therefore, The Ombudsman considered Allegation (c) partially substantiated.

Allegation (d)

500. According to EDB's response, during the selection process, the Committee mainly considered whether or not the applicants met the prescribed requirements. Students' self-recommendation letters only provided information for the Careers Guidance Team to prepare the information summary. These letters were neither counted with weighting nor discussed by the Committee during the selection process. In addition, it was an option for the student to ask a teacher how to write a self-recommendation letter, which did not create any conflict of interest when the teacher concerned served as a member of the Selection Committee.

501. Based on EDB's response, the Office of The Ombudsman agreed that the teacher who offered assistance to the student for writing a self-recommendation letter did not incur any conflict of interest by serving as a member of the Committee.

502. Therefore, The Ombudsman considered Allegation (d) not substantiated.

Allegations (e) and (f)

503. The Office of The Ombudsman believed that the Committee had collectively selected nominees for the Nominations and that the selection procedure was basically fair and just. While it was undesirable that the school did not prepare minutes of the selection meeting on 27 March 2012, it did not mean that the selection process was unfair.

Moreover, there was no evidence that the school compiled the information summary after the complaint was made.

504. In conclusion, The Ombudsman considered Allegation (e) partially substantiated and Allegation (f) unsubstantiated.

505. In sum, The Ombudsman considered this complaint partially substantiated.

506. The Ombudsman recommended that EDB instruct the school to –

(a) upload its arrangements concerning the Nominations such as the selection procedure and criteria and the announcement of results on its website, and inform all applicants of the selection results as soon as the results are available; and

(b) prepare and keep minutes of the selection meeting properly for future reference.

Administration's response

507. EDB accepted The Ombudsman's recommendations and has taken the measures set out below.

508. In September 2012, EDB gave recommendations to the school on the implementation of the School Principal's Nominations, and asked the school to formulate measures to improve the arrangements for the Nominations. Since October 2012, the school has progressively put in place measures to implement these recommendations –

(a) On 9 October 2012, the school sent a notice regarding the important dates of JUPAS and the school's Joint University Programmes Admission System (JUPAS) activities to its Secondary 6 students and their parents, which clearly stated the selection procedure and criteria, and the announcement of results for the School Principal's Nominations. The notice was distributed to each Secondary 6 student and uploaded on the school's website for reference by students and parents;

(b) in addition to releasing the selection results through the issue of a School Newsletter, the school would notify each applicant by mail after all the examinations of 2013 HKDSE have been completed (in around June 2013); and

(c) the school held the 2013 selection meeting of the School Principal's Nominations on 27 February 2013 and prepared the minutes for future reference.

Government Secretariat – Home Affairs Bureau

Case No. 2011/4098 – (1) Unclear procedures for application for the use of Private Recreational Leases facilities; (2) Unnecessarily disclosing the complainant's information to a third party when processing the complainant's application; and (3) Delay in processing the complainant's application

Background

509. On 17 October 2011, the complainant lodged a complaint with the Office of The Ombudsman against the Home Affairs Bureau (HAB).

510. The complainant claimed that it was a non-profit-making organisation dedicated to developing the shooting sport. In late May 2011, the complainant made an enquiry with the HAB on using facilities run by holders of Private Recreational Leases (PRLs). HAB issued a reply in early August 2011 to inform the complainant of the application procedures, including submissions by sports organisations of their applications for using such facilities to HAB, which would in turn consult the National Sports Associations (NSAs) concerned and instruct the respective PRL holders to make available the facilities for use by the organisations. On the same date, the complainant applied for the use of a gun club's shooting range (the application) through HAB. In early September, HAB issued a reply to the complainant, reiterating that the application had to be forwarded to the NSA concerned for consideration and comments.

511. In early October, HAB informed the complainant in writing that the application had been shelved because the application mechanism for using PRL facilities was under review.

512. The complainant was dissatisfied with the application mechanism for the use of PRL facilities; and HAB's handling of the application. The complainant's allegations against HAB could be summarised as follows –

(a) HAB failed to develop a clear guideline for applying for the use of PRL facilities. Specifically, it failed to define "sports organisations" and to provide a list of documents required to be submitted by the applicants;

(b) HAB unreasonably passed the documents submitted by the complainant to the NSA concerned for consideration; and

(c) HAB unreasonably shelved the application.

The Ombudsman's observations

Allegation (a)

513. HAB had developed a mechanism for eligible "outside bodies" to apply for the use of PRL facilities, including providing a definition for eligible "sports organisations".

514. HAB had in fact processed the application in earnest.

515. HAB had not promulgated full details of the application mechanism and the definition of eligible bodies, which left room for improvement. As for the types of documents required to be submitted by the applicants, no exhaustive list can be done due to varying contexts of applications.

516. In the light of the above, The Ombudsman considered Allegation (a) unsubstantiated.

Allegation (b)

517. There are many sports organisations in Hong Kong. It was therefore understandable for HAB to consult the NSAs concerned in order to be conversant with the context of applications and assess whether applications to use PRL facilities by individual organisations should be approved.

518. The Office of The Ombudsman also noted that all personal data (e.g. names) on the complainant's documents were edited out before passing to the NSA concerned, which was reminded to handle the documents with confidentiality. This means that HAB has done its utmost to safeguard the personal data of the persons concerned.

519. Allegation (b) was therefore unsubstantiated.

Allegation (c)

520. HAB did not shelve the application. As a matter of fact, HAB had completed the vetting procedures and informed the complainant of the result some two months after receipt of the application. Allegation (c) was therefore unsubstantiated.

521. Based on the aforesaid, The Ombudsman considered this complaint not substantiated.

522. To avoid misunderstanding, The Ombudsman suggested HAB to promulgate the definition of eligible bodies and the adaptable procedures in processing the applications.

Administration's response

523. HAB accepted The Ombudsman's recommendation and has taken the following actions –

(a) HAB placed an advertisement in four newspapers and magazines in July 2012 to promote and promulgate the definition of eligible bodies;

(b) HAB placed the relevant advertisement again in four local newspapers and magazines in May 2013;

(c) the definition of eligible bodies has been specified on HAB's website; and

(d) HAB will publicise the definition of eligible bodies again when necessary.

Hospital Authority

Case No. 2011/2936 – (1) Delay in processing a patient's application for joining the Public Private Interface – Electronic Patient Record Sharing Pilot Project, rendering his record inaccessible when needed; and (2) Failing to acknowledge a letter from the patient's family enquiring about the progress of the application

Background

524. In April 2011, the complainant's father (Mr A) was advised that a surgical operation was necessary when attending his regular medical appointment at a public hospital (Hospital B). Mr A intended to have the operation in a private hospital and signed a Public Private Interface – Electronic Patient Record Sharing Pilot Project (PPI-ePR) form to facilitate access to his medical records with the Hospital Authority (HA) hospitals and clinics by his private practitioner. However, Mr A did not receive the authorisation code until July that year.

525. On behalf of Mr A, the complainant chased HA for progress in writing but received no reply (Allegation (a)). He was dissatisfied with HA's inefficiency and alleged that its processing of the PPI-ePR application had caused delay in his father's treatment (Allegation (b)).

The Ombudsman's observations

526. The Office of The Ombudsman accepted that it was prudent for HA to verify the patient data upon detection of a "move episode[2]". While the usual application processing time was two weeks, HA took 70 days in this case. Moreover, it was not until HA issued an instruction that another public hospital started to sort out the clinical data. In view of the above, The Ombudsman considered Allegation (a) substantiated.

527. As to whether HA had failed to acknowledge the complainant's letter, the Office of The Ombudsman noted that the PPI-ePR Programme Office (PO) staff had explained the situation when the complainant called and enquired about the progress. However, on

[2] The practice of moving an episode number pre-created for a certain patient to another patient when the intended patient failed to show up is known as a "move episode".

receipt of the complainant's subsequent letter, the PO staff could have clarified with him on whether his concerns had been addressed in the telephone conversation. The complainant only managed to obtain the updates during Mr A's follow-up consultation with Hospital B and the private hospital.

528. The Office of The Ombudsman considered that although the delay was mainly caused by the time required to verify data involved in the "move episode" cases, and HA might be reluctant to reveal that Mr A's case involved the mix-up of patients' information, it should have taken the initiative to reveal the genuine and detailed cause of the delay to the complainant instead of waiting until he filed a complaint to The Ombudsman in August 2011. The Ombudsman, therefore, considered Allegation (b) partially substantiated.

529. Overall, The Ombudsman considered this complainant partially substantiated.

530. While HA has implemented some measures with a view to clearing up "yellow flag[3]" cases, The Ombudsman recommended that HA further adopt the following remedial measures –

(a) To urge frontline medical staff to clear any "yellow flags" in a patient's records upon attendance of the medical appointment by the patient; and

(b) to review the checks and balances mechanism to ensure strict adherence to HA's Patient Master Index Guidelines (the PMI Guidelines).

Administration's response

531. HA accepted all recommendations of The Ombudsman and has taken the following actions –

(a) A Task Force was set up to review the "move episode" mechanism under the "Clinical Informatics Program Executive Group" with a view to working out a more comprehensive

[3] Where there is a "move episode", a "yellow flag" will pop up in the PPI-ePR system, indicating that further verification of the patient's personal data is required.

approach to improve the current mode of clearing "yellow flags"; and

(b) to further improve on stricter adherence to the PMI guidelines, an enhanced monitoring on the compliance to the guidelines under the Quality Assurance Standards, in particular on "move episode" cases, has taken effect since January 2013. Hospital staff are now required to complete the follow-up actions within two weeks on the "same patient" cases; and six weeks for "different patients" cases. Considering the nature and complexity of individual cases, hospital staff should consider escalating particular cases to senior management level. Other check and balance mechanisms include issuance of annual reminder on compliance to the PMI Guidelines, as well as refresher training, have also commenced in parallel.

Hospital Authority

Case No. 2011/4424 – Failing to address the complainant's queries regarding the use of physical restraint on his father

Background

532. The complainant lodged a complaint against a hospital (the Hospital) under the Hospital Authority (HA) for delay in replying to his enquiry of 5 September 2011 and failure in addressing his queries in connection with an alleged breach of guidelines on the use of physical restraint to his father (the patient) on 28 August 2011 (the incident).

533. On 28 August 2011, the complainant asked two nurses of the Hospital about the incident but the staff claimed to be unaware of the matter. On 5 September 2011, the complainant raised a similar enquiry with the Patient Relations Officer (PRO) of the Hospital and asked the Hospital to provide a written reply to him on the incident. The Hospital undertook to provide a reply in four to six weeks but did not do so until 1 November 2011 [Allegation (a)].

534. Disappointed by the reply, the complainant requested the Hospital to arrange a meeting with the Hospital Chief Executive (HCE). A meeting was scheduled for 25 November 2011 and the PRO told the complainant that the HCE would be present. However, the HCE failed to show up, without prior notification or explanation to the complainant [Allegation (b)].

535. The complainant was disappointed that different staff of the Hospital provided different versions and misleading information to his queries. Also, the Hospital was just repeating the same content in their letters and did not provide answers to his queries. He also believed that the Hospital was not willing to disclose the real picture of the case and only wanted to protect its staff [Allegation (c)].

536. The complainant had also raised the following allegations -

(1) The Hospital has forged medical records that the nurse who performed the physical restraint had properly informed the relatives. Also, the nurse had indicated that the patient was confused, yet the physical restraint assessment record indicated

that the patient had accepted the physical restraint. This was unreasonable [Allegation (d)].

(2) the Ward Manager (WM) had provided false information to the complainant at a meeting on 16 September 2011 that the patient had no bleeding/infarcts in his brain, but the medical record of the Computer Tomography Brain Scan (CT Scan) done on 28 August 2011 indicated that large hypodensities were noted at both sides of the cerebellar hemisphere with effacement of sulci, suggestive of acute infarct [Allegation (e)]; and

(3) the Hospital was inconsistent on who actually restrained the patient [Allegation (f)].

The Ombudsman's observations

Allegation (a)

537. The Office of The Ombudsman noted that it took eight weeks for the Hospital to provide a written reply to the complainant, which slightly exceeded the Hospital's undertaking of four to six weeks. Upon receipt of The Ombudsman's referral, the Hospital wrote to the complainant on 29 November 2011 to apologise for the delay. Although, given the complexity of the case, the time taken by the Hospital to prepare the reply was not unreasonably long, The Ombudsman considered that the Hospital should inform the complainant and explain the reasons for the delay once they realised that more time would be required in preparing the reply.

538. The Office of The Ombudsman believed the major dissatisfaction from the complainant was the content of the reply. In view of this, Allegation (a) was considered partially substantiated.

Allegation (b)

539. The complainant said the PRO had told him that the HCE would be present at the meeting on 25 November 2011, but HA indicated that they had never promised the complainant that the HCE would attend the meeting. The Office of The Ombudsman could not ascertain this fact in the absence of independent evidence.

540. The Office of The Ombudsman considered it important for HA to better manage the expectation of the patient's relatives by, say,

indicating clearly who would meet with them on 25 November 2011. Also, when the complainant enquired the whereabouts of the HCE at the meeting, the Hospital should have clarified the above misunderstanding so as not to give the complainant an impression that the HCE had failed to show up without prior notification or explanation. In view of this, Allegation (b) was considered partially substantiated.

Allegation (c)

541. The Office of The Ombudsman agreed with the complainant that the Hospital's replies to the complainant on 1, 11, 29 November and 5 and 15 December 2011 were too brief without directly addressing the complainant's concerns. The written replies simply admitted that there were inadequacies in the procedures for applying physical restraints to the patient and apologised to the complainant. There were no details regarding the inadequacies or what actually happened on 28 August 2011.

542. While the Office of The Ombudsman had no doubt that the relevant details of the incident (including the content of the patient's medical records) were discussed during the various meetings with him and his relatives, given the complainant's repeated requests for a written reply, the Hospital should provide a more detailed account in the replies. As the complainant was clearly dissatisfied with the verbal explanations given by the Hospital and demanded a written reply, the Hospital should know that the complainant was demanding a detailed account of the incident instead of just a broad-brush explanation and apology. The Hospital's written replies were not conducive to addressing the concerns of the complaints and might even give the impression that the Hospital was trying to downplay the incident or withhold certain information.

543. Even during the course of investigation by the Office of The Ombudsman, HA was unwilling to disclose the whole picture from the outset. As a result, the Office of The Ombudsman had to make many rounds of enquiries with HA in order to gather the relevant information of the case. The Office of The Ombudsman believed this attitude adopted by the Hospital and HA in this case was a main factor leading to this complaint.

544. In view of the above, The Ombudsman considered Allegation (c) substantiated.

Allegation (d)

545. HA has explained the inaccurate record on the physical restraint form and the assessment of the patient during the time of restraint. The two nurses involved in the case were subsequently disciplined, one for not informing the relatives upon use of restraint, and the other for not informing the relatives and not keeping an accurate record on the physical restraint form. The Office of The Ombudsman did not have sufficient evidence to conclude what actually happened. In any case, the entry was a wrong one. HA has admitted fault and the staff concerned were disciplined.

546. On whether the patient had accepted the physical restraint, the Office of The Ombudsman doubted the propriety of regarding an absence of struggle from a confused patient as accepting the restraint and considered it necessary for HA to review such practice. Overall, Allegation (d) was considered substantiated.

Allegation (e)

547. Regarding the alleged false information provided by the WM on the patient's brain infarcts at the meeting on 16 September 2011, the WM had denied the allegation. In the absence of independent evidence, the Office of The Ombudsman considered Allegation (e) inconclusive.

Allegation (f)

548. HA has clarified that both nurses involved in the case had taken part in performing the physical restraint at different times of the day. As HA did not have any discussion record for the meeting held on 6 September 2011, the Office of The Ombudsman could not ascertain what exactly had been said and whether any inconsistencies existed in HA's explanation at different meetings. In any case, the Office of The Ombudsman believed that this complaint point was mainly caused by HA's inadequate and unclear explanation about the whole incident, such as the respective roles of the two nurses in the physical restraint process. Allegation (f) was therefore partially substantiated.

549. Overall, The Ombudsman considers the complaint partially substantiated.

550. The Ombudsman recommended HA to –

(a) provide training to enhance staff's effective communication with patients and their relatives, with emphasis on providing clear and adequate information and greater transparency;

(b) impress upon staff, through training or otherwise, the importance of making timely and accurate records, whether on patient care or essential verbal communication with patients and their relatives; and

(c) review the criteria for assessing patient's acceptance of physical restraint and, if necessary, revise the Physical Restraint Assessment Record form.

Administration's response

551. HA accepted all recommendations of The Ombudsman and has taken the following actions –

(a) A series of training programmes had been organised during the period from November 2011 to September 2012 by the Central Nursing Division and the department concerned of the Hospital for ward staff to enhance effective communication between ward staff, the patients and the patients' relatives;

(b) a series of training programmes and activities had been conducted from July 2012 to January 2013 to refresh and raise the awareness of the nursing staff about the importance of good practices on patient record documentation as well as effective communication and documentation relating to physical restraint on patients; and

(c) after a review on the assessment criteria for physical restraint of patients, the Hospital has revised the physical restraint assessment record, which is currently in use.

Hospital Authority

Case No. 2012/1168 – Improper handling of a patient's complaint on prescription of wrong medicine

Background

552. The complainant complained to the Office of The Ombudsman against the Accident and Emergency Department (AED) of a hospital (Hospital A) of the Hospital Authority (HA) for improper handling of her case.

553. The complainant said that she developed rash after taking antibiotics prescribed by her dentist. She attended the AED of Hospital A in the early hours of 21 June 2011 and was prescribed medications after consultation. When she presented the prescription to the Pharmacy of Hospital A on the following day, the Pharmacy staff told her that the prescription was not suitable for patients with skin allergy and asked her to go back to the doctor at the AED to follow up with the medication issue. Her complaints against HA were as follows –

(a) She suspected that the AED doctor had wrongly prescribed her with medications not suitable for patients with skin allergy；

(b) in response to her complaint, HA said that Hospital A had only kept the final prescription for record, and not the original one as a proof. She considered the explanation unreasonable and suspected that Hospital A was harbouring the doctor under complaint;

(c) the coordination between Hospital A's Pharmacy and AED was unsatisfactory. She was kept waiting in the AED for one and a half hours, only to be told that the prescription had been amended without the need to consult the doctor again; and

(d) she also lodged a complaint with HA/the Public Complaints Committee (PCC). Although PCC found her complaint substantiated, HA failed to take proper actions to follow up Hospital A's mishandling of her case.

The Ombudsman's observations

Allegation (a)

554. Having gone through the complainant's attendance record and prescription in the AED of Hospital A as well as the computer record on the original prescription retrieved by HA Head Office, the Office of The Ombudsman was inclined to accept that the doctor had not prescribed the complainant with "Amoxil" or "Flagyl" which could cause allergy to her. As to the appropriateness for the doctor to prescribe "Erythromycin" for the complainant, it was a professional clinical judgement. The Ombudsman found no relevant information to show that Allegation (a) involved administrative malpractice and hence would not comment on it.

Allegation (b)

555. In its reply to the complainant, Hospital A stated clearly and explained in detail that the doctor decided to prescribe to her the same medicine that was prescribed earlier by the dentist. The Office of The Ombudsman had doubt on the way Hospital A arrived at the above conclusion and explanation. The Office of The Ombudsman considered that Hospital A's investigation result was inconsistent with the facts. And upon PCC's learning of the relevant facts, HA should take a more proactive approach to follow up. Taking into consideration the experience of the complainant in the entire event, the different versions of explanation given by Hospital A and PCC to the complainant would easily give rise to an impression of harbouring or hiding the facts from investigation. The Ombudsman therefore considered Allegation (b) substantiated.

Allegation (c)

556. The Ombudsman considered that given the absence of guidelines for frontline staff to handle situations in accordance with actual operation, there was deficiency in Hospital A's existing procedures in tackling amendments in prescriptions. The Ombudsman therefore considered Allegation (c) substantiated.

Allegation (d)

557. The Ombudsman considered that there was a lack of effective regulatory and record keeping mechanism by Hospital A in handling prescriptions that required amendment. HA should review the existing arrangement to ensure proper keeping of relevant records and information. Besides, the incident revealed that there still appeared to be deficiency on the appropriate response that AED of Hospital A should take upon learning the shortage of certain medicine from Pharmacy, and there was room for improvement. Overall speaking, The Ombudsman considered Allegation (d) substantiated.

558. Overall speaking, The Ombudsman considered this complaint substantiated.

559. The Ombudsman recommended that HA should –

(a) review the procedures and formulate appropriate guidelines on the handling and record keeping of cases involving amendments in prescriptions to ensure that patients would be promptly informed of the reasons for the amendment, minimise as far as possible any inconvenience caused to the patients and facilitate effective monitoring by the hospital; and

(b) instruct Hospital A to enhance communication between AED and Pharmacy to avoid the recurrence of having AED to prescribe patients with medications in short supply.

Administration's response

560. HA accepted The Ombudsman's recommendations and has taken the following actions –

(a) Hospital A has reviewed the workflow in handling prescriptions that require clarification or amendment. According to the new arrangement effective from February 2013, the Pharmacy will resolve the problem of medication prescription with the doctor over the phone as appropriate. For a prescription that has to be returned and amended by the doctor, a "Prescription for Clarification" slip stating clearly the issues to be clarified will be attached to the prescription and passed to the doctor for follow-up. The amended prescription, together with the

original one and the clarification slip will be brought back to the Pharmacy. After dispensing the medications, the Pharmacy will keep the original and amended, as well as prescriptions and the clarification slip together for two years for inspection purpose; and

(b) HA has demanded Hospital A to enhance communication between AED and Pharmacy on medication supply to avoid the recurrence of similar incidents.

Home Affairs Department

Case No. 2012/1604 – Mishandling a request for installation of bollards to prevent cars from driving through a pedestrian walkaway

Background

561. On 17 May 2012, the complainant lodged a complaint with the Office of The Ombudsman against a District Office (DO) of the Home Affairs Department.

562. The complainant was a resident of a village in Hong Kong. He alleged that vehicles regularly drove on the pedestrian walkway of the village, jeopardising pedestrian safety. He therefore requested in August 2011 the authorities concerned to install bollard(s) on the walkway (Bollard Works) to prevent vehicles from entering. In November of the same year, the District Lands Office (DLO) posted notice in respect of the Bollard Works to consult villagers nearby. In April 2012, DO conducted tendering of the Bollard Works, and the works were expected to be completed in mid-May. However, DO suspended the Bollard Works on grounds that there was objection to the works.

563. The complainant held that DO should not take into account objection raised after the conclusion of the consultation period.

The Ombudsman's observations

564. DO appeared to have deviated from the usual procedures when it considered objection received after the consultation period. However, the Office of The Ombudsman considered it reasonable for DO to attempt mediation and strive for a consensus among residents even if the objection was received after the consultation period. It was also reasonable for DO to refer the matter to the Transport Department (TD), which was the designated department responsible for traffic matters, to resolve the issue from an overall traffic management perspective. The situation would even be better if TD would be able to provide a feasible solution acceptable to the community at large, as well as providing convenience for vehicles and ensuring pedestrian safety. In view of the above, The Ombudsman considered the complaint unsubstantiated.

565. The Ombudsman advised DO to request TD to expeditiously arrive at a solution concerning pedestrian safety on the walkway.

Administration's response

566. DO referred The Ombudsman's recommendation to TD in December 2012, as well as providing it with the relevant information. TD was requested to arrive at a solution to ensure pedestrian safety at the subject walkway from the overall transport management perspective.

567. TD responded in February 2013 that the concerned ingress and egress points (without railing at present) were for the use of the public to and from nearby bus stops. They also served as emergency vehicular access to village houses in case of emergency, and no installation of railing at such points was recommended. TD also pointed out that villagers might apply for parking area from DLO. TD would offer traffic advice on the parking area (and its ingress/egress points) where necessary.

Home Affairs Department

Case No. 2012/2968 – Unreasonably refusing the complainant's application for use of facilities in a community centre

Background

568. On 23 August 2012, the complainant complained to the Office of The Ombudsman against a District Office (DO) of the Home Affairs Department (HAD).

569. According to the complainant, on 16 August 2012, he applied to DO for using a community centre to hold religious activities (the concerned application). On 22 August, a staff from DO called the complainant saying that there were "some problems" with the concerned application. The staff mentioned, "……In the application form, it is stated that the target of service is congregation, which only include members of your church. This would be against the principle of public interest." (Argument 1) and "Given that your church is a Christian organisation and that the activity is of a religious nature, which is not in line with the principle of public interest, the application has been refused. Applications involving religious activities are generally not accepted." (Argument 2) The complainant alleged DO of unreasonably refusing the concerned application.

The Ombudsman's observations

570. The Office of The Ombudsman considered that according to the guidelines on the use of community halls/community centres (CHs/CCs) issued by HAD and DO, and the precedents of hiring facilities by the complainant, the concerned application met the conditions set out by DO.

571. HAD explained that Staff A called the complainant not only to inform him of the preliminary result of the application but also to explain the result and to ascertain whether the applicant would provide more information on the activity for DO's further consideration of the concerned application. However, according to the file record Staff A marked on the day of the telephone conversation, Staff A did not request the complainant to provide any information, but merely told him that the application had been turned down because it did not meet the criteria for

the use of facilities. The explanation of HAD apparently deviated from the file record made by Staff A.

572. The Office of The Ombudsman considered that even if Staff A did ask the complainant in the aforesaid telephone conversation to provide further information for DO to re-consider whether the activity under application meet the conditions on the use of facilities, the complainant would have difficulty in providing the information required if Staff A just vaguely asked for more information. Staff A should ask specific questions and request the complainant to make specific clarifications, so as to confirm the nature and details of the activity under application. The incident showed that Staff A improperly handled the concerned application. If her supervisor had been consulted in the process, the supervisor should also be held responsible.

573. Furthermore, the complainant had indeed promptly raised his doubts to Staff A, therefore it was not that he had no objection to the application result. The Office of The Ombudsman considered that Staff A should consult her supervisor (or an officer(s) of an even higher rank) on the case instead of abruptly terminated the processing of the application.

574. As to whether Staff A had mentioned Argument 1 and Argument 2 to the complainant, in the absence of independent supporting evidence, the Office of The Ombudsman was unable to establish the truth.

575. In any case, it was inappropriate for DO to rashly terminate the processing of the application and the staff concerned was careless in handling the matter. The Ombudsman considered this complaint substantiated.

576. The Ombudsman recommended HAD that, apart from implementing improvement measures (i.e. enhancing training for frontline staff so that they could have a more profound understanding of the hiring policy of the facilities of CHs/CCs and the rationale behind, and adopting measures to prevent occurrence of similar misunderstanding in future), DO should also remind its staff to seek advice from their supervisors or higher-ranking officers and to make reference to precedent cases should they have doubts about the applications for hiring of venues.

Administration's response

577. DO has arranged a briefing session for the staff responsible for handling applications for hiring of facilities of CHs/CCs to explain the hiring policy of CHs/CCs and the guidelines on the use of CHs/CCs as well as the skills for customer service and complaint handling.

Home Affairs Department

Case No. 2012/3851 – (1) Unreasonably requiring applicants for hiring a community hall/centre to submit a copy of the approval document for using copyright works; (2) Unreasonably requiring "eligible organisations" to submit a copy of such approval document; (3) Failing to grant an exemption to "eligible organisations" from submitting such approval document; and (4) Failing to provide assistance to "eligible organisations" to obtain approval documents

Background

578. On 23 September 2012, the complainant complained to the Office of The Ombudsman against a District Office (DO) of the Home Affairs Department (HAD).

579. The complainant claimed that his organisation was a charitable organisation which could be exempt from tax under section 88 of the Inland Revenue Ordinance. In January 2012, HAD revised the "Guidelines and Conditions on the Use of Facilities Available in a Community Hall/Community Centre" (the Guidelines) requiring hirers of community halls/community centres (CHs/CCs) of HAD to warrant that they shall obtain and maintain the relevant approvals, permits and licences (approval documents) and comply with the relevant conditions in using any copyright works during their use of CHs/CCs. DO has imposed an additional condition to the Guidelines of the District which required hirers to submit to DO copies of the approval documents at least two days before using CHs/CCs (additional condition).

580. The complainant considered that under section 76(2) of the Copyright Ordinance, the use of copyright works by charitable organisations, including the complainant's organisation, notwithstanding the copyrights belonging to any other persons, was not an infringement of the copyrights in the works. The complainant had therefore written to DO and subsequently to HAD to enquire whether exemption from the submission of the approval document could be granted, but to no avail.

581. The complainant's allegations against HAD/DO are summarised as follows –

(a) Unreasonably included "additional condition" in the Guidelines of the relevant district;

(b) unreasonably required hirers which were charitable organisations to submit a copy of approval document;

(c) unreasonably refused to grant an exemption to hirers which were charitable organisations from submitting approval document, such charitable organisations were thus required to obtain approval document before using copyright works in CHs/CCs; and

(d) unreasonably refused to provide assistance to hirers which were charitable organisations to obtain approval documents.

