THE GOVERNMENT MINUTE

IN RESPONSE TO

THE ANNUAL REPORT OF
THE OMBUDSMAN 2014

Government Secretariat
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THE GOVERNMENT MINUTE IN RESPONSE TO THE ANNUAL REPORT OF THE OMBUDSMAN 2014

Introduction

The Chief Secretary for Administration presented the Annual Report of The Ombudsman 2014 (the Annual Report) to the Legislative Council at its sitting on 2 July 2014. This Government Minute sets out the Government's response to the Annual Report. 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 and direct investigation respectively.

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

The Government takes 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.

2. The Ombudsman summarised six direct investigation and 321 full investigation cases in the Annual Report. This Minute responds to the six direct investigation and 111 full investigation cases in which recommendations were made by The Ombudsman. Among a total of 283 recommendations made by The Ombudsman, save for a few exceptions, Government departments and relevant public bodies have accepted all recommendations from The Ombudsman and taken or is taking various measures to implement those recommendations. The Government will continue to strive for quality public services in a positive, professional and proactive manner.

3. We agree with the comments made in The Ombudsman's Review that freedom of information is the bedrock for an open and accountable public sector. The Government will proactively improve the prevailing access to information regime so as to enhance the accountability and transparency of the Government; and is determined to take necessary actions to further improve the existing records management system, so as to manage and keep public records with archival value properly.

Part II
– Responses to recommendations in full investigation cases

Architectural Services Department and Food and Environmental Hygiene Department

Case No. 2013/0063A (Architectural Services Department) – Delay in re-opening a refuse collection point

Case No. 2013/0063B (Food and Environmental Hygiene Department) – (1) Delay in re-opening a refuse collection point; and (2) Failing to tackle the environmental nuisance caused by refuse dumped outside the refuse collection point

Background

4. A refuse collection point (RCP) had been closed for two to three years, though the works there had long been completed. In late 2012, the complainant enquired about the matter and Food and Environmental Hygiene Department (FEHD) replied that Architectural Services Department (ArchSD) had not responded to its repeated requests to have the RCP re-opened.

5. The complainant was dissatisfied that the two departments had delayed re-opening the RCP and that FEHD had failed to tackle the environmental nuisance caused by refuse dumped outside the RCP.

The Ombudsman's observations

Allegation (a)

6. Despite the minor nature of the works, the RCP had been closed from mid-2009 to early 2013. The delay was primarily due to prolonged inattention on the part of ArchSD, the project coordinator, aggravated by its appointment of the inexperienced and incompetent contractor.

7. As user department, FEHD should also have shown greater concern and put more pressure on ArchSD.

8. In the light of the above, The Ombudsman considered allegation (a) against ArchSD and FEHD substantiated.

Allegation (b)

9. As dumping of construction waste and bulky furniture outside the RCP persisted, we considered that FEHD should have enhanced its measures much earlier to tackle the problem. The Ombudsman therefore found allegation (b) against FEHD partially substantiated.

10. Overall, the complaint was substantiated. The Ombudsman recommended that –

ArchSD

(a) Select consultants and contractors more carefully to ensure their competence;

(b) remind staff of the need to step in quickly for solutions to problems; and

FEHD

(c) take reference from this case and monitor more closely the progress of works projects relating to its facilities.

Administration's response

11. ArchSD accepted The Ombudsman's recommendations and has taken the following actions –

(a) To ensure the competence of selected contractors and consultants, staff have been reminded to truly reflect the performance of contractors and consultants in their performance reports as these reports will be duly considered in the assessment of their competence during future selection of contractors and consultants; and

(b) staff have been reminded of the need to step in quickly to explore practical solutions when contractors are found incapable of solving major problems encountered. In addition, the internal reporting system has been enhanced such that more

critical projects are monitored by senior management.

12. FEHD accepted The Ombudsman's recommendation and has reminded its district staff to closely monitor the progress of works/maintenance projects relating to cleansing facilities in hand by issuing reminders to ArchSD at suitable intervals. For projects processed through the Department's Planning and Development Section, which FEHD would actively monitor the progress of each project, district staff have been reminded to alert the Planning and Development Section of any possible slippage so that it may liaise closely with the relevant works departments and ensure that the facilities would be open for public use as early as possible.

Buildings Department

Case No. 2013/0406 – Failure to take enforcement action against unauthorised building works

Background

13. On 31 January 2013, the complainant (a residents association) lodged a complaint with the Office of The Ombudsman against the Buildings Department (BD). According to the complainant, some unauthorised building works (UBW) of religious premises (the Premises) had been used as a columbarium for many years, causing nuisances to residents of the adjoining estate. In December 2006, BD served a removal order to the owner of the Premises, but the removal order had not been complied with. In February 2009, BD successfully prosecuted the owner concerned for non-compliance of the order. But the owner had not complied with the removal order thereafter. In October 2012, the complainant lodged a complaint with the District Council regarding the UBW at the Premises causing nuisance to residents in the nearby housing estates. The complaint was referred to BD, which followed up on the case again.

14. The complainant alleged BD of delay in taking enforcement action against the UBW.

The Ombudsman's observations

15. From October 2006 to September 2008, BD had in general handled the concerned UBW properly, including issuing the removal order in December 2006, initiating prosecution proceedings in October 2007 and making successful prosecution against the owner of the Premises in September 2008.

16. Given that the concerned UBW did not constitute obvious hazard or imminent danger to life or property and that the penalty was not light for failing to comply with an order without a reasonable excuse, it was not unreasonable for BD to follow the established procedures to initiate prosecution proceedings against the concerned owner rather than engaging a government contractor to remove the UBW in default of the owner of the Premises.

17. Nevertheless, the owner of the Premises had not taken any removal works of the concerned UBW since September 2009. It was not until November 2012 that BD initiated the second prosecution against the owner of the Premises for not complying with the removal order. It undoubtedly gave an impression that BD had not taken enforcement action efficiently.

18. BD explained that as it needed to conduct territory-wide inspections on building safety as triggered by major incidents in recent years, and due to re-organisation of the department, expeditious follow-up actions of the subject case could not be made. The Office of The Ombudsman did not consider such explanation a reasonable ground for the delay in initiating further prosecution.

19. Based on the above analysis, The Ombudsman considered this complaint partially substantiated and recommended BD to review its enforcement procedures. If prosecution was unable to force the owners concerned to remove the UBW and the presence of the UBW caused continuous nuisance to the neighbourhood, BD should consider engaging a government contractor to conduct removal of these UBW. In the subject case, the concerned UBW had been causing nuisance to the neighbourhood for many years. In case the concerned owner had no intention to demolish the concerned UBW after repeated prosecutions, BD should consider the option of engaging a contractor to carry out the removal works in default of the owner, including advance notification to the public so that sufficient time would be allowed for the people with niches of their ancestors stored in the concerned UBW to discuss with the owner of the Premises on the relocation of the affected niches.

Administration's response

20. BD did not accept the recommendation. As the concerned UBW did not constitute obvious hazard or imminent danger to life or property and the removal works would involve prior relocation of urns of ashes from the niches, which would require full cooperation of the affected family members and the joint efforts of other government departments, it would not be possible for BD to initiate the removal works without proper support beforehand. Moreover, the second prosecution action against the owner for non-compliance of the removal order was in progress. Past experience showed that the penalty of the second prosecution would generally be higher. BD considered that the

higher penalty would impose higher deterrent effect in urging the concerned owners to effect the required removal expeditiously. BD further noted that the Food and Health Bureau's proposed legislation on regulating private columbaria had been put to the Legislative Council in June 2014. BD therefore decided to keep in view the development and act accordingly.

21. The Ombudsman did not accept the above response of BD but considered that the subject case mainly involved UBW and enforcement action should be taken without further delay. Otherwise, all owners of UBWs would disregard BD's enforcement actions.

22. Subsequently, BD reported to The Ombudsman that the owner concerned had appointed an authorised person (AP) to coordinate the removal of the UBW as stipulated in the removal order. BD would urge the AP to submit a rectification proposal as early as possible and closely monitor the progress of the removal works. As per The Ombudsman's request, BD will submit regular progress reports on the removal works of the UBW in question.

Buildings Department

Case No. 2013/2050(I) – Refusing to provide certain information about a Notice of Appeal issued by the owner of an unauthorised building works

Background

23. On 9 July 2013, the complainant complained to the Office of The Ombudsman against the Buildings Department (BD).

24. In December 2012, the Building Authority, i.e. the Director of Buildings, issued a statutory order requiring the removal of an unauthorised building works (UBW) item near the complainant's residence. In January 2013, BD informed the complainant that the owner of the UBW had lodged a Notice of Appeal (the Appeal) against the removal order. On 4 February, the complainant wrote to BD to seek the following items of information about the Appeal –

(a) "when was the Notice of Appeal submitted";

(b) "on what ground was the Notice of Appeal submitted";

(c) "when will the Notice of Appeal be heard and concluded"; and

(d) "what is your Department's response to the Notice of Appeal".

25. The complainant complained to the Office of The Ombudsman that BD had unreasonably refused to release to him the information requested, besides having delayed replying to him.

The Ombudsman's observations

26. Information items (a) to (c) were owned by others, but BD held copies. According to the Code on Access to Information (the Code), if public interest was involved, BD should, depending on the significance of the public interest, seek the consent of the Appeal Tribunal (AT) and/or the owner of the UBW item as appropriate for releasing the information to the complainant, or even release the information to him without the consent of the information owners; otherwise it could simply decline the

complainant's request for such information (paragraphs 1.20[1] and 2.14(a)[2] of the Code).

27. While BD had put forward certain arguments which the Office of The Ombudsman did not consider entirely relevant, the Office of The Ombudsman found it not inappropriate of BD to decline the complainant's request for items (a) to (c) as they were not considered to involve public interest. The same applied to its handling of the complainant's request for item (d).

28. Nevertheless, BD had indeed failed to give the complainant a timely response as required by the Code. Hence, The Ombudsman considered this complaint partially substantiated.

29. In the course of the investigation, the Office of The Ombudsman noted that BD had actually corresponded with the complainant on the UBW, including provision of information to him on the fact that it had issued a removal order to the owner of the UBW and the latter had lodged the Notice of Appeal with AT. On the premises that the UBW case did not concern public interest including the complainant's, the Office of The Ombudsman questioned, on privacy grounds, the appropriateness of BD in providing the complainant with such information, even though arguably the complainant (if he was inquisitive enough) could have found out from the Land Registry that the removal order had been registered there.

30. The Ombudsman recommended BD to –

(a) take reference from this case and remind staff to give timely response to request for information as required by the Code; and

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[1] Paragraph 1.20 of the Code stipulates that "where information requested is held for, or was provided by, a third party under an explicit or implicit understanding that it would not be further disclosed, but a civil servant considers that the public interest may require disclosure, he will so advise the third party and invite the latter to consent to, or make representations against disclosure. The third party will be asked to respond within thirty days or such reasonable longer period as he may be granted on request."

[2] Paragraph 2.14(a) of the Code states that "information held for, or provided by, a third party under an explicit or implicit understanding that it would not be 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."

(b) review the appropriateness and consistency of its practices in providing information to people on cases that do not affect their interest.

Administration's response

31. BD accepted The Ombudsman's recommendations and has taken the following actions –

(a) Seasonal reminder will be issued to staff reminding them to give timely response in handling requests on access to information; and

(b) BD has also reviewed its practices in releasing information to the public on the existence of UBW and the progress of BD's enforcement action, and has issued a revised instruction for staff to follow.

Buildings Department and Fire Services Department

Case No. 2013/2887A&B – Shirking responsibility in taking enforcement action against unauthorised cabinets built in the public corridors in a building

Background

32. On 29 July 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Buildings Department (BD) and Fire Services Department (FSD). According to the complainant, in 2012 she discovered some large cabinets (the subject cabinets) obstructing the public corridors of several floors of the building where she resided (the subject building). Such cabinets also covered the hose reels and adversely affected the fire safety of the building. As such, she lodged complaints with both BD and FSD. BD replied to the complainant in September 2012 that as the subject cabinets did not constitute imminent danger, no priority enforcement action would be taken by BD. BD would instead issue advisory letters to the owners concerned for the removal of the said cabinets. FSD replied to the complainant in June 2013 that the subject cabinets were unauthorised building works (UBW) and the case should be followed up by BD.

33. The complainant alleged that both departments shirked responsibility in handling the case and as a result, the subject cabinets had not been removed.

The Ombudsman's observations

Allegation against BD

34. BD did arrange their staff to carry out site inspection after receiving the complaint from the complainant and processed the case in accordance with its policy and procedures. There was no evidence showing that BD refused to take up the responsibility.

35. As to why BD did not serve any statutory removal order, the Office of The Ombudsman accepted BD's explanation. As the subject cabinets did not constitute imminent danger, they were not actionable items under the prevailing UBW enforcement policy. Having regard to

the constraint of resources, BD had decided not to take immediate enforcement action. BD's explanation was understandable. As such, The Ombudsman considered the allegation against BD unsubstantiated.

36. That said, according to BD's inspection photos, some of the objects stored in the subject cabinets were suspected to be paint, kerosene and lubricating oil. The Office of The Ombudsman considered that for safety reason, BD should refer the case to FSD to follow up at that time in order to address the occupants' concern. The Ombudsman urged BD to alert its staff for improvement.

Allegation against FSD

37. FSD had indeed taken follow-up actions under its jurisdiction on the irregularities concerning the obstruction to means of escape as well as the operation of hose reels in the subject building. Upon identifying that the normal operation of the hose reels was obstructed by miscellaneous articles, FSD issued warnings accordingly. There was no evidence showing that FSD had shirked its responsibility.

38. As the subject cabinets were suspected UBW which fell under the jurisdiction of BD, the Office of The Ombudsman considered it reasonable for FSD to refer the case to BD for follow-up in parallel.

39. In view of the above, The Ombudsman considered the complaint against FSD unsubstantiated. That said, whether fire hose reel can be used and operated properly will affect directly the fire extinguishment and rescue duties of FSD. Hence, The Ombudsman urged FSD to closely monitor those irregularities that would likely recur, i.e. residents putting too many miscellaneous articles inside the cabinets which house the hose reels, and to take immediate prosecution actions against the person responsible for such irregularity (without giving prior warning), so as to enhance the deterrent effect.

Administration's response

40. BD did not accept The Ombudsman's recommendation given the following considerations –

(a) Both BD and FSD are responsible for the fire safety of buildings, and unavoidably there would be overlap between their respective jurisdictions. For public safety reason and better use of the

resources of BD and FSD, both departments have been communicating, holding discussions and defining clearly their own duties for upholding fire safety of buildings. In principle, BD is primarily responsible for actions against fire hazard arising from the passive fire safety measures of buildings (mainly include fire resisting construction of buildings, e.g. fire resisting wall, fire resisting compartment, fire rated doors, etc) including their alterations. Other types of fire hazard should be abated by FSD. If necessary, joint actions would be taken by both departments. Under this principle, the division of responsibilities between FSD and BD in respect of fire safety aspects in each building has been clearly defined. On the aspect of obstruction to the means of escape, BD is responsible for enforcement action against obstruction caused by UBW, whereas FSD is responsible for actions relating to fire services installations and equipment and obstructions caused by non-fixed items including dangerous goods. If during inspection BD discovered the presence of five types of serious conditions causing imminent danger to lives and properties, which include excessive storage of dangerous goods, BD staff should first alert FSD and then send it a standard referral memo;

(b) as far as this case is concerned, it is noted that BD staff found two small cans of suspected lubricating oil and kerosene on 7/F of the subject building, and another small can of suspected paint on 8/F. BD considered that the objects in terms of their locations, number and quantity, were not serious to be classified as excessive storage of dangerous goods as defined in the said inter-departmental arrangement. Therefore, the case had not been referred to FSD;

(c) in addition, BD considered that prior to referral of the case to BD, FSD would have assessed the fire hazard of the objects found in the subject cabinets and followed up the case according to the said inter-departmental arrangement. As such, BD opined that FSD should have taken the necessary enforcement actions; and

(d) if BD staff, upon inspection, noted the presence of excessive storage of dangerous goods or any matters that might fall within the jurisdictions of other government departments, the case would be referred to FSD or other relevant government departments to follow up. As regards this case, the objects

suspected to be inflammable being found in the subject cabinets were not considered as excessive storage of dangerous goods in terms of their location, number and quantity. In addition, the subject cabinets were not always stored with inflammable objects. Therefore it was considered that there was no need for BD to refer the case to FSD for follow up.

41. BD informed the Office of The Ombudsman of the above views and the Office of The Ombudsman concluded the case on 21 July 2014.

42. FSD accepted The Ombudsman's recommendation and would continue to closely monitor such irregularities and conduct regular inspections in the subject building. If an irregularity is identified, FSD will serve a fire hazard abatement notice (FHAN) under section 3 of Fire Service (Fire Hazard Abatement) Regulation on the person responsible for such irregularity and require him to abate the fire hazard within a given period of time.

43. In the case of recurring irregularity (i.e. if similar irregularity is found at the same location within 12 months), FSD will not issue FHAN, but will directly institute prosecution against the person responsible for the recurrence of such irregularity under section 9(2) of the aforesaid Regulation. The responsible person will be liable on conviction to a fine at level 6 and to a further fine of $10,000 for each day during which the offence continues.

Buildings Department and Food and Environmental Hygiene Department

Case No. 2012/3657A (Buildings Department) – Delay in handling a water seepage complaint

Case No. 2012/3657B (Food and Environment Hygiene Department) – (1) Delay in handling a water seepage complaint; (2) Being inconsistent in informing the complainant where the humidity test should be conducted; (3) Denying that the source of seepage was polluted water from the illegal/defective structures at the restaurant above the complainant's premises and insisting that it was only rainwater which would not cause environmental nuisance; and (4) Failing to inform the complainant of the progress of investigation

Background

44. On 19 September 2012, the complainant complained to the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD) and Buildings Department (BD).

45. Allegedly, since May 2010, the complainant had complained many times to FEHD and BD about water seepage in his clinic after heavy rain or typhoon. However, the two departments had mishandled his complaint, including –

(a) delaying actions on the seepage problem;

(b) being inconsistent in informing the complainant where the humidity test should be conducted;

(c) denying that the source of seepage was polluted water from the illegal/defective structures at the restaurant above his clinic (the Restaurant) and insisting that it was only rainwater which would not cause environmental nuisance; and

(d) failing to inform him in writing of the progress of investigation, except for one letter notifying him that the case would be transferred from FEHD to BD.

The Ombudsman's observations

Allegation (a)

46. It could be seen that the complainant and his staff had lodged repeated seepage complaints with the Joint Office for Investigation of Water Seepage Complaints (JO), which was set up by FEHD and BD, since May 2010. However, except for the complaint lodged on 18 June 2012, JO officer had failed to arrange site inspections expeditiously. Most inspections were conducted several weeks or even two months after the complaints were lodged.

47. Moreover, as early as on 16 August 2011, the complainant had indicated to JO officer that seepage occurred after heavy rainfall. However, the Hong Kong Observatory's records showed that other than 18 June 2012, the daily total rainfall on all other inspection days were either zero or minimal (ranging from 0 mm to 3.5 mm). Had JO been more sensitive to the weather factor and conducted inspections on rainy days after receiving the complaints, the source of seepage could have been identified much earlier.

48. Furthermore, after the inspection on 18 June 2012, the JO officer was aware of the seriousness of the water seepage in the complainant's clinic and concluded the source of seepage to be rainwater penetrating through the external wall of the building. However, instead of taking more concrete actions to resolve the problem, such as referring the case to BD proper, the JO officer just continued liaison with the person-in-charge of the Restaurant, which he had started about a year ago but to no avail.

49. In view of the above analysis, as far as JO is concerned, The Ombudsman considered allegation (a) substantiated.

50. As regards BD proper, having examined the relevant records, the Office of The Ombudsman was satisfied that BD was not informed of the unauthorised demolition works at the Restaurant until 10 August 2012. Follow-up action started in September without delay.

51. In this light, as far as BD proper is concerned, The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b)

52. The Office of The Ombudsman considered JO's explanation reasonable. JO officer was simply following the standard procedures for investigation and determining the course of action in accordance with his observations. Therefore, allegation (b) was unsubstantiated.

53. Nevertheless, the Office of The Ombudsman believed that should the JO officer have explained clearly to the complainant the investigation procedures and the requirements under different circumstances, the misunderstanding could have been avoided.