The Ombudsman's observations

Allegations (a) and (b)

582. The Office of The Ombudsman agreed that whether the hirers, including charitable organisations, met the conditions stipulated in section 76(2) of the Copyright Ordinance was not a matter for HAD or its DOs to decide. The reason is: if the owner of the copyright considers that a hirer has infringed his copyright, he can take legal action against the latter, and whether the latter can defend successfully by applying section 76(2) shall be determined by the court.

583. HAD had required DOs to incorporate the requirement on approval document into their district guidelines in accordance with the advice of the Intellectual Property Department (IPD) and the Department of Justice (DoJ). The purpose was to remind hirers of intellectual property rights protection, in case of any violation they may be legally liable for infringement of copyright, and the activities in the venue cannot be conducted smoothly. This should hardly be disputed.

584. The Office of The Ombudsman, however, considered the additional condition in the Guidelines of the relevant district warranted discussion for the reasons set out below.

585. All CHs/CCs in other districts, and also venues of various scales of the Leisure and Cultural Services Department (LCSD) which was also under the auspices of the Home Affairs Bureau as HAD, did not require hirers to submit copies of the approval documents before using the venues. In view of this, the additional condition in the Guidelines of the relevant district was indeed unnecessary. The public would find it difficult to understand why CHs/CCs in the relevant district had an additional requirement. The Office of The Ombudsman also could not see that the additional condition was serving the special needs or circumstances of the relevant district.

586. The practice of LCSD over the years was to require hirers not to use any copyright works without the consent of the owner of the copyright. Hirers should also be responsible for any claims and actions, etc., in respect of infringement of any intellectual property rights. This practice had been effective and provided adequate protection of the interests of various parties. This was worthy of reference for HAD.

587. The activities held by hirers may involve a number of copyright works. DOs would not examine in detail the programme content. Even if hirers submit on time copies of the approval documents, the venue staff might not be able to verify whether the hirers had obtained the permission of the owners of all the relevant copyright works. The professional venue management staff of LCSD had also said that there were difficulties in verifying each of these documents and therefore would not require hirers to submit copies of approval documents. In view of this, the additional condition introduced for CHs/CCs in the relevant district could in no way achieve the said purpose, i.e. to ensure that hirers had already obtained the approval from the relevant copyright holders/organisations when using copyright works in CHs/CCs so as to avoid violation of laws as well as the likelihood of subsequent recovery of royalties or lawsuits arising from the violation of laws. The requirement would only create troubles for hirers and DO.

588. The Office of The Ombudsman understood that DO had to respect the views of the relevant District Council (DC). However, DO also has the responsibility to convey fully to DC the above mentioned practice of LCSD so that CHs/CCs in the district will operate in a simple manner in line with other venues mentioned above.

589. The Ombudsman considered Allegations (a) and (b) substantiated.

Allegations (c) and (d)

590. The copyright of any work belonged to the owner of the copyright. HAD indeed did not have the authority to issue the "exemption document", so called by the complainant, in respect of a work. A person who wished to use the copyright works of any other person should consult the owner of the copyright or its agent direct.

591. According to HAD's response, HAD and DO had already rendered appropriate assistance to the organisation concerned.

592. The Ombudsman therefore considered Allegations (c) and (d) unsubstantiated.

593. All in all, The Ombudsman considered this complaint partially substantiated.

594. The Ombudsman urged HAD to review, together with DC, the arrangements in respect of the additional condition.

Administration's response

595. After consulting IPD and DoJ, HAD has revised the condition regarding intellectual property rights to only requiring hirers not to use any copyright works in CHs/CCs unless the hirers have obtained the consent or approval of the owners of the copyright or the licensing bodies concerned. DO has discontinued the requirements of the additional condition.

Home Affairs Department, Highways Department and Lands Department

Case No. 2011/4270A, B&C – (1) Improperly building a gate for the "Pai Lau" of a village near the complainant's estate, such that villagers could illegally occupy the Government land behind the gate; and (2) Failing to plan how to handle the problem of the gate, such that a joint operation had to be cancelled when the villagers claimed ownership of the gate.

Background

596. On 13 and 28 October 2011, on behalf of the owners' committee of his estate, the complainant filed a complaint with the Office of The Ombudsman against a District Office (DO) of the Home Affairs Department (HAD), Highways Department (HyD) and a District Land Office (DLO) of the Lands Department (LandsD).

597. All in all, the complainant was discontent with the following issues –

(a) The Government unreasonably built a metal gate for the "Pai Lau" of a village near the complainant's estate, such that villagers could lock up the metal gate for illegal occupation of the Government land behind the gate as fee-charging carparks, affecting pedestrian safety; and

(b) HAD, HyD and LandsD had held multiple meetings to discuss a joint operation to reclaim the Government land in question, but they did not consider how to deal with the metal gate for the "Pai Lau". Consequently, when the villagers claimed the ownership of the gate the day before the operation, the operation was abruptly cancelled. Thereafter, the Government no longer took any law enforcement actions.

The Ombudsman's observations

Allegation (a)

598. The Office of The Ombudsman noted that with an aim to settling the objections raised by the villagers in respect of the impact brought about by a Project (the Project), the relevant departments agreed with the Village Representative concerned (the VR) to re-provision the "Pai Lau". The Ombudsman held that it was a justified decision to re-provision the "Pai Lau", given the need to minimise the impact to nearby residents brought about by the Project and to preserve the historic landmark of the village. Having said that, the re-provisioning of the metal gate, on the other hand, would prompt the enclosure of the Government Land behind the "Pai Lau" by the villagers. The Administration showed a lack of thorough consideration in agreeing to re-provision the gate. It was especially improper for DO to allow the VR to take over a village road (the Access Road), the "Pai Lau" and its metal gate in June 2007, hence leaving the way open for the villagers to enclose the subject Government Land for their own use, under the guise of prevention of illegal parking.

599. Hence, The Ombudsman considered Allegation (a) against HAD, LandsD and HyD substantiated.

Allegation (b)

600. DO, HyD and DLO decided to call off the clearance operation on 1 September 2010 based on the Police's assessment on the situation. The departments had many meetings afterwards with an aim to finding a long term solution and had not ignored the problem.

601. As for the question of whether the Police's stance in the case is appropriate, The Ombudsman was not in a position to investigate into the actions of the Police under The Ombudsman Ordinance, except for complaint cases that involve violation of the Code of Access to Information. The Office of The Ombudsman would not comment on the Police's stance in handling this case.

602. The Ombudsman considered Allegation (b) against HAD, LandsD and HyD not substantiated.

603. Overall speaking, this complaint was partially substantiated.

604. The Ombudsman recommended that the relevant departments consider asking the villagers to choose between the two following options –

(a) To abolish the metal gate and open the Access Road permanently; or

(b) to grant the Access Road to the villagers for use on a short term tenancy basis on the condition that the pavement on the Access Road is to be open for public use.

Administration's response

605. The relevant departments accepted The Ombudsman's recommendation about abolishing the metal gate and open the Access Road permanently. In this connection, on 22 April 2013, DLO posted a notice under section 6(1) of the Land (Miscellaneous Provisions) Ordinance (Cap. 28) on the Access Road requiring the cessation of the illegal occupation of the concerned area of Government Land by 7 May 2013. An inter-departmental operation was conducted on 7 May 2013 to open and hold in place the metal gate so as to enable public access to the Access Road. Bollards were installed along the Access Road to prevent people from parking thereon.

606. As regards The Ombudsman's recommendation on granting the Access Road to the villagers for use on a short term tenancy basis on the condition that the pavement on the Access Road is to be open for public use, The Ombudsman later agreed that it was infeasible to grant the land to the villagers on a short term tenancy basis as the concerned area was authorised for use as a vehicular access in 2000 under the Roads (Works, Use and Compensation) Ordinance (Cap. 370). Therefore, the relevant departments would not need to submit progress reports on the implementation of this recommendation.

Home Affairs Department, Land Registry and Lands Department

Case No. 2011/4509A, B&C – Refusing to rectify a wrong lot number on a memorial for registering the succession to landed property in the New Territories

Background

607. On 10 November 2011, on behalf of the complainant, Solicitors A complained to the Office of The Ombudsman against a District Office (DO) of the Home Affairs Department (HAD) and the Land Registry (LR). As the Lands Department (LandsD) might be involved in the issue, Solicitors A agreed that LandsD be also included in the investigation by the Office of The Ombudsman.

608. Allegedly, while investigating the land title of a lot which the complainant intended to purchase, Solicitors A found that in 1935, the then DO had mistakenly registered in Memorial No. B succession to the land title by Mr C1 upon the death of Mr C2. However, Mr C2 was in fact the owner of another lot.

609. Accordingly, Solicitors A requested DO and the Land Registry (LR) to rectify the error in the land records, but both departments refused to take any action. Solicitors A considered that DO could in fact file a "Memo as to Error" to correct the error while LR could have asked DO to do so.

The Ombudsman's observations

610. HAD has the power and responsibility to register succession of New Territories properties. The Office of The Ombudsman accepted that the absence of original records and related documents did warrant HAD's extra caution in dealing with the request from Solicitors A to rectify the alleged error in Memorial No. B. However, DO had dismissed the solicitors' request too casually. Even though it might not be legally obliged to accept the request, it should have explored means to rectify the mistake apparently made by its predecessor. Its efforts after the Office of The Ombudsman's commencement of inquiry and the outcome clearly indicated that HAD could have been more helpful. In this light, The Ombudsman considered the complaint against HAD partially substantiated.

611. The Office of The Ombudsman noted that LR could not have initiated rectification of the error in Memorial No. B because of the limitations of its statutory powers. Regulation 20 of the Land Registration Regulations was not applicable to Memorial No. B either. The Office of The Ombudsman agreed that the onus was on DO to confirm that there was an error in Memorial No. B and to issue a "Memo as to Error" for LR's registration. Furthermore, LR had indeed made an effort to ask DO whether it would rectify the error. The Ombudsman, therefore, considered the complaint against LR unsubstantiated.

612. This case was outside LandsD's purview because it related to succession of New Territories property. In this connection, The Ombudsman considered the complaint against LandsD unsubstantiated.

613. The Ombudsman urged HAD to learn from this case and conduct more thorough investigation when processing similar requests in future.

The Administration's response

614. The Administration accepted the recommendation and has reminded New Territories District Offices to conduct more thorough investigation before responding to similar requests in future. DO has reminded the staff concerned to explore practical means of rectification more thoroughly for similar cases in future.

Housing Department

Case No. 2012/0935 – Delay in handling two flooding incidents and providing untrue information in the complainant's claim procedure

Background

615. The complainant was the tenant of a public housing unit (Flat A). At about 11 pm on 8 June 2010, she found the balcony of Flat A flooded with water gushing out from a pipe. She called the management office of the property service agent (PSA) and the Police at once. However, staff of the PSA arrived at the scene more than an hour later and argued with her over the source of the flooding. The main flushing water valve was finally turned off at 1 am.

616. The following evening (i.e. on 9 June), water again came gushing out from the flushing water pipe awaiting repairs. The PSA staff arrived at Flat A half an hour after receiving the complainant's call and turned off the flushing water valve.

617. The complainant was dissatisfied that the PSA staff had come to her assistance so late during both flooding incidents. The delays had caused damages to her property. Later on, she sought compensation from the Hong Kong Housing Authority (HKHA). Nevertheless, in an attempt to cover up its mistakes, the PSA provided false information to the loss adjuster (LA) of the insurer, such that the LA concluded that HKHA and the PSA had performed their duties and so advised against compensation. While the Housing Department (HD) later on refunded several thousand dollars of rentals to her, showing admission to negligence, it fell short of paying her due compensation for the damages to her property.

The Ombudsman's observations

Allegations (a)

618. The PSA staff arrived at Flat A shortly upon notification by the complainant and helped clear up the water there. There was no delay on their part. Follow-up actions by the PSA were in accordance with HD guidelines and nothing indicated any improprieties. The Ombudsman,

therefore, considered Allegation (a) unsubstantiated.

Allegation (b)

619. The Office of The Ombudsman considered that HD's explanation was supported by the Police records, the incident reports of the PSA and the statements by the PSA staff concerned. There was no evidence to prove that the PSA had given false statements to the LA. The Ombudsman considered Allegation (b) unsubstantiated.

Allegation (c)

620. The Office of The Ombudsman accepted HD's explanation regarding the complainant's claim that she had received a rental refund from the Department. The LA had been commissioned to assess liability for the incidents. That the complainant received the refund from the PSA did not imply that HKHA would take up liability for the property damage. The Ombudsman, therefore, considered Allegation (c) unsubstantiated.

621. Although the allegations above were considered unsubstantiated, the Office of The Ombudsman discovered during the investigation that the PSA failed to explain clearly to the complainant that the refund was a good-will gesture; and that the agreement has in its contents responded to the complainant's request for a rental refund, which would unavoidably be mistaken as HD's admission to liability and hence compensation. The Office of The Ombudsman considered the PSA's handling method questionable. On the other hand, the case also reflected HD's inadequate monitoring of PSAs, such that they could enter into private agreements with public housing tenants and give them financial assistance without HD's knowledge. This led to misunderstanding eventually.

622. Overall, The Ombudsman considered this complaint against HD was substantiated other than alleged as there were inadequacies regarding HD's monitoring of PSAs.

623. The Ombudsman made the following recommendations –

(a) HD should review the current guidelines on monitoring of PSAs and consider to set up a mechanism to regulate PSAs' provision of financial assistance to public housing tenants privately; and

(b) that the second flooding was caused by the section gate valve being turned on without authorisation was an indication of an inadequacy in the design of the valve. HD, therefore, should review the matter and make improvements in this regard.

Administration's response

624. HD accepted the two recommendations made by The Ombudsman and has –

(a) on 22 October 2012, updated its policy guidelines to the effect that PSAs are strictly forbidden to provide financial assistance to public housing tenants. If a tenant encounters financial difficulties, the PSA concerned may consider rendering assistance by paying out of its charity fund, subject to prior approval by HD; and

(b) designed a "valve lock" to lock the section gate valve as and when necessary. For example, in the course of maintenance, workers may lock the valve with the "valve lock" to prevent any persons from turning on the valve without authorisation. Relevant Estate Management Office Instruction was issued on 21 December 2012.

Housing Department

Case No. 2012/1240 – Delay in handling a report of backflow of sewage

Background

625. The complainant complained against a management company outsourced by the Housing Department (HD) for the delay in examination of the manhole/foul sewer and handling the report of the sewage backflow problem of his Public Rental Housing unit on 28 February 2012.

626. Two years before the case in question, the toilet of the complainant's Public Rental Housing unit had had a sewage backflow problem. As soon as he noticed the irregularities of the water closet on 27 February 2012, he called upon the management office to follow up. A lot of foul water flowed back to his toilet the next afternoon notwithstanding. A summary of his complaint is as follows –

(a) No sooner had the complainant discovered the sewage backflow at around 3:00 pm on the day of the incident did he notify the management office, but its staff did not arrive until after an hour;

(b) he gathered that the sewage backflow was a result of the management office's failure to handle his complaint lodged the previous day, i.e. 27 February, that there were irregularities in the water closet; and

(c) his complaint to HD Headquarters on 29 February went unanswered.

The Ombudsman's observations

Allegation (a)

627. The Office of The Ombudsman was of the view that, irrespective of whether the complaint was made in person or by phone, the staff did arrive at the flat within a reasonable time to provide assistance after the complainant notified the management office in person. The backflow problem was also handled in accordance with HD's guidelines. No maladministration was found. The Ombudsman, therefore, considered Allegation (a) unsubstantiated.

Allegation (b)

628. On examining the statements made by the staff of the management office and workmen concerned, the Office of The Ombudsman found no evidence in support of the allegation that the staff had not taken any follow-up action. As to whether an appropriate method had been used to examine the manhole or the suspected blockage of foul sewer, the Office of The Ombudsman was not in a position to comment on works-related activities. However, as explained by HD, even though no problems had been found with the manhole, this by no means implied that the place would be free from sewage backflow. The incident on the next day was no proof that the management office had not conducted any examination. The Ombudsman, therefore, considered Allegation (b) unsubstantiated.

Allegation (c)

629. Records showed that, upon receipt of the complaint from the complainant over the telephone on 29 February, the call centre of HD Headquarters referred the case to the management company in no time for follow-up and reply. On the same day, the staff of the company met with the complainant and his family, on whose request disinfection work was undertaken in the flat, and the case was referred to a loss adjuster for investigation followed by a written reply. The Office of The Ombudsman agreed that HD had dealt with the complaint in accordance with its guidelines. The Ombudsman, therefore, considered Allegation (c) unsubstantiated.

630. To sum up, The Ombudsman found this complaint not substantiated. However, The Ombudsman considered that HD should step up inspection of the work records of the management company and incident reports of the management company; staff concerned should be instructed to ensure that frontline staff maintains a proper record of their follow-up actions and the details of emergencies.

Administration's response

631. HD accepted The Ombudsman's recommendation and has instructed the management company to maintain a proper record of incidents and maintenance works. Clear guidelines should be issued to staff for handling complaints and emergencies. The company has also been required to give staff reminders at regular meetings and carry out inspections on its duty officers from time to time. HD has stepped up random inspection of the work records and incident reports of the management company. It was affirmed that the company had acted in line with the requirements.

Immigration Department

Case No. 2011/5200 – (1) Providing an incorrect telephone number to the complainant such that she was unable to get timely help from a border control point and failing to call an ambulance for her as promised; (2) Failing to explain to the complainant that calling an ambulance was outside the scope of the hotline service and advise her where to seek help; and (3) Failing to maintain complete records of telephone calls from enquirers seeking help

Background

632. The complainant's elder brother, who urgently needed medical treatment, was transferred back to Hong Kong by a mainland ambulance via a border control point. The complainant called the 1868 hotline (the hotline) of the Immigration Department (ImmD) to request an ambulance to stand by at the control point to take her brother to the hospital. She called the number that the hotline staff provided to seek help from the duty room of the control point, only to be told that it was not the right place to call.

633. Subsequently, she made several calls to the hotline and was promised arrangement for an ambulance. At the hotline staff's request, she provided the estimated arrival time. However, the ambulance on Hong Kong side was yet to arrive after she and her brother had reached the control point and completed the clearance. She then called the hotline again to urge for early arrival. The ambulance finally arrived 20 minutes after they had entered the territory and took the patient to the hospital. Unfortunately, the complainant's brother died that night.

634. The complainant considered that ImmD had not handled her case properly, resulting in delayed delivery of her brother to the hospital for medical treatment. She requested an investigation by ImmD. When she later found that it was the Police and not ImmD that called the ambulance, she considered the ImmD staff to have failed to act as promised. If calling an ambulance was outside the scope of the hotline service, the staff concerned should have explained it to her and advised her where to seek help. She refused to accept ImmD's explanation that its failure to provide a recording of the telephone conversation on that day was due to a suspension of power at Immigration Tower at the time. She suspected that ImmD was hiding the truth. The complainant's allegations against ImmD are –

(a) Providing an incorrect telephone number to the complainant such that she was unable to get timely help from a border control point and failing to call an ambulance for her as promised;

(b) failing to explain to the complainant that calling an ambulance was outside the scope of the hotline service and advise her where to seek help; and

(c) failing to maintain complete records of telephone calls from enquirers seeking help.

The Ombudsman's observations

635. The Office of The Ombudsman was satisfied that the hotline staff has provided the correct telephone number of the duty room to the complainant and handled the case in accordance with the departmental guidelines. As part of the recording or record of telephone conversation was unavailable and the staff members were unable to recall the incident, The Ombudsman could not be sure whether ImmD had made the promise as alleged by the complainant.

636. During a visit to the duty room of the control point in question, investigation officers of the Office of The Ombudsman found that it was not uncommon for Hong Kong residents to request ambulance service while they were outside the territory. ImmD also indicated that the frontline staff posted to work in the duty room were all experienced and capable officers familiar with the operations of control points. In the absence of objective proof, the complainant's allegation that the duty room staff failed to offer assistance when she called could not be justified. The Ombudsman considered Allegation (a) unsubstantiated.

637. Besides, The Ombudsman considered that the complainant had wrongly believed from the outset that an ambulance could be pre-arranged through the hotline. Unaware of her expectation, the hotline staff had not clarified it, resulting in her misunderstanding. The Ombudsman, therefore, considered Allegation (b) partially substantiated.

638. The Ombudsman's investigation confirmed that there was a power suspension at Immigration Tower at the time and the recording function of the hotline was disrupted. ImmD's explanation to the complainant was, therefore, based on facts and there was no cover-up. Nevertheless, this case revealed that when some functions of the hotline

service were disrupted, ImmD did not adopt any contingency measures to record the enquiries/requests for assistance that the direct lines handled. The Ombudsman was of the view that incomplete records might undermine the role of the hotline in assisting Hong Kong residents who were outside the territory in distress in the case of a widespread or major emergency. The Ombudsman, therefore, considered Allegation (c) partially substantiated.

639. Overall, The Ombudsman considered the complaint partially substantiated.

640. ImmD emphasised that the direct line system with no recording function had been effective in handling major incidents even before the upgrading of its hotline system. However, The Ombudsman took the view that, if ImmD kept only incomplete records for lack of a properly established case file and if the way ImmD staff handled a case was queried subsequently, it would be difficult for the Department to provide objective evidence either to defend for its staff or to give the party making the query a fair account.

641. The Ombudsman recommended ImmD to –

(a) promptly review the implementation of the improvement for recording enquiries/requests for assistance handled by the hotline and consider adding a backup system to maintain the recording function so that the hotline could perform its functions fully and effectively;

(b) review the contents, methods and channels of publicising its hotline service. Apart from giving a clear description of the role of Government departments in patient transfer across the border and the handling procedures of requests for assistance, the Department should also remind the public to familiarise themselves with the relevant information before departure from Hong Kong so that they could make sensible decisions for themselves in case of emergency; and

(c) review from time to time the current procedures and examine whether patients could be transferred to the nearest hospital more quickly to provide earlier treatment for patients.

Administration's response

642. ImmD accepted The Ombudsman's recommendations and has implemented/is implementing the following measures –

(a) ImmD has rolled out improvement measures for the hotline service and considered that these measures have been implemented to its satisfaction. It will continue to enhance internal monitoring and conduct timely review to ensure the effective implementation of the measures concerned. As to the proposal on adding a backup system to maintain the recording function, ImmD and its system contractor have completed the feasibility study. ImmD will seek funds in accordance with the established procedures and regulations to add recording function to the hotline backup system. Subject to funding approval, the system enhancement will be implemented by 2014;

(b) ImmD has stepped up the dissemination of information. The public is now able to obtain information on "Transfer of Patients from the Mainland to Hong Kong" via the interactive voice response function of the hotline and the GovHK website. The relevant information has also been added to the "Guide to Assistance Services to Hong Kong Residents in the Mainland" (Form No. ID938), which is available to the public and can be downloaded from the ImmD website; and

(c) ImmD has carried out reviews of the existing procedures jointly with the relevant departments and has held inter-departmental meetings with the Hong Kong Police Force and Hong Kong Customs and Excise Department on 6 September 2012 and with the Hong Kong Police Force, Hong Kong Customs and Excise Department and Fire Services Department on 14 September 2012. The conclusions of the two meetings are as follows –

    (i) It is unanimously agreed by the aforesaid departments that the existing mechanism of arranging ambulance service for Hong Kong residents in need at border control points has been operating smoothly and should be retained;

(ii) as the party responsible for activating the mechanism, the Police will further liaise with the entry and exit authorities at the Mainland checkpoint for notification of cases involving transfer of Hong Kong patients as soon as possible so that the mechanism can be activated in the first instance whereby ambulance service will be called and relevant departments notified with a view to providing prompt treatment to the patients; and

(iii) upon receiving request of emergency ambulance service from a patient at the control point, FSD will immediately dispatch an ambulance closest to the concerned control point to provide the service. FSD will also review from time to time measures to improve the achievement rate of the target response time.

Inland Revenue Department

Case No. 2012/0077 – Failing to retain complete records in a tax recovery case

Background

643. The complainant was an expatriate who had worked in Hong Kong during the 1990s. A tax representative (the Representative) was appointed by his employers to handle his tax matters and he left Hong Kong in 1998.

644. In May 2011, when the complainant was leaving the territory after a brief visit, he was stopped at the airport by the Immigration Department (ImmD) in accordance with a Departure Prevention Direction (the DPD) issued by the Court against him for outstanding tax. He was allowed to depart after making a partial payment including an outstanding tax of $45,544 and a $7,059 surcharge (collectively referred to as "the amount under complaint").

645. He subsequently found out that in March 1999, the Inland Revenue Department (IRD) had issued him a tax rebate cheque (Refund Cheque, the RC) in the amount of $45,544 for the year of assessment 1997/98. However, the Representative had returned the cheque to IRD in late April and requested that it be used to offset the complainant's outstanding tax. The complainant, therefore, asked IRD to refund the amount under complaint, but was refused.

646. IRD argued that it received a letter and a telephone call in late March and mid-April 1999 respectively, indicating that the complainant did not receive any tax rebate cheque and requesting a replacement cheque. It was noted that the complainant's address was also updated in the IRD database at that time (the new address). A new cheque (Replacement Refund Cheque, the RRC) in the amount of $45,544 was issued to the complainant at the new address on 17 May 1999. The cheque was cashed on 24 May. As such, the set-off arrangement as requested by the Representative had not been made, meaning that an amount of $45,544 was still outstanding.

647. The complainant refuted IRD's arguments and asked for proofs of his having requested, received and cashed the RRC, as well as the Department's record of its issuance. IRD could provide none. He was aggrieved that IRD had coerced him to pay the amount under complaint without grounds.

The Ombudsman's observations

648. The Office of The Ombudsman had identified certain inadequacies in IRD's records retention practice and did not fully agree with IRD's views regarding this case.

649. Tax recovery actions inevitably involve law enforcement actions that may restrict the right of the taxpayer, as in the complainant's case. IRD must take a prudent approach in keeping records for tax collection cases. In the present case, the Collection Enforcement Section, which took over the complainant's case for tax recovery actions since June 1999, was fully aware of the reasons for the $45,544 being outstanding and the significance of the RRC. Nevertheless, it did not keep copies of the relevant documents in the Refund Section files as evidence of the tax owed by the complainant.

650. Besides, the Office of The Ombudsman considered that refund records are not necessarily irrelevant to tax recovery action and it is the responsibility of IRD to ensure all records pertaining to the tax collection action are maintained properly as supporting evidence until the tax collection action is over.

651. As the paper records relevant to the complainant's requests for a replacement cheque and change of address had already been destroyed by IRD by 2007, the only piece of evidence that IRD could produce to indicate that the complainant had requested a RRC was an indirect one – an internal memo from the Refund Section to notify the Collection Enforcement Section of the request. It was not sure whether IRD had taken proper steps to verify the identity of the person who made the request in the first place.

652. Likewise, IRD's computer records such as the numbers and dates of issue of the RC and the RRC, the payee name source code and the address source code, as well as IRD's practice of marking all refund cheques with "Non-Negotiable and Account Payee Only" could just serve to suggest that the cheques had been made payable to the complainant and sent to the addresses given, and that the RRC had been credited to the complainant's bank account. IRD stated that there was no record of the RRC having been returned undelivered and that it had confirmed with the bank that the new address was the complainant's last known forwarding address. The Office of The Ombudsman considered these to be corroborative but not direct evidence of the RRC having been sent to an appropriate address. In fact, the Office of The Ombudsman could not be sure whether IRD had followed the proper and stringent procedures in accepting the address change request before sending the RRC to the new address.

653. Since IRD was not prudent enough in keeping records for tax recovery cases, the records concerning the complainant's tax liabilities were incomplete and inadequate. IRD could not provide concrete evidence to prove beyond doubt that the tax remained unpaid, though The Ombudsman believed it had perused all relevant records before applying for the DPD against the complainant.

654. Evidence of maladministration on the part of IRD was also found in the investigation of the Office of The Ombudsman. For instance, its staff failed to notice the inconsistent instructions given by the complainant (request for a replacement cheque) and the Representative (request for a set-off arrangement using the RC). This gave rise to various confusions later and hence this complaint. Update of the complainant's address was not heeded by different IRD officers even within the same section such that some letters concerning tax matters were sent to another address. The DPD could not be successfully served to the complainant because the Collection Enforcement Section still used an old address of the complainant.

655. Nor were IRD's tax recovery actions proactive enough. It did not try to deliver a warning letter to the complainant when notified by ImmD of his arrival in Hong Kong in December 2003. Similarly, the Collection Enforcement Section failed to contact the complainant direct through his overseas addresses or make effective use of his email address for tax recovery purpose after he had confirmed by email receipt of IRD's 2004 warning letter.

656. Notwithstanding the above inadequacies in handling the case on the part of IRD, the Office of The Ombudsman considered that IRD had reasonable grounds for taking tax recovery actions against the complainant. The bank statement kept by IRD was hard evidence that the RRC had been cashed on 24 May 1999, so the cheque must have been issued. Other evidence provided by IRD, though indirect, were strong corroborative evidence that the RRC had been issued in the complainant's name and the money credited to his bank account. Also, the RRC had been sent to the last known address of the complainant which could not be proved incorrect. There was no record of it having been returned undelivered.

657. The Office of The Ombudsman also considered IRD's application for the DPD against the complainant justified, as it had taken actions to recover the outstanding tax between July 1999 and June 2005, but in vain. Two letters concerning the outstanding tax and surcharge were sent to him at one of his overseas addresses, which was later proved to be correct. IRD, therefore, had reasons to assume that the complainant had left Hong Kong and resided elsewhere while being fully aware of his tax liabilities.

658. Overall, The Ombudsman considered this complaint partially substantiated.

659. The Ombudsman recommended that IRD to –

(a) critically review its records retention practice to ensure all relevant records and evidence are properly maintained in the collection files;

(b) review its internal communication and coordination mechanism to ensure effective and efficient transfer of information (especially any change of correspondence address of taxpayers/representatives) among various sections, and clarification of conflicting information received; and

(c) strengthen staff supervision to ensure proactive actions for tax recovery and minimise incidents of negligence in communication with taxpayers, record keeping and tax refund.

Administration's response

660. IRD accepted The Ombudsman's recommendations and has taken the following actions –

(a) IRD has completed the review and enhanced its internal guidelines on records retention and procedures on tax recovery. IRD had reminded officers that all the relevant documents should be properly retained in the collection files, and that proactive actions for tax recovery should be taken when information shows that a defaulter has returned to Hong Kong and/or a new address is available;

(b) IRD has reviewed the workflow and strengthened the internal communication and coordination mechanism to ensure effective and efficient transfer of information. Officers have been reminded of taking actions to amend the taxpayers' correspondence addresses promptly and standard internal memos have been revised for the purpose of improving communication amongst different units; and

(c) IRD has stepped up the staff supervision and coaching to ensure proactive actions for tax recovery and minimise incidents of communication gap in its operations.

Lands Department

Case No. 2011/4961 – Delay in handling the complainant's query about the area of land to be allowed for use under a proposed short term tenancy

Background

661. On 2 December 2011, the complainant, on behalf of his mother, lodged a complaint with the Office of The Ombudsman against the concerned District Lands Office (DLO) of the Lands Department (LandsD).

662. In June 2011, the complainant's mother obtained the approval from DLO to rent a piece of Government land (the Land concerned) in a district under a short term tenancy (STT). According to the complainant, he immediately requested DLO to rectify the problem that the area stated in the STT was bigger than that of the actual area, and an officer of DLO (Staff A) promised to arrange for a site inspection within two weeks. However, DLO procrastinated until November 2011 before it started to handle the problem.

The Ombudsman's observations

663. Although LandsD was of the view that there were internal guidelines on how to handle issues on an STT offer letter raised by an STT applicant, the Office of The Ombudsman noted that there was no clear instruction to staff as to whether they should interview the applicant before or after the acceptance of the offer so as to address the issues raised by the applicant. Hence, it was inevitable that staff might have different interpretations and could only act according to their own judgment.

664. In this case, Land A[4] was initially included in the calculation of rental payable by the complainant's mother for the STT area. It was difficult to understand the actual circumstances unless clarification was made on site. The plan attached to the STT Offer Letter gave no indication or explanation either. The area which the complainant had repeatedly queried was important information of the tenancy agreement. However, Staff A adopted the crude approach of "complete-formalities-first-and-resolve-problems-later" to handle the case. The complainant had no idea at all how LandsD had worked out the land area of the STT. It was therefore unreasonable for LandsD to require the complainant to produce evidence instead of clarifying with the complainant on site initially.

665. It was not crucial whether Staff A promised in June 2011 to arrange for a site inspection within two weeks. The fact was that Staff A had procrastinated in dealing with the issue raised by the complainant till November 2011. Based on the above, The Ombudsman considered the complaint substantiated.

666. The Ombudsman recommended that LandsD should consider reviewing the current guidelines, in order to work out clear and reasonable procedures for staff to follow. The guidelines should set out concrete examples requiring specific attention for reference by staff.

Administration's response

667. LandsD accepted the recommendation made by The Ombudsman. On 16 July 2012, LandsD issued a memo reminding staff to invite prospective tenants for an interview after the issuance of the STT offer letter so as to answer their queries about the contents of the offer letter. The relevant departmental guideline was amended accordingly in November 2012.

[4] A large concrete platform was erected on the Land concerned (total area of about 54 square metres) covering most of the area, and a large metal porch was erected thereon. One side of the porch extended beyond the boundary line of the concrete platform, sheltering a small portion of land (Land A) (total area of about 3 square metres) beyond the platform. Land A was calculated into the area of the land rented by the complainant's mother.

Lands Department

Case No. 2012/0120 – Failing to stop the illegal operation of a columbarium and its unauthorised occupation of Government land

Background

668. On 10 January 2012, the complainant lodged a complaint with the Office of The Ombudsman against the Lands Department (LandsD). The complainant lived in a village in the New Territories. According to the complainant, someone converted Houses A to C in the village into an unauthorised columbarium (the columbarium) in 2007. The columbarium, which was not authorised by the Government, occupied Government land unlawfully, causing environmental damage and affecting traffic flow.

669. The complainant alleged that the Administration failed to take timely actions to stop –

(a) the operation of the unauthorised columbarium; and

(b) the unlawful occupation of Government land near the columbarium.

The Ombudsman's observations

Allegation (a)

670. The District Lands Office (DLO) of LandsD had been following up on the case of the illegal conversion of Houses A and C to a columbarium (House B had not been converted). Although the progress had been slow, it was understandable that prompt action could not be taken given the need to clarify the legal issue of whether the Government had the right to take lease enforcement actions in respect of such cases. The Office of The Ombudsman noted that another case with similar legal issues in dispute had entered judicial proceedings. Based on the above observations, The Ombudsman considered Allegation (a) unsubstantiated.

Allegation (b)

671. The Ombudsman considered that DLO had taken proactive actions to follow up on the case in 2007. However, action had not been taken for four years because the case was of the "non-priority" category. The Office of The Ombudsman considered that although the way that the case was handled was in line with the established procedures, it was too lenient that LandsD used the same approach for the case in question. The justifications of the Office of The Ombudsman are set out below.

672. The Government land being unlawfully occupied was not small in size, and it was used for commercial operation by a columbarium that was illegally constructed. The Office of The Ombudsman considered the nature of the case serious, and that DLO had failed to take this into account when determining the priority of the case.

673. Furthermore, the land had been occupied unlawfully for four years. Even though the case was regarded as a "non-priority" case, it should not have been left unattended indefinitely. While it was understandable that, given resource constraints, DLO was unable to take immediate action for all cases and could only handle urgent cases in accordance with priority, it was undesirable that no schedule of action had been set and enforcement actions been delayed indefinitely simply because it was a "non-priority" case. Hence, The Ombudsman considered Allegation (b) partially substantiated.

674. Overall speaking, The Ombudsman considered this complaint partially substantiated. The Ombudsman recommended that LandsD should –

(a) follow closely the judicial proceedings regarding the alleged breach of land lease by a columbarium, and take land control actions as soon as possible;

(b) take prompt enforcement actions against the unlawful occupation of Government land in the present case; and

(c) consider setting a reasonable target for taking enforcement actions for "non-priority" cases to avoid indefinite delay of such actions.

Administration's response

675. LandsD accepted The Ombudsman's recommendations and has taken the following actions –

(a) LandsD has all along been following closely the judicial proceedings of another case with similar legal issues in dispute. Given that there is at present no concrete schedule for the court hearing, LandsD will, after the judgment of that case is available, seek legal advice for the case concerned and take appropriate lease enforcement action;

(b) land control actions have been taken against the unlawful occupation of unleased land under the Land (Miscellaneous Provisions) Ordinance and prosecution has been initiated. Legal proceeding is underway; and

(c) LandsD has promulgated guidelines to DLOs that they should as far as possible, initiate land control actions within 24 months on average for "non-priority" cases upon receipt of a complaint/referral. Except for very complicated cases, DLOs should also complete these cases within a further 12-month period upon initiating land control actions.

Lands Department

Case No. 2012/0583 – Delay in handling the complainant's small house application

Background

676. On 20 February 2012, the complainant lodged a complaint with the Office of The Ombudsman against the Lands Department (LandsD). According to the complainant, he made an application to the concerned District Lands Office (DLO) of LandsD for the construction of a small house on a lot in the New Territories in 2006. DLO posted a notice for public consultation in respect of the application in August 2010. However, up to February 2012, DLO had yet to complete processing the application and had not informed him of the progress of the case. It only said that the application was still being processed. He was dissatisfied with LandsD's delay in handling his case.

The Ombudsman's observations

677. The Ombudsman considered that there was obvious delay in handling the complainant's small house application by LandsD. Whether it was because of the heavy workload, it was hardly acceptable that the local District Survey Office (DSO) took more than a year to reply DLO's enquiry. Moreover, DLO consulted the Agriculture, Fisheries and Conservation Department (AFCD) in December 2010 (four months later) after a notice was posted in August 2010. It did not seek relevant department's comments within four weeks according to the guidelines.

678. Furthermore, on receipt of AFCD's comments on the tree problem in December 2010, the complainant's small house application should have been categorised as "non-straightforward application" immediately. However, DLO only informed the complainant in February 2012 in writing that his case was a "non-straightforward case" after the complainant's enquiry in January 2012. Obviously, DLO was not proactive and did not inform the applicant in writing within two weeks according to the guidelines.

679. The Office of The Ombudsman believed that DLO had not actively followed up on the tree problem in 2011 considering that DLO had failed to provide any file record to prove that its staff had communicated with AFCD many times, and AFCD expressed that no enquiry was received from DLO during the period concerned. Based on the above analysis, The Ombudsman considered the complaint substantiated.

680. The Ombudsman recommended LandsD –

(a) to instruct its staff to duly comply with the departmental guidelines in handling small house applications timely; and

(b) to require DSO to reply DLO on enquiries of small house applications within a specified time frame.

Administration's response

681. LandsD accepted The Ombudsman's recommendations and has taken the following actions –

(a) DLO has reminded its staff to timely handle the small house applications in compliance with the departmental guidelines. The complainant's small house application was approved in September 2012. The building licence was executed in January 2013 and registered in the Land Registry in late January 2013; and

(b) DSO has taken the following measures –

(i) To reply DLO's enquiry of small house application within a specified time frame (15 working days in general). If the case is very complicated and more time is needed, it will liaise with DLO to set a date for completing the work; and

(ii) to check the work log every three months and to review the completion date of the work that is about to overdue.

Lands Department

Case No. 2012/1909(I) – Unreasonably refusing to provide the complainants with documents related to their squatter structures

Background

682. The complainant is the owner of Lot A and in the early years built a number of squatter structures on Lot A, including Structure A. The structures were assigned with squatter survey numbers. In 2007, the complainant and his son (the complainants) applied to the concerned District Lands Office (DLO) of the Lands Department (LandsD) for rebuilding the squatter structures. It was not until then did they find that Structure A was not located on Lot A, but on an adjacent private lot (Lot B).

683. Between June and September 2012, the complainants complained to the Office of The Ombudsman that LandsD had unreasonably refused to provide them with the following seven pieces of information –

(a) A squatter control survey plan with the squatter survey numbers of the structures on the lot concerned;

(b) the squatter control survey record of their squatter structures in 1976;

(c) the squatter control survey record of their squatter structures in 1982;

(d) the 1984/85 Squatter Population Registration Form of their squatter structures;

(e) a letter from LandsD to the complainant in 1994 regarding the Letter of Approval for Agricultural Structures;

(f) a plan of Lot A and Lot B prepared by the Environmental Protection Department (EPD) in 1991; and

(g) a document on the payment of ex-gratia allowance for the implementation of Livestock Waste Control Scheme from EPD to the complainant in 1992.

684. The complainants wrote to LandsD in April 2012 requesting access to the aforesaid seven pieces of information.

685. In a written reply to the complainants on 25 May, the Squatter Control Office (SCO) of LandsD advised that items (a) to (d) were information for internal use only and would not be available to the public. For items (f) and (g), SCO consulted EPD and was told that the information could not be provided for third party use. SCO did not respond to the request for access to information relating to item (e) in the reply. On 28 May, the complainant called SCO to express his discontent. SCO consulted the Access to Information Officer of LandsD who advised that the complainants should be provided with the requested information in accordance with the Code on Access to Information (the Code). On 18 June, LandsD replied to the complainant in writing. For item (a), LandsD attached a copy of the squatter control survey plan on which information on other squatter structures had been erased. For items (b) and (c), LandsD provided the relevant information of Structure A in the reply. LandsD also promised to provide the complainants with information concerning items (d) and (e) after they had paid the photocopying fee. As for items (f) and (g), LandsD said that the request was referred to EPD for follow-up.

686. After the complainants had paid the photocopying fee, LandsD provided them with copies of items (d) and (e) in July. In providing item (d) the Squatter Population Registration Form, LandsD blotted out the particulars of three family members of the complainants, including their Chinese and English names, sexes, dates of birth, relationships with the householder (i.e. the complainant) and identity card numbers. On 24 and 25 September, the complainants called the Office of The Ombudsman twice to express his discontent about LandsD's tampering with the squatter control survey plan of the squatter structures (item (a)). They stressed that they were entitled to have access to all the information contained in the register form (item (d)) since the information was provided by the complainant to the Government.

The Ombudsman's observations

Item (a) Layout plan of the squatter structures

687. Paragraph (v) of the Introduction of the Guidelines on Interpretation and Application of the Code provided that, for all requests for information, irrespective of whether specific reference was made to the Code, government departments should decide whether to release the information in accordance with the provisions of the Code. It was therefore improper for SCO to have initially handled the request of the complainants without adhering to the provisions of the Code. In addition, SCO failed to explain in its reply the reason for its refusal to accede to the complainants' request. Nor did it inform them of the channels and means for appeal.

688. Nevertheless, before the complainants complained to the Office of The Ombudsman in June 2012, LandsD had already started to review their request. Having consulted its Access to Information Officer on the request, SCO promptly provided the complainants with the information in the same month. The Office of The Ombudsman took the view that, although the initial response of SCO to the complainants was not appropriate, LandsD had reviewed the case in time and took steps to rectify the mistake. Hence the approach of LandsD had no cause for criticism.

689. The Office of The Ombudsman also agreed with LandsD's decision after review. According to paragraph 2.9(c) of the Code, a department may refuse to disclose information if such disclosure would harm or prejudice the proper and efficient conduct of the operations of the department. The reason for LandsD to erase information on other squatter structures on the squatter control survey plan was in line with that set out in paragraph 2.9(c) of the Code.

690. Nevertheless, the Office of The Ombudsman noted that when LandsD informed the complainants of the review outcome on 18 June 2012, it did not explain to them the reasons for its refusal to disclose the information as required by the Code. LandsD explained that the complainants' request for a layout plan of the squatter structures was made in respect of their application for rebuilding their structures. Since LandsD had provided them with the squatter control survey plan containing the information of the structures concerned on 18 June, it had not refused to disclose any information and therefore did not have to give them the reasons for refusal.

691. The Ombudsman did not agree with LandsD's views in the preceding paragraph. What the two complainants requested from LandsD in April 2012 was a squatter control survey plan with the squatter survey numbers of the structures on the lot concerned, not just the survey number of their own squatter structures. LandsD should therefore explain to the complainants the reason for refusing to disclose information in respect of the other structures in accordance with the Code. As such, The Ombudsman considered the complaint in relation to item (a) partially substantiated.

Item (d) Squatter Occupancy Survey register form

692. Initially, SCO failed to handle the request of the complainants for item (d) in accordance with the Code. However, before the complainants complained to the Office of The Ombudsman, LandsD had started to review their request and had subsequently taken timely remedial action by providing the complainants with the information.

693. The Ombudsman took the view that LandsD's review decision appeared to meet the requirements of the Code. According to paragraph 2.15 of the Code, a department may refuse to disclose information about any person other than to the subject of the information, or other appropriate person. Hence, LandsD's review decision and the reason for the decision appeared to be in accordance with the reason for refusal of disclosure as set out in paragraph 2.15 of the Code. However, it would be more appropriate if LandsD would try to contact the three family members of the complainants to ascertain whether they agreed to the disclosure of the information before making the decision.

694. While the review decision of LandsD appeared to meet the requirements of the Code, the Office of The Ombudsman considered that the decision defied common sense. It was the complainant who provided the Government with all the information on the register form at that time, but LandsD refused to give him a full copy of the relevant information. The situation was similar to where a department insists that a person must obtain prior consent or authorisation from his family members before he could get a photocopy of the application form which he had sent to the department and in which he had entered the personal particulars of his family members. That was obviously unreasonable. The Office of The Ombudsman understood that there was no specific guideline in the Code as to how a request by a data supplier for access to the information provided by him should be handled. As such, LandsD

should seek legal advice of a higher level in respect of this case and consult the Constitutional and Mainland Affairs Bureau (CMAB) so that similar requests for information could be appropriately dealt with in the future.

695. Besides, in informing the complainants of the outcome of the review in June 2012, LandsD also did not explain to them the reason for its refusal to disclose the information as required by the Code. Given the above observations, The Ombudsman took the view that the complaint in relation to item (d) was partially substantiated.

696. As for the complaint in relation to items (b), (c), (e), (f) and (g), The Ombudsman considered the complaint not substantiated.

697. In conclusion, this complaint was partially substantiated. The Ombudsman urged LandsD to –

(d) enhance training and remind its staff to take note of and comply with the provisions of the Code when handling requests for access to information from members of the public; and

(e) seek legal advice of a higher level on how a request by a data supplier for access to the information provided by him should be handled and consult CMAB so that similar requests for information can be appropriately dealt with in the future.

Administration's response

698. LandsD accepted the recommendations made by The Ombudsman and has taken the following actions –

(a) The Squatter Control Unit/Headquarters of LandsD held a special meeting with managers of all district squatter control offices in March 2013 concerning this case to enhance their understanding of the Code. The managers were asked to share their knowledge on the Code with all frontline staff in the district squatter control offices so that they would fully understand the Code and handle requests for access to information in relation to squatter survey and occupancy survey records held by SCOs in accordance with the requirements of the Code. In addition, LandsD will circulate the guidelines on the Code to all new staff reminding them of the relevant

requirements. Introduction to the Code has been included as part of the induction training for new recruits in the DLOs. To help serving officers have a better understanding of the Code, a thematic talk on the Code was held by LandsD's Training Section in 2010. Similar talks were held in August and September 2013 to strengthen staff's knowledge about compliance with the Code and protection of personal data. Staff of the Office of the Privacy Commissioner for Personal Data also attended the talks to answer questions on the subject; and

(b) LandsD has consulted CMAB and the Department of Justice. Based on their advice, LandsD will provide the complainants with all the information contained in the Squatter Population Registration Form (i.e. item (d)).

Lands Department

Case No. 2012/2268 – Delay in taking lease enforcement action against property owners who violated the restriction on land use

Background

699. For many years, the Owners' Corporation of an industrial building had been complaining to the Lands Department (LandsD) about some units of the building being used for providing funeral services for pets, including cremation, provision of columbarium niches and adornment of the ashes, thus violating the land lease. However, the District Lands Office (DLO) under LandsD did not consider them as cases of high priority and hence had not taken any action. The problem persisted as a result.

The Ombudsman's observations

700. The facts showed that since 2004, DLO had received many complaints about violation of the land lease of the building. Each time, however, DLO merely issued warning letters after investigation and obtaining legal advice. As those cases were not accorded high priority, DLO did not take any lease enforcement action other than issuing the warning letters, which were not legally binding. As a result of DLO's delay in taking substantive enforcement action, violation of the land lease had continued for eight years and the number of units involved increased from two to four. In total, seven units had violated the land lease. The Office of The Ombudsman considered DLO had been lax in handling those cases.

701. Moreover, it was quite unnecessary for DLO to seek legal advice time and again as all the units of the building were bound by the same land lease conditions and those under complaint were all involved in such uses as cremation of pets and keeping of their ashes. The defence by some property owners that their units were used for industrial manufacturing sounded far-fetched. Indeed, cremation of animal corpses was in violation of the restrictions on land use of the building. The Office of The Ombudsman, therefore, urged DLO to step up efforts in gathering evidence for more rigorous enforcement action against such blatant violations of the land lease conditions.

702. Given the above observations, The Ombudsman considered the complaint substantiated.

703. The Ombudsman urged LandsD to expedite further actions on the irregularities in the building to deter other offenders.

Administration's response

704. LandsD accepted The Ombudsman's recommendation. Regarding the four units in the building which are used for pet funeral services, warning letters have been issued by DLO with a copy registered in Land Registry (commonly known as "imposing an encumbrance"). All DLOs have also been reminded to take prompt lease enforcement action when handling similar cases.

Lands Department

Case No. 2012/2444 – Failing to take land control action against a number of shops which had illegally occupied Government land

Background

705. On 16 July 2012, the complaint lodged a complaint with the Office of The Ombudsman against the Lands Department (LansdD).

706. According to the complainant, she repeatedly complained to LandsD since February 2012 that –

(a) some shops and stalls on the Hong Kong Island (the district) had long been occupying Government land by placing miscellaneous articles, wooden planks, trolleys and steel tables on the pavement and side lane in the district; and

(b) some shops in the district (the concerned shops) had been occupying Government land by erecting concrete platforms, metal or wooden platforms and ramps in front of the shops. However, she was only told in the LandsD's reply that the concrete platforms in front of the concerned shops were on private land.

707. The complainant alleged that LandsD was ineffective in taking enforcement actions and failed to prosecute the offenders, thereby allowing their continued occupation of Government land.

The Ombudsman's observations

708. The Office of The Ombudsman noted that LandsD had taken follow-up actions upon receipt of the complaint, including site inspections, clarification of the land title, and arrangements of land control actions under the Land (Miscellaneous Provisions) Ordinance (the Ordinance).

709. However, LandsD eventually did not take enforcement action under the Ordinance on the ground that the shops had removed the unauthorised platforms and ramps before the notice was posted. The sequence of events and inspection by the Office of The Ombudsman revealed that it was clearly a case of continued illegal occupation of Government land by the concerned shops. The platforms and ramps were rather bulky with a large quantity of goods thereon. If staff in the District Lands Office (DLO) of LandsD had stepped up enforcement action, they should have had sufficient opportunities to post notices requiring the occupiers to cease occupying Government land rather than allowing them to remove the articles temporarily to avoid enforcement actions. It was not until the Office of The Ombudsman started the inquiry that DLO took more substantive enforcement action by posting notices. Given the continued and blatant act of illegal occupation of Government land by the owner of the concerned shops, it was considered that the lax enforcement by DLO was unacceptable to the public.

710. Although LandsD claimed that the existing mode of enforcement had legal basis, the Office of The Ombudsman considered that it defied common sense. The platforms and ramps were temporarily removed after the posting of a notice and they were put back to the original place shortly afterwards. The concerned shops had neither complied with the notice nor really ceased occupying the Government land before the specified deadline, and the problem of occupation of Government land persisted after the deadline. However, LandsD regarded such act as rectification of the irregularities in accordance with the notice. The Office of The Ombudsman was sceptical of LandsD's view that the requirement of the notice would cease to have effect automatically after the deadline. Given that similar irregularities were very common in Hong Kong, LandsD should have sought legal advice again or conducted a comprehensive review on the effectiveness of the Ordinance long ago to curb the spread of such irregularities. Based on the above analysis, The Ombudsman considered the complaint against LandsD partially substantiated.

711. The Ombudsman urged LandsD to take rigorous enforcement actions against illegal occupation of Government land in the district; and to promptly follow up on the legal issues relating to the existing mode of enforcement.

Administration's response

712. LandsD accepted The Ombudsman's recommendations and has taken the following actions –

(a) LandsD has, in accordance with the working instructions given by the Steering Committee on District Administration at its 5th meeting in 2009, written to the District Office concerned asking it to designate the shops on the subject site as black spots, coordinate and arrange inter-departmental joint operations to combat the problem of illegal occupation of Government land by the shops to extend business area. The joint operation was conducted in March 2013, during which no platforms were found in front of the shops near the subject site. LandsD will continue to deal with cases of illegal occupation of Government land by shops in accordance with the working instructions; and

(b) in a written reply in December 2012 to The Ombudsman, LandsD quoted the legal advice of the Department of Justice (DoJ) that once the properties or structures mentioned in the notice posted under Section 6(1) of the Ordinance were removed, the notice would no longer be legally effective. Hence, if the unleased land was occupied again after the relevant properties or structures were removed, LandsD would have to issue another notice according to the law, requiring the occupier to cease occupying the unleased land before the deadline specified in the notice. Having considered The Ombudsman's recommendations, LandsD is seeking DoJ's advice again on another similar case.

Lands Department and Food and Environmental Hygiene Department

Case No. 2012/2566A(I) (Food and Environmental Hygiene Department) – (1) Delay in handling a complaint about miscellaneous articles placed near the complainant's residence and failing to solve the problem; (2) Failing to respond to a complaint about stench lodged a year ago; (3) Failing to respond to the complainant's request for the case number of her compliant; and (4) Poor staff attitude

Case No. 2012/2566B(I) (Lands Department) – (1) Delay in handling a complaint about miscellaneous articles placed near the complainant's residence and failing to solve the problem; (2) Failing to respond to the complainant's request for the case number of her complaint; and (3) Failing to recover the cost for removing the miscellaneous articles from the resident concerned.

Background

713. On 24 July 2012, the complainant lodged a complaint with the Office of The Ombudsman against a District Lands Office (DLO) under the Lands Department (LandsD) as well as a District Environmental Hygiene Offices (DEHO) of the Food and Environmental Hygiene Department (FEHD). According to the complainant, her neighbour (the resident concerned) piled up miscellaneous articles at the public area (the Land concerned) of her village house which not only caused obstruction but also led to bad smell. The complainant was even injured before by such miscellaneous articles. Her complaints are summarised as follows:

DLO

(a) Delay in handling her complaint and failing to solve the problem;

(b) failing to respond to her request in early July for the case number of her complaint;

(c) failing to recover the cost for removing the miscellaneous articles from their owner.

FEHD

(d) Delay in handling her complaint and failing to solve the problem;

(e) failing to respond to her complaint made about a year ago concerning the bad smell emitted;

(f) failing to respond to her request in early July for the case number of her complaint; and

(g) the evasive attitude of an officer (staff A).

The Ombudsman's observations

Allegation (a)

714. The Office of The Ombudsman reviewed photos taken during DLO's clearance actions in June 2012 and confirmed that miscellaneous articles were still placed in front of the house within the boundary of the railings. However the area outside the railings including the area which could be used as access was generally free from any obstruction by miscellaneous articles. The Office of The Ombudsman opined that it was reasonable for DLO to suspend enforcement actions to be taken against the occupation of part of the Government land as it was handling the short term tenancy application of the resident concerned.

715. However, the Office of The Ombudsman noticed that DLO had already rejected the first application of the resident concerned for short term tenancy in November 2010 but relevant notices were only posted in April 2011 to order the resident concerned to cease occupying the Land concerned. The follow-up action was not sufficiently proactive. The Ombudsman therefore considered Allegation (a) partially substantiated.

Allegation (b)

716. A request for a copy of the correspondence was not a complicated one. However, DLO took 26 days to send the "Photocopying Fees Notice" to the complainant, exceeding the target response time of 21 days under the Code on Access to Information (the Code). Hence The Ombudsman considered Allegation (b) substantiated. The Ombudsman noted that DLO had reminded its staff to handle requests for information timely in future according to the requirement of the Code.

Allegation (c)

717. LandsD was only empowered by law to recover relevant cost involved in an action from a convicted unlawful occupier. Since the resident concerned was not yet convicted, LandsD did not have the power to impose any charges on the resident concerned. Hence The Ombudsman considered Allegation (c) unsubstantiated.

Allegation (d)

718. The Ombudsman accepted FEHD's explanation. FEHD had followed up the complainant's complaints falling within its ambit. Recurrence of the problem was due to the continued defiance of law by the household concerned but not due to FEHD's delay in handling the complainant's complaints. The Ombudsman, therefore, considered Allegation (d) unsubstantiated.

Allegation (e)

719. The complainant and FEHD had different versions of whether the complainant had lodged a complaint with FEHD regarding the stench emitted from the miscellaneous articles. In the absence of separate evidence, The Ombudsman found it difficult to establish the facts. The Ombudsman, therefore, considered Allegation (e) inconclusive. In any case, FEHD conducted inspection after receiving the complaint and as a result found that no stench as described by the complainant was emitted from the miscellaneous articles.

Allegation (f)

720. DEHOs of FEHD should retain complete records of complainants' complaints referred from the Call Centre. FEHD now said that the DEHO concerned needed to verify the complainant's record with the Call Centre. The Office of The Ombudsman found FEHD's explanation unacceptable at the beginning. After verification, however, the complainant's complaint record kept by the DEHO was found to be incomplete. This indicated that the DEHO had problem in producing / keeping records. Anyway, the DEHO eventually took 31 days to provide the complainant with the information in this incident and failed to meet the target response time of 21 days to non-complicated requests as stipulated in the Code. The Ombudsman therefore considered Allegation (f) substantiated.