Allegation (c)

54. It could be seen that JO's conclusion regarding the cause of seepage was based on objective findings at the scene. BD proper's inspection also supported JO's conclusion.

55. However, in the absence of corroborative test reports, the Office of The Ombudsman could not ascertain whether the rainwater had been polluted en route from the external wall and the floor slab of the Restaurant to the complainant's clinic. The Ombudsman, therefore, found allegation (c) inconclusive.

56. While the Office of The Ombudsman accepted in principle that rainwater might not be an environmental nuisance, the circumstances of each case should be taken into account. In this case, the pictures that the complainant provided to the Office of The Ombudsman (showing the seepage water to be yellowish / brownish in colour) and the continuous water dripping observed at the inspection on 18 June 2011 suggested that JO should have played safe and arranged tests before jumping to the conclusion that there was no environmental nuisance. Fortunately, the problem seemed to have been alleviated with the Restaurant's reinstatement of the external window wall.

Allegation (d)

57. It was far from satisfactory that JO had issued only two written updates to the complainant, the interval of which was over two years. The Ombudsman considered allegation (d) substantiated.

58. In sum, The Ombudsman considered the complaint against FEHD (in the name of JO) partially substantiated, and that against BD unsubstantiated.

59. As regards allegation (c), The Ombudsman recommended JO to remind staff to evaluate the circumstances of each water seepage case, including rainwater seepage, with due care and plan follow-up actions accordingly.

Administration's response

60. JO accepted The Ombudsman's recommendation. The Ombudsman's report had been circulated among all JO staff and they were asked to adhere strictly to the procedural guidelines laid down in the Operational Manual on Handling Water Seepage Complaint.

61. Although under normal circumstances, seepage which originated from the penetration of rainwater through the external walls, roof or floor slab of a building would not be considered as a nuisance for the purpose of invoking the Public Health and Municipal Services Ordinance (Cap. 132), JO had reminded the staff to be more sensitive to weather factor and conduct inspections on rainy days to ascertain whether rain penetration would be the source of seepage.

Buildings Department and Food and Environmental Hygiene Department

Case No. 2013/3304A (Buildings Department) – Shirking responsibility in handling a complaint about unauthorised canopies erected by the operators of two fixed-pitch cooked food stalls

Case No. 2013/3304B (Food and Environmental Hygiene Department) – (1) Shirking responsibility in handling a complaint about unauthorised canopies erected by the operators of two fixed-pitch cooked food stalls; and (2) Failing to reply to the complainant's complaint

Background

62. On 26 August 2013, the complainant lodged a complaint with the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD) and Buildings Department (BD).

63. The complainant alleged that a row of canopies was erected over two fixed-pitch cooked food stalls in a street. The canopies impeded the dispersion of cooking fume, which affected the complainant's shop nearby (the Canopy Problem). He complained to FEHD about the Canopy Problem in December 2012. FEHD subsequently passed the case to BD for follow-up actions. But BD referred the case back to FEHD, leaving the Canopy Problem unresolved.

64. In June 2013, the complainant complained to FEHD again through the Chief Secretary for Administration's Office. FEHD undertook to offer him a reply within 30 days. However, the complainant had not received any reply from FEHD.

65. The complaint can be summarised as follows –

(a) FEHD and BD shirked the responsibility to each other and failed to take proper action against the Canopy Problem.

(b) FEHD did not offer a reply to the complainant regarding his complaint of June 2013.

The Ombudsman's observations

Allegation (a)

66. The Office of The Ombudsman, on the basis of its observations and the advice of Department of Justice (DoJ), considered that FEHD might not have deliberately shirked its responsibility by referring the Canopy Problem to BD at the outset. However, FEHD should, at the same time, have considered whether it could invoke Section 48 of the Hawker Regulation to take enforcement action, rather than delaying its consultation with DoJ until the complainant complained to the Office of The Ombudsman.

67. The Ombudsman therefore considered allegation (a) against FEHD partially substantiated.

68. BD's decision of not taking any enforcement action was made on legal basis. Hence, The Ombudsman considered allegation (a) against BD unsubstantiated.

Allegation (b)

69. FEHD admitted negligence for not giving the complainant a substantive reply. As such, The Ombudsman considered allegation (b) against FEHD substantiated.

70. Overall speaking, this complaint was considered partially substantiated on the part of FEHD, but unsubstantiated on the part of BD.

71. The Ombudsman urged FEHD to –

(a) complete its enforcement action against the Canopy Problem as soon as possible; and

(b) monitor similar problems in the fixed-pitch cooked food stalls at other locations and combat the problems in accordance with the law.

Administration's response

72. FEHD accepted the recommendations made by The Ombudsman and has taken the ensuing follow-up actions –

(a) Between January and July 2014, having regard to legal advice, FEHD instituted 11 prosecutions against the fixed-pitch stalls for the unlawful canopies by invoking Section 48 of the Hawker Regulation, four and one summons were taken against the two cooked food stalls under complaint respectively; and

(b) FEHD has issued guidelines to the relevant District Environmental Hygiene Offices, instructing them to take action in line with the legal advice should they come across similar canopy problems caused by fixed-pitch cooked food stalls.

Buildings Department and Lands Department

Case No. 2013/1588A (Buildings Department) – Failing to take enforcement action against an unauthorised building works item and delay in giving a reply

Case No. 2013/1588B (Lands Department) – Failing to properly follow up a complaint about an unlawful change of use of land and unreasonably amending survey plans

Background

73. On 3 May 2013, the complainant lodged a complaint to the Office of The Ombudsman against the Buildings Department (BD) and Lands Department (LandsD).

74. According to the complainant, the complainant reported to GovHK and a number of Government departments (including the BD and LandsD) via email in December 2011 that there were suspected unauthorised structures being used for warehouse purpose on certain lots of a village in the New Territories (the Site). The complainant was of the view that the container vehicles which travelled to and from such warehouses on the narrow village access might threaten the safety of the villagers (the First Report).

75. In January 2012, the Planning Department (PlanD) replied to the complainant that the structures on the Site did not contravene the Town Planning Ordinance. On 9 January, BD replied to the complainant that there were some structures on the Site, but no construction works were underway and the structures did not pose any obvious danger either. As regards the unauthorised structure on one lot at the Site (Lot A), a removal order was issued by BD on 9 September 2011, but enforcement action had to be withheld as the owner had filed an appeal. On 16 September, the District Lands Office (DLO) of LandsD replied that it would continue to follow up on the structures on some of the lots at the Site.

76. The complainant noted from PlanD's reply that a structure (Structure X) was being erected in the north-western part of Lot A. On 17 January 2012, the complainant provided BD with some photos and a copy of PlanD's reply and requested BD to follow up on Structure X.

77. On 16 January 2012, the complainant reported to GovHK (the Second Report) that there were suspected unauthorised warehouse extensions on two of the Site (Lot B) and the remaining portion of Lot B (Lot B RP). On the same date, the 1823 Call Centre (the Call Centre) replied that the case had been referred to BD. On 10 March, the Call Centre replied to the complainant that according to BD's inspection findings, there were maintenance works on Lot B and Lot B RP but no construction works were in progress, and hence BD would not take any further action. On 18 March, the complainant provided the Call Centre with supplementary information to support the allegation of unauthorised warehouse extensions on Lot B and Lot B RP. The Call Centre replied on the following day that the case had been referred to BD. Thereafter, BD made no further reply to the complainant.

78. The complainant also alleged that since late 2011 warehouse extensions had existed on Lot B RP, partly occupying Government land. But DLO, in preparing two survey plans in February 2010, extended the boundary of Lot B RP, resulting in the warehouses apparently not occupying Government land.

79. The complainant alleged –

(a) BD of turning a blind eye to the unauthorised warehouses and taking a long time to respond substantively to the Second Report; and

(b) DLO of failing to properly follow up on the First Report and allegedly condoning the unauthorised warehouse extension by revising for no reason the survey plans in February 2010.

The Ombudsman's observations

Allegation (a)

80. BD handled the complainant's reports according to its established policies, yet there were inadequacies on the part of BD in handling the case, and BD did not inform the complainant of the progress of follow-up on Structure X in a timely manner.

81. In the light of the above, The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

82. DLO handled the complainant's reports according to its established policies, but the progress was unsatisfactory. As for the allegation of revising the survey plans for no reason, The Ombudsman accepted the explanation of LandsD that the geographical information of Lot B and Lot RP was not revised.

83. Given the above, The Ombudsman considered allegation (b) partially substantiated.

84. In conclusion, The Ombudsman considered this complaint partially substantiated and urged LandsD to process the applications for short term waiver and/or short term tenancy and tackle the breaches of certain lots at the Site as soon as possible; and identify the lot on which Structure X was situated as early as possible so that BD could promptly take enforcement action.

Administration's response

85. LandsD and BD accepted The Ombudsman's recommendation. The District Survey Office of LandsD, DLO and BD have been working towards resolving the outstanding issues relating to unauthorised structures. All relevant applications for short term waiver and/or short term tenancy and breaches of lease conditions are being processed.

Buildings Department and Lands Department

Case No. 2013/2168A (Buildings Department) – Delay in taking enforcement action against unauthorised building works items

Case No. 2013/2168B (Lands Department) – Delay in handling a complaint about illegal occupation of Government land

Background

86. On 11 June 2013, the complainant complained to the Office of The Ombudsman against the Lands Department (LandsD) and Buildings Department (BD).

87. According to the complainant, two shops located at the junction of two streets (the two shops) persistently and unlawfully occupied the pavement (occupation of land issue) for extension of shop premises (unauthorised extensions issue), with unauthorised street numbers assigned to the premises by the occupiers (street numbers issue). On 13 December 2012, the complainant lodged complaints with LandsD about the occupation of land, unauthorised extensions and street numbers issues. In March 2013, LandsD informed the complainant that the two shops were unauthorised structures and that the complaints about unauthorised extensions and street numbers issues had been referred to BD and the Rating and Valuation Department respectively. On 21 May, the complainant asked BD about the progress of the investigation into the unauthorised extensions issue and sought the file number of the case, but to no avail.

88. The complainant alleged –

(a) LandsD of delaying the handling of the complaint about the occupation of land issue; and

(b) BD of delaying taking follow-up actions on the complaint about the unauthorised extensions issue.

The Ombudsman's observations

LandsD

89. The District Lands Office (DLO) of LandsD failed to follow up on the case after taking site inspection in December 2012 during which occupation of land and unauthorised extensions issues by the two shops were detected. It was not until March 2013, marking over 3 months' delay, that DLO, on receiving the complainant's email, started handling the complaint about occupation of land issue and referred the complaints about unauthorised extensions and street numbers issues to the relevant departments.

90. In view of above, The Ombudsman considered the allegation against LandsD substantiated.

BD

91. BD claimed that the inspection report submitted by its consultant could not be located before the Office of The Ombudsman stepped in. If it was true, the Office of The Ombudsman took the view that BD should have requested the consultant to re-submit the report on an earlier occasion. One major principle of Government departments serving the public was to respond to public's complaints/reports/enquiries within a reasonable time. BD's explanation was not an excuse for the delay in the follow-up action in respect of the unauthorised extensions issue.

92. In view of above, The Ombudsman considered the complaint against BD substantiated

93. Overall speaking, The Ombudsman considered this complaint substantiated and recommended that both LandsD and BD should learn from this case and promptly follow up on complaints/reports/enquiries from the public in future.

Administration's response

94. LandsD and BD accepted The Ombudsman's recommendation.

95. LandsD has reminded relevant staff that public complaints/ reports/enquiries should be handled promptly. Matters outside LandsD's purview should be referred to relevant Government departments as soon as possible and the complainant should be informed of LandsD's follow up actions in a timely manner as well.

Buildings Department and Lands Department

Case No. 2013/3955A (Buildings Department) – (1) Delay in handling complaints; and (2) shirking responsibility in taking enforcement action

Case No. 2013/3955B (Lands Department) – Shirking responsibility in taking enforcement action

Background

96. On 26 September 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Buildings Department (BD) and Lands Department (LandsD). According to the complainant, she was the owner of the first floor of a New Territories Exempted House (NTEH) (commonly known as "Village House") (subject village house). In 2011, the owner of the ground floor of the subject village house (owner A) constructed a wall outside the house and installed steel framed windows and a roof enclosure. The roof connected to the soffit of the balcony of first floor. Such unauthorised building works (UBW) (subject UBW) not only impeded the maintenance of the balcony on the first floor but also obstructed the means of escape. The complainant filed a lawsuit against owner A. Subsequently, owner A and the complainant reached a settlement, and owner A demolished part of the subject UBW voluntarily.

97. In early 2013, the complainant reported (the subject report) to BD and LandsD that owner A, after demolishing part of the subject UBW, re-built the subject UBW by installing steel framed windows (re-built UBW). After the case was handled by staff of BD's relevant geographical section for six months, it was referred to the Village Houses Section (VHS) of BD for processing. VHS replied to the complainant that the re-built UBW was constructed using the original materials, so it was not regarded as new UBW and no immediate enforcement action would be taken by BD. LandsD replied to the complainant that, according to BD's revised mechanism for reporting UBW in NTEH, they had no jurisdiction on UBW associated with NTEH constituting unauthorised occupation of government land. On the other hand, BD pointed out that UBW in NTEH constituted unauthorised occupation of Government land, hence should be under the jurisdiction of LandsD.

98. The complainant made the following allegations –

(a) BD delayed in handling the subject report; and

(b) there was shirking of responsibility between BD and LandsD in taking enforcement action against the re-built UBW.

The Ombudsman's observations

99. BD explained that, under normal circumstances, UBW that was rebuilt after demolition would be regarded as existing UBW constituting less serious contravention of the law and posing lower potential risks, which should be eligible for reporting under the "Reporting Scheme for Existing UBW in NTEH". Since the re-built UBW involved re-erection of the original steel framed windows and roof after demolition, it would be difficult for VHS to determine whether the re-built UBW should be regarded as a new UBW or not. With a lack of precedent, VHS therefore referred the case to the Existing Building Committee (EBC) of BD for detailed consideration and decision. Thereafter, EBC requested VHS staff to carry out re-inspection and provide further information for EBC's consideration. Therefore, VHS sought further information from the complainant, the relevant District Lands Office (DLO) of LandsD and the Lands Tribunal and then re-submitted the case to EBC for consideration. As a result, BD could not decide whether immediate enforcement action should be taken or not.

100. In the light of EBC's ruling on 4 March 2014 that the re-built UBW should be regarded as a new UBW, BD would take enforcement action against the re-built UBW.

101. The Ombudsman considered that BD had handled the subject report in line with its established policy and did not shirk its responsibilities. With regard to whether or not the re-built UBW should be regarded as a new UBW, there was no precedent and the ruling would have profound implications on the enforcement action to be taken by BD on similar UBW. It was understandable that BD referred the case to EBC for its scrutiny. The Ombudsman therefore considered the allegations against BD unsubstantiated.

102. LandsD explained that owner A had already made a declaration of his UBW with BD and provided such proof to DLO. DLO decided to suspend its enforcement actions against the relevant UBW as it had to wait for BD to confirm whether such declaration would be accepted. It was clear that DLO handled the subject report in accordance with its established policy and did not shirk its responsibility. The Ombudsman therefore considered the allegation against LandsD unsubstantiated.

103. The Ombudsman noted that it took BD several months to rule that the re-built UBW should be regarded as a new UBW, the progress was perceivably too slow from the complainant's perspective. The Ombudsman urged BD to learn from this case and expedite its processing of similar issues in future.

Administration's response

104. BD accepted The Ombudsman's recommendation and has uploaded onto BD's intranet the EBC paper that contains the background, argument and decision of EBC regarding the re-built UBW (i.e. UBW which has been demolished and then re-built to the original design with the original materials), for the reference of BD staff with a view to expediting the processing of similar cases in future.

105. For the subject case, an order was served to owner A under the Buildings Ordinance in April 2014 for removal of the UBW under concern.

Buildings Department and Lands Department

Case No. 2013/3986A&B – Delay and shirking responsibility in taking enforcement action against the illegal enclosure of a balcony of a New Territories Exempted House

Background

106. On 29 September 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Buildings Department (BD) and Lands Department (LandsD).

107. According to the complainant, she was the owner of the G/F unit of a New Territories exempted house (generally referred to as "village house") (the village house). On 13 May 2013, the complainant called the 1823 Call Centre (the Call Centre) to complain that the balcony of the unit above her own (the First Floor Unit) had been enclosed by the owner for use as a kitchen (the enclosed balcony), which she claimed might affect the structural safety of the building. On 13 June, the complainant called the Call Centre to inquire about the progress of the case and was informed that it was being followed up by BD. The complainant later called BD and was told that the First Floor Unit was a village house unit and the enclosed balcony might not breach any rules as long as the building area of the unit did not exceed 700 square feet. BD also indicated that LandsD's advice would have to be sought before a decision on how to follow up on the issue could be made.

108. In late September 2013, BD replied, via the Call Centre, to the complainant that the enclosed balcony was not an unauthorised building works (UBW) and that the case had been referred to the District Lands Office (DLO) of LandsD.

109. The complainant accused BD and LandsD of delaying to take enforcement action against the enclosed balcony and allegedly shirking responsibilities to each other.

The Ombudsman's observations

BD

110. The Office of The Ombudsman accepted BD's explanation that since the enclosed balcony of the village house was not an UBW under the Buildings Ordinance (Application to the New Territories) Ordinance and posed no obvious hazard, BD did not have the authority to take any enforcement action.

111. Given the above, The Ombudsman considered the allegation against BD unsubstantiated.

LandsD

112. BD already explained to DLO on 19 September 2013 that it had no authority to take enforcement action against the enclosed balcony and asked DLO to follow up on the case. LandsD also accepted that complaints were normally handled according to the lease conditions of the relevant lot and that lease enforcement actions could be taken against substantiated complaints.

113. However, LandsD all along maintained that it had to work in line with BD's enforcement actions against UBWs in village houses after BD implemented the enhanced enforcement strategy, and hence the enclosed balcony should be followed up by BD. In this case, it was clear that BD would not take any enforcement action against the enclosed balcony. There was indeed no reason for LandsD to insist on withholding lease enforcement to accommodate BD's enforcement action.

114. The Office of The Ombudsman agreed that the enclosed balcony should not be regularised by LandsD (i.e. to give retrospective approval). Nevertheless, LandsD should take the lease enforcement action against the enclosed balcony to achieve deterrent effect.

115. In view of the above, The Ombudsman considered the allegation against LandsD substantiated.

116. The Ombudsman urged LandsD to take lease enforcement action against the enclosed balcony as soon as possible.

117. Moreover, the Office of The Ombudsman noticed that there were often disputes between BD and LandsD (which are both under the charge of the Development Bureau) over their authorities and responsibilities, The Ombudsman recommended that advice be sought promptly from the Bureau in the event of any similar disputes in future so as to resolve problems for the public as soon as possible.

Administration's response

118. LandsD accepted The Ombudsman's recommendations. DLO issued a warning letter to the relevant house owners (the owners) regarding the enclosed balcony in May 2014. If the owners fail to rectify the irregularity, DLO would arrange registration of the warning letter against the subject premises in the Land Registry.

119. Upon the request of the owners on safety grounds, DLO had allowed a time extension until 28 August 2014. As no rectification works were taken by then, DLO proceeded to arrange the registration of the warning letter against the First Floor Unit in the Land Registry in late September 2014.

120. LandsD has issued guidelines to remind all New Territories DLOs (NTDLOs) that for cases where the BD has confirmed that the structures were not regarded as UBWs under the Reporting Scheme for UBW in village houses, NTDLOs should act on complaints and take appropriate lease enforcement action in accordance with current practices and procedures. NTDLOs should clarify with LandsD for cases where the division of responsibilities between BD and LandsD was not clear.