Allegation (g)

721. The Office of The Ombudsman considered that it was appropriate for the DEHO to refer the case to the DLO concerned which was responsible for the regulation of unlawful occupation of Government land and that the DEHO did not evade its responsibility in doing so. The Ombudsman, therefore, considered Allegation (g) unsubstantiated.

722. Overall speaking, The Ombudsman considered the complaint against LandsD partially substantiated; and that against FEHD also partially substantiated. The Ombudsman recommended that –

(a) LandsD should closely monitor the use of land rented by the resident concerned under the short term tenancy. In case the resident concerned fails to observe the land use specified in the short term tenancy, DLO should take prompt rectification action;

(b) FEHD should instruct its staff to respond timely in future according to the Code when they handle requests for information from the public; and

(c) FEHD should review the shortcomings in production/storage of record in the District Environmental Hygiene Offices.

Administration's response

723. LandsD accepted The Ombudsman's recommendation. As the resident concerned had not accepted the terms and conditions of the proposed short term tenancy issued by DLO on time, DLO rejected the resident's application for short term tenancy on 16 May 2013. DLO then posted a notice at the Government land concerned on 28 May 2013 and completed the control and clearance action on 21 June 2013.

724. FEHD accepted the recommendations. After conducting a review in the light of the lapses in producing/keeping records by DEHOs, FEHD has issued a circular to all staff of the Environmental Hygiene Branch of FEHD, reminding them that the details of all complaint cases referred from 1823 Call Centre must be accurately and fully recorded and that these records must be properly kept / stored. The circular also sets out instructions that staff must make responses in a timely manner and in accordance with the Code when handling public requests for information.

Lands Department and Water Supplies Department

Case No. 2012/3831A (Lands Department) – Impropriety in handling a proposed extension for Temporary Government Land Allocation to the Water Supplies Department

Case No. 2012/3831B (Water Supplies Department) – Delay in handling local residents' objection to Water Supplies Department's application for an extension of Temporary Government Land Allocation

Background

725. On 26 September 2012, the complainant (a District Councillor) lodged a complaint with the Office of The Ombudsman against the Lands Department (LandsD) and the Water Supplies Department (WSD). According to the complainant, LandsD allocated a piece of Government land (the site) to WSD for use as a contractor's yard. As the land allocation expired on 31 March 2012, WSD applied to LandsD for a five-year extension (the application). The concerned District Office (DO) conducted local consultation on the application, and over 90% of the respondents were against the application. Hence, LandsD asked WSD to meet with the objectors and respond to their objections.

726. However, apart from conducting a site visit with the complainant, WSD took no initiative to meet with the objectors or local organisations between March and September 2012. As a District Councillor, the complainant had on many occasions enquired LandsD at the meeting of the District Development and Environment Committee of the concerned District Council about the progress of the application. LandsD replied that it had urged WSD to address the residents' concerns as early as possible. Since WSD had not taken any follow-up action, the complainant requested LandsD to order the contractors of WSD to vacate the site in deference to public opinion. LandsD responded that it would conduct local consultation again and pass the views to WSD. The complainant considered that there was maladministration on the part of both LandsD and WSD in handling the application. The complainant alleged that –

(a) LandsD failed to properly monitor the case and urge WSD to handle and follow up on the residents' objections, while allowing WSD to continue occupying the Government land without having obtained an extension of allocation. Furthermore, in conducting public consultation again, LandsD had left the extension issue undecided, which was not in the interest of the public.

(b) WSD had disregarded public opinion, delayed the handling of objections and continued occupying the Government land without having obtained an extension.

The Ombudsman's observations

Allegation against LandsD

727. The relevant District Lands Office (DLO) of LandsD did follow up on WSD's application for extension, including consulting the relevant government departments and asking DO to conduct local consultation. It had also repeatedly urged WSD to meet with the objectors and respond to all the objections.

728. The Office of The Ombudsman accepted DLO's explanation for allowing the contractor of WSD to continue operating on the site after the allocation period expired. That the site was not taken back immediately on grounds of practical needs and public interest was understandable. DLO also clarified that no further local consultation had been conducted on the application. In view of the analysis above, The Ombudsman considered the complaint against LandsD not substantiated.

729. Nevertheless, as the land allocation for WSD expired a year ago (i.e. March of 2012), the Office of The Ombudsman was of the view that DLO should vigorously urge WSD to properly address the objectors' submissions and make an early decision on the extension application.

Allegation against WSD

730. Upon receiving the objections to the renewal application referred from DLO, WSD did, through DO, liaise with the Owners' Corporation of a nearby estate and the complainant (a District Council Member) for meeting and joint site inspection.

731. The events however showed that WSD had not been proactive enough in handling the objections. Apart from liaising with the complainant and the Owners' Corporation of the nearby estate through DO, WSD had not approached other objections such as residents in another nearby housing estate, other District Councillors and some other individuals with a view to reducing the differences in views and easing their concerns. In addition, the mitigation measures of the contractor were only implemented after The Office of The Ombudsman commenced its investigation. According to the above, WSD did not attach sufficient importance to the aspirations and concerns of the local residents.

732. Although WSD had indicated that it had been pursuing and searching earnestly for suitable replacement site, WSD had a duty to give higher priority to resolving and responding to the objections and concerns of local residents in order to improve the site conditions since the WSD contactor was still occupying the Site. In fact, DLO had repeatedly reminded WSD to address the concerns of the local residents before a suitable replacement site was available. Based on the above analysis, The Ombudsman considered the complaint against WSD partially substantiated.

733. The Ombudsman recommended that –

(a) LandsD should make a decision on the extension application and take practical follow-up action as soon as possible; and

(b) WSD should address the objector's views and concerns as soon as possible.

Administration's response

734. LandsD accepted The Ombudsman's recommendation. Having considered the advice of the professional departments and the improvement measures to be implemented by WSD, LandsD approved WSD's application for extension of land allocation on 9 May 2013.

735. WSD accepted the recommendation of The Ombudsman and has taken the following actions –

(a) In November 2012, WSD has examined all the objections received after the local consultation on the renewal application for land allocation of the site. WSD has then developed appropriate mitigation measures to address the concerns of local residents and has written to the two nearby housing estates and the District Council Members. In May 2013, WSD gave written response to the objections raised by objectors who have left a correspondence or email address. WSD also attended five meetings of the District Development and Environment Committee under the District Council from November 2012 to May 2013 to explain the mitigation measures of the contractor and progress of finding an alternative site. After serving all the above-mentioned responses and attending meetings of the District Development and Environment Committee of the concerned District Council, WSD has not received any further objections; and

(b) meanwhile, DLO has approved the extension of the temporary land allocation for the site to 31 December 2013. WSD has also identified a site with DLO which is suitable for replacement of the site. DLO is now proceeding with the land allocation process.

Leisure and Cultural Services Department

Case No. 2011/4956 – Failing to verify a tenderer's eligibility in a tender exercise for management of turf cricket pitches at a recreation ground

Background

736. The complainant lodged a complaint against the Leisure and Cultural Services Department (LCSD) for unfairness in the tender exercise for management of the turf cricket pitches at recreation ground A.

737. LCSD contracted out the management of the turf cricket pitches at recreation ground A through tender exercise. The complainant had tendered for the contract and been successful in two previous tender exercises. During these two contract periods, it had to meet the specifications required by a sports association specialised in cricket activities (Association A), which was the sole end user of the turf cricket pitches. However, in the tender exercise held in end of 2011, the complainant was unsuccessful. Association A was awarded the contract instead.

738. The complainant found that Association A had not been able to meet the contract requirements during its contract period especially in the following aspects: provision of works schedule prior to commencement, preparation of grass lanes, soil testing of the grass lanes/pitches under preparation, rolling of the grass lanes, measurement of final moisture levels or bulk density levels of the grass lanes/pitches and after match grass recovery. A staff member of LCSD had even commented openly that Association A had only completed 20% of the requirements outlined in the contract.

739. The complainant felt aggrieved that, had it known LCSD would allow the standard of pitch maintenance to drop, it could have lowered its tender price to be more competitive.

740. The complainant further added that Association A had failed to turn up for booked sessions at recreation ground A on multiple occasions because the turf cricket pitches under its maintenance were not suitable for cricket activities. It also noticed that Association A had helped

LCSD maintain the pitches for five weeks without pay after the end of the contract, which seemed to be unusual.

741. Specifically, the complainant alleged that –

(a) there was conflict of interest on the part of LCSD in awarding the management contract to Association A, which was the sole end user of the turf cricket pitches; and

(b) LCSD failed to monitor Association A's performance.

The Ombudsman's observations

742. The Office of The Ombudsman had scrutinised the documents and records of the three tender exercises at issue including the service specification and the list of potential service providers invited to tender. The service specification and the list for invitation to tender were the same for these three tender exercises. The Office of The Ombudsman noted that Association A did not tender for the service contract in the first and second tender exercises.

743. The Office of The Ombudsman also scrutinised the work records of LCSD in monitoring the performance of Association A and was satisfied that LCSD had taken full charge of the monitoring process and adopted the same monitoring measures in all of the three service contracts. Although Association A was a major user of the cricket ground, it was not the sole user. There was no evidence suggesting its involvement in the monitoring process in the three service contracts. File records showed that LCSD took action on the non-compliance of Association A during the latter's contract period and Association A responded to LCSD's action by making improvement.

744. On the allegation about conflict of interest and LCSD's failure to monitor Association A's performance, the Office of The Ombudsman had not found evidence suggesting that the user status of Association A had impacted on the tendering and service monitoring processes, except for LCSD's seeking of technical advice from Association A in drawing up service specification of the tender. Nor was there evidence of Association A having been involved in LCSD's acceptance of tender and service monitoring process. Moreover, Association A was not the sole user of the turf cricket pitches. The Office of The Ombudsman found LCSD staff had acted in accordance with the established Contract

Management Manual in monitoring Association A. Regarding the allegation of a staff member having commented on Association A's performance openly, the staff concerned had denied having given out the comment. In the absence of independent witness and corroborative evidence, the validity of the allegation could not be ascertained. As for Association A's failure to turn up for booked sessions, LCSD did take action as appropriate. Overall speaking, The Ombudsman found no concrete evidence to support the complainant's allegations against LCSD.

745. However, the investigation had revealed loopholes in LCSD's handling of tender exercise, as noted in the following paragraphs.

Failure to verify Association A's eligibility to tender.

746. The Office of The Ombudsman had scrutinised the documents provided by the tenderers in the three tender exercises at issue. While disqualifying in the first tender exercise the tenderer offering the lowest tender because the latter did not possess the mandatory service experience, LCSD ran short of verifying the documents provided by Association A in support of its claim of possessing the mandatory two years' experience in providing maintenance service for turf cricket pitch lanes.

747. In its submission to LCSD, Association A listed out its past experience in maintaining cricket grounds including recreation ground A and two other recreation grounds (recreation grounds B and C). It also enclosed a reference letter that confirmed the experience of a professional curator under its employment, but the professional curator only joined Association A after 2009. It was not entirely clear that Association A possessed two full years' experience in the field of turf maintenance when it bid for the tender in October 2011. For this, LCSD explained that its staff believed that recreation ground B had been managed and operated by Association A since September 2009, therefore Association A should possess the required experience when it bid for the contract in October 2011. However, there was no documentary proof of the commencement date of Association A's maintenance service with recreation ground B.

748. The Office of The Ombudsman considered there to be impropriety in LCSD's handling of the third tender exercise. If Association A was unable to provide documentary proof to support its claim of past experience in the field of turf maintenance, it could have been disqualified for the tender exercise, not to mention being awarded the contract. LCSD was negligent in failing to obtain documentary

proof of Association A's meeting the required experience requirement. The Office of The Ombudsman urged LCSD to learn from this case and strengthen staff supervision to ensure that checking of documentary proof of tenders' eligibility to tender would be properly carried out in future tender exercises.

Perceived conflict of interest

749. The Office of The Ombudsman understood the need for LCSD to consult local National Sport Associations on technical/professional issues. However, permitting a sports association and a potential service provider to provide free tangible service to LCSD inevitably gives the public an impression of conflict of interest and unfairness. The legal advice obtained by LCSD in early 2012 suggested that LCSD should avoid seeking technical advice from the company that may be awarded the contract. On this basis, LCSD should also refrain from taking advantage of Association A's free service so as to avoid perceived conflict of interest. LCSD could have gone through proper tendering procedures to identify suitable service contractor whenever service is needed, instead of engaging Association A to provide service for free.

750. In conclusion, there was no evidence of foul play or conflict of interest on the part of LCSD in awarding the service contract to Association A in the tender exercise held in end of 2011. Evidence showed that LCSD monitored the performance of Association A in accordance with the established guidelines. In this light, the complainant's complaint against LCSD was unsubstantiated. However, a case of maladministration by LCSD was found substantiated for improprieties other than those alleged by the complainant in handling the tender exercise.

751. The Office of The Ombudsman recommended LCSD to –

(a) remind LCSD's staff to check documentary proof carefully and thoroughly in handling tender exercises to ensure that potential service providers possess the required qualification and experience ; and

(b) remind LCSD's staff to stay alert and sensitive to the need to refrain from accepting free service that could give rise to perceived conflict of interest.

Administration's response

752. LCSD accepted both recommendations. The complaint against LCSD in handling the tender exercise as well as the recommendations made by The Ombudsman have been brought to the attention of all Chief Leisure Managers and the Principal Supplies Officer on 7 January 2013. The Supplies Section of LCSD also issued an email message to all Section Heads on 8 January 2013 drawing their attention to, among others, The Ombudsman's recommendations. In addition, the District Leisure Services Office (the subject DLSO) which oversees the various venues including recreation ground A has taken prompt action to alert its staff of the proper way of handling tendering exercise. At the District Staff Meeting, District Leisure Manager of the subject DLSO had made special emphasis on the case and seriously reminded her subordinates to observe the tender procedures and guidelines.

753. Prior to the tender exercise on "Provision of Package Service for Preparation of Turf Cricket Square for Cricket Competition at recreation ground A through Direct Purchase Authority Management System (DPAMS)" (with contract period from 15 February to 31 July 2013), the subject DLSO had made special efforts to ensure that the above guidelines were strictly followed by staff concerned in conducting the tender exercise. All staff were fully aware that they should refrain from accepting free service for the turf cricket pitches at recreation ground A regardless of the purpose and urgency of the service requirements.

754. Besides, the Training Section of LCSD regularly organises training programmes on procurement of stores and services as well as contract management to enrich the knowledge of our staff. These include: (a) Supplies Seminar on Tendering and Procurements Matters (4 sessions a year and 150 training places for each session); and (b) Contract Management Training Course (4 courses a year and 40 training places for each course). LCSD will nominate officers who need to handle procurement or contract management to attend the seminars and training courses in order to update and strengthen their knowledge and skills in handling tenders and contract matters. LCSD will organise more such courses if and when necessary.

Leisure and Cultural Services Department

Case No. 2012/1591 – Unfairness in the assessment for applications for hiring a performing venue and mishandling the display and distribution of publicity materials

Background

755. Since May 2011, the complainant had submitted several applications to the Leisure and Cultural Services Department (LCSD) for hiring the performance venue at a civic centre to hold a solo concert. However, LCSD kept rejecting her applications for a time slot on Friday, Saturday or Sunday. She queried the approving criteria and complained that LCSD might not be able to appreciate the levels of artistic attainment of individual applicants. This could result in unfair assessment of booking applications.

756. Finally, the complainant was allocated a Sunday slot in June 2012. She then designed a publicity poster with horizontal layout, but a staff member at the venue told her that the poster could not be displayed at LCSD's ticketing outlets because it was not in vertical format. Also, she was only allowed to place one poster and one promotional leaflet at each outlet. Noting that other organisers of performances could place multiple copies of leaflets at the outlets, the complainant alleged that LCSD was biased against her. She also criticised LCSD for undermining artistic creativity in requesting her to change the poster design without reasonable grounds.

The Ombudsman's observations

757. The Office of The Ombudsman examined LCSD's work records and confirmed that LCSD had followed its established procedures, assessment criteria and monitoring mechanism in approving applications for hiring performance venues. It had established a proper administrative regime for assessing the artistic standards of proposed events in order to ensure objectivity and fairness in its procedures as far as possible. From the perspective of public administration, there was no impropriety on the part of LCSD in handling the complainant's booking applications.

758. LCSD had given an account on the display and distribution arrangements of publicity materials. It had also committed to enhance staff training to improve their communication skills. In suggesting the complainant to follow the dimensions specified in the publicity materials guidelines, the venue staff was trying to make better allocation of resources and balance the needs of different organisers. This should not be regarded as undermining artistic creativity.

759. Overall, The Ombudsman considered the complaint unsubstantiated.

760. However, the Office of The Ombudsman considered that there was a lack of transparency in LCSD's system of approving applications for venue hiring. The information sheet currently provided to the public only gave a brief list of assessment criteria without further elaboration on their weighting and other details. Without sufficient information, unsuccessful applicants would naturally query whether there was any black box operation. They might also question the objectivity and fairness of LCSD's assessments.

761. The Ombudsman recommended that LCSD should review its system of approving applications for venue hiring and actively consider disclosing details of the assessment procedures to let applicants have a better picture of the requirements. If the booking results had to be determined by computer ballot, LCSD should also inform the unsuccessful applicants of the situation.

Administration's response

762. LCSD completed a comprehensive review of the guidelines and mechanism on the approval of applications for hiring performing arts venues in early 2013 and agreed to disclose the details of the revised assessment criteria and the respective weighting percentage and for the information to be clearly stated in the "Booking Arrangements" handouts distributed at the venues and on their respective webpages. If the booking results have to be determined by computer ballot, LCSD will also clearly inform the unsuccessful applicants of the related procedures in writing. The above arrangement has taken effect from April 2013.

763. LCSD gave a detailed account of the above follow-up measures in the progress report submitted to The Ombudsman in March 2013. The Ombudsman replied in writing in June 2013 and asked LCSD to further consider disclosing the assessment procedures in greater detail for enhanced transparency. LCSD is taking follow-up actions on The Ombudsman's request and will submit a progress report to The Ombudsman in due course.

Leisure and Cultural Services Department

Case No. 2012/1657B – Failing to properly handle the nuisance caused by airborne floss of cotton trees to residents nearby

Background

764. The complainant complained against the Leisure and Cultural Services Department (LCSD) for not properly following up his assistance request in which he claimed the airborne floss from cotton trees on the pavement of Argyle Street affected his health. The complainant said that there were a number of cotton trees on the pavement of Argyle Street planted by the Government. The dispersal of cotton floss every year when the seed pods ripened had adversely affected his health. The complainant said that he had filed complaints to LCSD via a District Council member in the past few years, and in response the department had removed the seed pods on site. Between March and May 2012, the complainant sought help from the 1823 Call Centre saying that the cotton floss from the trees nearby had drifted into his home and caused him breathing difficulty. LCSD conducted an inspection at his home and he was told that while the department was responsible for tree maintenance, it would not remove seed pods of cotton trees nor clear the cotton floss. The complainant was of the view that LCSD did not care for his health.

The Ombudsman's observations

765. In the past, LCSD did remove the seed pods of some cotton trees to reduce the effect of airborne cotton floss on the public. In 2011, after conducting an internal review on the work, LCSD changed its practice on handling the seed pods of cotton trees and issued a set of internal guidelines to its staff. However, the department did not inform the public, especially the residents living in districts affected by airborne cotton floss, of its decision. As such, the public was not aware of the development and had no means to learn the reasons and rationales for the change. In 2012, noting that the cotton trees would soon blossom, those who had sought help from LCSD or had benefited from the removal actions expected that the department would take the same action as in the past. When the complainant found that the department had taken no action, and later realised that it had changed its practice and refrain from removing the seed pods of cotton trees, it was understandable that they felt aggrieved as a result.

766. Whether LCSD should remove the seed pods of cotton trees was a matter of perspective, which might differ among different sectors. It also involved professional knowledge on tree planting and maintenance, which was not an administrative issue within the purview of the Office of The Ombudsman. Hence, the Office of The Ombudsman would not interfere nor comment. The investigation of the Office of The Ombudsman focused on how LCSD had made the decision to change its former practice and whether it had implemented its decision properly. The Office of The Ombudsman noticed that, although LCSD had made reference to the views of the Hong Kong Medical Association (HKMA) in 2011, when it decided to change its former practice on handling seed pods of cotton trees, the opinions of tree and conservation experts referred to in fact came from newspaper reports. After checking those reports, the Office of The Ombudsman noticed that the incident at a housing estate in Sheung Shui aroused public criticism because the contractor plucked the cotton flowers together with the seed pods, thus damaging the amenity value of the cotton trees. Green groups pointed out that cut wounds on cotton trees should be handled carefully or they might have an impact on the ecology. Other conservation groups opined that it was advisable to remove seed pods to prevent the dispersal of cotton floss. In sum, the expert opinions gathered by LCSD did not unanimously veto the practice of seed pods removal. However, LCSD hastily changed its former practice (i.e. removing seed pods at the requests of the public) without further examining the arguments concerned nor conducting any formal consultation with tree and conservation experts. There was a lack of thorough consideration.

767. LCSD reviewed its practice of removing seed pods of cotton trees in 2011 in response to queries from the public. Its decision to change its former practice was understandable. The problem was that, when implementing its decisions, LCSD was insensitive to the expectation and the feelings of the people affected, and failed to promptly conduct any consultations nor make announcements, thus leading to grievances and complaints.

768. Moreover, most of the factors for consideration cited by LCSD in removing seed pods of cotton trees were measureable, including "the distance between the cotton trees and the residential areas, the amount and density of cotton floss dispersed from the trees and the severity of its effects, whether the parties affected could adopt any other mitigating measures, the weather at the time and in the foreseeable future, the amount of floss left on the trees and the remaining period of floss

dispersal". Nevertheless, no objective standards were set for these factors. In fact, the cotton trees involved in this case have been in existence for more than ten years and their distance from the residential areas has never changed, whereas LCSD has changed its practice. LCSD did not explain or elaborate on the amount and density of cotton floss that would be regarded as severe; how to ascertain whether the parties affected could adopt other mitigating measures; and how the cotton floss left on the trees and the remaining period of floss dispersal would affect its decision. While the Office of The Ombudsman considered it proper for LCSD to rely on the specialist knowledge and experience of its frontline staff to assess individual cases in terms of severity, nuisance, urgency and necessity, it would be difficult to explain the assessment results to the public if the department continued to adopt the above factors without providing specific data or ranking. This could easily lead to complaints.

769. Although there was a lack of thorough consideration, LCSD was not totally groundless in changing its practice on handling cotton floss in June 2011. LCSD was responsible for the maintenance of cotton trees, yet it had no absolute justification or obligation to remove seed pods to prevent the dispersal of cotton floss. Nevertheless, LCSD handled the issue improperly for it failed to promptly inform the public or the residents affected of the reasons behind its decision to adopt the new measures and, as a result, it failed to meet the reasonable expectation of the residents affected. Besides, as no objective standards had been set for the factors to be considered by its frontline staff when handling complaints against cotton floss, it would be difficult to implement the measures effectively and explain the assessment results. The Ombudsman, therefore, considered the complaint partially substantiated.

770. The Ombudsman recommended LCSD that it should report to the District Councils concerned on how it would deal with cotton floss in future. Before doing so, LCSD should study objective scientific research on the pros and cons of removing seed pods of cotton trees so that it can explain clearly to the public the rationale behind its measures via the District Councils and other means (e.g. press releases). Besides, in examining the guidelines issued in June 2011, LCSD should review the factors for consideration and assessment criteria so that its frontline staff can comply and avoid similar complaints.

Administration's response

771. The representatives of LCSD and the Head of Tree Management Office of the Development Bureau attended the meeting of the Leisure and District Facilities Management Committee (the Committee) under the concerned District Council on 7 February 2013. The department submitted papers to explain its practice on handling cotton floss and answered the questions raised by members of the Committee at the meeting. The Committee Chairman concluded that LCSD should take the feelings of residents into consideration when handling cotton floss and adopt measures to alleviate the related problems.

772. After consolidating views of tree experts and the Tree Management Office (TMO), LCSD opined that, in principle, seed pods of cotton trees should not be removed for the sake of reducing the amount of cotton floss dispersed. The dispersal of cotton floss upon the ripeness of seed pods only lasts for a short period of time, and has no impact on human health. Removing unripe seed pods from cotton trees would leave small cuts on the branches, exposing the trees to pest attack and jeopardising their health. In view of the principle of "People, Trees, Harmony" advocated by tree experts, unnecessary disturbance to the natural growth of cotton trees should be avoided as far as possible.

773. Horticultural seminars, exhibitions, and promotional and educational activities will be organised by LCSD with a view to enhancing public knowledge of cotton trees and of the criteria adopted by the department regarding the removal of cotton seed pods, and encouraging the public to understand the ecology of cotton trees, to appreciate their beauty as well as to accept the phenomenon of cotton floss dispersal. Moreover, an article in the fifth issue of the department's Green Ambassador Newsletter explains that floss dispersal, which lasts for a short period of time every year, is a natural phenomenon and a part of the normal growth cycle of cotton trees. The message of "People, Trees, Harmony" and the need to refrain from removing seed pods of cotton trees are conveyed.

774. LCSD has conducted a comprehensive review and consulted tree experts on the pros and cons of removing seed pods of cotton trees. However, there are technical difficulties in developing a set of objective or measurable criteria to quantify the amount and density of floss left on the trees or the remaining period of floss dispersal, etc. In fact, whether and when to remove the seed pods depends on the actual condition of individual trees. Instead of relying on a set of simple and measurable standards, the decision should be made upon site visits by professionals with arboriculture knowledge and experience. LCSD has consulted TMO, whose response is that currently there are no scientific grounds for setting measurable criteria on whether or when to remove cotton seed pods.

775. TMO has issued guidelines on handling seed pods of cotton trees and LCSD has further updated the line-to-take for its staff on handling related questions. The frontline staff of LCSD will carefully strike a balance between different opinions and relevant factors when receiving complaints about the nuisance caused by cotton floss and requests for removing seed pods. Staff with experience in tree management will conduct a site visit in each case to assess the situation. LCSD will consider removing the seed pods only when airborne cotton floss is causing a great nuisance to the residents and the environment, other practicable mitigating measures (e.g. stepping up the clearance of cotton floss fallen to the ground) fail to solve the problem, and it is urgent and necessary to take action. In collaboration with Food and Environmental Hygiene Department, LCSD will step up the clearance of fallen cotton floss to reduce airborne cotton floss. LCSD will further review the relevant arrangements later, taking into consideration the implementation of TMO's guidelines in 2013.

Leisure and Cultural Services Department

Case No. 2012/1718 – Failing to properly handle the nuisance caused by airborne floss of cotton trees to residents nearby

Background

776. The complainant was the property management company of a residential estate. There were six cotton trees planted on the pavement outside the residential estate. The complainant was concerned that airborne cotton floss dispersed by the trees each spring might affect the residents' health, and the seed pods falling from the trees might also injure passers-by.

777. The complainant had thus sought help from the Leisure and Cultural Services Department (LCSD). In August 2011, LCSD replied that in April and May every year, its Tree Team would arrange for workers to use elevated platforms and remove the ripe fruits from the cotton trees in order to reduce the effect of cotton floss on the local residents.

778. In March 2012, noting that the cotton trees would soon blossom, the complainant contacted LCSD again for follow-up action. However, an LCSD officer denied having made any such promise. He only said that the case would be referred to the Food and Environmental Hygiene Department (FEHD) to step up its clearance of the cotton floss and seed pods settled on the ground.

The Ombudsman's observations

779. Whether LCSD should remove the seed pods of cotton trees involved professional knowledge on tree planting and maintenance, hence it was not an administrative issue within The Ombudsman's purview. The Office of The Ombudsman's investigation focused on how LCSD had made its decision to change its former procedures, and whether it had implemented the new measures properly.

780. In the past, LCSD had, at the local residents' request, removed the seed pods of some cotton trees. When LCSD conducted an internal review in 2011, LCSD only considered the views of the Hong Kong Medical Association and some media reports. There was no formal consultation with tree experts at that time. There was a lack of thorough consideration and in-depth study by LCSD in changing its former procedures.

781. After issuing the internal guidelines to its staff in June 2011, LCSD failed to promptly inform the public or the residents affected of the new measures and explain to them the reasons behind. Those who had sought help from LCSD before were disappointed to learn that it would no longer take action as in the past. It was understandable that they felt aggrieved as a result.

782. Moreover, although most of the factors for consideration cited by LCSD were measurable, no objective standards were set for those factors. While the Office of The Ombudsman considered it proper for LCSD to rely on the specialist knowledge and experience of its frontline staff to assess each case, it would be difficult to implement the measures effectively and explain the assessment results to the public in the absence of specific data or ranking. This could easily lead to queries and complaints.

783. Although there was a lack of thorough consideration, LCSD was not totally groundless in changing its procedures for handling cotton floss. However, LCSD was insensitive to the reasonable expectation of the residents affected, nor did it provide any objective criteria to explain its decision. The Ombudsman, therefore, considered the complaint partially substantiated.