Buildings Department and Lands Department

Case No. 2013/2794A & 2013/2836A (Buildings Department) – Failure to take timely and effective enforcement action against an unauthorised columbarium and other unauthorised building works at a temple

Case No. 2013/2794B & 2013/2836B (Lands Department) – Delay in taking effective enforcement action against illegal occupation of Government land, erection of illegal structures and breach of lease conditions by a temple

Background

121. In July 2013, the Office of The Ombudsman received complaints from different members of the public (the complainants) that an unauthorised columbarium in a monastery (the Monastery) was occupying government land. However, the actions taken by the Lands Department (LandsD) and Buildings Department (BD) over the years failed to deter the Monastery. The complainants alleged that –

(a) LandsD had not taken any decisive land control action against the breach of lease conditions and illegal occupation of government land by the Monastery; and had not enforced a removal order for long, thus allowing the problem to persist; and

(b) BD had not taken any resolute enforcement action to remove the columbarium and other unauthorised structures in the Monastery; and had lightly declared them as without immediate danger, thus allowing the columbarium and the structures to remain.

122. In 2007, LandsD and BD received reports about the Monastery's unauthorised structures and illegal occupation of government land. After investigation, the two departments confirmed that the irregularities included –

(a) the operation of a columbarium on the private land of the Monastery, which was in breach of the planned land use and the relevant lease conditions;

(b) the illegal occupation of the government land abutting the private land of the Monastery and the construction of unauthorised structures (including a columbarium) thereon; and

(c) the presence of unauthorised structures on the private land of the Monastery (including a columbarium).

123. LandsD has the powers and duties to regulate and take enforcement actions against the breaches mentioned in items (a) and (b) above while BD is responsible for regulation of item (c).

The Ombudsman's observations

Allegation against LandsD

124. The Office of The Ombudsman found that LandsD had explained why its District Lands Office (DLO) decided to withhold lease enforcement action against the Monastery's suspected breaches of land use and lease conditions. The Office of The Ombudsman generally accepted LandsD's explanation for withholding lease enforcement action under the prevailing regulatory policies.

125. As for the Monastery's illegal occupation of government land, DLO only posted notices and instituted prosecution under the Land (Miscellaneous Provisions) Ordinance in the past few years after Application A for regularising the unauthorised structures on government land was withdrawn by the Monastery. No substantive action has been taken for taking back the government land or demolishing the unauthorised structures.

126. However, after DLO issued notices to the Monastery and instituted prosecution, the area of the government land illegally occupied by the Monastery decreased substantially. The Monastery also removed some of the niches inside the unauthorised structure and submitted plans to BD for commencing work to demolish the structure. The Office of The Ombudsman was of the view that DLO's land control action was not without progress. The complainants had criticised the court for imposing too light a penalty on the Monastery, as a result of which DLO's prosecution lacked deterrent effect. As the sentence imposed by the court, be it heavy or light, is beyond DLO's control, it does not involve maladministration on the part of DLO.

127. To conclude, The Ombudsman considered that from the administrative perspective, the allegation against LandsD unsubstantiated. But the Office of The Ombudsman also pointed out that according to available information, the Monastery had been employing a delaying tactic and has taken advantage of the loophole in LandsD's existing policy of withholding lease enforcement action by submitting to the Town Planning Board application for planning permission/amendment of planning permission application and for review/appeal/hearing adjournment upon rejection of the applications. Notwithstanding that its breaches of the law/lease were confirmed by government departments many years ago, the Monastery was still keeping its structure (i.e. the columbarium) for profit making. The Office of The Ombudsman noticed that such a policy loophole also appeared in many cases of breach of lease conditions.

Allegation against BD

128. The Office of The Ombudsman considered that BD was acting in accordance with its established policies when no immediate enforcement action was taken against the existing unauthorised structures on the private land of the Monastery. As to the newly erected unauthorised structures, BD had duly taken enforcement. Moreover, there was no evidence suggesting that BD was imprudent in assessing the risks of the unauthorised structures in the Monastery. As such, The Ombudsman considered that from the administrative perspective, the allegation against BD unsubstantiated.

129. The Ombudsman made the following recommendations –

LandsD

(a) should review the policy, especially the need to withhold lease enforcement action, or put in place measures to prevent offenders from deliberate procrastinating so as to hinder indefinitely LandsD's operation;

(b) in addition, the arrangement on the relocation of ancestors' ashes is, after all, essentially a contractual/compensation issue between the Monastery and family members of the deceased. The Government's enforcement action should not be hindered endlessly. Instead of merely posting notices or initiating prosecution repeatedly, LandsD should take decisive action to take back the government land (including the portion of the

columbarium thereon) after the deadline. The only thing that LandsD needs to do, before taking this action, is to give a clear and adequate notice (e.g. publishing a notice in the newspapers) to the family members of the deceased. In this way, the situation that the Monastery could continuously occupy government land to make profits by paying only an insignificant fine could be prevented;

BD

(c) should closely monitor the progress of the Monastery's submission of plans for demolishing the unauthorised columbarium so as to prevent the Monastery from employing the same tactic to further delay the demolition work; and

(d) since a removal order in respect of the Monastery's columbarium had been issued by BD and a fine had been imposed by the court for the non-compliance with the removal order, BD should take practical action resolutely. Likewise, BD should notify the family members of the deceased by giving a public notice in the newspapers and demolish the unauthorised structure after the deadline in order to eradicate the problem.

Administration's response

130. LandsD accepted the recommendations and has taken the following actions –

(a) LandsD issued to all DLOs guidelines on the handling of regularisation applications from unauthorised columbaria. On receiving such an application, the respective DLO should write to the applicant requiring him/her to meet certain prerequisite conditions, or DLO may refuse to process the application and resume the lease enforcement action (and/or land control action). Such conditions include, inter alia, (i) the irregularities shall not be intensified or exacerbated and (ii) sale of niches or promotion of niches by any form of advertisement should stop pending approval of the planning/regularisation application.

On 25 June 2014, the Food and Health Bureau introduced the Private Columbaria Bill into the Legislative Council (LegCo) for discussion and consideration. LandsD will, in the light of the

discussions, further consider whether to formulate other guidelines on regularisation applications.

(b) Regarding the arrangement on the relocation of ancestors' ashes, the Government, apart from taking land control action according to the law, needs to consider the importance of ancestors' ashes to Chinese people. Therefore, prudence should be exercised in land control action involving ancestors' ashes. Where the occupier is cooperative in arranging the relocation of ashes, it is justifiable that reasonable time be given as far as possible to allow the occupier and the consumers who have purchased/rented the niches to make their own arrangement to relocate the ashes. In this way, the occupier will not be able to take advantage by shifting the responsibility of relocating the ashes to the Government. In fact, the DLO concerned has been continuously taking appropriate land control action against the illegal occupation of government land by the Monastery in an attempt to make the parties concerned to relocate the ashes.

In addition, the Development Bureau introduced the Land (Miscellaneous Provisions) (Amendment) Bill 2014 to LegCo on 9 July 2014. The Bill aims to increase the penalties for offences relating to illegal occupation of unleased government land for the purpose of enhancing the deterrent effect of the offences.

131. BD accepted recommendation (c) and will closely monitor the progress of submission of plans regarding the demolition of the unauthorised structure. BD has taken the following actions –

(a) Two letters were sent to the Monastery on 3 and 7 March 2014 urging them to submit the plans;

(b) on 4 April 2014, the authorised person (AP) appointed by the Monastery submitted the site formation proposal to BD for approval. The proposal also indicated that the unauthorised structure would be demolished. On 28 May 2014, BD notified the AP that the proposal was rejected under the Buildings Ordinance;

(c) two letters were sent to the Monastery on 5 June and 7 July 2014 urging it to resubmit the plans to BD as soon as possible; and

(d) the owner was sentenced by the court to a fine in the second round of prosecution jointly initiated by BD and LandsD.

132. BD did not accept recommendation (d). According to BD's existing policy, BD would not arrange demolition of an unauthorised building work (UBW) by government contractor unless the UBW constitutes obvious hazard or imminent danger to life or property. Nevertheless, BD has carried out inspections from time to time to review the situation and based on BD's recent inspections, the UBW under complaint did not pose imminent danger. In addition, it would be more effective to post the notice before Ching Ming Festival at the entrance of the columbarium and also the entrance of the Monastery so that the owners of the niches would be aware of BD's enforcement action. Subsequently, BD posted notices on 18 March 2014 before Ching Ming Festival at the entrance of the columbarium and also the entrance of the Monastery, reminding the owners of the niches to liaise with the Monastery to remove the niches concerned. A letter was sent to the Monastery on 7 March 2014 requiring it to arrange demolition of the columbarium so as to comply with the order.

133. The Office of The Ombudsman indicated no objection to BD's alternative approach.

Buildings Department,
Food and Environmental Hygiene Department
and Lands Department

Case No. 2012/5694A (Buildings Department) – Failure to effectively control a food shop's unauthorised building works extending from private land to Government land

Case No. 2012/5694B (Food and Environmental Hygiene Department) – Failing to effectively control an unlicensed food shop

Case No. 2012/5694C (Lands Department) – Failing to effectively control the illegal occupation of Government land by a food shop with unauthorised building works and platform

Background

134. On 17 December 2012, the complainant lodged a complaint with the Office of The Ombudsman by mail against the Food and Environmental Hygiene Department (FEHD), Lands Department (LandsD) and Buildings Department (BD).

135. According to the complainant, she complained to FEHD on 29 October 2012 about an unlicensed food premises selling food next to a shop at a certain location (the subject location). However, FEHD replied that the food premises (Food Premises A) was not a licensed food premises and hence could not take action to close the premises. Instead, FEHD referred the case to BD and LandsD for follow-up actions as it involved unauthorised building works (UBWs) on Government land. Subsequently, BD informed the complainant that it had referred the case to LandsD. But LandsD did not give the complainant a substantive reply.

136. The complainant alleged that the three Government departments failed to coordinate their regulatory actions against Food Premises A, resulting in its continued use of the premises for illegal operation of business.

The Ombudsman's observations

FEHD

137. FEHD had been tackling the problem involving the operation of an unlicensed food factory by Food Premises A. But as FEHD admitted after its internal review, the application for a closure order should not have been withheld in the first place even if the case involved UBWs and occupation of Government land.

138. FEHD relied on a piece of legal advice which suggested that it was not appropriate to apply for a closure order in this case. The Office of The Ombudsman questioned whether such advice was applicable to this case, having taken into account its actual circumstances. First, Food Premises A was an extension from the side of the street shop of a building. The rear portion of the shop did not link up with other parts of the building and would by no means lead to the fire escape exit. As the shop occupied only a small portion of the public pavement, the Office of The Ombudsman was not convinced that the closure of Food Premises A would cause obstruction to the access or fire escape. Moreover, even if it was not appropriate to close the public place, the action to close the part of Food Premises A situated on private land was considered adequate in restraining the premises from continuing its business operation.

139. The Office of The Ombudsman therefore considered that FEHD should have applied to the court for a closure order in respect of this case in the first place. If there were difficulties in determining the coverage of closure due to the presence of Food Premises A's UBWs on Government land, FEHD should have proactively consulted the relevant Government departments and collected the required information for applying to the court for a closure order, so as to impose a penalty against Food Premises A as early as possible for its serious irregularities.

140. Moreover, although FEHD had prosecuted Food Premises A for operating a food business without a licence, the premises continued to operate its unlicensed business regardless of the penalties. Apparently, FEHD's enforcement strategy lacks deterrent effect. In fact, in as early as March 2012 when FEHD was aware of the occupation of public pavement on Government land by Food Premises A for hawking purpose, FEHD should have at that juncture considered prosecuting the premises by invoking provisions governing illegal hawking for greater deterrent effect. Under the provisions of the Public Health and Municipal Services Ordinance, in addition to instituting prosecutions, FEHD could

seize the paraphernalia and commodities of the shop, thereby enforcing against the shop continuing for its business operation.

141. Based on the above analysis, The Ombudsman considered the allegation against FEHD partially substantiated.

LandsD

142. The District Lands Office (DLO) of LandsD conducted site inspection twice after receiving the complaint, and immediately responded to the 1823 Call Centre on the same day, asking the centre to refer the case to other departments for follow-up according to the established division of duties.

143. However, notwithstanding that Food Premises A's unauthorised extension and UBWs were under the purview of BD, the persistent practice of placing a metal platform in front of the shop during business hours was clearly a case of illegal occupation of Government land. The Office of The Ombudsman took the view that DLO, as the administrator of Government land in the district, could not shirk its responsibility. The fact that the platform was movable was hardly a convincing argument to insist the established division of work and allow the unlawful occupation of Government land to persist.

144. Based on the above analysis, The Ombudsman considered the allegation against LandsD partially substantiated.

145. After the Office of The Ombudsman looked into the case, it was noted that DLO had changed its stance by taking proactive enforcement actions against all illegal occupation of Government land at the subject location and achieved concrete results.

BD

146. Although BD noted the retractable awning and fixed metal frame at Food Premises A during its inspection in November 2012 and decided to take enforcement action, it failed to discover the structural connection between Food Premises A and the street shop of the building. As a result, BD mistakenly considered that the other UBW should be followed up by LandsD. BD discovered the mistakes after conducting another inspection.

147. In fact, BD had made similar erroneous observation in the investigation of another case at the subject location in March 2012. In other words, there was precedent of BD being negligent. The Office of The Ombudsman was disappointed that BD staff, being a professional responsible for examining the structural problems of buildings, had conducted the inspection casually.

148. In view of the above analysis, The Ombudsman considered the allegation against BD partially substantiated.

149. In conclusion, The Ombudsman considered this complaint partially substantiated and recommended that –

(a) FEHD should instruct its staff to proactively follow up on cases of unlicensed restaurants with serious irregularities by —

(i) obtaining necessary information from relevant departments to continue with the actions to apply to the court for a closure order if the situation so warranted, even if the case involved UBWs or occupation of Government land by the food premises; and

(ii) considering prosecuting the food premises for unlicensed hawking if it occupied public place for selling food, so as to serve as a stronger deterrent;

(b) LandsD should review its enforcement policy on movable platforms. For platforms, fixed or otherwise, which occupied Government land on a daily basis, LandsD should take enforcement action according to law; and

(c) BD should remind its staff to carry out inspection of UBW prudently, and should enhance training in order to improve and enhance staff professionalism and judgment in site inspection.

Administration's response

150. FEHD accepted The Ombudsman's recommendations and has taken the follow-up actions below –

(a) FEHD has reminded its staff that when handling cases in respect of unlicensed food premises with serious irregularities, they were required to institute prosecutions against unlicensed food premises in accordance with departmental guidelines and established procedures and, where appropriate, apply to the court for closure orders; and

(b) when taking enforcement actions against unlicensed food premises, FEHD staff would exercise professional judgment to collect concrete evidence at the scene in order to establish the fact that illegal activities have been carried out, as well as to invoke the relevant legislation (including the legislation in respect to illegal hawking) to institute prosecutions. FEHD would continue to implement practicable measures to strengthen deterrence against unlicensed food premises.

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

(a) In late 2013, LandsD formed a working group which included a representative of the Department of Justice to study how to enhance the effectiveness of enforcement action against persistent illegal occupation of Government land by movable items. The study is still in progress; and

(b) on 9 July 2014, the Government introduced the Land (Miscellaneous Provisions) (Amendment) Bill 2014 into the Legislative Council to amend the Land (Miscellaneous Provisions) Ordinance (Cap. 28) to increase the penalties for offences relating to unlawful occupation of unleased Government land for the purposes of enhancing the deterrent effect of the relevant offences.

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

(a) Having considered that the case was as a result of the negligence of individual staff, BD has cautioned the staff concerned and reminded them to carry out inspections with due diligence and vigilance; and

(b) to develop training and development programme and arrange experience sharing seminars for staff from time to time in order to enrich their professional knowledge and working experience.

Buildings Department, Food and Environmental Hygiene Department and Lands Department

Case No. 2013/2989A&B (Buildings Department and Food and Environmental Hygiene Department) – Failing to control a stall illegally built on a pavement

Case No. 2013/2989C (Lands Department) – Failing to control the illegal occupation of a pavement by a stall

Background

153. On 2 August 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Buildings Department (BD), Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

154. The complainant alleged that an unauthorised concrete stall was built on a pavement for trading by a stall (Stall A). This was obviously illegal, but the aforementioned departments did not take any enforcement action against it.

The Ombudsman's observations

155. According to the investigation of the Office of The Ombudsman, Stall A was holding a fixed-pitch hawker licence issued by FEHD. It was not unlawful for it to trade within the permitted area. As the licensing authority, FEHD had carried out appropriate monitoring of the stall after receiving the complaint. This matter fell outside the purviews of BD and Lands D.

156. In the light of the above, The Ombudsman considered the complainant's allegation against BD, FEHD and LandsD unsubstantiated.

157. Nevertheless, Stall A occupied an entire section of the pavement. The Ombudsman therefore urged FEHD to keep a close watch of the situation. If any vehicle-pedestrian conflict occurred afterwards, for the safety of pedestrians, FEHD should assess whether the stall should be relocated, in consultation with the Transport Department.

Administration's response

158. FEHD accepted The Ombudsman's recommendation. During the three months between mid-November 2013 and mid-February 2014, FEHD staff conducted 30 inspections to Stall A at different timeslots but found no unauthorised extension of business area by the stall. According to site observation, the pedestrian flow of the pavement concerned was low and vehicle-pedestrian conflict was not found. Having assessed the situation, FEHD does not consider it necessary to relocate the stall at this stage. Nevertheless, FEHD will continue to monitor the situation and re-assess the need to relocate the stall, if necessary.

Buildings Department, Food and Environmental Hygiene Department and Lands Department

Case No. 2013/2959A (Buildings Department) – Failure to control the unauthorised building works of a shop on a pavement

Case No. 2013/2959B (Food and Environmental Hygiene Department) – Failing to control a shop operator's illegal hawking activity on a pavement

Case No. 2013/2959C (Lands Department) – Failing to control the illegal occupation of a pavement by a shop operator with a concrete platform

Background

159. On 2 August 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Buildings Department (BD), Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD). According to the complainant, a shop with unauthorised structures on a pavement (the shop) had been operating for nine months, posing a hazard to the safety of the building and the road users. BD and LandsD failed to follow up on the issue.

160. The complainant also considered that it unreasonable for FEHD in general only took enforcement actions against unlicensed itinerant hawkers but not shops (with illegally built concrete structures) engaging unlawfully in trading activities on government land.

The Ombudsman's observations

Allegation against BD

161. BD explained to the Office of The Ombudsman that no measurement of the projections of the shop concerned had been taken during the site inspection in 2012 due to its limited manpower which rendered it difficult to cater for UBW outside the scope of a complaint. Later in 2013, BD received further complaint from the complainant against the shop concerned. Since the site situation remained unchanged as revealed from the photographs, BD replied to the complainant without

carrying out further site inspection.

162. Although the complainant in 2012 only complained about the occupation of pavement, BD staff had carried out site inspection and did notice the above-mentioned projections. However, they simply ignored whether those projections were actionable UBW or not and did not measure their dimensions. The Office of The Ombudsman considered that manpower issue was not a valid excuse. BD had failed to discharge its duty to a certain extent.

163. Not until the receipt of the notification from LandsD did BD take site measurements of the projections from the shop concerned. It was then confirmed that those projections had exceeded the dimensional limits tolerated by BD and were therefore actionable. The Office of The Ombudsman opined that if BD had seriously examined the issue at the beginning, appropriate follow-up action could have been taken earlier. Overall speaking, The Ombudsman considered the allegation against BD substantiated.

Allegation against FEHD

164. FEHD informed the Office of The Ombudsman that before receiving the complaint from the complainant in August 2013, it had already found the shop causing pavement obstruction and taken follow-up actions, including giving warnings and charging the shop operator with the offence of causing obstruction. After receiving the complaint in August, FEHD took enforcement actions again. FEHD also explained that as no substantial evidence could be collected to prove any transactions, the shop operator was not charged with the offence of illegal hawking.

165. It could be seen from the above that FEHD had all along been following up the problem of pavement obstruction by the shop. Nevertheless, as shown in the photos taken in November 2012 and in 2013, the shop operator placed commodities (i.e. bread) for sale and equipment (including two bread shelves and two racks) on the platform, causing obstruction on that part of the pavement. It could thus be inferred that the shop operator had been violating regulations persistently.

166. After the Office of The Ombudsman commenced its investigation, the number of articles placed on the platform by the shop operator in September and December 2013 was less than before. It could be seen that the irregularities had become less serious, but the

problem still existed.

167. In fact, according to the Government's internal division of work and enforcement strategy, FEHD should take enforcement actions by charging the offenders, be they itinerant hawkers or shop operators, with the offence of illegal hawking if they carry out illegal hawking activities in public place. However, in this case, FEHD had all along charged the shop operator with only the offence of causing obstruction, which imposed less deterrent effect, and there were indeed inadequacies.

168. According to the interpretation provision of the Public Health and Municipal Services Ordinance, the act of any person who exposes for sale any goods in any public place has already constituted a hawking activity. The Office of The Ombudsman considered that FEHD could charge the shop operator with the offence of illegal hawking as long as it had collected evidence to prove such an act. Even if evidence of actual transactions had to be collected, FEHD staff were only required to conduct observation in the vicinity of the shop over a period of time and it should not be difficult for them to witness cases of cash transactions between shop staff and customers. In this connection, the Office of The Ombudsman urged FEHD to engage in active collection of evidence, institute more prosecutions for the offence of illegal hawking and seize the offenders' goods in order to achieve a stronger deterrent effect.

169. In view of the above analysis, The Ombudsman considered the allegation against FEHD partially substantiated.

Allegation against LandsD

170. The Ombudsman considered that LandsD, due to staff negligence, did nothing to address the unlawful occupation of government land by the shop platform before the complaint was lodged the second time. In view of this, The Ombudsman considered the complaint against LandsD substantiated.

171. In sum, The Ombudsman considered this complaint substantiated and urged –

(a) BD to remind its staff of the need to carefully review the cases when handling public complaints and to follow up on all irregularities involving actionable UBWs;

(b) FEHD to be more proactive in gathering evidence so that the charge of unlicensed hawking could be resorted to more often and the goods seized under the relevant legislation, so as to achieve a greater deterrent effect and to clamp down hard on such blatant wrongdoings; and

(c) LandsD to instruct its staff to exercise care in handling referral letters from other departments and to review the filing procedures to avoid further misplacing of letters.

Administration's response

172. BD accepted the recommendation and has revised the relevant internal manual to remind its staff that in examining reported cases, they should follow up on all items of actionable UBW involved.

173. FEHD accepted The Ombudsman's recommendation. FEHD staff conducted ongoing inspections to the shop, but found no irregularities including illegal hawking or pavement obstruction. On 7 February 2014, FEHD staff noted that the shop had ceased business, with subsequent demolition of the fixtures inside and outside the shop premises commencing in late February. The premises remained vacant after its shop front structure had been demolished.

174. LandsD accepted the recommendation and has taken the following actions –

(a) Reviewing the existing filing procedures and introducing a system to review the correspondence regularly to ensure all the cases received are handled and followed-up in a timely manner; and

(b) reminding concerned staff to observe the need to handle all correspondence prudently in accordance with (a) above.

Buildings Department, Lands Department and Office of the Communications Authority

Case No. 2012/3950A (Building Department) – Failing to take enforcement action against unauthorised radio base stations on the rooftops of two village houses

Case No. 2012/3950B (Lands Department) – (1) Failing to follow up properly on the unauthorised radio base stations on the rooftops of two village houses; and (2) unreasonably approving the excavation works of a power supply company to supply electricity to one of the unauthorised radio base stations, and failing to conduct local consultation on the excavation works

Case No. 2012/3950C (Office of the Communications Authority) – Failing to regulate unlicensed radio base stations on the rooftops of two village houses

Background

175. On 29 September 2012, the complainant lodged a complaint by mail with the Office of The Ombudsman against the Lands Department (LandsD), the former Office of the Telecommunications Authority (OFTA) (i.e. the present Office of Communications Authority (OFCA)) and Building Department (BD). The complainant was a resident of a village in the New Territories. According to the complainant, residents of the village wrote to LandsD and BD in August 2006, reporting unauthorised erection of a radio base station (Station 1) on the roof of a village house (VH1). However, the concerned government departments failed to take effective enforcement action. Later, another radio base station (Station 2) was erected on the roof of an adjoining village house (VH2).

176. The complainant alleged that –

(a) LandsD –

(i) did not take appropriate follow up action on the unauthorised erection of radio base stations at the concerned locations; and

(ii) approved the road excavation works carried out by a power supply company for electricity supply to the radio base

stations concerned, without consultation with the villagers;

(b) OFTA/OFCA failed to regulate unlicensed installation of radio base stations; and

(c) BD did not take enforcement action against the unauthorised building works (UBW) at the concerned locations.

The Ombudsman's observations

Allegations against LandsD

177. The Office of The Ombudsman found that while the relevant District Lands Office (DLO) of LandsD had written to the owner and Company A respectively regarding the breach of lease conditions by VH1 and reported the breach to OFTA for action (which had resulted in the suspension by Company A of the operation of Station 1), Station 1 had yet to be removed after many years and the breach of lease conditions persisted. DLO explained that as Station 1 was not a priority case, immediate lease enforcement actions were not carried out. Nonetheless, given that the breach had been confirmed and BD's enhanced enforcement policy against village house UBWs was not in place then, The Office of The Ombudsman considered that DLO should have at least "imposed an encumbrance" on the property, a step which did not involve much resources but could achieve a deterrent effect.

178. Regarding the villagers' more recent complaint about Station 2, DLO had rejected Company B's application for a short term waiver in the light of the circumstances. Regarding the complaint about excavation works, DLO had taken follow-up actions and its explanation was accepted by the Office The Ombudsman.

179. Overall speaking, The Ombudsman considered the allegation against LandsD partially substantiated.

Allegation against OFCA

180. OFCA took appropriate follow-up actions in 2006 and 2012 respectively against Company A's unapproved installation and use of Station 1. As a result, OFCA issued a warning to the company.

181. Subsequent to Company B's application in 2012 for erecting Station 2, OFCA had been monitoring whether the company used this station without OFCA's approval. Also, OFCA handled the company's application in accordance with the established procedures and eventually withdrew its approval for Station 2. Such actions were appropriate. The Ombudsman therefore considered the allegation against OFCA unsubstantiated.

Allegation against BD

182. Although the complainant claimed that the villagers had reported to BD in 2006 regarding VH1, such claim did not accord with BD's claim and the complainant failed to provide specific information of the aforesaid report. In the absence of corroborative evidence, The Ombudsman could not ascertain the allegation and made no comment on it.

183. Upon receiving the report about VH2 in 2012, BD right away instructed a consultant to follow up the case. Thereafter, BD's staff also conducted inspection and investigation. The follow-up work is still in progress.

184. In conclusion, The Ombudsman considered the allegation against BD unsubstantiated.

185. Nevertheless, BD should follow up the aforesaid UBW closely, including taking immediate enforcement actions against the UBW at VH2 and ascertaining whether the owner of VH1 had reported the UBW in line with the new policy, with a view to formulating a plan of enforcement actions.

186. The Ombudsman urged –

(a) LandsD to take more proactive actions against cases in breach of lease conditions in the future. Even though the cases may not be of high priority, consideration should be given to imposing an encumbrance to achieve a deterrent effect; and

(b) BD to follow up and monitor the UBW at VH1 and 2 closely and take enforcement actions in accordance with its enforcement policy.

Administration's response

187. LandsD accepted The Ombudsman's recommendations and has taken the following actions –

(a) LandsD issued memoranda asking DLOs to take more prompt and proactive actions against cases in breach of lease conditions in the future. Besides, a memorandum was also issued on 3 June 2013 to DLOs reminding them of the need to impose, according to the procedures, an encumbrance in respect of other cases not complying with the warning, so as to achieve a deterrent effect; and

(b) in a subsequent site inspection, DLO found that the UBWs on the rooftops of VH 1 and 2 had been demolished.

188. BD accepted The Ombudsman's recommendation. Its recent inspection revealed that the UBW on the roofs of VH 1 and 2 had been demolished. As such, it is not necessary for BD to take any further enforcement action.

Companies Registry

Case No. 2013/1132 – (1) Allowing a company to submit bogus information for filing in the Companies Registry; and (2) Not following up the complainant's complaints against the company's breach of the Companies Ordinance

Background

189. The complainant, being a director of a company (Company A), lodged a complaint with the Office of The Ombudsman on 3 April 2013 against the Companies Registry (CR). The complainant alleged that the major shareholder of Company A had filed with CR a "Notification of Change of Secretary and Director (Appointment/Cessation)" (Form D2A) giving bogus information that the complainant had resigned as a director of Company A. When the complainant lodged a complaint to CR, CR responded that it only filed the document submitted. The complainant considered that CR had not dealt with his complaints properly, thus prejudicing his interest and reputation.

190. The complainant also alleged that Company A had failed to convene any shareholders' meeting, directors' meeting and Annual General Meeting and refused to provide him with the company's Memorandum and Articles of Association as well as information on its operation. He had lodged a complaint with CR but he considered that CR had not followed up.

The Ombudsman's observations

191. The Office of The Ombudsman noted that CR had to handle a large number of documents (over 2 million documents) every year and only less than 0.01% cases involved complaints or disputes, and the Companies Ordinance clearly stated that CR was not required to verify the truth of the information contained in the documents. The Ombudsman considered that it was not unreasonable that CR did not require companies to submit supporting documents when it handled documents filed by companies for registration.

192. As far as this case is concerned, when CR received the Form D2A filed by Company A in March 2012, CR had not received any complaint from the complainant. Hence, there was no reason for CR to cast doubts on the information provided by Company A and CR registered the Form D2A filed by Company A according to normal procedures. The Office of The Ombudsman considered that there was no maladministration on the part of CR in its handling of the Form D2A filed by Company A, and the complaint against CR for allowing a company to submit bogus information for filing in the Companies Register was unsubstantiated.

193. Regarding the handling of the complainant's complaint, CR had initiated an investigation against Company A and taken follow-up actions after receiving the complainant's complaint. However, the Office of The Ombudsman considered that CR had handled the various allegations made by the complainant in different ways. In particular, there was a significant delay in handling the claim that Company A was allegedly in breach of section 26 of the Companies Ordinance (i.e. the requirement to provide copies of memorandum and articles of association to members). After replying to the complainant on 25 May 2012 informing him that an investigation would be conducted for his complaint, CR had not provided a substantive reply to the complainant until 10 May 2013 and no interim reply had been given during the period. While the Office of The Ombudsman noted that CR could only reply to the complainant in May 2013 after receiving in April 2013 Company A's substantive responses to its questions, given that the investigation lasted nearly a year, CR should have given the complainant interim replies to inform him of the progress of investigation so as to avoid giving the impression that no follow-up action was taken by CR. The Ombudsman considered that the complainant's complaint against CR for not following up with his complaint was partially substantiated.

194. In view of the above, The Ombudsman considered the complaint against CR partially substantiated and recommended CR to –

(a) consider adding appropriate annotation to the registered Form D2A of Company A which contained incorrect information so that the public would not be misled by the incorrect information; and

(b) set up a system or issue guidelines on complaints handling to ensure that CR staff would handle all complaints in a proper and timely manner. If a long period of time is required for handling a complaint case, interim replies should be issued to the complainant.

Administration's response

195. CR accepted The Ombudsman's recommendations and has taken the following actions –

(a) in respect of the registered Form D2A of Company A which contained incorrect information, CR has taken an administrative measure to add annotations in Company A's Document Index on the Companies Register to indicate that the information reported in the document is incorrect; and

(b) CR has an established mechanism and issued internal guidelines on the handling of complaints relating to alleged breaches of the Companies Ordinance. To ensure that all complaints are handled properly and timely by Registry staff, CR's General Registration Section has issued instructions to its staff on handling complaints to highlight the importance of handling all complaints properly and timely. CR has also required its staff to regularly review cases under processing and give complainants interim replies so as to avoid giving them the impression that CR has not taken any follow-up actions.

Correctional Services Department

Case No. 2013/0697 – Improperly opening, reading and stopping an expatriate inmate's letters to his consulate and a non-government organisation, and coercing him into destroying the letters afterwards

Background

196. On 25 February 2013, the complainant made a complaint to the Office of The Ombudsman against the Correctional Services Department (CSD), and provided additional information on 11 March same year.

197. Allegedly, on 4 February 2013, while on remand in a reception centre (the Centre) of CSD, the complainant put into the post box a letter to the Consulate General of the his country in Hong Kong (Letter 1) and a letter to a non-governmental organisation (Letter 2).

198. On 8 February, an officer of the Centre (Officer A) told the complainant that his letters would not be sent out and the letters were subsequently returned to him.

199. The complainant complained that the Centre had opened, read and stopped his letters and afterwards coerced him into destroying the letters.

The Ombudsman's observations

200. The Office of The Ombudsman accepted that it was legitimate of CSD to open, search and read Letter 1 in accordance with Rule 47A of the Prison Rules (the Rules). There was no dispute that Officer A had interviewed the complainant and Letter 1 had been returned to him afterwards. Paragraph (5) of Rule 47A of the Rules empowers CSD to stop letters from inmates under specified circumstances only. Letter 1, however, did not fall under any of those circumstances. In other words, the Centre staff should not have stopped it or done anything which could be understood or misunderstood as an attempt to stop it. The Office of The Ombudsman noted CSD's duty to look after the emotional well-being of inmates, especially those on remand. It did not query the Centre staff's interview with the complainant per se. There was also no independent evidence to show that Officer A had coerced the complainant

into getting back Letter 1. Nonetheless, The Ombudsman did not find it necessary at all for the Centre staff to hold up Letter 1 for the purpose of the interview. Any such action should be avoided, lest it could be regarded as an infringement of the already limited right of inmates to communicate with the outside world. Based on the above, The Ombudsman considered the allegation in relation to Letter 1 partially substantiated.

201. Under paragraph (6) of Rule 47A of the Rules, CSD may stop any letters from inmates exceeding four pages of A4 paper in length. The crucial point in this case was that the Centre had not made a copy of Letter 2 before returning it to the complainant and the complainant had destroyed it himself. The Office of The Ombudsman, therefore, was unable to ascertain the length of the letter and, as a result, could not adjudge whether the Centre's stoppage of the letter was justified under paragraph (6) of Rule 47A of the Rules. In this light, The Ombudsman found the allegation in relation to Letter 2 inconclusive.

202. Overall, this complaint was partially substantiated. The Ombudsman urged CSD to remind its staff not to hold up letters to or from inmates except under the circumstances specified by law, even if there is a need to interview them on their grievances/emotional problems revealed in such letters.

Administration's response

203. In the present case, CSD staff had no intention to hold up the letter. Even if the complainant did not withdraw the letter eventually, the interview process would not hold up the mailing of the letter.

204. CSD accepted The Ombudsman's recommendation. To avoid causing any misunderstanding, CSD has reminded its staff that in case a person in custody voluntarily withdraws a letter, the staff should request the person in custody concerned to give a written confirmation that such return of letter is of his/her own accord. CSD has informed the Office of The Ombudsman of the new arrangement.

Correctional Services Department

Case No. 2013/2776 – Unreasonably refusing the complainant's request that an assault on him by a fellow inmate be reported to the Police

Background

205. On 23 July 2013, the Office of The Ombudsman received a complaint against the Correctional Services Department (CSD) from the complainant.

206. Allegedly, on 31 May 2013, while serving his sentence in a correctional institution (the Institution), the complainant's nose was punched by another person in custody (the Assailant), leading to a non-stop bleeding. He was sent to the Institution Hospital for diagnosis and treatment. Subsequently, he was sent to the Accident & Emergency (A&E) Unit of a hospital for further examination and a crack at the nasal bone was found.

207. The complainant claimed that he requested the Institution to report the case to the Police right after the assault. However, the Superintendent of the Institution considered that the Institution could handle the case as the injury sustained by the complainant was not severe and therefore refused to report the case to the Police. On the following day, the Institution conducted a disciplinary hearing and consequently gave the assailant three days loss of remission.

208. The complainant claimed that it was unreasonable for the Institution to deal with the case by internal disciplinary hearing only and refuse to report the case to the Police. The complainant suspected that the Institution was harbouring persons in custody in their violation of laws.

The Ombudsman's observations

209. The Office of The Ombudsman understood that the Prison Rules empower the Superintendent of an Institution to conduct adjudication on a person in custody for any offence against prison discipline through internal disciplinary hearing. However, anyone who has been harmed

should have the right to report to the Police for the Police's criminal investigation and have the suspected offenders tried under the law. Such basic right should not be lost because of a person is under imprisonment. In this case, although the Institution did not accede to the complainant's request to report the case to the Police, complainant was allowed to write by himself to the Police for assistance. It could be seen that the complainant's right to report to the Police has not been completely deprived. The crux in this case was whether the severity of the complainant's injury required immediate report to the Police.

210. The Office of The Ombudsman noted that although the medical reports from the Institution Hospital and the A&E Unit of the Hospital on 30 May (in lieu of 31 Mary as recalled by the complainant) both indicated that the complainant sustained a certain degree of injury on his nasal bridge, bleeding from his nostrils was stopped spontaneously in the A&E. The complainant was not required to be hospitalised or receive any treatment. On the next day, a Medical Officer of the Institution also considered that the complainant was not required to be admitted into the hospital for treatment or observation. On 10 June, the otolaryngologist did not prescribe any medication to the complainant as the injury of the complainant had recovered naturally by itself without causing any significant harm to his body. Based on the above, The Ombudsman considered that it was not unreasonable for the Institution not to report the case to the Police as the case was not really serious in nature. The allegation against CSD was therefore unsubstantiated.

211. That said, the Office of The Ombudsman reiterates that although persons in custody lose their personal freedom, they should still enjoy other basic rights. If a person in custody is harmed because of others' contravention of the law, he or she should be entitled to resort to the law and report to the Police. The case should then be heard and tried by the courts so as to bring the offenders into justice. While at present CSD allows persons in custody to report their cases to the Police by writing letters, the process of criminal investigation and collection of evidence may be affected because of the time-consuming postal delivery.

212. The Office of The Ombudsman was pleased to note that CSD had amended the operational guideline, and would relay the requests of persons in custody for referral to the Police. The Ombudsman considered that it could alleviate the grievance of persons in custody and facilitate staff to maintain good order and discipline in the institutions.

Administration's response

213. CSD accepted The Ombudsman's recommendation and amended the relevant operational guidelines in August 2013. Under the amended guidelines, CSD would relay to the Police all requests for Police referral from persons in custody.

Customs and Excise Department

Case No. 2013/2131 – Failing to follow up a complaint about the composition/quality of petrol supplied by a petrol filling station

Background

214. After a fill-up at a petrol station, the complainant's vehicle started to have problems and breakdowns. He sent it to a repair shop and the technician found a large amount of water in the oil tank. The complainant believed that the petrol supplied by the petrol station had been mixed with a great deal of water. He lodged a complaint with Customs and Excise Department (C&ED), but the latter refused to handle his complaint on the grounds that the quality of petrol is outside the Department's jurisdiction.

The Ombudsman's observations

215. The crux of this complaint was the complainant's suspicion that the petrol contained a large amount of water. Should his suspicion be true, the supplier/retailer might have contravened section 7(1) of the Trade Descriptions Ordinance (the Ordinance), the provision about false trade description, since the "composition" of the petrol had been changed and no longer fitted the usual interpretation of "petrol". Moreover, the quality of petrol might affect "the fitness for purpose or performance" of petrol, thereby causing such problems as those of the complainant's vehicle.

216. The Office of The Ombudsman considered C&ED to have jumped to a conclusion, without careful consideration, that this complaint was outside its jurisdiction. Furthermore, any investigation by EPD would not absolve C&ED of its duties to protect consumers under the Ordinance. C&ED should have performed its duties and followed up the matter itself after referring the case to EPD.

217. In view of the above, The Ombudsman considered the complaint substantiated and recommended that C&ED to –

(a) monitor the results of EPD's laboratory tests, ascertain whether there was any contravention of the Ordinance and then notify the

complainant of its findings; and

(b) remind staff to examine complaints carefully and start investigation should there be prima facie evidence of contravention of the Ordinance.

Administration's response

218. C&ED accepted The Ombudsman's recommendations and has –

(a) checked with EPD the outcome of laboratory tests performed on samples taken from the petrol filling station concerned and informed the complainant of findings after investigation was carried out under the Ordinance; and

(b) reminded its staff to exercise due care when screening public complaints and assess the merit of taking parallel actions given prime facie evidence and justifications.

Development Bureau and Lands Department

Case No. 2013/1829A&B – Failing to properly handle a report on an unhealthy tree

Background

219. On 22 May 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Tree Management Office (TMO) of Development Bureau (DEVB) and the Lands Department (LandsD).