784. The Ombudsman recommended that –

(a) LCSD should report to the District Councils concerned on how it would deal with cotton floss in future. Before doing so, LCSD should study objective scientific research on the pros and cons of removing seed pods of cotton trees so that it can explain clearly to the public the rationale behind its measures via the District Councils and other means (e.g. press releases); and

(b) in examining the guidelines issued in June 2011, LCSD should review the factors for consideration and assessment criteria so that its frontline staff can comply and avoid similar complaints.

Administration's response

785. The representatives of LCSD and the Head of Tree Management Office (TMO) of the Development Bureau attended the meeting of the Leisure and District Facilities Management Committee under the concerned District Council on 7 February 2013. The department submitted papers to explain its practice on handling cotton floss and answered the questions raised by members at the meeting. The Committee Chairman concluded that the department should take the feelings of residents into consideration when handling cotton floss and adopt measures to alleviate the related problems.

786. In consolidating the views of tree experts and TMO, LCSD opined that, in principle, seed pods of cotton trees should not be removed for the sake of reducing the amount of cotton floss dispersed. The dispersal of cotton floss upon the ripeness of seed pods only lasts for a short period of time, and has no impact on human health. Removing unripe seed pods from cotton trees would leave small cuts on the branches, exposing the trees to pest attack and jeopardising their health. In view of the principle of "People, Trees, Harmony" advocated by tree experts, unnecessary disturbance to the natural growth of cotton trees should be avoided as far as possible.

787. Horticultural seminars, exhibitions, and promotional and educational activities will be organised by LCSD with a view to enhancing public knowledge of cotton trees and of the criteria adopted by the department regarding the removal of cotton seed pods, and encouraging the public to understand the ecology of cotton trees, to appreciate their beauty as well as to accept the phenomenon of cotton floss dispersal. Moreover, an article in the fifth issue of the department's Green Ambassador Newsletter explains that floss dispersal, which lasts for a short period of time every year, is a natural phenomenon and a part of the normal growth cycle of cotton trees. The message of "People, Trees, Harmony" and the need to refrain from removing seed pods of cotton trees are conveyed.

788. LCSD has conducted a comprehensive review and consulted tree experts on the pros and cons of removing seed pods of cotton trees. However, there are technical difficulties in developing a set of objective or measurable criteria to quantify the amount and density of floss left on the trees or the remaining period of floss dispersal, etc. In fact, whether and when to remove the seed pods depend on the actual condition of individual trees. Instead of relying on a set of simple and measurable standards, the decision should be made upon site visits by professionals with arboriculture knowledge and experience. LCSD has consulted TMO, whose response is that currently there are no scientific grounds for setting measurable criteria on whether or when to remove cotton seed pods.

789. TMO has issued guidelines on handling seed pods of cotton trees and LCSD has further updated the line-to-take for its staff on handling related questions. The frontline staff of LCSD will carefully strike a balance between different opinions and relevant factors when receiving complaints about the nuisance caused by cotton floss and requests for removing seed pods. Staff with experience in tree management will conduct a site visit in each case to assess the situation. LCSD will consider removing the seed pods only when airborne cotton floss is causing a great nuisance to the residents and the environment, other practicable mitigating measures (e.g. stepping up the clearance of cotton floss fallen to the ground) fail to solve the problem, and it is urgent and necessary to take action. In collaboration with FEHD, LCSD will step up the clearance of fallen cotton floss to reduce airborne cotton floss. LCSD will further review the relevant arrangements, taking into consideration its implementation of TMO's guidelines in 2013.

Labour Department

Case No. 2012/2623(I) – Refusing the complainant's request for information and failing to give reasons for refusal

Background

790. The complainant suspected that an advertisement boards shop (Shop A) near a news stall which she operated emitted plastic debris that affect the health of others. She called the Labour Department (LD) on 18 July 2012 for an analysis report of the plastic debris sample (the report concerned) collected by LD in its visit to Shop A. However, LD refused her request without any explanation.

The Ombudsman's observations

791. The Office of The Ombudsman considered that the report concerned only contained analysis result, without any information relating to manufacturing or commercial secrets or working processes, or any information provided by a medical doctor in accordance with Section 15 of the Occupational Safety and Health Ordinance (the Ordinance). Therefore, sections 29(3) and (4)[5] of the Ordinance were not applicable to the report concerned.

792. Paragraph 2.14(a) of the Code on Access to Information (the Code) specifies that: (a department may refuse to disclose information under the following situation:) information held for, or provided by, a third party under an explicit or implicit understanding that it would not be

[5] Section 29 of the Ordinance –

(3) A person who is or was formerly employed as a public officer commits an offence if, without lawful authority, the person discloses to another person –
  (a) information relating to manufacturing or commercial secrets or working processes that was obtained through the exercise or performance of a function under this Ordinance or the Factories and Industrial Undertakings Ordinance (Cap 59); or
  (b) information notified by a medical practitioner in accordance with section 15.

(4) For the purposes of this section, a person has lawful authority to disclose information if the disclosure –
  (a) is made in connection with the administration of this Ordinance (or the Factories and Industrial Undertakings Ordinance (Cap 59)); or
  (b) is made for the purpose of complying with a requirement of another Ordinance; or
  (c) is ordered by a court, or by a person authorised by law to examine witnesses, in connection with the hearing or determination of any matter by the court or person.

further disclosed. However, such information may be disclosed with the third party's consent, or if the public interest in disclosure outweighs any harm or prejudice that would result.

793. In fact, the report concerned was provided by the Government Laboratory. According to paragraph 2.14(a) of the Code, LD could provide the report to the complainant after obtaining the consent of the Laboratory. Since the Government Laboratory is a government department, if it did not agree to disclose the report, it was also obliged to state its reasons as required under the Code.

794. LD stated that the report concerned involved "third party information", including the proprietor of Shop A and two public officers. The Office of The Ombudsman believed that LD had mixed up the "third party information" under paragraph 2.14(a) of the Code with the "individual information" under paragraph 2.15.

795. In fact, the report concerned did not contain any personal information of the proprietor of Shop A. Regarding the names and ranks of the two public officers mentioned in the report concerned, as they were acting in the capacity of government representatives and performing public duties in the report, the Office of The Ombudsman did not agree that their names and ranks should be concealed. Even if LD had doubt on this, it could give a copy of the report to the complainant with their names concealed.

796. In conclusion, there was no legal basis for LD to refuse the complainant's request for information and LD failed to comply with requirements under the Code. The Ombudsman considered the complainant's allegation against LD substantiated.

797. The Ombudsman asked LD to consider providing a copy of the report concerned to the complainant; LD might seek further legal advice if it still had doubt.

Administration's response

798. LD sought further advice from the Department of Justice (DoJ) according to the recommendation of The Ombudsman and submitted to DoJ the supplementary information on the working processes as stated by the proprietor of Shop A. DoJ advised that the report concerned could be regarded as information relating to working processes as referred to in

Section 29(3)(a) of the Ordinance. Disclosure of the report concerned by LD to the complainant would constitute an apparent risk of contravening the provision of the Ordinance, i.e. a public officer commits an offence if, without lawful authority, discloses to another person information relating to working processes that was obtained through enforcing the Ordinance. Accordingly, DoJ did not recommend LD to disclose the report concerned to the complainant. LD accepted DoJ's advice and had informed the complainant and the Office of The Ombudsman of the decision.

799. Upon knowing further legal advice, the Office of The Ombudsman found LD's final decision of not providing the report concerned to the complainant understandable. As the Office of The Ombudsman had concluded the case, there was no need for LD to follow up on the recommendation.

Labour Department

Case No. 2012/4825 – (1) Wrongly referring the complainant's case to the Minor Employment Claims Adjudication Board; (2) Providing incorrect advice to the complainant; and (3) Refusing to confirm the reason for rejecting the complainant's case in writing

Background

800. On 6 November 2012, the complainant lodged a complaint with the Office of The Ombudsman against the Labour Department (LD).

801. According to the complainant, she served as a tourist guide for a travel agency (Company A) on a verbal agreement. Company A deducted tips, administration fee and trip completion fee from her salary. She was aggrieved by the deduction and sought assistance from LD on 12 September 2012. On 5 October, a conciliation meeting for the complainant and Company A was conducted by a conciliation officer (Staff A) of LD but the conciliation was not successful. Hence Staff A suggested the complainant to pursue her claim at the Minor Employment Claims Adjudication Board (MECAB).

802. On 11 October 2012, the complainant filed her claim with MECAB. A staff of MECAB (Staff B) informed the complainant that her claim of "tips" and "administration fee" were not wages, hence MECAB could not handle her case; and advised her to pursue her case at the Small Claims Tribunal (Tribunal). The complainant asked Staff B to confirm in writing the reason of rejecting her case but to no avail. Subsequently, the complainant met Staff B's supervisor, Staff C. Staff C reiterated to the complainant that she was a self-employed person and her claims of payments were not wages, hence MECAB was not in a position to handle the case; and that if the Tribunal refused to accept her case, she could return to MECAB for assistance.

803. On the same date, she received a call from Staff A who apologised to her for not knowing ahead that MECAB could not handle her case.

804. The complainant accused LD of the following –

(a) Staff A wrongly referred her case to MECAB;

(b) MECAB refused to confirm in writing the reason for rejecting her case; and

(c) MECAB wrongly advised that if the Tribunal rejected her case, she could pursue her case at MECAB

The Ombudsman's observations

Allegation (a)

805. The Office of The Ombudsman agreed that, in general, it was a normal practice for LD to refer cases unsettled after mediation to MECAB. However, in the present case, Company A did not confirm an employer-employee relationship with the complainant. Staff A failed to remind the complainant that if there was no employer-employee relationship between both parties, her claims would not fall under MECAB's jurisdiction. Staff A showed deficiency in this regard.

806. Based on the above, The Ombudsman considered Allegation (a) partially substantiated.

Allegations (b) & (c)

807. As to why Staff B and C advised the complainant to pursue her case at the Tribunal, and Staff C refused to confirm his advice and opinion in writing, LD had responded to each of these issues. The Office of The Ombudsman considered LD's explanation reasonable. As such, The Ombudsman found Allegations (b) and (c) unsubstantiated.

808. Overall speaking, this complaint was partially substantiated. The Ombudsman recommended LD to strengthen the training of mediation officers so as to prevent similar problem from occurrence.

Administration's response

809. LD accepted The Ombudsman's recommendation and has taken the ensuing follow-up actions –

(a) To strengthen training for mediation officers newly posted to LD on their knowledge of the jurisdictions of various civil courts and the points to note in handling similar cases; and

(b) to revise the guidance notes for claimants to enable the claimants to have information on the respective jurisdictions of the Labour Tribunal and MECAB before the claimants file claims at the Labour Tribunal and MECAB.

Marine Department

Case No. 2012/1983 – Mishandling the complainant's application for permission to lay a private mooring

Background

810. In February 2011, the complainant applied to the Marine Department (MD) for permission to lay a private mooring for his pleasure vessel at a bay of an outlying island. Later that year, the pleasure vessel changed ownership. MD thus decided to stop processing his application. The complainant disagreed and pressed MD for more details of its established guidelines and procedures. MD rejected his request, stating that the information was for internal reference only.

811. The complainant alleged that MD had mishandled his application.

The Ombudsman's observations

Handling of the Application

812. It was MD's policy not to accept applications to lay a private mooring from those who do not own a vessel and MD stopped processing the complainant's application because he was no longer the owner of the pleasure vessel. The Office of The Ombudsman considered MD's handling of the application in compliance with its established guidelines and procedures.

Provision of Guidelines and Procedures

813. The Guidelines to the Code on Access to Information (the Code) gave examples of situations where a department's operation would be affected. Such examples were the conduct of tests, management reviews, examinations or audits conducted by or for a department where disclosure of the methods used might prejudice the effectiveness of the tests or the attainment of their objectives.

814. The present case did not fall within the areas contemplated by the relevant provision of the Code as suggested by its Guidelines. MD assumed that its staff would be inhibited from making frank and candid decisions in the face of contentions from applicants who were given MD's guidelines and procedures with regard to the processing of applications. The Office of The Ombudsman considered such assumption unreasonable and MD's reasons for refusal invalid.

815. Overall, The Ombudsman considered this complaint partially substantiated.

816. The Ombudsman recommended MD to provide the complainant with copies of the relevant parts of the guidelines and procedures.

Administration's response

817. MD accepted The Ombudsman's recommendation and has taken the following actions –

(a) MD has provided the complainant a copy of the relevant parts of the guidelines and procedures on handling applications; and

(b) MD circulates the departmental circular regarding the Code at regular intervals, and has incorporated a brief account of this complaint case in the circular for reference of MD's staff.

Office of the Communications Authority

Case No. 2011/4218 – Falsely claiming that the complainant had refused to give a statement in order to cover up delay in commencing investigation into a complaint

Background

818. On 12 January 2009, the complainant filed a complaint with the Office of The Ombudsman against the former Office of the Telecommunications Authority (OFTA).

819. According to the complainant, he completed the number porting procedures at the sales booth of a telecommunications operator (Company A) on 18 March 2008, and signed contracts to port his mobile phone numbers A and B to the network of Company A, to be effective on 28 June and 26 July 2008 respectively. However, Company A subsequently allocated two phone numbers to him and started to charge him fees in April and May of the same year. He contacted Company A but the matter was not resolved. He then lodged a complaint with OFTA on 3 July of the same year. Later he learnt that both the mobile phone numbers and effective dates on the contractual documents held by Company A had been altered: the aforesaid phone numbers were respectively changed to phone numbers C and D, while the effective dates were revised to 29 March 2008.

820. The complainant was dissatisfied with OFTA on the following matters –

(1) He complained to OFTA that the conduct of Company A was suspected to be "misleading and deceptive" (the complaint). However, OFTA refused to follow up on the case for the reason that the matter involved a "contractual dispute" which was not within its jurisdiction. He considered that OFTA was shirking responsibilities; and

(2) despite the fact that OFTA subsequently changed stance to follow up on the complaint, after examining the contractual documents provided by the complainant and Company A, OFTA considered that there was insufficient evidence to support which document was correct, and there were no other complaints or

evidence showing that Company A had engaged in misleading or deceptive conduct during the sales process. Therefore, OFTA did not carry out further investigation into the case. He considered that OFTA was trying to evade its responsibility and did not look into the case thoroughly.

821. The Office of The Ombudsman completed the enquiry on 28 July 2009 and informed the complainant of the results in writing –

(a) Regarding Allegation (1), the Office of The Ombudsman considered that "contract tampering" should be considered as "misleading or deceptive conduct" as specified under section 7M of the Telecommunications Ordinance. OFTA's initial interpretation of the complaint as a "contractual dispute" reflected the department's possible misunderstanding about or insufficient knowledge of its power of investigation in relation to dealing with consumer complaints. Hence, OFTA should review this issue; and

(b) regarding Allegation (2), the Office of The Ombudsman considered OFTA's decision of "not further investigating the case" unconvincing. The Ombudsman urged OFTA to re-examine the case.

822. OFTA accepted the Office of The Ombudsman's recommendation and decided to commence a full investigation into the complaint. The department completed the investigation in July 2011 and released the investigation report on 19 August of the same year.

823. On 2 September of the same year, the complainant wrote to OFTA claiming that the content of the above investigation report was partially untrue. On 12 October, OFTA replied to him in writing –

> The case officers of OFTA requested to obtain a statement from the complainant via phone on 10 and 11 November 2008 and during the meeting with him on 20 November 2008, but he refused to give a statement. As a result, OFTA could not carry out further investigation into the complaint at that time. The turning point at which OFTA decided to commence a full investigation into the complaint was when the complainant had finally given a statement on 29 December 2009 upon being contacted again by OFTA.

824. The complainant expressed dissatisfaction with the reply of OFTA and requested the Office of The Ombudsman to re-investigate OFTA. The contents of his new complaint are as follows.

Contents of the New Complaint

825. According to the complainant, on 10, 11 and 20 November 2008, OFTA's staff members A and B only asked him about details of the case and photocopied the relevant documents. They did not ask for any statement from him. OFTA had never demanded any statement from him until 24 September 2009.

826. The complainant also claimed that OFTA's letter of reply to him dated 29 December 2008 ("letter of reply (1)") stated that: "We note that the issue had arisen out of the discrepancies in the contractual documents respectively held by the company (Company A) and you (the complainant). As there was insufficient evidence to verify which document was original, and that this complaint was an individual case with no other complaints or evidence showing that Company A had engaged in any misleading or deceptive conduct during the sales process, we consider the information on hand to be insufficient for carrying out further investigation". However, in its letter of reply dated 12 October 2011 (letter of reply (2)), OFTA changed its stance by saying that: "We initially closed this case mainly because we did not have your (the complainant's) statement, which would be an important piece of evidence to be relied on as proof in future, in order to support our commencement of a full investigation into your case".

827. The new complaint of the complainant against OFTA can be summarised in the following two points –

Allegation (a): OFTA falsely claimed that he had refused to give a statement at the outset; and

Allegation (b): OFTA gave inconsistent reasons as to why the complaint case was initially closed without further investigation.

The Ombudsman's observations

Allegation (a)

828. The file records of OFTA showed that its staff had requested the complainant to give a statement or testimony in November 2008 to no avail. The records were contemporaneous records, rather than records written after a considerable period of time had passed. In the absence of any evidence showing that those records were untrue, the Office of The Ombudsman considered the records credible and accepted the representations made by OFTA.

829. In view of above, The Ombudsman considered Allegation (a) unsubstantiated.

Allegation (b)

830. OFTA briefly explained in letter of reply (1) why the case was closed while in letter of reply (2), the reasons were more clearly explained. The Ombudsman opined that there was no contradiction between the two letters of reply.

831. In view of above, The Ombudsman considered Allegation (b) also unsubstantiated.

832. That said, if OFTA had explained to the complainant clearly and in fuller details in its reply (1), this complaint might have been avoided. The Office of The Ombudsman recommended that the Office of the Communications Authority (OFCA), which has replaced OFTA, should provide details clearly when giving replies to complaints or enquiries from the members of the public.

833. Overall speaking, The Ombudsman considered this complaint unsubstantiated.

Administration's response

834. OFCA accepted the recommendation of the Office of The Ombudsman.

835. In fact, OFCA does from time to time review and seek to improve its complaint-handling mechanism and internal guidelines and procedures, having regard to the experience gained from its daily handling of cases involving suspected misleading or deceptive conduct by telecommunications service providers in contravention of section 7M of the Telecommunications Ordinance (including the experience from this case). Insofar as replying to members of the public on section 7M-related complaints is concerned, OFCA has enhanced its internal procedures of approving replies to the complainants since May 2012.

836. In the past, where the former OFTA had completed an initial enquiry into a section 7M complaint and, on the basis of the information available, considered that there was no reasonable ground to suspect that the conduct of the telecommunications operator in question might be in breach of section 7M and hence the case was recommended to be closed without further follow-up, the recommendation and the letter informing the complainant that his case would not be further processed were approved by respective heads of the section (non-directorate officers) responsible for handling the complaints in question. Starting from May 2012, the recommendation and the related reply letter to the complainant are subject to the approval by the Assistant Director of OFCA's Market & Competition Branch (directorate officer) who is responsible for overseeing all section 7M cases. This adjustment in the internal procedures can strengthen OFCA's supervision of the section 7M cases to ensure consistency in the approach of handling the complaint cases across different sections under the Market & Competition Branch, and can ensure that all the relevant reply letters would, as far as possible, give clear and detailed account of OFCA's initial enquiry, as well as the decision to close the case and the reasons thereof.

Official Receiver's Office

Case No. 2011/4916 – (1) Failing to carefully examine the value of a bankrupt's property in Mainland China when acting as trustee; and (2) Delay in handling the complaint

Background

837. The complainant was the creditor of a bankrupt (Mr A) whose assets were managed by the Official Receiver's Office (ORO) as trustee. The complainant alleged that ORO, when handling a property in Mainland China jointly owned by Mr A and his family member (Ms B), had accepted a valuation report provided by Ms B without careful examination. Consequently, Mr A's 50% ownership in the property was sold to Ms B at a price far below its market value, to the detriment of the creditors.

The Ombudsman's observations

838. The Office of The Ombudsman's investigation focused on whether ORO had put in place appropriate administrative arrangements for handling property sale, and whether it had for assessed or engaged relevant professionals to assess property values, thus enabling ORO to discharge its duties of realising assets and protecting the interests of bankrupts and creditors.

839. The first valuation report clearly stated that it had, on the request of the property owners (namely, Mr A and Ms B), used the "costs approach" to assess the replacement or reconstruction value (instead of the market transaction value) of the property. According to the practice guide issued by the Estate Agents Authority, the "replacement costs approach" is seldom used and is only used sometimes as a last resort to value the type of properties which rarely changed hands and for which there are few comparables, such as hospitals, schools and churches.

840. The property partially owned by Mr A was for residential purposes. It was strange that ORO had not raised any query over the "costs approach" adopted in the first valuation report and had accepted it without any analysis or explanation in the file records. It seemed that the case officer had submitted the case to his supervisor for approval

shortly after receipt of a valuation report provided by Ms B. The file records did not show that they had considered the contents of the valuation report and whether the valuation approach adopted served the intended purpose.

841. It was only after ORO had completed the transaction and received the complaint that it verified the qualifications of the valuation institution concerned and its staff, and checked whether the institution had any bad records. This fully reflected ORO's lack of deliberation and due diligence in its earlier approval process.

842. The Office of The Ombudsman considered the problem attributable to ORO's too rudimentary internal guidelines, which failed to include the essential step of scrutinising the property valuation report. Also, the supervisory mechanism at the management level was slack and failed to play the proper role of a gate-keeper before the deal was closed. As admitted by ORO, its officers were not experts in property valuation and they might be even less familiar with property outside Hong Kong. This was exactly why proper guidelines and effective supervision were important.

843. Moreover, the Office of The Ombudsman noted that Ms B had not provided any receipt to support an expense item to be deducted from the proceeds of property sale, and some other expense items deducted appeared to be messy and unclear. However, ORO exercised discretion to allow these items claimed by her. From the perspective of accountability, the officer should at least give an account on file of the justification for exercising his discretion, which should also be subject to review and monitoring by the management.

844. ORO failed to conduct careful verification and consider thoroughly the contents of the valuation report before entering into the transaction. Its supervisory mechanism was clearly inadequate, such that the management was unable to identify the problem and take actions at an early stage.

845. In the light of the above, The Ombudsman considered the complaint substantiated.

846. The Ombudsman recommended ORO to consider the following improvement measures –

(a) To review and revise promptly the internal guidelines on sale of bankrupts' landed properties, which should include specifying under what circumstances a second valuation report should be sought;

(b) to review and improve the supervisory mechanism on handling the sale of bankrupts' landed properties; and

(c) to remind its staff members to record properly all deductible expenses in their files and consult their supervisors where necessary.

Administration's response

847. ORO accepted The Ombudsman's recommendations and agreed that the relevant guidelines should be reviewed and improved with a view to enhancing the alertness of staff, especially with regard to the contents of valuation reports. It has implemented The Ombudsman's recommendations set out below.

848. During the course of investigation by The Ombudsman, ORO has taken the following measures –

(a) ORO has reviewed and issued the revised General Guidelines on Sale of Bankrupts/Discharged Bankrupts' Landed Properties (the Guidelines) to its staff in July 2012 in which the monitoring mechanism on the sale of bankrupts' landed properties was enhanced, such as requiring the case officer to consult the supervisor and consider whether a second valuation report should be obtained in case of doubt about the contents of the valuation report; and requiring the case officer to seek the approval of the Chief Insolvency Officer on the selling price of a non-Hong Kong property; and

(b) The Official Receiver wrote to the staff in July 2012 to remind them of the importance of obtaining valuation based on market value and documenting properly the deductions approved of the case. In case of doubt when handling applications for deductible expenses, the case officers should consult their supervisors.

849. In the long run, ORO has further reviewed its procedures on the sale of the bankrupts' landed properties and revised the relevant Guidelines. The new Guidelines which were issued in April 2013 included the following –

(a) Specifying clearly under what circumstances a second valuation report should be sought by the case officer;

(b) defining clearly who are qualified to provide professional valuation reports;

(c) prescribing in detail which valuation methods should be adopted in the valuation reports and requiring the case officers to seek prior approval from the Chief Insolvency Officer before accepting other valuation methods;

(d) specifying the items of allowable deductions and allowances from the sale proceeds; and

(e) including the contents of paragraph 12(b) above, i.e. requiring the case officers to consult their supervisors when handling the applications of deductible expenses in case of doubt.

850. ORO will provide continuous training to its staff to maintain awareness, and will enhance the Guidelines when necessary.

Post Office

Case No. 2012/0360 – Improper handling of a complaint about mail delivery

Background

851. The complainant alleged that there had been misdelivery of mail by the Post Office (PO) since 2005. Consequently, a number of letters sent to her were lost and she received some letters addressed to other people. There was improvement after she had complained to PO in 2009. However, the problem recurred at the end of 2011 and she complained to PO again.

852. PO explained that non-delivery of mail could be due to various factors. In the absence of evidence, PO could not conclude that it was a result of misdelivery by the postman. She was dissatisfied with PO's explanation and believed that her privacy might have been disclosed as a result.

The Ombudsman's observations

853. The Office of The Ombudsman considered that there was indeed a problem of misdelivery as the complainant did produce a letter which was addressed to another person. Yet, the evidence available could not establish that PO had misdelivered her bank statement to others and caused her privacy to be disclosed. The complainant also told the Office of The Ombudsman that there had not been any misdelivery lately.

854. Although test letters and on-site opinion surveys were used by PO to monitor mail delivery service, very few completed questionnaires were returned as stated by PO. This showed the customers' lukewarm response to the surveys. Also, the problems of misdelivery of mail and return of undelivered mail items to the senders were not covered in the questionnaire. The Office of The Ombudsman considered PO's monitoring measures unable to serve their purpose. As a result, PO's investigation in response to complaints had not been very effective and the validity and reliability of its opinion surveys were doubtful.

855. In view of the above, The Ombudsman considered the complaint partially substantiated.

856. The Ombudsman recommended PO to –

(a) enhance its monitoring mechanism by reviewing the handling of complaints about lost mail and considering using more proactive methods to check for misdelivery of mail. Such methods may include obtaining consent from the recipient to contact the sender for clarification to improve its mechanism;

(b) consider improving the design of its survey questionnaire so that it can get a better picture of its mail delivery service; and

(c) consider taking into account cases involving misdelivery of mail in its evaluation of services so that the performance can be accurately assessed.

Administration's response

857. PO accepted The Ombudsman's recommendations and has taken the following actions –

(a) Its monitoring mechanism has been improved to ensure proper mail delivery and issued guidelines to frontline supervisors to facilitate their handling of complaints about lost mail. Depending on the nature of the case, PO will consider taking appropriate measures to check for misdelivery of mail, which may include conducting post check or obtaining the consent from the addressee to contact the sender for clarification;

(b) the design of its questionnaire has been improved to include customers' feedback on mail misdelivery. The revised questionnaire has been in use since November 2012; and

(c) since April 2013, cases of mail misdelivery have been taken into account for more accurate evaluation of the quality of mail delivery service.

Post Office

Case No. 2012/2439(I) – (1) Delay in responding to the complainant's enquiry; (2) Unreasonably withholding a damage report issued by the Mainland postal administration; and (3) Citing a wrong mail item number in its reply letter and allegedly providing an untrue statement

Background

858. In early May 2012, the complainant used the Post Office (PO)'s Speedpost service to send five cans of powdered formula milk to his relative in the Mainland. When the parcel was delivered to the destination, however, it was damaged with milk powder leaking out. In response to his enquiry, PO indicated that, based on a report issued by the Mainland postal authority, the damage had been caused by inadequate packing and thus no compensation would be payable. The complainant was dissatisfied that PO had delayed for more than a month before giving him a reply and that the mail item number cited in the reply letter was wrong. PO had also refused his request for a copy of the damage report on the ground that it was an internal document.

859. The complainant then obtained a certificate directly from the local delivery office in the Mainland through his relative. The certificate stated that the external packing of the parcel was intact but, on opening the lids, the inner seals of two cans were found to have been completely broken. It was suspected that the damage was caused deliberately. The complainant queried why PO had not mentioned such things in its reply letter and alleged that it had provided an untrue statement.

The Ombudsman's observations

860. The Code on Access to Information (the Code) requires Government departments to actively provide the public with Government-held information as far as possible, unless there are reasons to refuse disclosure as stated in Part 2 of the Code.

861. The Office of The Ombudsman noted that PO had failed to give a reply to the complainant within the specified timeframe. It had also failed to comply with the Code in withholding the damage report on the ground of internal document without first ascertaining the intent of the Mainland postal administration. Even though the complainant had not made the request for information under the Code initially, PO was still obliged to act in compliance with the Code. It should have taken the initiative to seek the third party's consent and release the information as soon as possible. The Ombudsman, therefore, considered both Allegations (a) (delay in reply) and (b) (refusal to provide report) substantiated.