220. According to the complainant, there was a big tree with health problem (the Tree) near the main access to a village where the complainant lived. In November 2012, the complainant reported the problem to TMO, and the case was immediately referred to LandsD's relevant District Lands Office (DLO). The complainant however had since received no reply. In February 2013, the complainant approached DLO and was told that the Tree was in normal condition and no special maintenance was required for the time being. Since the complainant was still concerned about the health condition of the Tree and the danger it might pose to the villagers, he again requested DLO to follow up on the case. The staff of DLO undertook to take follow-up action, but made no further reply to the complainant. At the midnight of 23 May 2013, the Tree collapsed and damaged property of the villagers.

221. The complainant criticised TMO and LandsD for failing to address the safety problems of the Tree seriously.

The Ombudsman's observations

DEVB

222. TMO duly referred the case to DLO for follow-up action the next day after receiving the complainant's report. Yet TMO still had the responsibility for handling complicated cases that could not be properly resolved by departments. As early as 2012, the Tree Unit (TU) of LandsD consulted TMO on the Tree and was asked to prepare a detailed risk assessment report on the Tree. TU submitted a report to the TMO in May, and further sought TMO's advice in August but got no reply. In March 2013, TU again urged TMO to give a reply in respect of the

complainant's case, but to no avail. As such, TMO indeed failed in its duty to give advice or guidance on the Tree.

223. In view of above, The Ombudsman considered the allegation against DEVB substantiated.

224. Fortunately, DEVB has learnt from the case and put in place a case registration mechanism to facilitate proper follow-up actions by TMO.

LandsD

225. DLO had handled the case according to procedures, including conducting inspection and seeking expert advice from TU. But it was not until more than a month after the inspection on 28 November 2012 did DLO submit an inspection report to TU. Though the mistakenly inspected tree was classified as an emergency case in the report, it was not until another month later (i.e. 8 February 2013) did TU render its advice to DLO.

226. Moreover, DLO did not promptly reply to the complainant after receiving TU's advice. Neither did it seek clarification from the complainant on the vast discrepancies in tree descriptions between TU's inspection report and the complainant's report. As a result, it was not until 19 February 2013 was TU's mistaken inspection of another tree discovered after repeated enquiries by the complainant on the progress of the case. DLO's request for another inspection was not attended to by TU until 27 March, which further delayed the progress of the case.

227. Besides, the Office of The Ombudsman learned from LandsD that the Tree was inspected by TU as early as in September 2011, and it was found that the long lateral branches were slanted and decaying and had to be cut and there were also holes on the trunk. But due to objection of the villagers on the grounds of feng shui, the branches were not removed eventually.

228. DLO had to address the potential hazard of the Tree to the villagers again when the complainant made the report. But it did not learn from experience and failed to make detailed planning after deciding to fence off the Tree. It did not, for example, seek assistance from the Police and the District Office (DO) in resolving the villagers' objection and/or contacting the village representative in advance. As a result, even the simple task of fencing-up the unleased/unallocated Government

land to protect the safety of the residents/passers-by could not be done. DLO also failed to inform TMO of the situation, resulting in the latter not able to give timely consideration whether to escalate the issue to a more senior level. The Tree collapsed because of the procrastination of the issue and LandsD's failure to take preventive measures.

229. Based on the above analysis, The Ombudsman considered the allegation against LandsD substantiated.

230. The Ombudsman urged LandsD to learn from this case and handle public reports/complaints about dangerous trees as quickly as possible, including early and appropriate action to address local residents' discontent on proposed tree pruning or removal. The assistance of the Police and the relevant DO should be sought if necessary. Where trees found to be at risk of collapse were on Government land, resolute actions should be taken to maintain or remove the trees to protect the life and property of the public.

Administration's response

231. LandsD accepted the recommendation. DLO has reminded staff in regular staff meetings that if TU identifies any tree(s) which is found to be at risk of collapse, DLO has to promptly arrange the necessary removal/pruning works. In case of resistance from local residents, staff should seek assistance from DO and the Police.

Education Bureau

Case No. 2013/0989 – (1) Failing to provide a school for mentally handicapped students with school facilities in accordance with the current standards; and (2) Unreasonably refusing to relocate the school to another vacant school premises

Background

232. On 25 March 2013, a concern group formed by a group of parents of a special school lodged a complaint to the Office of The Ombudsman against the Education Bureau (EDB).

233. The school where the children of these parents were attending (the School) had a site area of 971 square meters, and the premises of the School are adjoining that of another school (the Adjoining School). The students of these two schools had to share certain facilities. The concern group considered that the space of the school premises was severely insufficient, and the area of the School was smaller than schools of the same category. The concern group had repeatedly requested EDB to solve the problem of over-crowdedness, or to relocate the School to the vacant school premises in the same district as soon as possible, but in vain.

234. The concern group criticised EDB for –

(a) failing to provide the students of the School with school premises in accordance with the current standard; and

(b) unreasonably declining to relocate the School to the vacant school premises in the same district.

The Ombudsman's observations

235. EDB had explained clearly why the areas of the premises of the School and the Adjoining School are smaller than that of the other schools of the same special education type and why the two schools have to share some of the school facilities.

236. It was evident that EDB had indeed conducted conversion works to improve the space of the School for learning and teaching in accordance with the established policy. Moreover, EDB had all along been supporting the School to lease a land from the District Lands Office to further increase the space for activities.

237. Since the School could not be re-provisioned or redeveloped immediately, it was understandable that EDB had to improve the environment and facilities of the premises of the School through school improvement works.

238. In view of the preceding paragraph, The Ombudsman considered that allegation (a) unsubstantiated.

239. On the other hand, as for why the School was unable to be relocated to the vacant school premises in the same district, EDB had given clear explanations. The fact was that the two vacant school premises in the same district had already been reserved or planned for other uses.

240. In view of the preceding paragraph, The Ombudsman considered that allegation (b) unsubstantiated.

241. In sum, this complaint was unsubstantiated. The Office of The Ombudsman urged EDB to complete the discussion of its proposed improvement proposal (the concerned proposal) with the School as soon as possible, so that a more comfortable learning environment could be provided to the students.

Administration's response

242. The Ombudsman urged the EDB to complete the discussion of the concerned proposal with the School as soon as possible, so that a more comfortable learning environment could be provided to the students. EDB accepted the recommendation and was always willing to discuss with the School about the concerned proposal. However, on 24 September 2013, the concern group submitted a proposal to EDB through the Legislative Council Secretariat and expressed that they did not accept the concerned proposal and suggested that a separate extension project should be carried out on a government land near the School.

243. On 18 December 2013, EDB received an extension proposal from the School Sponsoring Body of the School. The proposal was discussed and supported at a meeting of the relevant District Council Social Services Committee on 15 July 2014. EDB would arrange for conducting technical feasibility study of the proposal and follow up the result as appropriate according to established procedures.

Education Bureau

Case No. 2013/2751(I) – Refusing to provide the complainant with the number of students with special educational needs and the number of teachers with relevant qualifications of each school in Hong Kong

Background

244. On 22 July 2013, the complainant lodged a complaint with the Office of The Ombudsman by mail against the Education Bureau (EDB). According to the complainant, he made a request to EDB via email on 9 July for the following information on each and every local primary school in 2013 –

(a) The number of existing students with Special Educational Needs (SEN); and

(b) the number of teachers with recognised special education qualifications.

245. On 11 July, EDB gave a reply to the complainant explaining how EDB provided support for students with SEN and asking him to access information (b) in "Scholl Profiles" by himself. EDB did not respond to the request for the information (a) in the reply. On the same date, the complainant sent an email to EDB explaining that the purpose of the information request was to look for a suitable school for his son with Autistic Spectrum Disorder. On 22 July, the complainant called EDB and requested the information again; however, EDB turned him down as the requested information had always been kept undisclosed. The complainant was dissatisfied with the decision of EDB and therefore lodged a complaint with the Office of The Ombudsman.

The Ombudsman's observations

Information (a): The number of students with SEN

246. The Office of The Ombudsman understood that the concept of Integrated Education (IE) was to allow the students with SEN to learn with other students and to let other students treat students with SEN with

no bias or discrimination. If EDB disclosed information (a), it would in effect distinguish students with SEN from other students and go against the concept of IE. It would thus impair the efficiency of the implementation of IE. From this perspective, the Office of The Ombudsman accepted that EDB cited paragraph 2.9(c) of the Code on Access to Information (the Code) (i.e., information the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of a department) to decline the provision of information (a) to the complainant.

Information (b): the number of teachers with recognised special education qualifications

247. The Office of The Ombudsman considered that the number of teachers with recognised special education qualification should not be regarded as "third party information" as defined in paragraph 2.14(a) of the Code (i.e. information held for, or provided by, a third party under an explicit or implicit understanding that it would not be 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). Even if this information was regarded as "third party information", there was no evidence showing that teachers and schools had reached any consensus with EDB to limit the disclosure of the compiled statistics by EDB to parents. In fact, quite a number of schools had already provided the number of teachers with special education training in their school profiles. Moreover, it was understandable that parents would wish to know the number of teachers who had received special education training in each school. The disclosure of these statistics should be in line with public interest. On the contrary, there was no information showing that disclosure of the statistics would hamper the operation of EDB or affect the implementation and development of IE.

248. If EDB considered that information (b) could not fully reflect the professional capacity of schools in catering for students with SEN, footnotes might be provided to the complainant to explain the limitations of the statistics in order to avoid any misunderstanding. Based on the foregoing analysis, the Office of The Ombudsman considered that there were insufficient grounds to support EDB in declining the disclosure of information (b) to the complainant.

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

250. The Ombudsman recommended EDB to –

(a) reconsider the complainant's request for information (b); and

(b) maintain communication with the complainant and provide him and his son with the most appropriate support.

Administration's response

251. EDB accepted the two recommendations made by The Ombudsman. Regarding the complainant's request for information (b), EDB has reviewed the collection arrangement of teacher training data, including the means of collecting the data, the purpose for collection and its limitations, etc. (for example, there is a wide variety of special education training, some of which are arranged by schools according to their school-based needs or some may be taken on teachers' own initiative. Teachers may choose to report the training information or not as they desire). Therefore, EDB considers that the collection of the related data can only be used for holistic planning at the system level. At the school level, it may lead to misunderstanding if the said data is used for measuring the professional capacity of schools in catering for students with SEN.

252. EDB understands that the complainant wished to have the information to facilitate his decision in choosing a school. In fact, EDB has suggested that, in order to get a picture of the recent and comprehensive teacher training information of each school, the complainant could browse the school information of individual schools on the website of Primary School Profiles (http://www.chsc.hk/psp2013/eng/index.php). It contains not only the number of teachers with special education training, but also the information on student support, home-school co-operation, school ethos, etc. of each school. The comprehensive information should be very useful and of high reference value for parents in choosing a school. The professional staff of EDB will, during regular visits, review with each school the progress of teacher training, and remind them to provide accurate information regarding teachers with special education training in their school profiles. EDB has also reminded schools again in its letter to public sector schools in mid-June of 2014.

253. As for recommendation (b), EDB has contacted the complainant again to know more about the school life of his son and informed him that, if necessary, EDB's professional staff would communicate with his son's school and assist in exploring appropriate support for his son. EDB also encouraged the complainant to keep in contact with the school on the learning needs of and the appropriate support measures for his son. The complainant has not requested any further information and the staff at EDB had provided him with a phone number again for future contact.

Environmental Protection Department

Case No. 2013/0366 – Delay in following up reports on vehicle idling

Background

254. One afternoon in late January 2013, the complainant noticed that a truck driver had left his vehicle idling (i.e. leaving the engine on while the vehicle was stationary) for more than 10 minutes. He called Environmental Protection Department (EPD) thrice within an hour to report the incident, but the Department did not take immediate follow-up action and its staff did not give the complainant a reply until the following afternoon.

255. The complainant was dissatisfied that EPD had delayed following up his reports such that the unlawful behaviour of vehicle idling could not be effectively curbed.

The Ombudsman's observations

256. As offenders may drive off any minute, enforcement personnel often have difficulty in taking timely enforcement action after receiving such reports. Therefore, instead of dispatching enforcement personnel to the scene at once, EPD will simply designate those sites with multiple reports as black spots, and notify the Police for more frequent patrols. Publicity-cum-enforcement will be stepped up at such black spots as well. The Office of The Ombudsman appreciated that for these reasons and because of manpower constraints, EPD could not have staff immediately deployed to the scene for enforcement action after receiving the complainant's reports.

257. Nevertheless, as Traffic Wardens (TWs) are the main enforcement personnel for vehicle idling and they are constantly on patrol, there is no reason why EPD cannot ask them to take immediate enforcement action after its staff have received reports on such offences. Clearly, EPD had not been making the best use of the available resources for law enforcement. The effectiveness of the legislation was thus undermined. EPD had also failed to live up to the expectation of those civic-minded citizens who cared to report offences.

258. Overall, The Ombudsman considered this complaint partially substantiated and urged EPD to quickly work out with the Police a mechanism such that once a report on vehicle idling offence is received, TWs on patrol in the area can be notified to take enforcement action.

Administration's response

259. EPD accepted The Ombudsman's recommendation. A meeting between EPD and the Police was held on 24 October 2013 to explore whether a mechanism could be put in place such that once a report on vehicle idling offence is received, TWs on patrol in the area can be notified to take enforcement actions.

260. As ensuring smooth traffic flow and road safety should be accorded the highest priorities, the Police considered that immediate deployment of TWs to engage in or to deal with idling engine complaints would not be possible in view of their daily traffic duties and other operational commitments. The Police considered that the present arrangement for TWs in dealing with idling engine complaints was sufficient and effective, which TWs would take enforcement actions against idling vehicles during their normal patrol, and would take part in the joint publicity-cum-enforcement operations with EPD officers at identified idling black spots from time to time.

Environmental Protection Department

Case No. 2013/0934(I) – Unreasonably refusing to provide information about the emission of fumes by some restaurants

Background

261. Between July and December 2012, the complainant made repeated complaints to the Office of The Ombudsman that the Environmental Protection Department (EPD) did not follow up properly his complaint against the pollution caused by oily fume emitted from two restaurants (Restaurants A and B) on the ground floor of the building in which he lived. On 16 January 2013, the Office of The Ombudsman completed the investigation and provided the complainant with the investigation report.

262. Between January and March 2013, the complainant complained to the Office of The Ombudsman against EPD again.

263. According to the complainant, he wrote to EPD on 22 January 2013 to raise the following questions, trying to have a better understanding of the root cause of the emission of oily fume from the restaurants concerned –

(a) Are the oily fume and odour emitted from all cooking appliances of Restaurant A, including those cooking appliances in the kitchen near the front entrance, processed by the newly installed electrostatic air steriliser before they are emitted to the street?

(b) (i) How often is the electrostatic air steriliser cleaned?

(ii) Will the routine inspections conducted by EPD ensure that the electrostatic air steriliser of Restaurant A operates properly?

(c) How often will EPD conduct a routine inspection after the closure of his complaint case?

(d) How many restaurants have exhaust outlets emitting oily fume in the direction of the gate of the car park in the Complainant's housing estate at present? What are the names of the restaurants and the detailed locations of emission?

(e) Does Restaurant A have any other exhaust outlets emitting oily fume in the direction of the gate of the car park?

(f) What emission control facilities has Restaurant B installed?

264. On 15 February, EPD replied to the complainant in writing to explain its general procedures of handling complaints against emission of oily fume and advise that it was not appropriate to disclose the details of individual restaurants and EPD's deployment of enforcement actions. The complainant showed his dissatisfaction on EPD's reply on the same day.

265. On 8 March, EPD replied to the complainant in writing as follows –

Complainant's enquiry	EPD's reply
Item b(i)	Electrostatic precipitators without auto-cleansing system should be cleaned at least once a week normally.
Items (a), (d), (e) & (f)	The information belonged to individual restaurants. EPD could not disclose information of a third party to the Complainant.
Items (b)(ii) & (c)	The information concerned EPD's arrangement for enforcement actions. To ensure effectiveness of the enforcement actions, disclosure was not desirable.

266. The complainant considered that his enquiries concerned public interest and it was unreasonable for EPD to refuse to provide the information based on the above grounds.

The Ombudsman's observations

267. Item b(i) of the complainant's enquiries was only a request for general information. Failure of EPD to offer a reply initially was inappropriate. Fortunately, EPD provided him with the information later.

268. Regarding items (a), (e) and (f) of the complainant's enquiries, while the information he requested concerned a "third party", such information had been obtained through EPD's investigation of the complainant's complaint against Restaurants A and B. The Office of The Ombudsman doubted if it should be deemed by EPD to be "held by a third party" or "provided by a third party". The Office of The Ombudsman believed that there was largely no "explicit or implicit agreement" between EPD and the third party not to further disclose the information obtained through investigation. Although Restaurant A later expressed unwillingness to disclose to the complainant information concerning their restaurant (EPD never consulted Restaurant B), EPD did not indicate how such disclosure would cause harm or damage to Restaurants A or B.

269. Under these circumstances, the Office of The Ombudsman considered that EPD could and should have revealed the information obtained through investigation, including the situation of the restaurants concerned, to the complainant in greater detail.

270. Regarding item (d) of the complainant's enquiries, EPD claimed that it did not have the required information. The Office of The Ombudsman was of the view that even though EPD could technically invoke the provisions of the Code on Access to Information (the Code) relevant to reject the complainant's request for information, the Department should follow up the complainant's enquiries actively and handle his complaint properly if not much resources were required.

271. The Office of The Ombudsman noted that the complainant had also made similar enquiries to the Food and Environmental Hygiene Department, which responded to every items raised in his enquiries. In view of this, the Office of The Ombudsman knew that it was not difficult to obtain the information requested by the complainant.

272. As for items (b)(ii) and (c) of the complainant's enquiries, EPD, as the authority for enforcing the Air Pollution Control Ordinance, was obliged to conduct investigations on complaints lodged by the public against oily fumes/air pollution. In principle, all actions taken by EPD in response to complaints involved enforcement arrangements/ procedures of the Department. The Office of The Ombudsman was of the view that in deciding whether to disclose certain information about enforcement arrangements/procedures of EPD, the key consideration of EPD should be whether the disclosure of information would jeopardise or harm its enforcement work.

273. Although items (b)(ii) and (c) of the complainant's enquiries involved EPD's specific enforcement plans and deployment, EPD did not state all along how the disclosure of information could jeopardise or harm its enforcement work. In responding to the enquiries, EPD could have provided comparatively general information to the complainant.

274. Summing up the analysis above, The Ombudsman considered this complaint partially substantiated.

275. Besides, the Office of The Ombudsman noted in EPD's replies of 15 February and 8 March 2013 that it did not state the reason for refusing to release the information and how it tallied with that stated in the Code, neither did it quote the relevant paragraph number of the Code nor advise the complainant the appeal and complaint channels. EPD clearly had not paid attention to the requirements set out in the Code's Departmental Guidelines (the Guidelines).

276. The Ombudsman urged EPD to –

(a) re-consider providing information in response to items (a), (b)(ii), (c), (d), (e) and (f) of the complainant's enquiries;

(b) provide training to its staff to ensure that they understand clearly and comply with the contents and requirements set out in the Code and the Guidelines; and

(c) seek assistance from the Constitutional and Mainland Affairs Bureau if they still have doubts about the Code and/or the Guidelines.

Administration's response

277. EPD accepted The Ombudsman's recommendations and has taken the following actions –

(a) It replied to the complainant on 26 November 2013 to provide information regarding each of his enquiries;

(b) a training workshop was organised for managerial staff of the regional offices in September 2013 to enhance their understanding in the handling of complaints as well as matters related to the Code; and

(c) it undertook to consult the Constitutional and Mainland Affairs Bureau whenever there is doubt on matters relating to the Code.

Environmental Protection Department and Food and Environmental Hygiene Department

Case No. 2013/1576A (Environmental Protection Department) – Failing to fully respond to the Complainant's queries about the environmental nuisance caused by an illegal barbecue establishment and lax site inspections

Case No. 2013/1576B Food and Environmental Hygiene Department) – Delay in fully responding to the complainant's queries about the environmental nuisance caused by an illegal barbecue establishment

Background

278. On 5 May 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and the Environmental Protection Department (EPD).

279. According to the complainant, he complained to FEHD via 1823 Call Centre in February 2013, alleging that a barbecue establishment had been operating illegally near a West Rail station, causing serious air pollution problem. FEHD replied in March that the barbecue establishment did not commit the offence of conducting a food business without a licence. As the Department did not respond to his enquiry about the licence(s) required for conducting the business, the complainant made a further enquiry to FEHD on 17 April. However, no reply had been received from the Department.