862. The Office of The Ombudsman agreed that the reply letter issued by PO at the end of June was based on the information available then. While PO made a mistake in the mail item number, there was no evidence of an untrue statement. The certificate subsequently obtained by the complainant provided certain details which seemed to be different from those in the damage report, but China Post already reiterated that the packing of the parcel was faulty. From the perspective of public administration, PO was not improper in citing its service conditions and refusing to pay any compensation. The Ombudsman, therefore, considered allegation (c) partially substantiated.

863. Overall, the complaint was partially substantiated.

864. The Ombudsman recommended PO to –

(a) review the measures for managing enquiries about mail items, such as enhancing its computer system by adding an alert function to reduce backlog and delay of cases; and

(b) draw up internal guidelines to ensure that its staff follow the Code when handling requests for information, and formulate proper procedures to scrutinise decisions of refusing to release information.

Administration's response

865. PO accepted The Ombudsman's recommendations and has taken the following actions –

(a) The computer system of Mail Tracing Office has been enhanced in July 2012. For those enquiries which have been outstanding beyond the prescribed timeframe, the system would alert the relevant supervisors; and

(b) conducts staff briefings and regularly reminds staff to follow the Code when handling requests for information. When situations arise where there are reasons to refuse disclosure of information as set out in Part 2 of the Code, the staff should refer the request for information to relevant officer(s) for assessment.

Registration and Electoral Office

Case No. 2012/3176 – (1) Failing to contact the complainant to confirm her address before cancelling her voter registration; and (2) Failing to take prompt action to address the complainant's complaint about having received the poll cards of some unknown persons

Background

866. On 10 September 2012, the complainant lodged a complaint with the Office of The Ombudsman against the Registration and Electoral Office (REO). The complainant, who was originally a registered voter, filed the following complaint against REO with regard to its handling of her voter registration –

(a) As she did not receive the "poll card" sent by REO for the Legislative Council (LegCo) Election in September 2012, she called REO to make an enquiry in early September that year. The staff replied that REO had sent letters by registered post to her but the letters were returned undelivered and her registration as a voter was thus removed. The complainant accused REO for being unfair to her since REO did not contact her to follow up the undelivered mails before removing her registration; and

(b) before the District Council (DC) Election in November 2011 and the LegCo Election in September 2012, REO sent mails addressed to two persons with another surname and another person (collectively referred to as "persons involved") to her residential address. As she did not know the "persons involved", upon receipt of the mails, she handed them to the management office of her housing estate immediately. In the phone conversation mentioned in allegation (1), she also reported this incident and provided the full names of the two "persons involved" with another surname to REO. However, the staff replied that REO could not disqualify the "persons involved" from voting before the polling day of the LegCo Election (i.e. 9 September). She accused REO for not preventing the "persons involved" timely from using a false residential address to vote in the LegCo Election.

The Ombudsman's observations

867. Regarding Allegation (a), from the sequence of events, there was impropriety on the part of REO in handling the complainant's case. The complainant's case fell into the category of "suspected case of voter providing incorrect residential address". The Office of The Ombudsman opined that REO should first seek to confirm with the complainant about her address by phone in accordance with its established procedures. However, REO had not taken such steps.

868. That said, the Office of The Ombudsman also considered that the complainant should fulfil her responsibility as a voter and reply to the inquiry letters sent by REO. The two letters sent by REO by registered mail were returned as undelivered and no reply was received for the letter sent later by surface mail. Under such circumstances, REO should not take the full blame for the complainant's eventual disqualification from registration. For the reasons set out above, The Ombudsman considered Allegation (a) partially substantiated.

869. Regarding Allegation (b), when receiving the report from the complainant, REO indeed had no authority to disqualify the "persons involved" from voting before the polling day of the 2012 LegCo Election. Nevertheless, REO had already followed up (and would continue to follow up) the issue concerning the registered residential addresses of the "persons involved" in accordance with the established procedures and the relevant legislation. For the reasons set out above, The Ombudsman considered Allegation (b) unsubstantiated.

870. Overall, this complaint was partially substantiated. The Office of The Ombudsman was of the view that voting right was very important to members of the public. Although REO had already provided channels for the public to inspect the "provisional register" and the "omissions list", it could still go further to make the information more readily available by uploading the "provisional register" and the "omissions list" onto its website and allowing the public to get access to the information simply by inputting their personal particulars into the website. REO agreed to conduct a feasibility study in this respect with due consideration given to proper protection against data leakage and the public's acceptance of the arrangement.

871. The Ombudsman urged REO to –

(d) remind its staff to observe the procedures properly in handling voter registration in future; and

(e) follow up actively with the feasibility study of allowing online inspection of the "provisional register" and the "omissions list" by members of the public.

Administration's response

872. REO accepted The Ombudsman's two recommendations and has taken the following measures –

(a) In taking statutory inquiry proceedings, in addition to approaching the voters concerned by postal mail in accordance with the existing procedures, REO will, subject to the availability of resources and time, telephone the voters who have provided their phone numbers to ascertain their registration particulars preliminarily and to remind them of the need to update/confirm their registration particulars before the statutory deadline. After reviewing the relevant procedures of processing applications for voter registration and updating of voters' registration particulars, REO has drawn up operational guidelines and will enhance staff training to ensure greater effectiveness in handling the relevant work, as well as improving the service quality further in order to provide appropriate assistance to voters; and

(b) the feasibility and viable option of allowing members of the public to inspect the "provisional register" and the "omissions list" online are being actively studied with a view to employing information technology to provide a more convenient means for voters to inspect their registration particulars.

Rating and Valuation Department

Case No. 2012/2786 – (1) Unhelpful and sloppy staff attitude; (2) Delay in handling the complainant's application for information of the rateable value of a property; and (3) Mishandling the complainant's request for refund

Background

873. On 14 August 2012, the complainant complained to the Office of The Ombudsman against the Rating and Valuation Department (RVD).

874. According to the complainant, he went to RVD on 21 May 2012 to apply for the provision of rateable values of a property in the Government Rent Roll for 23 years from 1989/90 to 2011/12. RVD informed him on 6 June that his application had been approved. After he paid the application fee of $1,909 ($83 for each year), RVD provided him the required information together with a letter stating that the public might obtain the relevant information of the last three years via the Property Information Online (PIO) at a charge of only $9 for each year.

875. The complaints lodged with RVD by the complainant can be summarised as follows –

(a) Staff A and Staff B of the reception counter and Staff C who handled his case adopted a lax attitude. They had neither responded to his enquiries in detail nor given an account of the services provided by RVD, including the provision of some of the required information via the Internet at a lower charge. As a result, he had paid extra application fee;

(b) during a telephone conversation with him on 22 May, Staff C pledged that the processing of his application could be finished within seven to eight working days. However, it was not until 6 June (i.e. after 12 working days) did RVD reply him. The complainant considered that RVD had delayed in processing his application; and

(c) he requested RVD to refund the amount equivalent to the difference in application fees for three years (i.e. 2009/10 to 2011/12). However, RVD indicated that it would only refund

the amount equivalent to the difference in application fees for two years (i.e. 2010/11 and 2011/12) and asked him to make the application in writing with justification for consideration by the Department. He considered that the arrangement was not reasonable.

The complainant also pointed out that RVD had made available on PIO the 2012/13 rateable values of all properties in Hong Kong contained in the Government Rent Roll for public inspection free of charge from 1 April to 31 May 2012. That being the case, he considered that RVD should let the public obtain the rateable values for 2009/11 to 2011/12 online at a charge of $9 for each year.

The Ombudsman's observations

Allegation (a)

876. There were discrepancies between the statements of the complainant and the staff concerned regarding the processing of the case. In the absence of independent evidence, The Ombudsman was unable to ascertain the content of the conversation between the two parties, and the attitude of the staff. Therefore, The Ombudsman considered Allegation (a) inconclusive.

Allegation (b)

877. The Ombudsman was unable to ascertain whether Staff C had explained to the complainant that it would take longer time to search for the relevant information before 1991/92 and whether he had pledged to finish processing the complainant's application within seven to eight working days. Nevertheless, in view of the process undertaken by RVD in collecting the information on rateable values of the concerned properties for 23 years, including the need to search through the microfilm records for information of earlier years, and finishing the task on the ninth working day, The Ombudsman considers that the time taken was not unreasonable. Based on the above analysis, The Ombudsman considered Allegation (b) unsubstantiated.

Allegation (c)

878. As the 2009/10 property rateable value was in fact no longer available on PIO on the date (21 May 2012) of submission of application by the complainant, the complainant ought to pay $83 to obtain the rateable value concerned through written application regardless of whether or not he had learnt about the PIO service at that time. Since RVD had already provided the complainant with the rateable value concerned, The Ombudsman considered that there was no reason for the Department to refund to him the difference in application fees.

879. As for the difference in application fees for the other two years, RVD applied discretion and agreed to refund the difference to the complainant. The arrangement was reasonable and empathic.

880. Based on the above analysis, The Ombudsman considered Allegation (c) unsubstantiated.

881. Nevertheless, The Ombudsman had the following observations in this case –

(a) After inspecting the form completed by the complainant, The Ombudsman noticed that a statement reading "Rateable values of properties contained in the Valuation Lists and/or Government Rent Rolls for the last three years of assessment can be obtained via the Property Information Online." was in fact printed as a Note at the lower right-hand corner of the form. It was considered inadequate that charge levied for the online search was not mentioned in the Note;

(b) when the complainant obtained from RVD the printed copy containing the required information (with a higher fee charged), it was stated in the accompanying letter that an online application was available (with a lower fee charged). Even though RVD staff had earlier reminded the complainant of the availability of an online application, The Ombudsman considered that the mentioning of a cheaper means in the letter to the complainant at such final stage would create the impression that RVD had not provided this piece of material information in a timely manner. The workflow was considered not desirable; and

(c) it was understandable that Staff C acted in accordance with the procedure to ask for a written refund request from the complainant. That said, The Ombudsman considered that since RVD had already decided to make the refund to the complainant, the Department could simplify the procedure and only ask the complainant to provide his correspondence address followed by a written confirmation with him on his refund request.

882. Overall speaking, The Ombudsman considered that this complaint is not substantiated.

883. The Ombudsman recommended RVD to –

(a) revise the Notes of the Application Form (the Notes) by pointing out clearly that there will be a difference between the fees for manual processing by RVD and for online application by the public;

(b) improve the processing of applications in order to avoid any problem as stated in paragraph 881(b) above;

(c) exercise flexibility according to the circumstances of individual cases when dealing with refund applications so that unnecessary steps may be reduced.

Administration's response

884. RVD has immediately revised the application form by stating in the Notes the amount charged for online enquiry through PIO. In addition, RVD has reminded frontline staff that upon receiving application for such enquiries, clear explanation should be given to the applicant that there is a difference between the fees for online service and for manual processing service. The amount of the service charged must also be disclosed. With the enhanced measures implemented, RVD is no longer required to further mention the option of online application in its final letter when dispatching the information enquired. It can eliminate any unnecessary misunderstanding.

885. As the refund arrangement will involve accounting transactions, RVD has to confirm the identity of the payee and his/her payment details in normal circumstances. So a written application made by the payee is required. In this case, however, RVD has adopted a flexible approach and successfully obtained the correspondence address of the complainant. The refund has been arranged accordingly.

Rating and Valuation Department and Judiciary Administrator

Case No. 2012/1922A (Rating and Valuation Department) – (1) Giving wrong advice for the complainant's application for repossession of his property; (2) Neglecting him maliciously when he was queuing at the enquiry desk to express his views; and (3) Failing to conduct a thorough investigation into his complaint

Case No. 2012/1922B (Judiciary Administrator) – Failing to give a true account of an incident in the course of an investigation into the complainant's complaint

Background

886. On 6 August 2012, the complainant lodged a complaint with the Office of The Ombudsman against the Rating and Valuation Department (RVD) and the Lands Tribunal (LT) under the Judiciary.

887. On 6 June 2012, in connection with his application for a "writ of possession", the complainant approached the enquiry counter of RVD in the lobby of LT to seek assistance. According to the complainant, an unknown staff member of RVD (Rent Officer A) had misled him into putting down "the address of the premises he had rented out" in the "Applicant's Address" column of the English version of Notice of Application under Landlord and Tenant (Consolidation) Ordinance (Form 22). Subsequently, the complainant came to know that he should have put down his own address in that column instead.

888. On 9 June, when the complainant visited LT to continue with his application for the "writ of possession", he indicated to a clerk of LT that he wanted to express his views on the work performance of Rent Officer A. The LT clerk then took him to somewhere near RVD counter and related to the rent officer manning the counter (Rent Officer B) that there was a citizen giving his views on Rent Officer A. As Rent Officer B was attending to a couple's enquiries, the complainant then waited next to the cabinet for keeping various forms. However, after the couple had left, Rent Officer B proceeded to attend to enquiries of another citizen (Citizen A), paying no attention to the complainant. As a result, the complainant waited for 30 minutes before he was finally served by Rent Officer B. The complainant took the view that Rent Officer B had kept him waiting deliberately.

889. On 11 June, the complainant lodged a complaint with RVD.

Having consolidated the findings of the investigations carried out by RVD and the Judiciary, RVD replied to the complainant twice. However, the complainant was dissatisfied with the explanations given by the two departments.

890. The complaints can be summarised, in chronological order, as follows –

(a) With regard to misleading the complainant on 6 June, Rent Officer A of RVD replied during RVD's investigation that she could not recollect the incident, thereby evading the complainant's allegation. The erasure of the corresponding column did indicate that the complainant had been misled;

(b) in respect of the June 9th incident, the LT clerk explained both on the spot and during the management investigation that he did not tell Rent Officer B explicitly that the complainant was waiting for talking to him face to face. The complainant opined that the LT clerk's account did not make good sense or tally with the facts in that the complainant did in fact tell the LT clerk explicitly that he wanted to talk to Rent Officer B face to face, so that the LT clerk brought him to RVD counter;

(c) with regard to the incident on 9 June, Rent Officer B of RVD kept him waiting purposely but falsely claimed both on the spot and in RVD's investigation that he was unaware that the complainant was waiting for a face-to-face conversation; and

(d) RVD did not carry out the investigation seriously; they accepted excuses made by their staff and covered up their wrongdoings.

The Ombudsman's observations

Allegation (a)

891. With regard to the complainant's allegation of being misled by Rent Officer A, the Office of The Ombudsman noted the following –

(a) The incident happened on 6 June and the complaint was lodged with RVD on 11 June. RVD then interviewed the two Rent Officers in turn on 12 and 13 June. In other words, when being interviewed by RVD, the two Rent Officers were in fact trying to

recall an incident which happened about one week ago;

(b) while carrying out their duties at the LT, the two Rent Officers had to answer a multitude of various enquiries from the public without taking down the enquiry details. It was therefore not at all surprising that they could not recall the complainant's enquiries;

(c) it was reasonable to believe that the two Rent Officers, with experience of well over 10 years each, were very familiar with Form 22;

(d) Form 22 is a simple form, on which the key information of the "Applicant's Address" and "Respondent's Address" columns are printed in bold, so as to draw the applicant's attention; and

(e) on the copy of Form 22 provided by the complainant, the "Applicant's Address" column appeared to have been altered but it was no longer possible to discern whether it was the address of the rented premises being erased. And even if the erased information had been incorrect, there was no evidence indicating such a mistake was made due to an instruction from an officer.

892. In consideration of the above, The Ombudsman believed that Rent Officer A was not able to recall the incident, and accepted that it was very unlikely for her to have misled the complainant as alleged by the complainant. The Ombudsman therefore considered Allegation (a) unsubstantiated.

Allegation (b)

893. The Ombudsman was satisfied that the LT clerk had related to Rent Officer B that there was a citizen giving his views on Rent Officer A. However, there was a possibility that he did not make it clear to Rent Officer B that the said citizen (i.e. the complainant) was waiting nearby for talking to him face to face. As a matter of fact, the LT clerk did not deny having known at the material time that the complainant wanted to talk to Rent Officer B face to face. He took the complainant to somewhere near RVD counter so as to let him state his views to the officer manning the counter himself. However, it did not mean that he had given clear indication to Rent Officer B that the complainant was waiting.

894. The Ombudsman did not consider the LT clerk's account to be in any way untrue or unreasonable. The LT clerk simply needed to improve his communication skills.

895. Based on the above, The Ombudsman considered Allegation (b) unsubstantiated.

Allegation (c)

896. The Office of The Ombudsman considered that it was very unlikely that Rent Officer B deliberately kept the complainant waiting. The justifications are as follows –

(a) The Ombudsman believed that the LT clerk did not explicitly inform Rent Officer B that the complainant was waiting;

(b) Rent Officer B was serving a couple and naturally he would continue attending to them; and

(c) as Visitor A had sought Rent Officer B's advice earlier, it was not unreasonable for Rent Officer B to serve him again when he returned to the counter for further assistance.

897. Based on the above comments, The Ombudsman considered Allegation (c) unsubstantiated.

898. However, on a site visit, The Ombudsman noticed that the LT hall was small in size with few people. Moreover, Rent Officer C was also on duty at RVD counter with Rent Officer B when the incident occurred. Both Rent Officers admitted that they were aware of the complainant standing nearby. Given the situation on that day, The Ombudsman considered that the two Rent Officers should have taken the initiative to ascertain the complainant's intentions through a more proactive customer service. The unpleasant incident could then have been avoided.

Allegation (d)

899. The Office of The Ombudsman noted that RVD had reached the following conclusions after the internal investigation –

(a) Records revealed that the LT clerk did not inform Rent Officer B that the complainant was waiting;

(b) there was no evidence indicating that Rent Officer B intentionally kept the complainant waiting;

(c) the incident was due to inadequate communication between Rent Officer B and the LT clerk; and

(d) the incident revealed that improvements could be made to the counter services RVD offered at the LT. RVD and LT had started working on this.

900. Although the complainant was not satisfied with the result of RVD's internal investigation, The Ombudsman, after scrutinising the records of the internal investigation, opined that the investigation was carried out in an objective and serious manner, and RVD had actively reviewed the need to enhance the enquiries counter service. Therefore, The Ombudsman considered Allegation (d) not substantiated.

901. In view of the above, The Ombudsman considered that the complaint against RVD unsubstantiated; and that against the Judiciary also unsubstantiated.

902. The Ombudsman urged that –

(a) RVD should remind the Rent Officers on duty at LT to be more alert to the needs and intentions of the visitors there, and to take the initiative to offer assistance; and

(b) the Judiciary should remind the LT clerk to improve his communication skills to avoid recurrence of similar misunderstandings.

Administration's response

903. RVD has reminded all Rent Officers to be more alert to the needs of the visitors at LT, who might be waiting for RVD's services, and to take the initiative to offer assistance. Furthermore, a queuing area had been designated at LT hall in June 2012 with signage put up, so that visitors can clearly identify the area for queuing up for RVD's services.

904. The Judiciary Administrator accepted the recommendation, and has already reminded the staff member concerned again to improve his communication skills to avoid recurrence of similar misunderstandings.

Social Welfare Department

Case No. 2012/1418 – (1) Unreasonably refusing to follow up a complaint against a subvented non-governmental organisation; and (2) Failing to provide on its website the Chinese version of some documents relating to the monitoring of subvented non-governmental organisations

Background

905. On 5 and 11 June 2012, the complainant lodged complaints with the Office of The Ombudsman against the Social Welfare Department (SWD).

906. The complainant had jointly provided English courses (courses-in-question) with a non-governmental organisation (Organisation A) since 2004. On 4 May 2012, the complainant lodged a complaint with SWD, alleging that SWD had failed to monitor the Organisation A properly, and that for certain documents related to the service performance of non-governmental organisations, only the English version was provided on the SWD Homepage, thus making it difficult for the public to monitor the performance of some organisations. On 6 June, SWD replied to the complainant as follows –

(1) Organisation A was receiving SWD subventions for providing services in respect of social centres for the elderly, integrated children and youth services centres, etc. The service unit which jointly organised the courses-in-question with the complainant was the Continuous Learning Centre (CLC) under Organisation A. As CLC was not a service unit subvented by SWD, it was therefore not monitored by SWD. As such, SWD was not in a position to follow up the complainant's complaint; and

(2) the Funding and Service Agreements (FSAs) displayed on the SWD Homepage were agreements signed between SWD and the subvented non-governmental organisations, with only the original version in English available. As regards the Chinese version of the Performance Assessment Manual to its Homepage, it was under preparation by SWD and would be uploaded onto its website later.

907. The complainant did not accept SWD's explanation above and lodged a complaint with the Office of The Ombudsman as follows –

(a) Both subvented and profit-making services were organised by the same group of staff of Organisation A on the same premises but Organisation A did not inform the public whether the activities were subvented or profit-making when publicising the activities, in addition to requiring the participants of CLC courses (including the courses-in-question) to become the Organisation A's members first before joining the courses. The complainant considered SWD's refusal to follow up their complaint as shirking its responsibility; and

(b) FSAs displayed on the SWD Homepage set out the basis of subventions for individual service units, and were useful to the public for monitoring the service units' performance, auditing procedures and the principles of providing non-subvented activities. It was therefore unreasonable for SWD not to provide the Chinese version of the FSAs. Moreover, SWD did not provide the time-frame for uploading the Chinese version of the Performance Assessment Manual to its Homepage.

The Ombudsman's observations

Allegation (a)

908. SWD had put in place a monitoring mechanism under which non-governmental organisations would have to observe relevant requirements in providing non-subvented services or activities on subvented premises. SWD had handled the complainant's complaint according to its existing policy and mechanism. The complainant had not made clear their complaint in the first place. Nor did they indicate their agreement to SWD, according to its complaints handling mechanism for referring the complaint to the Independent Complaints Handling Committee, which was responsible for handling complaints against subvented non-governmental organisations, for follow-up action. It was indeed difficult for SWD to follow up the complaint. Based on the above, The Ombudsman considered Allegation (a) unsubstantiated.

909. If the complainant suspected Organisation A engaged in profit-making activities, it might consider reporting to the Inland Revenue Department.

Allegations (b)

910. Chinese is the language commonly used by the majority of Hong Kong people. Given that SWD had uploaded the original English version of the FSAs to its Homepage for public viewing, it was unreasonable that a Chinese version was not provided. As to the Performance Assessment Manual, SWD had in late September 2012 updated its English version and uploaded it to its website together with the Chinese version. Based on the above, The Ombudsman considered Allegation (b) substantiated.

911. Overall speaking, the complaint against SWD was partially substantiated.

912. The Ombudsman recommended that SWD should consider implementing the translation task in batches and by phases, or providing the Chinese version only for FSAs that come into effect after a certain date; whilst for any individual FSAs entered into force before that date, the Chinese version should be provided only upon request.

Administration's response

913. SWD accepted The Ombudsman's recommendation and has set up a working group to implement the following tasks. With effect from 1 October 2013, all FSAs newly uploaded to SWD's website will be provided with the Chinese version; for existing FSAs, a Chinese version will be provided to the public upon request.

Social Welfare Department

Case No. 2012/1511 – (1) Unreasonableness in the assessment of the income of an elderly and disabled couple, who had received a residential property as a gift, such that they had to return one month's Comprehensive Social Security Allowance; and (2) Delay in handling the application of the complainant's father for Disability Allowance

Background

914. The complainant's parents lived in a public housing unit and were Comprehensive Social Security Assistance (CSSA) recipients. In June 2011, the complainant's sister purchased the unit for them, so that they could continue to live there as owners. Subsequently, Social Welfare Department (SWD) notified the elderly couple that the purchase amount should be treated as their income (Rule (1)). They thus became ineligible for CSSA in July and were required to return that month's CSSA allowance to SWD.

915. The complainant considered SWD's decision unreasonable. She contended that according to the information provided on the Department's website, the value of an owner-occupied residential property would be totally disregarded for the asset test under the CSSA Scheme if there is an aged or disabled member in the household (Rule (2)). Since her father was 65 and her mother was receiving disability allowance, both of them were eligible for that waiver. Besides, she had made several telephone calls to SWD to seek clarification before the public housing unit was purchased. An SWD officer confirmed to her that her parents' eligibility for CSSA would not be affected even if they became owners of their public housing unit.

The Ombudsman's observations

916. The Office of The Ombudsman checked the SWD website and confirmed that the rules on the asset and income tests are in the Department's guidelines. Purely from the perspective of administrative procedures, SWD should not be regarded as at fault for enforcing the established Rule (1) to recover an overpaid CSSA allowance from the complainant's parents.

917. In the absence of telephone recording, the Ombudsman was unable to ascertain the details of the conversations between the complainant and the SWD officer. However, the Ombudsman considered that both Rules (1) and (2) were crucial information and should have been cited together by the officer when answering the complainant's enquiry.

918. In view of the above, the Ombudsman considered the complaint partially substantiated.

Other Observations

919. This case also showed that Rules (1) and (2) are essentially contradictory. Rule (2) is based on the principle of compassion to care for the elderly and disabled. The intent is commendable. However, when an elderly or disabled CSSA recipient is given a place of residence by his/her relative or friend, there is actually no increase in his/her disposable income. If SWD rigidly enforces Rule (1) and requires him/her to return one month's CSSA allowance, it might paradoxically cause substantial hardship to him/her for one whole month, and possibly even an absurd scenario of him/her "being wealthy enough to own his/her home, but having no money to feed himself/herself".

920. The Ombudsman, therefore, urged SWD to review the above issue.

Administration's response

921. SWD has reviewed Rules (1) and (2) under the CSSA Scheme. As the CSSA Scheme is entirely funded by general revenue, the Government has the responsibility to make reasonable allocation of the resources and ensure the sustainability of the social security system. SWD therefore needs to impose income and asset tests under the CSSA Scheme. In executing the income and asset tests, SWD needs to strike a fair balance. In making compassionate arrangements to allow elderly or disabled CSSA recipients to continue living in their original homes, SWD has to ensure that public funds are spent properly and are used to assist the needy families or persons.

922. According to the CSSA Scheme, all applicants for CSSA must pass both its income and asset tests. The rules concerning CSSA recipients with self-owned residential properties include the following –

(a) For the asset test (Rule (2)), the value of an owner-occupied residential property will be totally disregarded if any member in the household is old, disabled or medically certified to be of ill health; and

(b) For the income test (Rule (1)), any financial contributions (including financial support from family members or relatives) received by CSSA recipients for purchasing properties or other assets will be calculated as their "assessable income". The CSSA entitlement in the ensuing month will thus be adjusted, taking into account any amounts so received.

923. The above two rules are not contradictory to each other. Regarding the asset test, the waiver is based on compassionate grounds to allow elderly or disabled CSSA recipients to continue living in their original homes so that they can continue enjoying the established neighbourhood relationships. As regards the income test, CSSA recipients should first use their own economic resources, including financial support from relatives or friends, to cope with their basic necessities. This is in line with the objective of CSSA which is to act as a safety net of last resort for people in need.

924. Under the CSSA Scheme, the purchase of a residential flat is not considered as a basic necessity. If CSSA recipients are allowed the choice of using the funds/resources supplied by family members or relatives for individual exempted items (e.g. a self-occupied property), instead of coping with their basic necessities, this will defeat the purpose of the CSSA Scheme which is to act as a safety net of last resort.

925. Above notwithstanding, SWD concurred with The Ombudsman's view that both Rules (1) and (2) are crucial information, which should be cited together by SWD's officers when answering customers' enquiries. Frontline officers have been advised to improve their communication with the clients and provide them with relevant rules and regulations under the CSSA Scheme.

Social Welfare Department and Food and Environmental Hygiene Department

Case No. 2011/4073A – Failing to take any enforcement action against suspected unauthorised hawking activities carried out in the name of charity sale

Case No. 2011/4073B – Failing to suspend the charity sale by a charitable organisation immediately on learning that the organisation had allegedly transferred its Public Subscription Permit to hawkers for profit-making hawking activities

Background

926. The complainant alleged that a charitable organisation (Organisation A) had illegally transferred its Public Subscription Permit (PSP) obtained from the Social Welfare Department (SWD) to some hawkers for profit-making activities. Subsequent media coverage of the allegation was investigated by the Police. However, SWD failed to protect public interests by suspending Organisation A's public charity sale immediately. The complainant considered this a case of ineffective control on the part of SWD.

927. Besides, the complainant reported to the Food and Environmental Hygiene Department (FEHD) a hawker stall in operation at an approved site for Organisation A's charity sale, where no sign was displayed to show that the stall was operated by the organisation for charity sale. He was dissatisfied that FEHD staff had only conducted a site inspection without taking any enforcement action.

The Ombudsman's observations

928. The Ombudsman's investigation revealed that SWD had in fact followed up the complainant's allegation by making enquiry with Organisation A about the media report and referring the case to the Police. It was not unreasonable of SWD to decide not to cancel/suspend the organisation's fund-raising activities, as there was insufficient evidence of a serious breach/a criminal offence having been committed.

929. Nevertheless, this case reflected SWD's lax monitoring of fund-raising activities of organisations with PSPs. The video recording provided by the complainant showed that Organisation A might have illegally transferred its PSP to hawkers for profit-making activities and a number of PSP conditions had apparently been breached. SWD should have checked with FEHD the situation as shown on the video recording and demanded an explanation from Organisation A.

930. As to whether there was any sign at the stall showing that Organisation A was conducting a charity sale, The Ombudsman considered that since the issue was outside FEHD's purview, it was not improper of FEHD staff to refrain from taking action there and then.

931. Based on the above analysis, The Ombudsman considered the complaint against SWD substantiated other than alleged, and the complaint against FEHD was unsubstantiated.

932. However, there were inadequacies in FEHD's criteria for approving licence exemption and its monitoring of charitable activities. FEHD also lacked a reporting mechanism to alert SWD of suspected irregularities of charitable organisations. Both SWD and FEHD should review their practices in this regard.

933. The Ombudsman recommended that SWD judiciously handle complaints against charitable organisations for non-compliance with PSP conditions. It should take decisive actions (including suspension of the fund-raising activities) in serious cases to protect public interests.

934. The Ombudsman recommended that FEHD should notify other relevant departments when irregularities were found in the fund-raising activities of organisations granted licence exemption and, where appropriate, initiate prosecutions against "unlicensed hawking".

Administration's response

935. SWD accepted The Ombudsman's recommendation and will continue to take timely and decisive actions in handling complaints against charitable organisations for non-compliance with PSP conditions as follows –

(a) Once SWD receives a complaint related to PSP, immediate follow-up action will be taken to ascertain if there is any breach

of PSP conditions by the permit holder. Based on all the evidence available, including photos and videos provided by the complainant, the Police investigation and the explanation of the organisation in question, SWD will prudently consider if the complaint is substantiated;

(b) if there is sufficient evidence to substantiate the complaint that the organisation in question has breached the PSP condition with serious violation or committed any criminal act, SWD will immediately revoke the PSP issued to the organisation or suspend its fund-raising activities approved by the PSP to protect public interest;

(c) in case that there has yet to be sufficient evidence to prove that the organisation in question has breached the PSP condition with serious violation or committed any criminal act and the case has been under police investigation, SWD will prudently withhold the processing of other fund-raising applications of the organisation in question until the result of police investigation is available. SWD will also suspend the fund-raising activities approved by the PSP if there is sufficient legal justification; and

(d) if a charitable organisation has repeatedly breached the PSP conditions despite SWD's warnings, SWD will take special monitoring measures, including processing the organisation's future application for PSP by two batches. Approval for the organisation's fund-raising activities in the second stage will only be given if PSP conditions have not been breached in the first stage.

936. FEHD accepted the recommendation and has reminded hawker control staff have been reminded to stay vigilant when inspecting activities carried on by charitable organisations. Any irregularity detected would be brought to the attention of the department(s) concerned, including SWD, the Police or the Home Affairs Department by phone. Hawker control staff would also issue written referral to the department(s) concerned as appropriate with details of the suspected illegal fund-raising activities for their follow-up actions. Should there be sufficient evidence showing that an illegal hawking offence has been committed, hawker control staff would proceed with prosecution under section 83B(1) & (3) of Public Health and Municipal Service Ordinance (Cap. 132) against the offender(s) accordingly.

Social Welfare Department and Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit)

Case No. 2012/3140A (Efficiency Unit) – (1) Failing to respond to the complainant's complaint against a Government department; and (2) Providing the complainant's telephone number to the Government department without the complainant's consent

Case No. 2012/3140B (Social Welfare Department) – (1) Failing to arrange another officer to take care of a disabled person who was under legal guardianship of the Director of Social Welfare when the case officer was on leave; (2) Improper response to the complainant's enquiry about the health condition of the disabled person; and (3) Assigning the officer under complaint to handle the complainant's complaint

Background

937. On 6 September 2012, the complainant lodged a complaint with the Office of The Ombudsman against the Social Welfare Department (SWD) and the 1823 Call Centre (the Call Centre) under the Efficiency Unit (EU).

938. According to the complainant, he was a doctor who regularly gave medical consultations at a hospital. One of his patients (Patient A) was a student of a special school, and was severely mentally retarded and wheelchair-bound. The complainant offered Patient A medical treatment in curing warts on several occasions, one of which was to conduct warts removal operation. As the written consent of the guardian of Patient A was required for conducting the operation, the complainant came to know that Patient A had no relatives and her guardian was Social Worker A from an Integrated Family Service Centre (IFSC) of SWD.

939. On 29 June 2012, Patient A was escorted by two escort workers to meet the complainant at the hospital for a follow-up consultation. After examination, the complainant was worried that Patient A did not get proper care at school and called Social Worker A immediately, but no one answered. So the complainant reflected the situation to another staff member of IFSC, but was informed that "Social Worker A would know nothing as she was not a family member of Patient A". Later, the

complainant learnt from another IFSC staff member that Social Worker A was on leave until 3 July.

940. Between 4 and 7 July, the complainant called Social Worker A again but still could not reach her. He left a call-back message, and dialled another phone number as per Social Worker A's instruction recorded in the telephone system, but there was still no answer. On 10 July, the complainant called the Call Centre to complain against SWD.

941. After about two weeks, while the complainant was attending to patients in his hospital, Social Worker A accompanied Patient A to the hospital for a follow-up consultation. After the consultation, Social Worker A requested to talk to the complainant. During the conversation, Social Worker A did not explain in detail whether the school provided proper care for Patient A, or why she did not respond to the complainant's calls.

942. As at 31 August, the complainant did not receive any reply from the Call Centre. He therefore called the Call Centre to check the progress of his case and was told that his case had been closed. On 1 September, an Assistant Manager of the Call Centre called the complainant and explained that SWD emailed the Call Centre on 12 July, saying that the case was completed. However, the Assistant Manager did not explain why the Call Centre had not reported the progress of the case to him.

943. On the same day, the Supervisor of IFSC told the complainant that Social Worker A had met him and explained the issue, and SWD had informed the Call Centre of the situation on 12 August. The complainant questioned why the staff member being complained against, i.e. Social Worker A, was tasked to handle his complaint and explain things to him. The Supervisor explained that she was on leave at that time, so Social Worker A contacted the complainant on her behalf. The complainant also questioned why SWD had got his mobile telephone number, and the Supervisor told him that the number was provided by the Call Centre.

944. On the above incident, the complainant complained against –

SWD

(a) It did not arrange an replacement officer to perform the duties of a guardian of Patient A during the period of time when Social Worker A was on leave;

(b) it was unreasonable for an officer of IFSC to say that Social Worker A, not being a family member of Patient A, would have no knowledge of Patient A's health condition;

(c) it was inappropriate to arrange Social Worker A to handle the complaint, which was against herself;

Call Centre

(d) for failing to properly follow up on and reply to his complaint; and

(e) for providing his personal information, including mobile telephone number, to SWD without his consent.

The Ombudsman's observations

Allegation (a)

945. The Ombudsman was of the view that SWD did arrange another officer to follow up the duties regarding Patient A during Social Worker A's leave, and that the guardianship case of Patient A had continuously been monitored according to established mechanism. Allegation (a) was therefore not substantiated.

Allegation (b)

946. SWD had accepted that the officer had made inappropriate remarks and agreed to improve, Allegation (b) was substantiated.

Allegations (c) & (d)

947. After reviewing relevant records, the Office of The Ombudsman believed that –

(a) upon receipt of the referral of complaint from the Call Centre on 10 July 2012, SWD has, in accordance with the established procedures, informed the District Social Welfare Officer, through whom the complaint was directed to an acting director of IFSC (Director B), but not Social Worker A, for follow-up; and

(b) Director B had replied to the Call Centre via email on 12 July 2012 to report on the follow-up situation of the complaint.

948. That said, the Office of The Ombudsman was aware that –

(a) in its e-mail to SWD on 10 July 2012, the Call Centre enclosed the details of the complaint including the complaint's request that SWD should call him to give him a reply; and

(b) in its reply e-mail to the Call Centre, SWD –

(i) did not expressly ask the Call Centre to relay its reply to the complainant; and

(ii) did not use a prescribed template for the reply, but only asked the Call Centre to relay its response to the complainant.

949. The Office of The Ombudsman opined that, Allegations (c) and (d) were arisen from the fact that SWD did not call the complaint to give him a reply as he requested, and that there was miscommunication between SWD and the Call Centre; while SWD did not clearly ask the Call Center to relay the reply to the complainant, the Call Centre failed to clarify with SWD regarding the remarks as to whether it would like the Call Centre to relay the reply.

950. Based on the above analysis, The Ombudsman considered that Allegation (c) against SWD substantiated other than alleged; and Allegation (d) against the Call Centre partially substantiated.

Allegation (e)

951. The Office of The Ombudsman had listened to the recording of the telephone conversation between the complainant and the officer of the Call Centre on 10 July 2012, although the officer was unable to finish the question as to whether the complainant was willing to disclose his telephone number to SWD, noting from the conversation, the complainant did not object to having "direct contact" from SWD. The Ombudsman therefore considered that it was reasonable for the Call Centre to provide the complainant's mobile telephone number to SWD, and Allegation (e) was not substantiated.

952. Overall speaking, the complaints against SWD and EU were both partially substantiated.

953. The Ombudsman recommended that SWD to –

(a) ascertain carefully upon receipt of a complaint referral from the Call Centre whether the complainant has requested a direct reply from SWD; and

(b) clearly advise the Call Centre to make a reply on behalf of SWD if a direct reply to the complainant is considered not appropriate.

954. The Ombudsman suggested EU to remind the Call Centre to examine the contents and format of replies from departments to determine whether the Call Centre should reply on their behalf. Clarification should be sought from departments immediately if in doubt.

Administration's response

955. SWD accepted the Ombudsman's recommendations and has taken the following actions –

(a) SWD has reminded its staff of the proper procedures in handling cases referred by the Call Centre. If it is considered more appropriate for the Call Centre to reply on behalf of SWD, SWD should clearly ask the Call Centre to do so; and

(b) in the light of the above complaint case, SWD will, on the advice of the Ombudsman, closely monitor cases where replies are made to the Call Centre.

956. EU accepted The Ombudsman's recommendation. When the Call Centre refers a case to a department, a template will be provided for reply so that the department can explain the progress and advise the Call Centre whether it needs to relay the reply to the complainant. The Call Centre has reminded SWD to use the template to provide replies in future, to ensure that messages are communicated accurately. EU has also reminded staff in the Call Centre that when a reply is received from a department, it should examine the contents and format carefully to confirm whether the reply should be relayed to the complainant. Clarification should be sought from the department immediately if in doubt.

Transport Department

Case No. 2012/1403 – Unfair treatment in rejecting the complainant's applications for residents' bus service and selective enforcement in terminating its coach service

Background

957. The complainant lodged a complaint against the Transport Department (TD) for unfair treatment in rejecting the application of a residential development (the Development) for Residents' Service (RS) and selective enforcement in terminating its coach service.

958. Over the years, TD has rejected the Development's several applications for operating RS provided by non-franchised buses[6] (NFBs). Since its occupation in 2004, the Development had been using unauthorised coach service. In May 2012, the coach service was terminated by TD.

959. The complainant was dissatisfied that, while TD rejected repeated RS applications for the Development on the ground that it was located very close to public transport facilities, it approved the RS for other residential developments in the area which were also located very near to public transport facilities. The complainant considered that TD was unfair in rejecting the RS applications for the Development, and was taking selective enforcement in terminating the Development's coach services.

The Ombudsman's observations

960. The Office of The Ombudsman considered that TD's enforcement actions in 2011 to terminate the unauthorised RS service for the Development justified, bearing in mind that such service might not have valid insurance to cover the passengers on board. There was also no evidence suggesting TD selectively targeting the Development for enforcement, as TD had been taking enforcement actions against unauthorised NFB services throughout the territory.

---

[6] NFBs play a supplementary role in the public transport system to relieve heavy demand on regular public transport services primarily during peak hours and to fill gaps of passenger demand that cannot be met by regular services.

961. Separately, the Office of The Ombudsman agreed that TD had sufficient justifications to turn down the RS application for the Development, as it was close to a Light Rail (LR) station and the proposed RS would overlap to a large extent with the catchment area of the LR. Site visit by the Office of The Ombudsman also indicated that the walking time from the Development to the nearest LR station was just two minutes. Besides, TD's surveys showed that the LR service had sufficient capacity to meet the current demand. As such, the Office of The Ombudsman agreed that the proposed RS could not meet the established approval criteria for an RS and TD's decision to reject the application was justified.

962. As for the complainant's discontent against TD's decision to approve the RS for another residential development in the vicinity, the Office of The Ombudsman had concerns over TD's assessment procedures, in particular the measurement of walking distance from the development concerned and the nearby public transport facilities. The Office of The Ombudsman noted that TD had to consider many factors in assessing an RS application, and some could not be measured objectively. Further, accessibility was only one of the criteria in determining whether an RS application should be approved. Whilst the Office of The Ombudsman did not find any evidence indicating that TD's approval of the RS application for the other residential development was improper, it suggested TD specifically and objectively define the way and standardise the procedure to measure the walking distance between a residential development and public transport facilities nearby.

963. The Office of The Ombudsman therefore considered the complaint unsubstantiated but TD's vetting procedures show room for improvement.

964. The Ombudsman suggested that TD should consider putting in place a guideline, or beefing up its existing internal departmental instructions, to set out in detail the vetting procedure for RS applications, in particular on how "walking distance" should be assessed. The guideline should set out the methodology (e.g. starting point and route to be chosen), criteria (e.g. benchmark distance), as well as the procedures (e.g. whether site visits should be conducted) as far as possible. Once the new guidelines or departmental instructions are in place, any subsequent RS applications (including renewal applications) should be assessed in accordance with the latest standards and procedures.

Administration's response

965. In response to the recommendation of The Ombudsman, TD is reviewing relevant parts of its internal Departmental Instructions to see how best to incorporate criteria and methodology to measure walking distance between a residential development and a major public transport facility nearby.

Transport Department,
Lands Department and Home Affairs Department

Case No. 2011/3089A, B&C – Failing to properly handle unlawful occupation of Government land for 30 years

Background

966. The complainant alleged that for many years a piece of unleased Government land (the Site) had been unlawfully occupied for different purposes such as car parking, but the Lands Department (LandsD), the department responsible for managing the site, had failed to properly handle the issue. Moreover, the complainant noticed that the Transport Department (TD) had carried out improvement works on the Site, which would in effect encourage illegal parking. The Home Affairs Department (HAD) had also done nothing to follow up the issue at the district level.

The Ombudsman's observations

967. The Site was located right between busy roads and village houses, and yet the Government departments concerned had allowed unlawful occupation of Government land for illegal parking, hawking and other purposes to continue for more than 30 years. They had neither taken any enforcement action nor regularised those illegal activities. Rather, an improvement project was carried out at the vehicle access point, which was in effect an encouragement to illegal parking. It was embarrassing to the Administration. The Office of The Ombudsman considered that the departments concerned should be held responsible.

968. As the department responsible for managing unleased Government land, LandsD had merely relied on other departments such as the Police and Food and Environmental Hygiene Department (FEHD) to clamp down on the illegal activities. It paid little attention to the effectiveness of those actions and failed to follow up. While there might be constraints under the Land (Miscellaneous Provisions) Ordinance for LandsD to take enforcement action against activities like illegal parking and hawking as it had stressed, LandsD still could not stay away from the issues entirely. Rather, as the problems had continued for years after its

referral to other departments, LandsD ought to find other solutions.

969. After taking into account the views from HAD and TD, LandsD simply relied on the suggestion from HAD and decided to maintain the status quo. In fact, HAD had also advised that LandsD could consider providing additional parking spaces to resolve the illegal parking problem.

970. LandsD had delayed giving priority to the case. This would give people an impression that LandsD was trying to favour those with vested interest by not taking enforcement action, thereby undermining public faith in the law enforcement authorities. If LandsD considered the condition of the Site tolerable, it should consider regularising it so that necessary control action could be taken and reasonable rent collected.

971. The Office of The Ombudsman did not accept that TD should handle the issues of illegal parking and road safety separately. Even though the problem of illegal parking on the Site should be resolved in line with the decision of the land control authority, TD should render assistance. As illegal parking on the Site had existed for decades, if TD continued to cite the availability of parking spaces in the vicinity when assessing whether the Site should be designated as a fee-charging car park, the long-standing problem of unlawful occupation of the Site could hardly be resolved. If TD believed that there were adequate parking spaces, it should indeed refute the suggestion from HAD and support the elimination of illegal parking.

972. Moreover, while TD did not see the need to provide additional parking spaces on the Site, it proposed improvement works in order to ensure pedestrian safety and maintain the status quo. What TD did was self-contradictory and redundant. It could also be perceived as a measure to benefit those with vested interest.

973. Expecting strong opposition from the villagers, HAD suggested that LandsD should maintain the status quo if there was no road safety hazards. This had become a convenient excuse for LandsD not to take enforcement and control actions. While it was the duty of HAD to reflect the villagers' views and expectations, the Office of The Ombudsman considered that HAD should balance the views of different parties and find a sensible, reasonable and lawful solution.

974. In view of the above, The Ombudsman considered the complaint against TD partially substantiated and the complaints against LandsD and HAD substantiated.

975. The Ombudsman recommended that –

TD

(a) to take a broader perspective in its future discussions with other departments regarding the long-term solution to the unlawful occupation of Government land and consider the opinions of various parties, such as the feasibility of regularising illegal parking;

LandsD

(b) to actively liaise and discuss with HAD, TD, the Police and other departments concerned for a long-term solution to the unlawful occupation of the Site;

(c) to liaise and discuss with other departments concerned on ways to determine the temporary and long-term uses of the Site; and

HAD

(d) to closely follow up the problem of unlawful occupation of the Site and liaise with the departments concerned, local organisations and villagers to seek temporary and permanent solutions to the problem.

976. The Ombudsman was pleased to note that the three departments concerned accepted his recommendations.

Administration's response

977. LandsD accepted The Ombudsman's recommendations and has taken the following follow-up actions –

(a) In March 2013, LandsD, together with the relevant departments including HAD, TD, FEHD and the Police, carried out a joint clearance and control operation at the Site. LandsD will continue to closely monitor the Site to prevent relapse of the problem; and

(b) government departments are also considering the long-term use of the Site.

978. The District Office of HAD accepted the recommendation of The Ombudsman. The District Office has coordinated inter-departmental meetings with the relevant government departments, namely LandsD and TD and formulated solutions to the problem in accordance with The Ombudsman's recommendation. The District Office has also liaised with the relevant Rural Committee, village representatives, District Council members of the relevant constituency and other stakeholders in order to collect their views.

979. TD will continue to communicate closely with relevant Government departments and stakeholders on the long-term use of the Site and to provide advice and assistance from traffic engineering and management perspectives.

Part III
– Responses to recommendations in direct investigation cases

Food and Environmental Hygiene Department and Lands Department

Case No. DI/231 – Regulatory Measures and Enforcement Actions against Illegal Extension of Business Area by Restaurants

Background

980. Alfresco dining (for example, in piazzas, on pedestrian passageways or underneath footbridges) had always been popular among some people. Restaurant operation outside the boundary of licensed premises did not constitute a serious offence, but in densely populated districts where space was limited, such activities often led to obstruction of streets, caused environmental hygiene and noise problems, and brought nuisance to upstairs and nearby residents. Food and Environmental Hygiene Department (FEHD), the licensing authority of restaurants, had failed to effectively curb or contain the problem, despite its regulatory and enforcement actions. Lands Department (LandsD) had also seldom taken enforcement actions against illegal occupation of Government land by restaurants, although it was responsible for land administration.

981. In light of this, The Ombudsman had conducted direct investigation. This direct investigation aimed to identify any inadequacies and room for improvement in the current regulatory and enforcement regime.

982. The Ombudsman recommended –

FEHD

(1) to actively explore the best use of existing resources and relevant legislation, consider setting up a taskforce comprising Health Inspectors and Hawker Control Officers (HCOs), deploying more manpower and using diverse strategies to deal with unauthorised food operations in public places; before these could be implemented, to allow HCOs more participation in dealing with the problem so as to increase FEHD's enforcement strength;

(2) based on the situation of each district, to set objectives and formulate strategies for tackling illegal extension of business area by restaurants;

(3) to conduct targeted raids on recalcitrant offenders, taking more frequent enforcement actions against them, making arrests and seizure of articles;

(4) to exercise more stringent control on those unlicensed restaurants which persistently extend their business area outside their premises, conducting more frequent inspections and bringing more prosecutions, applying for closure orders from the Court, as well as publicising information about those restaurants through the media and uploading such information on FEHD's website for easy public access;

(5) to continue to submit charge records of offenders to the Court in the hope that it would impose heavier penalties on them;

(6) to consult the District Councils (DCs), which represent the local communities, on its enforcement plans, seek their views and support for the purpose of gaining public recognition and reducing resistance from those who are benefiting from illegal operations;

(7) to consider amending the relevant legislation to simplify the mechanism for appeal against suspension or cancellation of licences from three-tier to two-tier;

(8) except under very special circumstances, to refrain from withholding the suspension or cancellation of licences pending appeals by restaurant licensees; to draw up relevant assessment criteria and procedures;

(9) to consider extending the applicability of the non-standard licensing requirements of prohibiting encroachment on Government land or common passageways to all premises under application for restaurant licences;

(10) to lengthen the "observation period" before the issuance of provisional licence;

(11) in respect of an applicant whose restaurant licence has previously been cancelled due to repeated offences, to refuse to process, for a specified period of time, his/her application, or an application made by his/her representative, for any restaurant or related licence in relation to the same premises;

(12) to consider, in the long term, how to restrict applications from recalcitrant offenders for restaurant or related licences in relation to any premises;

(13) to suggest to DCs the designation of spots for alfresco dining in suitable areas, and to facilitate applications from restaurant operators for setting up outside seating accommodation at those spots;

(14) to deliberate with the Home Affairs Department on how to balance stakeholders' interests with regard to public consultation on applications for setting up outside seating accommodation; and

LandsD

(15) to study with the Department of Justice (DoJ) on how to more effectively exercise statutory powers to tackle illegal occupation of Government land by restaurants, in fulfillment of its responsibility as Government land administrator;

(16) subject to the outcome of their study, to actively support FEHD in rigorous actions against recalcitrant offenders; and

(17) subject to the outcome of their study, to review with the Steering Committee on District Administration the arrangement whereby Lands D only deals with illegal occupation of Government land involving structures of a "more permanent nature".

Administration's response

983. The Administration generally accepted recommendation (1). A taskforce comprising Health Inspector grade officers had been established on a pilot basis to step up enforcement against unauthorised food operations in public places at targeted blackspots. Hawker Control Team (HCT) staff is not deployed to the taskforce to take part in inspecting and prosecuting restaurants for illegal extension of business area. This is because HCT staff is mainly responsible for management of hawkers, taking enforcement actions against unauthorised extension of business area by shops (such as pharmacies, fruit shops, etc.) and prosecution for littering. To deploy HCT staff to the taskforce will have substantive implication on the entry requirements, training, scope of work, duties and responsibilities, and management of HCT staff. Nevertheless, as and when the taskforce requires assistance as to the seizure of tables/chairs and the maintenance of order at the scene, FEHD will, depending on the operational requirements in each case, deploy HCT staff to support the taskforce in its enforcement actions where necessary and appropriate.

984. The Administration accepted recommendation (2). Taking into account the severity of the problem of illegal extension of business area by food premises in different districts, FEHD will set objectives, formulate strategies, and review and adjust the enforcement strategies with regard to its resources and work priorities.

985. The Administration accepted recommendations (3) to (6). FEHD will consult the DCs and seek their support in respect of adopting more stringent enforcement measures against food premises with illegal extension of business areas in public places. Subject to available resources and support from the relevant DCs and other departments (e.g. the Police), FEHD will consider employing targeted tactics against recalcitrant food premises in addition to its regular enforcement actions. These tactics include increased frequency of prosecutions as well as arrests of offenders and seizure of articles. Application will also be made to the Court for closure orders to close unlicensed food premises with illegal extension of the business area in public places where appropriate. Information on the unlicensed restaurants on which closure orders are executed will be made available to the public through the media and press releases uploaded to FEHD's website. FEHD will also continue to submit relevant information to assist the Court in its consideration of the level of penalties.

986. Recommendations (7) and (8) are under consideration by the Administration. To prevent some licensees from making use of the appeal mechanism to delay the execution of penalties, FEHD adopts the "non-stay" approach in notorious and recalcitrant cases i.e. it does not exercise discretion to withhold suspension or cancellation of licence pending determination of the appeal by the appeal tribunal. FEHD has reviewed the practice and adopted the non-stay approach with effect from 28 May 2013. FEHD will monitor the effectiveness of the non-stay approach. Meanwhile, for restaurants which are not located at blackspots and do not have a history of abusing the appeal mechanism, FEHD considers it appropriate to continue with the existing practice of withholding suspension or cancellation of licence pending determination of the appeal. FEHD will revisit this practice in its study of the recommendation to de-layer the appeal mechanism.

987. The Administration also needs to deliberate further on recommendation (9). In respect of applications for restaurant licences at premises with a history of illegal outside seating accommodation (OSA), FEHD will impose a non-standard requirement (NSR) in the licensing requirements for provisional licence (P-licence), requiring the applicants not to encroach on any government land or common passageway beyond the confines of their premises. The P-licence will not be granted if illegal extension of business area by the food premises persists during processing of the application for P-licence. Since the provisional licensing system is introduced as a business facilitation measure, if the above-mentioned NSR is extended indiscriminately to cover all premises under application for a restaurant licence, the time required for the issue of a P-licence for all applicants would be lengthened due to the need to check against records of non-compliance during the application processing period. FEHD needs to carefully consider whether the extension of this NSR to all restaurant licence applications is appropriate as a tool for tackling the illegal OSA problem, which tends to concentrate at certain premises. FEHD would review the need for implementation of this recommendation against the effectiveness of other enhanced enforcement actions we are putting in place.

988. The Administration accepted recommendation (10). Effective from 29 May 2013, FEHD has extended the observation period from two weeks to eight weeks. If there is any prosecution against offence related to illegal OSA in respect of the premises under application for food business licence, the full licence will not be issued until the premises are free of OSA-related offences for a clear period of 8 weeks.

989. The Administration accepted recommendation (11). Effective from 19 July 2013, FEHD would refuse a former licensee's application for the same type of food business licence in respect of the same premises for 12 months after the licence was cancelled due to repeated breaches related to illegal OSA offences.

990. The Administration needs to further deliberate recommendation (12). FEHD has implemented a series of regulatory measures to crack down on illegal OSA. FEHD will review the effectiveness of these measures before ascertaining whether it is necessary to impose further restrictions on the applications by repeated offenders for a food business licence in respect of other premises.

991. The Administration accepted recommendations (13) and (14). FEHD is seeking views from DCs on the designation of suitable spots for alfresco dining. Subject to views from DCs, FEHD will deliberate together with HAD how to balance the interests of various stakeholders with regard to applications for OSA.

992. The Administration accepted recommendations (15) to (17) and as per recommendation (15), the Administration has sought the advice of DoJ again on the constraints of invoking the Land (Miscellaneous Provisions) Ordinance in handling cases involving easily movable objects. The Administration is following up on recommendations (16) and (17).

Fire Services Department and Hospital Authority

Case No. DI/243 – Conveyance of Patients by Ambulance to "Area Hospitals"

Background

993. Fire Services Department (FSD) is responsible for conveying patients by ambulances to the accident and emergency departments of hospitals for emergency treatment. According to the agreement between FSD and Hospital Authority (HA), the territory is divided into 20 areas (catchment areas). In general, ambulances must take patients to the designated hospitals or clinics within the hospital catchment areas[7] (area hospitals) where patients are located.

994. Nevertheless, an area hospital may not necessarily be the hospital closest to the location of a patient. There are concerns that the current fixed rule for ambulancemen to take patients "in critical condition" (e.g. cardiac arrest or serious respiratory distress) to area hospitals may lead to serious consequences because of the delay caused by longer travelling time.

995. In view of above, The Ombudsman initiated a direct investigation to examine the current arrangement for conveying patients in critical condition to an area hospital, with a view to identifying whether there may be any inadequacies and room for improvement.

996. The Ombudsman recommended FSD and HA to –

(a) provide special arrangements under the current system: patients in critical condition should be taken to the nearest hospital if the area hospital is not the nearest one;

(b) provide proper training and draw up clear guidelines for ambulancemen, including the definition of patients in critical condition, to facilitate implementation of the measure in (a) above; and

[7] Unless in special circumstances, such as patients are in "severe trauma" or involved in "large-scale accidents", etc.

(c) set up a regular review mechanism and maintain contact with various stakeholders (including frontline ambulancemen), so as to introduce the measures in (a) and (b) above gradually.

Administration's response

997. FSD and HA generally accepted The Ombudsman's recommendations and have taken the following actions –

(a) FSD and HA have set up a working group comprising HA's Accident and Emergency doctors, FSD's Medical Director and representatives of ambulance service, etc to follow up the implementation of the Ombudsman's recommendations;

(b) FSD and HA have agreed on a special arrangement on the conveyance of patients in critical condition. Since late July 2013, patients in critical conditions in cases of cardiac arrest or respiratory arrest will be conveyed to the nearest hospitals; and

(c) the working group of HA and FSD will conduct regular reviews on the effectiveness of the special arrangement and explore the feasibility of extending the special arrangement to patients of other types of critical conditions.