280. The complainant also sent written enquiries to EPD on 23 March raising five questions concerning problems of air pollution and odour nuisance caused by the concerned barbecue establishment. However, EPD has shirked its responsibility by replying only one of these questions (about EPD's inspection dates and times) in their written reply on 17 April. The remaining four questions were still outstanding. The complainant sent an email to EPD again on 18 April, requesting for a reply to his queries as soon as possible. However, EPD just replied that they would respond to his email on 18 April soon. The complainant has not subsequently received any comprehensive reply from EPD.

281. The complainant alleged that both FEHD and EPD delayed in giving him a reply and sidestepped his queries. The complainant also queried about EPD's inspection result and considered that their inspections were lax.

The Ombudsman's observations

Allegation against FEHD

282. Upon receipt of the complaints lodged by the complainant on 18 February and 17 April 2013, FEHD immediately assigned officers to follow up and gave substantive replies in a timely manner. After reviewing the complaint e-mails sent by the complainant and FEHD's replies, the Office of The Ombudsman confirmed that FEHD had not delayed in giving the complainant replies or sidestepped his queries. As such, The Ombudsman considered the complaint lodged by the complainant against FEHD unsubstantiated.

Allegation against EPD

283. The Office of the Ombudsman considered that the control of air pollution and odour nuisance has been defined in the relevant legislation. EPD had taken follow-up actions in handling the complaints in accordance with the provisions of the relevant legislation, including several on-site inspections and assessments. There is no evidence showing that the inspections conducted by EPD were lax. Since no strong odour was detected during investigation and the possible pollutants would quickly dissipate in the exposed environment, it was not unreasonable for EPD not to take any enforcement actions under the Air Pollution Control Ordinance.

284. In addition, after receiving complaints and enquiries from the complainant EPD has made timely interim or substantive replies. Therefore, the Office of the Ombudsman considered that in terms of procedure, EPD had not delayed in responding to the complainant. However, EPD did not fully address the complainant's queries.

285. In fact, the explanation given by EPD to the Office of The Ombudsman was exactly what was required by the complainant. The Office of The Ombudsman was of the view that the complainant's queries were not purely personal opinion but some reasonable doubts on EPD's enforcement approach. EPD should be responsible for making a

response. Even if there was communication difficulty between the two sides, EPD should not have avoided the questions raised by the complainant.

286. Based on the above analysis, The Ombudsman considered the allegation against EPD partially substantiated.

287. Overall speaking, The Ombudsman considered this complaint partially substantiated and urged –

(a) FEHD to closely monitor the situation and take appropriate enforcement actions as soon as operation of unlicensed food business thereat was detected; and

(b) EPD to gain experience from this case and remind staff to give clear and comprehensive responses to public enquiries.

Administration's response

288. FEHD accepted The Ombudsman's recommendation and will continue to monitor closely the mode of operation of the barbecue establishment and take appropriate enforcement actions as soon as operation of unlicensed food business thereat is detected.

289. EPD accepted The Ombudsman's recommendation and has reminded staff to give clear explanations in providing responses to the public.

Environmental Protection Department and Lands Department

Case No. 2013/0463A (Lands Department) – Improperly processing and approving an application for building a New Territories Exempted House with a proposed septic tank system in close proximity to a beach

Case No. 2013/0463B (Environmental Protection Department) – Improperly processing an application for building a New Territories Exempted House with a proposed septic tank system in close proximity to a beach

Background

290. On 7 March 2013, the complainants complained to the Office of the Ombudsman against the Environmental Protection Department (EPD) and the Lands Department (LandsD).

291. The complainants lived in a village (the Village). Allegedly, in June 2007, a District Lands Office (DLO) of LandsD posted a notice in the Village about an application for building a New Territories Exempted House (NTEH) on a certain lot (the Lot) in the Village. The complainants raised objection and pointed out to DLO that the Lot was close to a beach and the proposed septic tank system (STS) would be built within 30 metres from the High Water Mark (HWM) of the sea. That would contravene the regulation that all STSs should be built at least 30 metres away from HWM. Nonetheless, DLO told the complainants that the Environmental Protection Department (EPD) did not object to the NTEH development. DLO finally overruled the complainants' objection to the NTEH application.

292. The complainants considered EPD and LandsD to have processed the NTEH application improperly, and LandsD to have wrongly approved the application.

The Ombudsman's observations

EPD

293. When first contacted by DLO back in December 2009, EPD should have noted from DLO's Ground Features Report that the proposed STS was only 20 metres from the beach. According to EPD's Practice Note ProPECC PN3/97, that should be regarded as an "important/special" case that should be vetted by EPD. It was therefore wrong of EPD to advise DLO that the case should not have been referred to EPD for vetting.

294. Worse still, EPD's initial advice to DLO was apparently irrelevant to the proposed STS. It failed to point out to DLO the non-compliance of the proposed STS with the general 30-metre clearance requirement. To some extent, EPD's somewhat confusing view and ambivalent stance might have misled DLO into overruling the complainants' objection.

295. It was not until August 2012 that EPD clearly pointed out to DLO that the proposed STS should be at least 30 metres from HWM. But the NTEH application had already been approved by DLO Conference. The saving grace was that EPD subsequently became more involved in the issue of the siting of the proposed STS, which was still under consideration by DLO in consultation with EPD.

296. All in all, The Ombudsman considered the allegation against EPD partially substantiated.

LandsD

297. The Office of The Ombudsman noted that before approving the NTEH application, DLO had consulted relevant departments including EPD, and EPD's stance was unclear. But then DLO's own Ground Features Report had indicated that the proposed STS was only 20 metres from a beach, which did not meet the general 30-metre clearance requirement in both LandsD's internal guidelines "Drainage and Health Requirements for Village Type House" and EPD's Practice Note ProPECC PN 5/93.

298. The Office of The Ombudsman could not see how the clearance requirement relating to stream courses was applicable to this case which concerns the clearance requirement relating to a beach. In any event, the Office of The Ombudsman was not suggesting that DLO should not have processed the application. The Office of The Ombudsman's view was – as the approving authority for NTEH applications, DLO should have sought further clarification from EPD regarding the latter's initial ambivalent stance, rather than overruling the complainants' objection forthwith.

299. Had the complainants not submitted a late appeal in August 2012, the NTEH development might have proceeded without an explicit 30-metre clearance requirement. And with that turn of events, EPD stated unequivocally that the STS should be at least 30 metres from HWM and saved the day by DLO Conference imposing the 30-metre clearance requirement on the NTEH development.

300. In view of such remedial action taken, The Ombudsman considered the allegation against LandsD partially substantiated.

301. The Ombudsman urged –

(a) EPD to refresh staff on the provisions of its Practice Notes and remind them of the importance to give sound and clear advice to other departments; and

(b) LandsD to remind staff to diligently seek clarification from other departments when their comments are doubtful.

Administration's response

302. EPD accepted The Ombudsman's recommendation and has reminded staff, through the line management of the Regional Offices, on the provisions of the Practice Notes and the importance to give sound and clear advice to other departments in handling similar cases in future.

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

(a) The New Territories DLOs have been reminded to diligently seek clarification from other departments when their comments are unclear, in the processing of NTEH applications; and

(b) after seeking EPD's advice, the technical circular for Drainage and Health Requirements for Village Type Houses has been revised to include "the minimum clearance requirements for the soakaway system as detailed in Appendix D of the EPD's ProPECC PN 5/93 should be met" in respect of cases with "septic tank and soakage pit system located between 15 metres and 30 metres from stream courses and wells not for drinking or domestic purposes".

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

Case No. 2013/0158A, B&C – Failing to take effective action to tackle the environmental nuisance caused by sewage discharge from some squatter huts

Background

304. On 8 January 2013, the complainant (a company) wrote to the Office of The Ombudsman on behalf of a housing estate (the estate), to complain against the Environmental Protection Department (EPD), Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

305. As alleged by the complainant, the soil pipes of a cluster of squatter huts (the squatter huts) located outside the boundary of the estate were connected to the drains of the estate without permission in September 2012, thus seriously affecting environmental hygiene. The complainant complained to FEHD about the incident. FEHD replied that it would coordinate with EPD and LandsD in tackling the problem. However, the three departments had taken no follow-up actions and the problem persisted.

The Ombudsman's observations

Allegation against FEHD

306. After receiving the complaint, FEHD had all along taken follow-up actions and referred the case to EPD for follow-up on the illegal sewage discharge from the squatter huts.

307. Upon checking FEHD's documents, the Office of The Ombudsman noted that FEHD staff indicated to the complainant on 17 December 2012 that the case had been referred to EPD for follow-up and FEHD would "take action at the same time" with EPD. However, EPD had in fact closed the case as early as 24 September.

308. As explained by FEHD, after its staff had received from EPD a letter which was issued to the complainant, he/she telephoned EPD and was informed that EPD would follow up on the problem of illegal sewage discharge from the squatter huts. However, he/she failed to make any proper record. The Office of The Ombudsman had sought clarification from EPD, but the latter replied that there was no record of the relevant telephone conversation.

309. FEHD's explanation differed greatly from EPD's reply. Nevertheless, the Office of The Ombudsman considered that if FEHD's explanation in the preceding paragraph was true, it indicated that EPD had changed its previous decision of "closing the case". FEHD staff should then have made a record or confirmed with EPD in writing to avoid misunderstanding. Anyhow, FEHD did follow up the case subsequently instead of ignoring the complaint lodged by the complainant. Based on the above analysis, The Ombudsman considered the allegation against FEHD unsubstantiated.

Allegation against LandsD

310. Upon receipt of the complaint, the concerned District Lands Office (DLO) of LandsD indicated to 1823 Call Centre on the same date that matters raised in the complaint fell outside its purview, and recommended that the case be referred to FEHD for follow-up. Subsequently, the relevant Squatter Control Office (SCO) of LandsD had taken follow-up actions upon receipt of the complaint concerning illegal building structure, and explained to the complainant the legitimacy of the concerned squatter huts. The Ombudsman considered that DLO and SCO had handled the case properly and therefore considered the allegation against LandsD unsubstantiated.

Allegation against EPD

311. Although EPD did conduct follow-up investigation upon receipt of the complaint, it did not liaise with other departments to explore solutions to the problem simply because there was no space for building a septic tank near the squatter huts involved. EPD closed the case hastily just on the "belief" that LandsD and FEHD would solve the problem. However, as the case involved direct discharge of untreated faeces to storm water drains, the problem should not be neglected. The Office of The Ombudsman was of the view that EPD, being an enforcement department against illegal discharges, was not proactive enough in handling the case. If EPD could have taken the initiative to

liaise and discuss with other departments to come up with a solution earlier, the pollution problem might have been resolved promptly. In view of above, The Ombudsman considered the allegation against EPD substantiated.

312. In sum, this complaint was partially substantiated. The Ombudsman recommended that –

(a) FEHD should remind staff to properly record the progress of follow-up actions taken on cases. If the cases also involve the work of other departments, written confirmation should also be made with the relevant departments to avoid misunderstanding; and

(b) EPD should enhance training to improve its staff's attitude in handling complaints.

Administration's response

313. FEHD accepted The Ombudsman's recommendation and has reminded staff to properly record the progress of follow-up actions taken on cases. If the cases involve the work of other departments, written confirmation should also be made with the relevant department(s) to avoid misunderstanding.

314. EPD accepted the Ombudsman's recommendation and has organised two training workshops in late 2013 for frontline officers in the regional offices to enhance their skills and understanding on complaint handling.

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

Case No. 2013/0931A (Environmental Protection Department) – Failing to control the noise nuisance caused by an illegal barbecue establishment

Case No. 2013/0931B (Food and Environmental Hygiene Department) – Failing to control the illegal operation of food premises at a barbecue establishment

Case No. 2013/0931C (Lands Department) – Failing to take enforcement action against the breach of lease conditions by a barbecue establishment

Background

315. On 12 April 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Lands Department (LandsD), Environmental Protection Department (EPD), and Food and Environmental Hygiene Department (FEHD).

316. According to the complainant, someone had been operating a barbecue establishment (Site A) illegally in a village near his residence for many years, causing serious noise nuisance. Moreover, it had been selling liquor without a licence.

317. The complainant complained to relevant Government departments, which made the following replies –

(a) According to LandsD, Site A was situated on a private old scheduled agricultural lot under a block lease without lease-breaching structures. The use was not in breach of the land lease; and

(b) according to EPD, the activity on Site A, which was situated on private land rather than in public place, was regarded as general commercial operation and the noise generated thereon was regulated under the Noise Control Ordinance (the Ordinance). EPD was required to assess the noise level generated on Site A

with reference to the criteria set out in the Technical Memorandum under the Ordinance. Upon measurement, EPD confirmed that the noise level on Site A did not exceed the prescribed limit.

318. In respect of the sale of liquor without a licence on Site A, the relevant departments did not take any follow-up actions or enforcement action but shifted the responsibility to one another.

319. The complainant alleged that over the years, LandsD, EPD and FEHD had not taken proper follow-up actions or effective measures in combating the illegal operation of business, generation of noise nuisance and sale of liquor without a licence on Site A. In the recent couple of years, the operation of another barbecue establishment (Site B) on the concerned location had aggravated the above problems.

The Ombudsman's observations

LandsD

320. The leases governing Sites A and B did not prohibit the use of the sites as barbecue establishments. Where structures not authorised by LandsD exist on the sites, the relevant District Lands Office (DLO) of LandsD had the right and duty to exercise control.

321. Upon receipt of complaints, DLO conducted site inspections on a number of occasions and addressed the issues of unauthorised structures and occupation of Government land related to the barbecue establishments according to the established procedures. As for the recurrence of unauthorised structures in recent months, DLO had also taken lease enforcement action accordingly. There was no evidence showing DLO shirked its responsibilities.

322. Based on the analysis above, The Ombudsman considered the allegation against LandsD unsubstantiated.

EPD

323. EPD had been following up on the noise nuisance problem of the concerned barbecue establishments in accordance with the relevant legislation and regulation, by sending staff to conduct numerous inspections and noise assessments. The Office of The Ombudsman was

of the view that it was understandable that EPD could not take any enforcement action because the measured noise levels from the concerned barbecue establishments did not exceed the noise limit specified in the relevant technical memorandum.

324. Based on the above analysis, The Ombudsman considered the allegation against EPD unsubstantiated.

FEHD

325. FEHD followed up on the illegal operation of the barbecue establishments concerned within its purview. Enforcement actions, including conducting surprise inspections, instituting numerous prosecutions and even considering closing the barbecue establishments, were taken. There was no evidence showing that FEHD shirked its responsibility.

326. Given the above analysis, The Ombudsman considered the allegation against FEHD unsubstantiated.

327. The Ombudsman made the following recommendations –

(a) DLO should closely monitor the situation (i.e. the recurrence of unauthorised structures in the two barbecue establishments) and take more effective lease enforcement action (including registration of warning letters in the Land Registry) as early as possible so as to enhance the deterrent effect;

(b) EPD could explore the possibility of applying the standard of section 13(1)(a) of the Ordinance to assess the noise problem alleged by the complainant. It appeared that such standard would be applicable to the situation in which a victim still felt annoyed in the overall environment even though the sound level was not high;

(c) FEHD should further explore whether prosecution could be taken against the barbecue establishments for operating an unlicensed restaurant; and

(d) FEHD should consider applying to the court for fencing off the land on which barbecue equipment and fixed structures were erected so as to address the problem more effectively.

Administration's response

328. LandsD accepted The Ombudsman's recommendation and issued warning letters to the land owners on 10 December 2013, requiring the breaches be purged and the relevant structures be demolished and removed to the satisfaction of DLO within 14 days. Upon expiry of the deadline, DLO conducted follow-up inspections of the two barbecue establishments and found that the breaches persisted. Consequently, DLO sent copies of the warning letters to the Land Registry for registration on 6 January 2014. In addition, DLO will continue to closely monitor the situation and take further lease enforcement action according to the priority of the cases. DLO plans to issue a final warning letter. If the owner fails to comply, LandsD is prepared to re-enter the lot.

329. EPD accepted The Ombudsman's recommendation and conducted further surveillance checks to assess the noise level at the building where the complainant resided in accordance with section 13(1)(a) of the Ordinance. The assessment re-affirmed that the noise did not amount to a source of annoyance under section 13(1)(a) of the Ordinance.

330. FEHD accepted The Ombudsman's recommendations and has taken follow-up actions set out below –

(a) Since 2012, FEHD officers have conducted surprise inspections and instituted prosecutions against the two barbecue establishments from time to time. Joint arrest actions in collaboration with the Police Force have also been taken, including the seizure of articles used in the operation of business. For the purpose of effective enforcement, FEHD deployed officers of the Intelligence Unit to disguise as patrons and entered the premises to first observe the mode of operation for numerous times. Prosecutions were instituted against the operators based on the circumstantial evidence collected at the scene. The on-the-spot evidence so collected indicated that unlicensed fresh provision shops (FPSs) were operated in movable structures in the two barbecue establishments. Barbecue food items were sold to the patrons for self-service barbecue on the sites where no catering service was provided. Up till now, the mode of operation has not been changed (except in a case where the operator of one of the barbecue

establishments was prosecuted by FEHD on 15 June 2012 for operating an unlicensed restaurant, which was contrary to section 31(1)(b) of the Food Business Regulation (the Regulation) (Cap. 132 sub. leg. X). Between June 2013 and early January 2014, FEHD instituted a total of 33 prosecutions (including 12 arrest operations) against the operators of the two barbecue establishments for operating unlicensed FPSs under section 31(1)(d) of the Regulation; and

(b) FEHD made a referral of the matter about the metal canopy mentioned in the relevant investigation report to LandsD on 4 September 2013 for follow-up actions. FEHD will continue to monitor the situation. If changes in the mode of operation of the barbecue establishments are found, FEHD will review its enforcement strategy in a timely manner, including examining the feasibility of applying to the court for a closure order, so as to combat the problem more effectively.

Equal Opportunities Commission and Hospital Authority

Case No. 2012/5806A (Equal Opportunities Commission) – Being perfunctory in investigating a complaint, obstructing the complaint intentionally and unreasonably asking the complainant to provide a photograph of him in a wheelchair

Case No. 2012/5806B (Hospital Authority) – Unfairness of a public hospital in refusing to allow vehicles transferring patients in wheelchair to enter via a side entrance for picking up/dropping off patients, while allowing vehicles of privileged persons to do so

Background

331. The complainant was a wheelchair user and had to attend medical consultations regularly at a medical centre (the MC) at a public hospital (the Hospital) under the Hospital Authority (HA). He alleged that the Accessible Hire Car (AHC) that transferred him was not allowed to enter via the side entrance (the Entrance) near the MC so that it could drop him off right there. As a result, he had to put up with the inconvenience of getting off somewhere on the road outside the Hospital and be pushed a long way by his family member every time he went to the MC. However, non-emergency ambulances and other vehicles of privileged persons could use the Entrance and drop off and pick up passengers outside the MC. He had requested the Hospital to open the Entrance to AHCs, but was refused.

332. Considering such arrangements unfair, the complainant lodged a complaint with the Equal Opportunities Commission (EOC). Nonetheless, EOC allegedly handled his case perfunctorily and did not explain clearly to the complainant the handling methods and procedures of the case, and asked him to provide proof of disability (PoD, such as medical reports) with the intent to obstruct his complaint. Later on, EOC decided that a photograph showing him in a wheelchair should suffice. The complainant felt offended and humiliated. He deemed it ridiculous and loose that photographs could be accepted as PoD.

The Ombudsman's observations

HA

333. The investigation officers of the Office of The Ombudsman conducted a site inspection at the Hospital in late August 2013 to better understand the environment of the locations in question. Pushing a wheelchair along the way, the officers also tried the two routes leading to the MC: from the Entrance through the Access (Route 1) and another route going through a barrier-free access as suggested by the Hospital (Route 2). The purpose was to test the time needed to arrive at the MC and to make observations along the way. The findings were as follows –

334. For Route 1 –

(a) there were three large gates at the Entrance but only one gate door on the left was open. It was barely wide enough for two people to walk abreast;

(b) during the inspection, pedestrian traffic was heavy with a lot of the passers-by being elderly and mobility-impaired patients;

(c) vehicular and pedestrian traffics were not segregated; and

(d) the Access was too narrow to allow vehicles to make a U-turn.

The Office of The Ombudsman agreed that safety concerns would indeed arise if the Entrance was open to unauthorised vehicles (including AHCs) and so it was not unreasonable for the Hospital to refuse the complainant's request. Actually, information provided by the Hospital showed that vehicles were authorised to enter via the Entrance strictly on a need basis (e.g. hearses were granted access via the Entrance in order to avoid taking bodies of deceased patients out to the pavement and causing uneasiness among pedestrians).

335. For Route 2 –

(a) it would take a longer time to go to the MC via this route than Route 1;

(b) near the Entrance of the MC, there was a pair of smoke stop doors which were quite heavy and always stayed closed. To

push open the doors while pushing a wheelchair through would prove quite a difficult task (the complainant alleged that his family members had sustained injuries as a result); and

(c) for unaccompanied and helpless wheelchair users, the above would pose an obstacle.

The office of The Ombudsman found Route 2 acceptable on the whole, though the Hospital should make improvements with regard to the smoke stop doors.

336. In the light of the above, The Ombudsman considered the complaint against HA unsubstantiated.

EOC

337. Having examined EOC's handling of the complainant's case, the office of The Ombudsman found that EOC did seriously follow it up and investigate, but EOC finally concluded that the Hospital's arrangements did not constitute disability discrimination.

338. Nevertheless, EOC initially handled the complainant's case by way of an "enquiry". It then decided "not to investigate" a month or so after establishing his case as a "complaint". That could give the complainant an impression that EOC was unwilling to establish his case and conduct investigations. Furthermore, neither EOC's "Complaints Handling Procedures" nor its website explained the differences between "enquiries" and "complaints". EOC should step up publicity in this area and consider improving wordings used in concluding complaints.

339. On the other hand, the office of The Ombudsman found nothing improper in EOC's request for PoD from the complainant in accordance with established procedures. EOC exercised discretion to accept a photograph as such proof so that a case could be established as soon as possible for follow-up actions. Insisting on the complainant providing absolute PoD would only make things difficult for him. If the complainant felt offended, he could refuse the request for a photograph, but then he would have to provide proof by other means.

340. There was no evidence that EOC intentionally obstructed the complaint. EOC had to ask the complainant for PoD. The complainant's dissatisfaction mainly stemmed from EOC's decision "not

to investigate" his case.

341. The Ombudsman, therefore, considered the complaint against EOC unsubstantiated.

342. Overall, The Ombudsman considered this complaint unsubstantiated and recommended that –

HA/the Hospital

(a) should link the smoke control doors in the barrier-free access to the medical centre with the central fire control system so that the doors could always stay open to facilitate the access of wheelchair users;

(b) should improve the uneven floor along the barrier-free access route;

(c) should open the two gates at the side entrance at the same time to facilitate the access of wheelchair users.

EOC

(d) to consider stepping up publicity on the differences between handling cases by way of "enquiry" and "complaint", as well as complainants' rights and obligations; and

(e) to consider enhancing publicity that complainants must provide proofs of identity, and to advise complainants of this responsibility upon receipt of their cases and the ways of providing such proofs.

Administration's response

343. HA accepted The Ombudsman's recommendations and has taken the following actions –

(a) In December 2013, HA linked the smoke control doors in the barrier-free access to the medical centre with the central fire control system so that the doors could always stay open to facilitate the access of wheelchair users;

(b) in December 2013, HA completed the project to improve the uneven floor along the barrier-free access route; and

(c) with effect from September 2013, HA has kept both gates at the side entrance open to facilitate the access of wheelchair users.

344. EOC accepted The Ombudsman's recommendations and has taken the following measures –

(a) EOC launched a newly designed "Enquiry Form" for public use in December 2013. By distinguishing the Enquiry Form from the Complaint Form, it hoped to remind the public that EOC handles enquiries and complaints under different procedures;

(b) (i) starting from December 2013, EOC has listed out in the acknowledgment letter to the complainants the documents needed and the reason(s) for requesting them according to individual case's circumstances. The actual forms of wording in the letter will depend on the different situations of the cases concerned; and

(ii) in mid-February 2014, EOC revised its Complaint Form and added a note under the "Points to Note" section to remind complainants that they are obligated to provide relevant identity document, proof of the relevant attribute, and supporting documents for the incident to EOC in relation to their complaint cases. Examples of the relevant documents are also listed in the Form for the complainants' reference.

Estate Agents Authority

Case No. 2012/5437 – (1) Delay and impropriety in handling a complaint about the misconduct of two property agents; and (2) Refusing to disclose investigation progress

Background

345. The complainant had a residential flat leased out. In October 2010, an estate agent (Agent A) persuaded her to sell the flat, saying that an old couple was willing to purchase it subject to existing tenancy.

346. Agent A then prepared a provisional agreement for sale and purchase (the first PASP) and a "supplementary agreement". The complainant, however, noticed that the latter agreement stated that the vendor would deliver "vacant possession" of the flat upon completion of the transaction. She, therefore, demanded to add in a clause stipulating that: "the buyer must allow the tenant to stay in the flat until the fixed-term tenancy expires". Agent A complied and the complainant signed the two agreements.

347. The complainant also noticed that the buyer was not the old couple and that the deposit was paid by a cheque issued by Agent A's colleague (Agent B). Agent A explained that the old couple did not have a cheque book so they paid the deposit in cash to Agent B and asked him to write a cheque to the complainant. Moreover, the buyer was actually the couple's grandson, according to Agent A.

348. Later on, the complainant discovered that the first PASP also contained the "vacant possession" clause but Agent A never explained that to her. Suspecting a fraud, she refused to execute the agreement. Agent A subsequently prepared another provisional agreement for sale and purchase which, stating that the flat would be sold "subject to existing tenancy", was signed by a different buyer. Dissatisfied that Agent A had taken the liberty to find a new buyer, the complainant refused to sign this agreement. The two estate agents then abused her on the telephone. Eventually, the flat was sold to the first buyer "subject to existing tenancy".

349. In December 2010, the complainant lodged a complaint with the Estate Agents Authority (EAA) and made a written statement. She enquired of the case progress several times afterwards, but was denied the information. EAA only notified her in mid-October 2012 that Agent A had admitted to wrong-doing and that EAA would reprimand him and require him to attend professional development courses.

350. The complainant was aggrieved that EAA had delayed the processing of her complaint, refused to notify her of case progress and failed to conduct a thorough investigation into the misconduct of the two estate agents which she considered as amounting to criminal offences.

The Ombudsman's observations

351. EAA had taken 22 months to complete its investigation of this case. Initially, EAA denied any delay or impropriety. It admitted to deficiencies and introduced improvement measures only after a review. Laxity in its attitude was obvious. That the case had been referred back to the Complaints Section (CS) twice by the Disciplinary Proceedings Section (DPS) and the consequential delay also revealed inefficiency and a lack of communication between the two Sections.

352. Furthermore, EAA never publicised its performance pledge on complaint handling or informed the complainants specifically of the time needed for case processing. That was not in keeping with public expectations. Taking this case as an example, although the case officer had contacted the complainant a number of times, the delay of nearly two years would inevitably give her an impression that there was little progress.

353. Besides, EAA did not get to the bottom of the matter and find out the whole truth. The complainant's allegation against the two estate agents was quite serious, and her description of the events (paragraphs 345 to 348 above) would certainly invite doubts over their professionalism and integrity, and whether they had protected the interests of their clients. EAA, however, had obviously failed to conduct a thorough investigation. It only punished Agent A for impropriety in asking the complainant to sign the first PASP and the supplementary agreement but never asked whether the two estate agents admitted to the allegation. Moreover, when Agent B did not respond to its invitation to a meeting, EAA did not pursue further or take any action regarding his uncooperative attitude. All in all, while Agent B's

performance was far from professional, EAA simply did not try its best to dig out the truth. Whether it had exercised due diligence in discharging its duties was questionable. Overall, The Ombudsman considered this complaint substantiated.

354. EAA had subsequently reviewed its complaint handling procedures and immediately implemented a number of measures to strengthen case monitoring, as well as to increase case processing efficiency and procedural transparency. The Ombudsman made further recommendations to EAA, including –

(a) To review the implementation of improvement measures already adopted by EAA in a timely manner to ensure that they are carried out fully and effectively;

(b) to study the inclusion of investigation time as a factor in measuring service performance so as to facilitate public monitoring;

(c) to address the inadequacies of complaint investigation by reviewing the relevant operational guidelines and tightening the evidence collection procedures;

(d) to review the induction/in-service training of investigation staff with a view to improving the professionalism and efficiency of the investigation of misconduct; and

(e) to consider, when handling complaints, not only to investigate whether the estate agents concerned had violated relevant regulations, but also to look into whether they had done any behaviour which was not up to professional standard. EAA should consider such unprofessional behaviour when determining whether the estate agents concerned are still fit and proper to hold a licence under the Estate Agents Ordinance (the Ordinance) when they apply for licence renewal.

Administration's response

355. EAA accepted The Ombudsman's recommendations and has taken the following actions –

(a) EAA has reviewed the implementation of improvement measures to ensure that they are carried out fully and effectively. These measures include the following –

(i) To compile a case monitoring list;

(ii) to enhance the internal communication;

(iii) to streamline the procedures of handling non-compliant cases;

(iv) to include the performance pledge of investigation work in EAA's "Complaints Handling Manual" for its monitoring;

(v) to inform complainants of the investigation progress in writing, and state in the "Important Notice to Complainants" that the case officers will inform them of the investigation progress in writing every three months; and

(vi) to update the "Important Notice to Complainants" to explain that the case processing time will be prolonged if it is necessary to ask for further evidence/information from the complainant and to allow the complainant an opportunity to respond;

(b) EAA is drafting a performance pledge on investigation time, and will include the investigation time as a factor in measuring the service performance to facilitate public monitoring;

(c) concerning the inadequacies of complaint investigation, EAA has finished the review of the relevant operational guidelines and tightened the evidence collection procedures;

(d) EAA has strengthened the induction/in-service training of investigation staff. EAA will provide a structured training programme for its new investigation staff and it includes courses arranged by EAA and investigation courses organised by the Civil Service Training and Development Institute. Also, EAA will provide regular continuous in-service training for its staff to enhance the professionalism in investigation; and

(e) having considered the recommendation of The Ombudsman, EAA has reviewed and revised the guidelines on the investigation power conferred by Section 28 of the Ordinance with a view to exercising the power more effectively and flexibly. If a licensee acts in an uncooperative manner or gives no response in the course of EAA's investigation, EAA may, under suitable circumstances, exercise its power under Section 28 to request the licensee to produce any document or record which is relevant to the investigation and give all assistance in connection with the investigation. Under the Ordinance, any person who, without reasonable excuse, fails to produce the relevant document or give assistance in connection with the investigation as required by the investigator, commits an offence.

Estate Agents Authority and Transport and Housing Bureau

Case No. 2013/1899A (Estate Agents Authority) – Improperly handling the complainant's application for renewal of his salesperson's licence and delay in revoking his existing licence

Case No. 2013/1899B (Transport and Housing Bureau) – Improperly handling the complainant's appeal against a licensing decision of the Estate Agents Authority

Background

356. The complainant, a former licensed salesperson of estate agency, alleged that the Transport and Housing Bureau (THB) overruled his appeal against the Estate Agents Authority (EAA) for recommending the revocation of his licence and refusing his application for licence renewal, which the complainant found both THB and EAA were unfair in handling the case.

357. EAA learned from the media coverage that the complainant committed an offence of indecent assault while he was the holder of a valid salesperson's licence, and therefore requested him to submit information regarding his conviction in order to determine, in accordance with the Estate Agents Ordinance (the Ordinance), whether he was a fit and proper person to hold the licence. Subsequently, EAA considered that the complainant had committed an offence of a grave nature and was not a fit and proper person to hold the licence, and therefore recommended revocation of his licence.

358. The complainant stated that the assessment in his probation report was positive and he was only sentenced by the court to an order of 100 hours of community service for the offence. He did not agree to EAA's view that he had committed a serious offence. The complainant's allegations against EAA are summarised as follows –

(a) EAA was operating behind closed doors. No objective criteria were set for "a fit and proper person"; no hearing was arranged for him to defend himself in respect of the decision; and no detailed information of similar cases was disclosed, thus making it difficult for him to defend himself and determine whether the verdict was fair; and

(b) it was months after the complainant had submitted information about his conviction did EAA notify him of its recommendation to revoke his licence. The complainant objected to this recommendation and lodged an appeal. His licence however expired in February 2013 and was not renewed by EAA while he was waiting for his appeal to be heard. The complainant alleged EAA of delay in handling his case.

359. The complainant's allegations against THB are summarised as follows –

(c) Not disclosing the precedent cases of appeal for the complainant to determine whether the verdict was fair; and

(d) not indicating whether the representations and evidence provided by the complainant were accepted during the appeal hearing; nor a detailed explanation of reasons for overruling his appeal was given to the complainant after the hearing.

The Ombudsman's observations

Allegation (a)

360. In accordance with section 24 of the Ordinance, EAA notified the complainant in writing of its decision to refuse his application to renew the licence and the reasons for the decision. EAA also, in accordance with section 27(3) of the Ordinance, informed the complainant in writing of its recommendation to revoke his licence, which was still valid at the time, and advised him to make representations concerning the decision. Hence, there was no maladministration on the part of EAA as it had acted according to the provisions of the Ordinance.

361. Regarding the issue of "a fit and proper person", relevant policies had already been established and published by EAA to meet the requirements of the Ordinance. As regards EAA's decision per se, since an appeal against the decision could be filed through the statutory appeal channel under section 31 of the Ordinance, the Office of The Ombudsman had no authority to interfere under The Ombudsman Ordinance.

362. The Ombudsman was of the view that EAA had acted in full compliance with the Ordinance, but the complainant still felt aggrieved and was dissatisfied with the requirements under the prevailing Ordinance in the sense that he considered that EAA should have arranged a hearing and disclosed details of precedent cases. This concerned legislative matters rather than administrative matters, hence the Office of The Ombudsman would not interfere.

Allegation (b)

363. As for the allegation that the Administration Section of EAA was slow in taking follow-up action, the Administration Section did not finish compiling a report until November 2012 after receiving the information from the complainant and the court in May that year. During that period, the complainant was not notified of the progress or any specific follow-up action taken by EAA. Later, the case was further delayed due to the Licensing Committee's transition to a new term of office. This was far from satisfactory. EAA therefore has revised the guidelines for the procedures concerned, including the licence revocation procedures, so as to expedite the process. Under the new guidelines, the Administration Section might, without consulting the Licensing Committee beforehand, recommend licence revocation in cases involving certain serious offences (such as indecent assault), so that the licensee could make representations sooner. The Administration Section could then forward the case report, together with the representations of the licensee, to the Licensing Committee for deliberation. In addition, EAA ought to maintain contact with the applicant and licensee when handling the case, such as informing the licensee of the progress of the case every two months. The aforesaid improvement measures were applicable only to cases where revocation of licence was recommended. The Office of The Ombudsman considered that EAA should review and improve the arrangements for transition to a new term of office for its committees as deliberation of other licensing matters might also be affected by the transition.

364. In view of the above analysis, The Ombudsman considered the allegations against EAA partially substantiated.

Allegations (c) & (d)

365. The Appeal Panel is the statutory organisation established under section 32 of the Ordinance, and is not a subject of investigation under the jurisdiction of the Office of The Ombudsman in accordance with The

Ombudsman Ordinance. The Office of The Ombudsman had no authority to intervene the decision and operation of the Appeal Panel.

366. The Office of The Ombudsman was of the view that allegations (c) and (d) against THB were indeed made directed against the Appeal Panel and the Panel of Adjudicators formed by members of the Appeal Panel. The allegations against THB were therefore unsubstantiated.

367. The Ombudsman recommended EAA to –

(a) look into the causes of delay in handling the case by the Administration Section and work out improvement measures; and

(b) review the arrangements for transition to a new term of office for committees so as to minimise the impact.

Administration's response

368. EAA accepted The Ombudsman's recommendations and has looked into the causes of delay in handling the case and introduced the following improvement measures –

(a) The Manager of the Licensing Section will review the list of monitored cases on a weekly basis rather than on a monthly basis in order to enhance monitoring the progress of cases;

(b) increasing time-limited staff (namely two case officers) for handling cases; and

(c) increasing the number of times that the Licensing Committee is required to handle cases (either by way of meeting or circulation of documents) each year, from about six to eight times to about eight to ten times.

369. EAA has reviewed the arrangements for the Licensing Committee's transition to a new term of office, and decided to increase the number of meetings of the Licensing Committee before expiration of its prevailing term, so as to expedite the handling of cases that are expected to be completed during the period of transition. Meetings will be convened within one month after the transition of office in order to handle any backlog cases due to the transition.

Fire Services Department

Case No. 2013/3336 – (1) Delay of an ambulance in taking the complainant's wife to hospital (2) An ambulanceman's poor attitude towards the complainant

Background

370. According to the complainant, on the night of 25 October 2012, his wife was found suffering from shortness of breath and her family therefore summoned ambulance service. However, the ambulancemen did not convey the patient to hospital immediately upon arrival at scene. In addition, the siren of the ambulance was not sounded during its journey to a hospital. As a result, it took nearly one hour for the ambulance to reach the hospital after the ambulance call was made. Upon arrival at the hospital, an ambulanceman shouted at the complainant and behaved rudely. At that time, the patient was found not responsive to any stimuli. The patient passed away in the hospital afterwards.

371. The complainant alleged that FSD had delayed in taking the patient to hospital (allegation (a)) and an ambulanceman behaved rudely towards him (allegation (b)).

The Ombudsman's observations

372. The Office of The Ombudsman understood that providing appropriate pre-hospital care and treatment to emergency patients could enhance their survival rate. As such, FSD adopted the "Patient Assessment Model" under which ambulance personnel should conduct assessment of the patient's condition and make appropriate judgment based on their professional knowledge. According to the description of FSD, the ambulancemen had broadly conformed to that mode of operation throughout.

373. However, the Office of The Ombudsman was of the view that certain procedures carried out by the ambulancemen before leaving the scene did not need to be performed while the vehicle was stationary, including enquiring patient's family members as to the patient's medical history and cause of her sickness, reassuring the patient, taking her vital

signs and inputting patient's data into the computer system. Moreover, the Office of The Ombudsman considered that arranging the change of patient's family member to escort the patient and checking whether their seat belts were securely fastened could be done within short spell of time. In other words, the ambulance should have started its journey to hospital several minutes earlier.

374. Although there was no evidence showing that the time the ambulance stayed at scene had any causal relationship with the subsequent deterioration of the clinical condition of the patient in the Accident & Emergency ward, and there was no information indicating that the ambulancemen concerned delayed taking action intentionally, FSD had the responsibility to convey the patient to hospital for medical treatment as soon as practicable, which was also a reasonable expectation of the patient as well as her family members. In this incident, it took quite some time, i.e. 26 minutes, for the ambulance to leave the scene after its arrival. It was understood that the ambulancemen had to perform certain procedures but their medical skills and equipment were constrained. FSD should reflect on the possibility of streamlining ambulancemen's procedures so that patients could be conveyed to hospital more expeditiously for comprehensive treatment.

375. In view of the stable condition of the patient, the ambulancemen concerned considered it unnecessary to activate the visible and audible warning device during the journey to hospital and decided to let the ambulance run at a normal and steady speed. In this regard, the Office of The Ombudsman could not query the explanation given by FSD as it could not ascertain the patient's condition at that time.

376. With the above analysis, The Ombudsman considered allegation (a) partially substantiated.

377. Regarding allegation (b), the statements made by the complainant and the ambulancemen differed. In the absence of any independent corroborating evidence, the Office of The Ombudsman could not ascertain the facts of the case. As such, The Ombudsman had not arrived at a conclusion on this allegation.

378. Overall speaking, this complaint was partially substantiated. The Ombudsman urged FSD to consider streamlining the working procedures in order to convey patients to hospitals more expeditiously.