Government Secretariat – Home Affairs Bureau

Case No. DI/269 – Administration of Government Policy on Private Recreational Leases

Background

998. For many years, in order to meet the shortage of recreational and sports facilities in Hong Kong, Government has granted land at nil or nominal rent by way of Private Recreational Leases (PRLs) to some organisations to establish and operate sports clubs. Such organisations comprise private bodies committed to promoting sports development and providing recreational facilities, social welfare organisations, uniformed groups, national and district sports associations and civil servants associations. The facilities of the sports clubs are dedicated for use mainly by their members.

999. These sports clubs are funded by fees collected from members or facility users, or money raised by the clubs themselves. At present, there are altogether 73 PRLs granted to various sports clubs, with a membership of over 700 000.

1000. PRLs were generally for a term of 15 years. As at 30 June 2012, 55 of the 73 PRLs had expired. Most of the sports clubs concerned had applied for renewal of their leases.

1001. Home Affairs Bureau (HAB) is responsible for administering the policy on granting land by way of PRLs for establishing and operating sports clubs (the PRL policy). The PRL policy and lease conditions stipulate that all sports clubs shall open their sports facilities for use by "eligible bodies" when requested by "competent authorities". The competent authorities are responsible for vetting the applications to use the sports facilities of the sports clubs submitted by eligible bodies within their respective purview.

1002. In light of this, The Ombudsman conducted a direct investigation, aimed at assessing –

(a) the PRL policy hitherto administered by HAB; and

(b) at the juncture of the current PRL renewal exercise, the merits of the arrangements proposed by HAB to enhance public access to sports club facilities.

1003. The Ombudsman urges HAB to –

(a) take into account fully public interests when vetting and revising the Scheme to Implement the Greater Access Requirements ("the Scheme") of the sports clubs such that they would make their sports facilities as readily accessible as possible to meet the needs of eligible bodies;

(b) strengthen the publicity arrangements concerning the opening of the sports facilities of the sports clubs, including requiring the various competent authorities to disseminate the relevant information to those eligible bodies within their purview, while checking closely whether the competent authorities and the sports clubs have uploaded such information on to their websites;

(c) implement with vigour its measures to monitor the sports clubs' compliance with the lease conditions and the Schemes, including the setting up of the electronic database, frequent random checks and immediate actions to rectify inadequacies where necessary;

(d) enhance the mechanism for handling complaints regarding the opening of sports facilities and, in particular, stipulate clearly who has the authority to make the final decision in case of disputes; and

(e) embark on a comprehensive policy review as soon as possible, involving wide public consultation.

Administration's response

1004. HAB accepted all recommendations made by The Ombudsman and has taken the following actions –

(a) HAB has worked with PRL lessees to increase considerably the extent which their facilities are open to outside bodies. Accordingly, lessees have committed to open up their facilities as follows (the hours/bed-night shown are on a monthly basis) –

(i) Lessees mainly operating sports facilities (31)

Number of hours	No. of PRLs
1000 hours or above	11
750-999 hours	0
500-749 hours	7
250-499 hours	12
60-240 hours	1

(ii) lessees mainly operating camping facilities (16)

Number of occupancy in terms of bed-night	No. of PRLs
4000 or above	4
3000-3999	2
2000-2999	6
1000-1999	3
60-999	1

(b) HAB has implemented the following measures to increase publicity on the availability of sports facilities run by the lessees –

(i) Relevant information has been uploaded to the HAB website. Separately, competent authorities have more frequently advised institutions under their purview of the arrangements for hiring sports facilities at lessees' premises, as well as uploading information on PRLs to their websites. HAB will remind various competent authorities to re-circulate such information among the institutions under their purview on a regular basis;

(ii) advertisements have been placed in local newspapers and magazines to publicise the availability of sports facilities at premises operated under PRLs. This exercise will be repeated; and

(iii) lessees have been asked to provide more detailed relevant information on their websites. HAB will follow up on the issue.

(c) HAB has taken the following steps to enhance the monitoring of lessees' opening-up of their sports facilities –

(i) Developing a database to allow HAB to strengthen its monitoring of lessees' publicity and usage rates of facilities;

(ii) requiring all lessees to submit reports on the usage rates of their sports facilities; and

(iii) requiring competent authorities to submit regular reports on requests submitted through them by outside bodies.

(d) HAB will promulgate the arrangements for handling complaints lodged by eligible bodies regarding the usage of lessees' sports facilities; and

(e) HAB is liaising with relevant bureaux and departments to prepare for a comprehensive review of the PRL policy.

Housing Department

Case No. DI/274 – Recovery of Mortgage Default Debts

Background

1005. It is the policy of the Hong Kong Housing Authority (HKHA) to issue mortgage default (MD) guarantees for properties sold under the Home Ownership Assistance schemes in order to secure favourable borrowing terms from the banks for the buyers. Where a property owner defaults on the mortgage, the bank may foreclose and sell the property, and where the proceeds of sale are insufficient to cover the outstanding loan, the bank may make a claim to the Housing Department (HD), the executive arm of HKHA, for the shortfall. After settling the MD claim, HKHA is entitled to subrogate the bank's rights to the loan. HD, as the executive arm of HKHA, will have both the right and the duty to chase the ex-owner for the recovery of the shortfall.

1006. Through a complaint case, The Office of The Ombudsman came to know that although HD had been settling MD claims since 1991, it only started chasing ex-owners for the MD debts 18 years later in 2009.

1007. Against this background, The Ombudsman initiated a direct investigation to examine the magnitude of the problem and whether there was room for improvement in HD's debt recovery arrangements.

1008. The Ombudsman recommended that HD should –

(a) draw lessons from this experience and adopt a more alert and vigilant approach in managing public money in future;

(b) review the operational arrangements to ensure that the appropriate order of priority is followed in handling the case work. HD should consider, among other things, whether effort should continue to be made to pursue time-barred and deceased-debtor cases, taking into account the effectiveness of such efforts, the resources available and the existing case backlog;

(c) review the workflow with a view to streamlining the procedures, paying particular attention to, among other things, whether the

arrangements for searching addresses are efficient and whether the MD team can be given access to use more interview rooms;

(d) review carefully the guidelines and strengthen training for the staff;

(e) exercise due care and diligence in handling the MD debt cases and enhance monitoring of staff performance; and

(f) endeavour to meet the target of completing the firstround review of all the 4 407 cases by 2015-16 through staff redeployment or any other means.

Administration's response

1009. HD accepted all recommendations made by The Ombudsman and –

(a) will continue to adopt a vigilant approach in managing public money;

(b) has finished the review of operational arrangements, work procedures, relevant guidelines and the monitoring mechanism for MD debt recovery in September 2013. The Ombudsman has been notified of the result of the review and the progress of relevant follow-up actions;

(c) has given the MD team access to use more interview rooms for the handling of MD debt cases;

(d) has arranged monthly meetings and briefings to explain to the MD team the work requirements and review the work procedures and arrangements so as to enhance training for the staff and improve their work efficiency;

(e) will enhance the monitoring of staff performance; and

(f) will strive to meet the target of completing the firstround review of all cases by 2015-16 through streamlining the procedures. HD will also monitor the progress in a timely manner and deploy staff where necessary to achieve the target.

Leisure and Cultural Services Department

Case No. DI/221 – Booking and Use of Sports Facilities of Leisure and Cultural Services Department

Background

1010. The Office of The Ombudsman received complaints from time to time about sports facilities of the Leisure and Cultural Services Department (LCSD), mostly about their booking and use. Over the past two years, for instance, the Office of The Ombudsman has handled more than 50 such complaint cases.

1011. About 80% of the operating costs of LCSD sports facilities are subsidised by public funds. Users come from all walks of life in different age groups. It is, therefore, of utmost importance to ensure that members of the public have a fair chance to use the facilities and that abuse and wastage should be prevented as far as possible.

1012. In this connection, and pursuant to The Ombudsman Ordinance (Cap. 397), The Ombudsman announced on 5 July 2011 to initiate a direct investigation into the mechanism and arrangements regarding the booking and allocation of LCSD sports facilities with a view to identifying areas for improvement.

1013. The Ombudsman recommended that LCSD should –

Touting Activities

(a) consider shortening the advance booking period for individuals from the existing 30 days to, for example, 7, 10 or 14 days;

(b) consider reducing the maximum booking hours allowed for individuals (e.g. by limiting the combined total number of hours per day, per week or per month etc. for different facilities and venues);

(c) consider requiring individuals to use their identity cards only as identity documents for booking of venues (only individuals without identity cards may use their passports);

(d) consider introducing the arrangement for immediate payment for telephone reservations;

(e) consider taking administrative measures to curb the touting activities carried out by touts taking advantage of the priority booking rights enjoyed by limited companies;

(f) review the reallocation arrangement for hirers affected by bad weather, including considering shortening the 60-day advance booking period or cancelling the special arrangement of reallocation;

(g) continue to require staff to strictly follow the verification procedure to check the identity documents of all venue users;

(h) review the "stand-by" mechanism, including considering charging fees on "stand-by" users or abolishing the "stand-by" mechanism on a trial basis at facilities/venues where the problem is serious;

(i) consider imposing penalties on individuals who fail to show up for their reserved sessions;

(j) impose administrative penalties, such as suspending the eligibility to make bookings for a certain period of time, on individual hirers engaged in unauthorised transfer of user permits;

(k) consider actively stepping up efforts to investigate suspected cases and imposing appropriate administrative penalties when touting activities are blatant;

Booking by Individuals

(l) review the arrangement for block booking quotas in order to enhance transparency and improve the availability of venues for booking by individuals, including the following –

(i) setting quotas for the most popular time slots;and

(ii) increasing the transparency of the bookings made by the Home Affairs Bureau and LCSD (for example, setting separate quotas or including them in the quotas for booking by organisations);

(m) continue to explore further improvement measures to shorten the time needed for accessing the Leisure Link System during peak hours, such as increasing the system capacity and processing speed, as well as adding an automatic queuing function for online bookings;

(n) consider providing a computerised system for the booking of non-fee charging facilities;

(o) consider making the signing in arrangement more flexible, such as allowing a hirer to authorise at the time of booking another user to sign in;

Booking by Organisations

(p) carefully review and amend the unclear guidelines so that its staff members can be given adequate guidance and instructions;

(q) adopt improvement measures to better communicate with organisations (e.g. use of emails);

(r) consider shortening the notice period for cancellation of booking by organisations;

Use of Venues

(s) consider simplifying the procedure for cancelling individual bookings, including making arrangements for online cancellation or cancellation by telephone;

(t) review the penalty for organisations failing to use the booked venues;

(u) consider adjusting the opening hours of venues to increase supply; and

Overall

(v) fully consult its stakeholders before introducing major changes, continue to listen to the feedback of stakeholders and keep its system and arrangements under constant review in order to meet the needs of the public.

Administration's response

1014. LCSD generally accepted the recommendations made in the investigation report. A number of improvement measures have been introduced following a comprehensive review of the booking procedures for the facilities conducted before The Ombudsman launched the Direct Investigation.

1015. As at July 2013, LCSD has implemented 11 of the 22 recommendations made by The Ombudsman and expects to implement another seven recommendations by the first quarter of 2014. LCSD will then review the remaining four recommendations, conduct feasibility studies and assess their cost-effectiveness. Details of the response to The Ombudsman's recommendations are set out at **Annex**.

Transport Department and Highways Department

Case No. DI/223 – Effectiveness of Administration of Temporary Closure of Metered Parking Spaces during Road Works Carried out by Public Utilities

Background

1016. The Office of The Ombudsman noted from complaint cases that some metered parking spaces have been closed for periods much longer than actually necessary for the approved road excavation works. In view of the limited number of metered parking spaces and the high demand for such facilities, the Office of The Ombudsman considered that closure should be kept to the minimum.

1017. The Office of The Ombudsman's preliminary examination showed some deficiencies in Transport Department's (TD) and Highways Department's (HyD) procedures and practices in the administration of temporary closure of metered parking spaces involving road excavation works. In late 2010 and early 2011, TD and HyD initiated some enhancement measures. However, there were still many cases of non-compliance. Hence, The Ombudsman initiated this direct investigation on 15 July 2011 to examine –

(a) deficiencies in administering temporary closure of metered parking spaces during road excavation works carried out by public utilities;

(b) effectiveness of the enhanced measures introduced by TD and HyD in 2010 and 2011 to monitor temporary closure of metered parking spaces during road excavation works carried out by public utilities; and

(c) other measures, if any, for further improvement.

1018. The Ombudsman recommended that –

(a) HyD to continue conducting audit inspections on sites involving temporary closure of metered parking spaces and reporting non-compliance to TD, until TD's monitoring measures have shown to be fully effective;

(b) TD to emphasise to utility undertakes (UUs), by refining the contents of the Approval Conditions or otherwise, the importance of –

(i) submitting site photos on time and the consequence of non-compliance;

(ii) informing TD of "early completion" of works and the consequence of non-compliance;

(c) TD to check closely the submission of site photos by UUs and, if necessary, to set up a computerised database for this purpose;

(d) TD to keep statistical records and details of non-compliance cases;

(e) TD to review the situation of non-compliance at half yearly intervals to see if any further measures are necessary; and

(f) TD to enhance its assessment of the time required for closure of parking spaces.

Administration's response

1019. TD and HyD accepted The Ombudsman's recommendations and have taken the following actions.

In response to recommendation (a)

1020. HyD has continued conducting audit inspections on sites involving temporary closure of metered parking spaces. Upon discovery of non-compliance, HyD would immediately report to TD.

In response to recommendation (b)

1021. TD has refined the contents of the Approval Conditions to emphasise the importance of submitting site photos, informing TD of completion of works ahead of schedule as well as the consequences of non-compliance. Following consultation with the Utilities Technical Liaison Committee, which comprises management representatives of UUs, the Water Supplies Department, the Drainage Services Department and HyD, the revised Approval Conditions had been endorsed and came

into effect on 1 November 2012.

1022. Under the revised Approval Conditions, the Applicant shall submit at least one and not more than three photos to TD -

(a) on the start day of the suspension period;

(b) once a week if the suspension period is more than one week; and

(c) on the final day of the suspension period showing the completion of reinstatement works.

1023. If the works necessitating suspension of parking spaces are completed ahead of the original schedule, the Applicant shall report to TD immediately to shorten the suspension period, and such report should be submitted no later than three working days ahead of the revised end date of suspension.

1024. The revised Approval Conditions also state clearly that apart from the UUs' contractors, the Engineer's Representative of the project, the representative of the UUs or any person responsible for the management of the application shall also liaise closely with TD to ensure that the operation of affected parking spaces can be resumed as soon as the works are completed.

1025. If the Applicant fails to submit the required photos or inform TD of early completion, the revised Approval Conditions empower TD to withdraw the approval of suspension of the concerned metered parking spaces. As TD's approval is one of the excavation permit conditions under the Land (Miscellaneous Provisions) Ordinance (Cap. 28), its withdrawal will lead to a breach of the excavation permit conditions, and the Applicant commits an offence if the excavation works continue.

In response to recommendations (c), (d) & (e)

1026. Since the coming into effect of the revised Approval Conditions on 1 November 2012, TD has maintained detailed records of each non-compliance case. The records include details such as location, number of parking spaces affected, suspension period originally approved, reason for the anomaly, name of UU, rectification date, action taken, etc. The non-compliance records are saved on TD's intranet and are updated quarterly. TD will review the database on a quarterly basis to see if further actions are necessary.

In response to recommendation (f)

1027. To facilitate assessment of the time required for the closure of parking space, TD will require those who apply for the closure of metered parking spaces for over 30 days to provide detailed information, such as a comprehensive daily works schedule, to justify the scope and duration of the works. The subject officer should also make reference to the Applicant's non-compliance records during assessment. If necessary, a Traffic Management Liaison Group meeting, which involves the Applicant, the Hong Kong Police Force and TD, may be conducted to discuss the detailed arrangements.

Annex

Response of the Leisure and Cultural Services Department to the Improvement Measures Recommended by The Ombudsman on the Booking Arrangements for Recreation and Sports Facilities

(A) Items implemented

Recommendation of The Ombudsman		Progress
Item (a)	Consider shortening the advance booking period for individuals to, for example, 7, 10 or 14 days.	LCSD shortened the advance booking period for individual hirers from 30 days to 10 days on 18 June 2013.
Item (c)	Consider requiring individuals to use only their identity cards as identity documents for booking of venues (only individuals without identity cards may use their passports).	• Starting from 20 August 2012, only Hong Kong Identity (HKID) Card is accepted for application for Leisure Link Patron (LLP) registration. No other documents (e.g. travel documents) can be used as identity proof for online registration. • LCSD is making arrangements to improve the existing LLP registration system and planning to launch a re-registration exercise in the second quarter of 2014 for more than 760 000 existing patrons to use their HKID Cards to re-register with a view to weeding out multiple registrations made in a bid to exceed the booking quota set for individual hirers.
Item (f)	Review the reallocation arrangement for hirers affected by bad	The arrangement was implemented with effect from mid-June 2013. The reallocation period offered to hirers arising from cancellation of booking in

Recommendation of The Ombudsman		Progress
	weather, including considering shortening the 60-day advance booking period or cancelling the special arrangement of reallocation.	bad weather has been reduced from 60 days to 15 days.
Item (g)	Continue to require staff to strictly follow the verification procedure to check the identity documents of all venue users.	• To prevent unauthorised transfer of booked facilities, LCSD has stated clearly in the Conditions of Use that hirers are required to produce their identity documents for verification at the check-in counters. • In response to the public's concerns about possible abuse and touting activities, LCSD instructed all venue staff to strictly follow the verification procedure to check the identity documents of all hirers in 2011. They were also reminded about the documents that could be accepted as identity documents. Before using the booked facilities, hirers are required to produce the identity documents used at the time of booking for verification purpose. Users who are not the registered hirers will not be allowed to sign in.
Item (h)	Review the "stand-by" mechanism, including considering charging fees on "stand-by" users or abolishing the "stand-by" mechanism on a trial	• LCSD cancelled the "stand-by" arrangement for football pitches on a trial basis on 18 June 2013 for a period of six months. • Given the diverse views of the public on the arrangement, LCSD will closely monitor the situation and assess

Recommendation of The Ombudsman		Progress
	basis at facilities/venues where the problem is serious.	whether cancelling the "stand-by" arrangement for football pitches will give rise to the venues being left unused and thus resulting in wastage. LCSD has collected data on the utilisation of venues three months after the introduction of the trial measure (i.e. in September 2013) for preliminary analysis and will conduct a comprehensive review six months after the introduction of the trial measure (i.e. in late 2013) in order to decide whether the "stand-by" arrangement for football pitches should be cancelled on a long-term basis.
Item (m)	Continue to explore further improvement measures to shorten the time needed for accessing the Leisure Link System (LLS) during peak hours, such as increasing the system capacity and processing speed, as well as adding an automatic queuing function for online bookings.	LCSD completed Phases I and II of the LLS upgrade project in March 2012 and April 2013 respectively. Since the upgrade, the system capacity and processing speed have been enhanced significantly. The loading of the central processing unit of the system has dropped from about 90% to below 40% on average in the first 5 minutes from 7 a.m. during the peak hours, indicating a significant improvement. Generally speaking, members of the public can log in within the first 15 minutes after the start of the booking, which is half of the time required before the upgrade. The average number of online transactions processed during the morning peak session (i.e. from 7:00 a.m. to 7:05 a.m.) has increased by 56% from 360 to 560, while the waiting time at booking counters has been reduced by about 36% from 14 to 9 minutes on average. LCSD will continue to monitor the operation of LLS and take heed of the

Recommendation of The Ombudsman		Progress
		views of the public in order to enhance the system at appropriate time.
Items (p) and (q)	Carefully review and amend the unclear guidelines so that its staff members can be given adequate guidance and instructions; and adopt improvement measures to better communicate with organisations (e.g. use of emails).	• LCSD sent an email to all District Leisure Services Offices in April 2012 to remind its venue staff to follow the "Booking Procedure for Use of Recreation and Sports Facilities" when giving replies to the organisations applying for block booking. To avoid unnecessary misunderstanding, notifications on the arrangement and situation of the applications must be provided in writing when communicating with the organisations. • In addition, LCSD incorporated the time frame for replying to organisations into the revised "Booking Procedure for Use of Recreation and Sports Facilities" in mid-June 2013.
Item (r)	Consider shortening the notice period for cancellation of booking by organisations.	LCSD shortened the notice period for cancellation of booking by organisations from 40 days to 20 days in mid-June 2013.
Item (s)	Consider simplifying the procedure for cancelling individual bookings, including making arrangements for online cancellation, cancellation by telephone and refund after cancellation.	LCSD implemented the improvement measure on 18 December 2012 to allow LLS patrons to cancel their bookings online using their personal passwords instead of completing the cancellation procedure at the venues in person.
Item	Fully consult its	• LCSD carried out a comprehensive

Recommendation of The Ombudsman		Progress
(v)	stakeholders before introducing major changes, continue to listen to the feedback of stakeholders and keep its system and arrangements under constant review in order to meet the needs of the public.	public consultation in late 2012. The consultation exercise included sending official to attend meetings of the relevant committees under the 18 District Councils (DCs) to seek the views of Members on the improvement measures from 24 October to 18 December 2012, writing to national sports associations (NSAs) and sports organisations, and uploading a consultation paper onto LCSD's website and the Public Affairs Forum of the Home Affairs Bureau (HAB) for public information and to invite public views on the improvement measures. • In addition, LCSD conducted a questionnaire survey of facility users in major recreation and sports facilities such as sports centres, tennis courts and turf football pitches managed by LCSD from 14 to 16 December 2012 to collect their views on the major improvement measures. • LCSD also sought comments from Members of the Community Sports Committee on the proposed improvement measures on 27 November 2012 and reported to them on 1 March 2013 on the results of the public consultation and the proposed improvement measures to be implemented by LCSD.

(B) Items to be implemented in 2013-14

Recommendation of The Ombudsman		Progress
Item (b)	Consider reducing the maximum booking hours allowed for individuals (e.g. by limiting the combined total number of hours per day, per week or per month etc. for different facilities and venues).	• At present, individual hirers are allowed to book a maximum of two hours during peak hours and four hours during non-peak hours per day for the same type of fee-charging facility at the same venue. For turf football pitches, the quota for booking by individual hirers is one session per day. • In view of the recommendations of The Ombudsman, the views of the shareholders and the result that about 64.3% of the respondents in the questionnaire survey agreed to the reduction of the maximum booking hours for fee-charging facilities for individual hirers – (i) LCSD proposes that, with regard to the facilities in high demand, the booking quota for individual hirers should be reduced to a maximum of two sessions during peak hours per day for the same type of facility. This daily quota is applicable to not only the same facility at the same venue, but also the same type of facility at all leisure venues. The quota of a maximum of one session per day for individual hirers of turf football pitches will remain unchanged; and

Recommendation of The Ombudsman		Progress
		(ii) LCSD expects that the proposed improvement measures will be implemented in the first quarter of 2014 as soon as the modification of LLS is completed.
Item (e)	Consider taking administrative measures to curb the touting activities carried out by touts taking advantage of the priority booking rights enjoyed by limited companies.	LCSD has established a working group to review the existing arrangement for organisations to make priority bookings in the capacity of a limited company and an organisation registered as a society, and the priority they enjoy. The existing penalty system for breaching the Conditions of Use by organisations will also be reviewed. It is expected that the new measures will be implemented in the first quarter of 2014 upon completion of the review.
Item (i)	Consider imposing penalties on individuals who fail to show up for their reserved sessions.	• In view that the 18 DCs and the majority of respondents supported the imposition of penalty on individual hirers who had committed irregularities, LCSD proposes to suspend the offenders' right to book leisure facilities. The improvement measure is expected to be implemented upon completion of the modification of LLS in the first quarter of 2014.
Item (j)	Impose administrative penalties, such as suspending the eligibility to make bookings for a certain period of time, on individual hirers who are engaged in unauthorised transfer of user permits.	

Recommendation of The Ombudsman		Progress
Item (k)	Consider actively stepping up efforts to investigate suspected cases and imposing appropriate administrative penalties when touting activities are blatant.	• The penalties are as follows – (i) <u>Hirers repeatedly fail to show up for their booked sessions and make prior cancellation over a period of time</u> The hirer who, on two occasions in 30 days, fails to take up the booked session and notify LCSD of the cancellation of booking at least one day in advance will be suspended from booking all land-based fee-charging facilities for 90 days; (ii) <u>Hirers are engaged in unauthorised transfer of user permits</u> Since unauthorised transfer of user permits involves touting activities and the comments received during the consultation called for stiffer penalty, LCSD proposes that hirers who are found to be engaged in unauthorised transfer or touting of user permits should be immediately suspended from booking all land-based fee-charging facilities for 180 days; and (iii) <u>Hirers abuse the rate concession in making bookings</u> Taking into account the views of the DCs that the efforts to curb

Recommendation of The Ombudsman		Progress
		the abuse of rate concession in making bookings should be stepped up, LCSD proposes that the period of suspending an offender from booking all land-based fee-charging facilities should be extended from the original proposal of 90 days to 180 days, in order to achieve deterrent effect.
Item (l)	Review the arrangement for block booking quotas in order to enhance transparency and improve the availability of venues for booking by individuals, including the following: • setting quotas for the most popular time slots; and • increasing the transparency of the bookings made by HAB and LCSD (for example, setting separate quotas or including them in the quotas for booking by organisations).	LCSD has established a working group to review the existing arrangements for block booking quotas (including those of HAB and LCSD) for peak hour sessions. The new measures are expected to be implemented upon completion of the review in the first quarter of 2014.
Item (t)	Review the penalty for organisations failing to use the booked venues.	LCSD will review the penalty for organisations failing to use the booked venues with a view to minimising the wastage of venue resources arising from organisations' failure to use the booked venue without giving timely notice of cancellation. The new

Recommendation of The Ombudsman		Progress
		measure is expected to be implemented upon completion of the review in the first quarter of 2014.

(C) Items to be implemented or studied further in or after 2014

Recommendation of The Ombudsman		Progress
Item (d)	Consider introducing the arrangement for immediate payment for telephone reservations.	• LCSD put in place some interim improvement measures in 2012. Telephone reservation for recreation and sports facilities has to be made at least three days in advance and confirmed by payment at least one day before the day of use. Moreover, sessions for which telephone reservation has been cancelled will be posted on the Leisure Link website at 1 a.m. on the following day. These sessions will be available for booking from 7:30 a.m. on the same day through telephone, the Internet, booking offices or self-service kiosks on a first-come-first-served basis. • In the long run, LCSD is exploring the feasibility of introducing immediate payment arrangement for telephone reservation in order to make available on-the-spot confirmation of booking. However, given the lack of such mode of operation and such

Recommendation of The Ombudsman		Progress
		service demand in other departments within the Government, LCSD is now examining with the departments concerned the feasible option that can meet the requirements in such areas as financial arrangement, security and privacy, and ensure cost effectiveness for the sake of proper use of public money. The improvement measure is still under deliberation and a conclusion on its feasibility is expected to be reached in 2014-15.
Item (n)	Consider providing a computerised system for the booking of non-fee charging facilities.	LCSD has started a feasibility study, which is expected to be completed in 2013-14, and will consider whether to provide booking service through LLS for non-fee charging facilities on the recommendations of the study report.
Item (o)	Consider making the signing in arrangement more flexible, such as allowing a hirer to authorise at the time of booking another user to sign in.	• It was initially projected that the number of hirers failing to sign in personally would decline significantly after the advance booking period for individual hirers was shortened in June 2013 as the hirers would be more certain whether they could use the booked venues. • LCSD will assess the effectiveness of the measure of shortening the advance booking period for individual hirers after

Recommendation of The Ombudsman		Progress
		its implementation, and examine whether the arrangement of allowing more than one user to sign in may lead to abuse or touting activities.
Item (u)	Adjust the opening hours of venues to increase supply, including opening artificial turf football pitches earlier in the morning or adjusting slightly the time reserved for nurturing natural turf pitches.	• LCSD has taken the following measures to increase the supply of football pitches – (i) LCSD has planned to build more artificial turf pitches in the coming three years to meet public demand (the number will be increased from 30 pitches in late 2012 to 39 pitches in 2015). The number of available sessions will be increased by about 2 000 per month; (ii) LCSD will consult the DCs concerned on the needs to adjust the opening hours of artificial turf football pitches according to the usage pattern of and demand for individual venues in the respective districts. If the pitches open earlier at 7 a.m., football activities may cause noise nuisance to the residents in the neighbourhood. Therefore, LCSD cannot advance the opening hours of the pitches forthwith; and (iii) at present, the venue staff of football pitches will adjust and increase the number of

Recommendation of The Ombudsman		Progress
		sessions available according to weather conditions, the growth of grass, and the maintenance arrangements for individual venues. • LCSD will closely monitor the development in respect of the provision of football pitches and their usage pattern, and assess the effectiveness of the measures to increase the number of sessions.