Administration's response

379. FSD accepted The Ombudsman's recommendation and promulgated a Departmental Order (the Order) on 10 December 2013 to remind ambulance personnel that inputting patients' data into a computer system and rendering examination and treatment to patients can be conducted while en-route to hospital and are not accepted as the reason(s) for delaying departure of the ambulance for hospital.

380. To ensure ambulance personnel's compliance with the Order, FSD will review the ambulance journey records and look into any unusual cases of overstay and unusually long journey time.

381. FSD will also remind ambulance personnel from time to time that they are required to convey patients to hospitals as soon as practicable and avoid any unwarranted stay at scene.

Fire Services Department and Buildings Department

Case No. 2013/0471A&B – Failing to take proper action on complaints about smoke stop doors and to abate the fire hazard expeditiously

Background

382. The complainant, the Owners' Corporation of a building, alleged that at each of the two smoke lobbies on one floor of the building, one of the two smoke stop doors had been removed (Irregularity (a)) and the other one was held open (Irregularity (b)). The complainant lodged a complaint with the Fire Services Department (FSD) and requested immediate enforcement action. FSD, however, just referred the case to the Buildings Department (BD) and the problem persisted.

383. The complainant considered FSD and BD to have failed to take proper action on its complaints and to abate the fire hazard expeditiously.

The Ombudsman's observations

FSD

384. The Office of The Ombudsman noted that FSD had conducted an investigation on Irregularity (a) within five working days, and referred the case to BD and notified the complainant of its referral within 11 working days, in accordance with its procedures and well within its time pledges.

385. FSD had also conducted an investigation on Irregularity (b) within 24 hours and notified the complainant of the result within six working days, again as pledged. Irregularity (b) had subsequently been rectified (the smoke stop doors were closed), so no further enforcement action by FSD was necessary.

386. In the light of the above, The Ombudsman considered the complaint against FSD unsubstantiated. Nevertheless, the Office of The Ombudsman found that –

(a) Irregularities (a) and (b) actually posed similar fire risks, but they were classified respectively as "non-imminent" and "imminent" cases by FSD simply because the former did not fall within its jurisdiction and the latter did, which was somewhat misleading; and

(b) Irregularity (a) might have been resolved earlier if FSD had referred such cases to BD for action in parallel with its investigation.

BD

387. The Office of The Ombudsman noted that owing to its heavy workload of unauthorised building works (UBW) cases, BD had to prioritise its actions on different cases. Therefore, it could not have attended to Irregularity (a) sooner. Anyhow, BD had carried out inspections within two weeks of the complainant's report, well within its time pledge. It had also notified the complainant of the result of its investigation within its 30-day pledge.

388. The complaint against BD was therefore unsubstantiated. However, the Office of The Ombudsman noticed that BD had not issued an advisory letter to the owner until 20 March, although inspections had been conducted in mid-February. BD should have drawn the attention of the owner to the UBW items earlier.

389. The Ombudsman recommended that –

FSD

(a) To review its terminology in the classification of cases (i.e. "imminent cases" and "non-imminent cases");

(b) to revise its work procedures for accelerating the resolution of Irregularity (a) cases (i.e. smoke stop doors having been removed) by referring such cases to BD for action in parallel with FSD's investigation; and

BD

(c) to remind staff to issue advisory letters to the owner as soon as possible after UBW have been identified.

Administration's response

390. FSD accepted The Ombudsman's recommendations and has taken the following actions –

(a) Re-classified Irregularity (a) case as "imminent case"; and

(b) revised the work procedures such that upon receipt of fire hazard complaints under the category of Irregularity (a) which fall within BD's jurisdiction, the cases will be referred to the latter department for follow-up within 24 hours.

391. BD accepted and implemented The Ombudsman's recommendation by revising internal instruction to remind BD staff that inspection report for UBW should be compiled as early as practicable for the agreement of the Unit Head, such that advisory letter or order can be issued in the earliest instance.

Fire Services Department and Lands Department

Case No. 2012/4620A (Fire Services Department) – Conniving with the parking of vehicles loaded with cylinders containing dangerous gases in an open area

Case No. 2012/4620B (Lands Department) - Shirking responsibility in handling complaints about the parking of vehicles loaded with cylinders of dangerous gases in an open area

Background

392. On 2 November 2012, two complainants lodged a complaint with the Office of The Ombudsman against the Fire Services Department (FSD) and Lands Department (LandsD). According to the complainants, they lodged complaints with FSD between February and March 2012 about the frequent parking of large vehicles loaded with dangerous gases at a location (Location A) in Yuen Long (the subject matter). After receiving the first complaint, FSD instituted prosecution against the persons responsible for the subject matter. However, FSD did not institue prosecution thereafter on the ground that the vehicles concerned were just conveying gases. FSD even allowed the person in charge of those vehicles to summon the drivers to drive away the lorries to avoid prosecution.

393 On 11 October 2012, the complainants lodged another complaint with FSD on the subject matter. FSD replied that it was unable to take any further action and the complainants were advised to lodge their complaint with LandsD. The complainants did so on the following day but LandsD replied to them on 26 October 2012 that the subject matter was outside its jurisdiction and advised that the complaint should be raised with FSD.

394. The complainants made the following allegations –

(a) FSD connived in the prolonged parking of vehicles loaded with dangerous gases (the subject vehicles) at Location A, which endangered the safety of nearby residents; and

(b) LandsD and FSD were shirking their responsibility to each other on the subject matter.

The Ombudsman's observations

395. Upon investigation, the Office of The Ombudsman came to a view that FSD's decision of not prosecuting the person in charge of the vehicles was based on applicable provisions of the relevant legislation and the outcome of its inspections. The referral of the case to LandsD was premised upon the complainants' allegation that Location A might involve an unauthorised change of the use of land. The Office of The Ombudsman considered that FSD's way of handling this case was not unreasonable.

396. As to whether FSD had ever mentioned that it was unable to take any further action in its reply to the complainants, the Office of The Ombudsman did not rule out the possibility that there had been a misunderstanding in the communication between the complainants and FSD staff.

397. In view of the above, The Ombudsman considered the complaint against FSD not substantiated.

398. LandsD had explained the development of how its District Lands Office (DLO) handled the subject matter and pointed out that the subject matter was outside DLO's jurisdiction. The way that DLO had referred the case to relevant department was considered reasonable. As such, The Ombudsman considered the complaints' allegation against LandsD unsubstantiated.

399. Overall speaking, this complaint was unsubstantiated yet The Ombudsman recommended that FSD should conduct an in-depth investigation as to whether vehicles loading dangerous gases were frequently parked at Location A for a prolonged period (such as overnight). If this turned out to be the case, FSD should seek legal advice from the Department of Justice as to whether such parking would constitute "storage" within the meaning in Section 6(1) of the Dangerous Goods Ordinance, and whether enforcement action should be taken against the act of "storing" Category 2 dangerous goods on vehicles parked at Location A for a prolonged period without a proper licence.

Administration's response

400. FSD accepted the recommendation and agreed that prolonged parking of a vehicle (even if it is a licensed dangerous goods vehicle) loaded with dangerous goods at a site not licensed for storing dangerous goods might constitute an offence. To address such action that may be illegal, FSD is seeking legal advice on the concerned enforcement policy.

Food and Environmental Hygiene Department

Case No. 2012/4136 – Failing to take effective regulatory action against obstruction of passages in a market

Background

401. The complainant alleged that some stall operators had persistently occupied the passages in a market (the Market) managed by the Food and Environmental Hygiene Department (FEHD), causing serious obstruction. She had complained many times to FEHD between January and September 2012, but there had been no improvement.

The Ombudsman's observations

402. The investigators of the Office of The Ombudsman conducted three site visits between February and March 2013 and noted that the passages in the Market, which should have been 2.5 metres wide, were very congested because most stall operators placed their commodities outside their display platforms. At some sections, the width of the passage was just 0.8 metre, causing inconvenience if not danger to customers.

403. Under the Code of Practice for Market Management, stall operators who occupy spaces beyond their display platforms are liable to prosecution. However, FEHD's District Environmental Hygiene Office had instituted very few prosecutions after receiving reports of irregularities of the contractor which managed the Market. That had greatly compromised the deterrent effect of the legal sanctions.

404. FEHD's enforcement action against the obstruction problem had all along been weak. It had become a customary practice for many stall operators to extensively encroach on the common areas. That was indeed improper. In this light, The Ombudsman considered the complaint substantiated.

405. FEHD had enhanced its enforcement efforts since the intervention of the Office of The Ombudsman. There was an increase in the number of prosecutions and one stall operator might face termination of tenancy. In order to increase the deterrent effect of its

enforcement action, The Ombudsman urged FEHD to institute prosecutions more decisively against those stall operators who were heedless of its warnings.

Administration's response

406. FEHD accepts The Ombudsman's recommendation. Between 22 April 2013 and 11 August 2014, FEHD instituted 14 prosecutions against stall operators for placing commodities outside their stalls, thus causing obstruction of passages in the Market. As FEHD staff observe during their daily inspections, the situation of obstruction of passages in the Market has improved.

Food and Environmental Hygiene Department

Case No. 2012/4700 – (1) Failing to take effective enforcement action against illegal extension of a restaurant and two cooked food stalls; and (2) Failing to keep the complainant informed of the progress of his complaint case

Background

407. On 6 November 2012, the complainant lodged a complaint with the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD).

408. The complainant alleged that the operators of a restaurant (Restaurant A) and the cooked food market stalls (Cooked Food Stall A and Cooked Food Stall B) opposite to Restaurant A often placed tables and chairs on the pavement in the evening to operate their business, thereby causing obstruction to passageways, environmental hygiene problems and noise nuisance. Having lodged a complaint about the above situation with FEHD in August 2012, the complainant was informed that the case was being followed up and he would be provided with a reply as soon as possible. However, the above situation persisted and he criticised FEHD for its ineffective enforcement actions (Allegation (a)).

409. In addition, FEHD had never responded to the complainant's complaint except for the acknowledgment of receipt of his complaint (Allegation (b)).

The Ombudsman's observations

Allegation (a)

410. According to the site visits by the staff of The Office of The Ombudsman, tables and chairs were blatantly placed on the pavement for business operation by Restaurant A, Cooked Food Stall A and Cooked Food Stall B. The problem was quite serious, causing considerable obstruction and nuisance to the residents. In spite of FEHD's enforcement actions, the result was not effective.

411. Restaurant A always placed tables and chairs on the pavement for business operation, but not many warnings had been issued by FEHD in the past. It was at a later stage that FEHD issued more warnings to and finally cancelled provisional licence of Restaurant A.

412. As regards Cooked Food Stalls A and B, FEHD had merely taken enforcement actions under Section 4A of the Summary Offences Ordinance which was also considered by FEHD as rather lenient, without issuing any warning in respect of their acts of placing paraphernalia outside the stalls, which was obviously a breach of the tenancy agreement. FEHD's regulatory actions had not been strict enough. It was not until the Office of The Ombudsman commenced investigation that FEHD took improvement measures. Based on the above analysis, The Ombudsman considered allegation (a) substantiated.

Allegation (b)

413. Regarding FEHD's staff had not informed the complainant of the progress of the case, FEHD explained that the concerned case file was shelved as it was misplaced in another file. FEHD had instructed the staff concerned to handle the files with care and apologised to the complainant. It was apparent that due to the negligence of FEHD's staff, the complainant had been waiting desperately. As such, The Ombudsman considered allegation (b) substantiated.

414. Overall, The Ombudsman considered this complaint substantiated and urged FEHD to –

(a) step up enforcement and regulatory actions against the irregularities at subject location, including special monitoring of any unlicensed operation by Restaurant A after cancellation of the licence; and

(b) strictly enforce the terms of the tenancy agreements of Cooked Food Stall A and Cooked Food Stall B.

Administration's response

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

(a) FEHD will continue to closely monitor the situation and take appropriate enforcement actions once operation of unlicensed food business is detected; and

(b) on 22 April 2013, FEHD issued the third warning letter to the tenants of Cooked Food Stall A and Cooked Food Stall B respectively under the Warning Letter System, ordering them to cease illegal extension of their business areas onto the street within 12 days. If subsequent breach of tenancy clauses/conditions was detected within six months from the issue date of the third warning letter, FEHD would consider terminating the tenancy of the concerned stall in accordance with the established policy. In the subsequent six months, FEHD conducted numerous inspections to the subject cooked food stalls and found no irregularity.

Food and Environmental Hygiene Department

Case No. 2012/5024 – Failing to take effective enforcement action against pavement obstruction caused by a fruit shop

Background

416. On 15 November 2012, a member of the public (the complainant) complained to the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD).

417. Allegedly, a fruit shop (Shop A) had been causing street obstruction and blocking the entrance of a building. In mid-2012, the complainant complained to FEHD, but the Department failed to take effective enforcement action against the shop.

The Ombudsman's observations

418. The Office of The Ombudsman accepted that FEHD had taken some enforcement actions against the illegal extension of Shop A. However, the obstruction problem persisted.

419. The Office of The Ombudsman noted that the subject street had long been a popular shopping area. Illegal shop-front extension had prevailed for years. Clearly, Shop A had been hawking fruits on the street by extending its business area.

420. Despite such blatant illegal hawking by the operator of Shop A, FEHD had instituted only one prosecution against him/her for such an offence. With the experience that the shop operator did sell some fruit to the staff of the Office of The Ombudsman right in the extension area during a site inspection, it was hardly convincing that FEHD claimed it was difficult in collecting evidence of illegal hawking. The primary responsibility of FEHD is to control the illegal hawking. With its sparse prosecution against the operator of Shop A for such an offence and its lack of determination to tackle the illegal activity, FEHD has failed to live up to public expectation. The Ombudsman considered that FEHD should have instituted more of such prosecutions, which may result in seizure of equipment/commodities and a heavier penalty, instead of just continually prosecuting the shop operator for obstruction, which has

proved not so effective in deterring Shop A from extending its business area.

421. Taking into account of the above, The Ombudsman considered the complaint partially substantiated.

422. The Ombudsman made the following recommendations for FEHD –

(a) Continue to monitor the situation closely and step up enforcement actions, including more prosecutions against the operator of Shop A without first issuing warning letters, and active collection of evidence of his/her illegal hawking activities for prosecution such that FEHD can seize its goods and apparatus for stronger deterrent effect; and

(b) in the light of the magnitude and seriousness of street obstruction and illegal hawking on the subject street, to enlist support from other Government departments for more frequent joint operations to combat the problem.

Administration's response

423. FEHD accepted the recommendations of The Ombudsman and has taken the following actions –

(a) FEHD has been keeping the vicinity of the subject street under close surveillance and stringent enforcement actions would be taken as necessary. District staff were reminded to maintain vigilance and to take enforcement action under sections 83B and 86 of the Public Health and Municipal Services Ordinance (Cap. 132) whenever sufficient evidence against illegal hawking can be established; and

(b) FEHD conducted four inter-departmental operations on 14 June 2013, 19 August 2013, 16 December 2013 and 25 April 2014 respectively, during these operations, individual departments have taken enforcement actions within their ambit and FEHD have taken out 37 prosecutions against the offenders (including Shop A) for causing obstructions to public places under section 4A of Summary Offences Ordinance (Cap. 228).

Food and Environmental Hygiene Department

Case No. 2012/5680(I) – (1) Delay in following up a food complaint and staff failing to wear uniform when performing duties; (2) Failing to collect evidence relevant to a food complaint; (3) Failing to prosecute the food premises concerned; (4) Unreasonably refusing to provide the complainant with the investigation report; and (5) Providing inconsistent replies to the complainant

Background

424. The complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) on 9 December 2012. He provided supplementary information on 31 December.

425. According to the complainant, he had breakfast at around 8:45 am on 31 March 2012 at a restaurant (Restaurant A). When he opened and poured out a packet of syrup (the Syrup) provided by Restaurant A on the food, a number of ants were found in the Syrup. He then called the 1823 Call Centre to lodge a complaint with FEHD. More than an hour later, a FEHD officer (Officer A) in casual wear came and took the Syrup away for inspection. Inspection result confirmed that there were over 60 ants in the Syrup. On 13 September, FEHD informed the complainant in writing that investigation had been completed and a letter would be issued to Restaurant A requesting it to make sure that its food was of the nature, substance and quality demanded by the purchaser. FEHD later informed the complainant that the Syrup was not manufactured and packaged locally and FEHD was therefore not in the position to take prosecution action. The letter issued by FEHD to Restaurant A was of advisory nature only.

426. The complainant made the following allegations against FEHD –

(a) It was not until over an hour after receiving his complaint that Officer A arrived at the scene. Officer A was in casual wear which was alleged to be in breach of FEHD's operational guidelines;

(b) Officer A only took away the Syrup without collecting other relevant evidence (e.g. breakfast food and closed circuit television footage) which showed the way he handled the case was rather perfunctory;

(c) issuing only an advisory letter instead of prosecuting Restaurant A even when it was already confirmed that ants were found in the Syrup. This action was tantamount to condoning the selling of food unfit for consumption by Restaurant A and a disregard for the safety of the public;

(d) the complainant was only allowed to access to his own statement and was unreasonably refused to access to the investigation report; and

(e) providing inconsistent replies by saying that investigation was completed in a letter dated 13 September 2012, but stating that investigation was still underway in a letter dated 19 December.

The Ombudsman's observations

Allegation (a) - officer delayed his investigation at the scene and did not wear uniform

427. The complainant and Officer A gave different accounts of the time Officer A arrived at Restaurant A on the day of the incident (the former claimed it was after 10 am while the latter said it was around 10 am). In the absence of independent corroborative evidence, the Office of The Ombudsman could not verify the complainant's allegation. The Office of The Ombudsman however opined that no matter 45 minutes or over one hour it took Officer A to arrive at the scene that day after his telephone conversation with the complainant, the response time was neither fast nor too slow.

428. Regarding the allegation that Officer A did not wear uniform when performing duties, FEHD explained Officer A's uniform was stained and his trousers were torn after leaving the duty room and falling on the ground on the way to Restaurant A. Officer A immediately put on the casual wear and got to Restaurant A in order not to cause any delay in handling the case. The Office of The Ombudsman accepted that it was understandable provided that FEHD's explanation was true. However, it was improper for Officer A not to keep a record or report the

situation to his supervisor afterwards. FEHD had reminded its staff to make improvements in this regard. Summarising the analysis above, The Ombudsman considered allegation (a) partially substantiated.

Allegation (b) - Failure to collect other relevant evidence

429. After reviewing relevant records, the Office of The Ombudsman accepted the FEHD's account that Officer A had inspected the hygiene of Restaurant A and several packets of syrup of the same kind to ensure no foreign substance was found in other food sold. The Ombudsman considered it reasonable for Officer A not to collect other relevant food or items as evidence if it was confirmed that the ant-like substances were only found in the Syrup. Hence, The Ombudsman considered allegation (b) unsubstantiated.

Allegation (c) - Not pursuing prosecution but condoning the selling of food unfit for consumption by Restaurant A

430. The Office of The Ombudsman considered it reasonable for FEHD to decide not to prosecute Restaurant A according to the legal advice sought. Besides, Officer A had inspected the hygiene of Restaurant A and randomly several packets of syrup of the same kind to ensure no foreign substance was found in other food sold. It showed that FEHD had not connived at the selling of unsafe food by Restaurant A. Hence, The Ombudsman considered allegation (c) unsubstantiated.

Allegation (d) - Unreasonably refusing the provision of test report

431. The Office of The Ombudsman accepted FEHD's account after considering the relevant records. Another officer of FEHD (Officer B) wrote to the complainant on 30 November 2012 to inform him that it was yet to be decided whether the test report would be provided, rather than rejecting outright his request.

432. However, the Office of The Ombudsman found that the complainant was only asking for a piece of simple information, and without any sufficient reason, FEHD did not inform the complainant of its final decision until 18 January 2013 (i.e. two months after receiving the complainant's request on 14 November 2012), which was obviously a delay. The delay was attributed to the fact that Officer B had not consulted the Access to Information Officer in the first instance. It was further delayed when later on the complainant could not be reached by phone and the Centre for Food Safety (CFS) deferred informing the

complainant of the decision in writing. Therefore, the complainant could hardly avoid having the impression that FEHD was reluctant to provide the requested information.

433. Moreover, the supervisor of the Pest Control Advisory Section, without consulting his/her superior officer, indicated that the complainant should not be provided with a copy of the inspection report. This showed that he/she was unaware of the guidelines on the Code on Access to Information (the Code).

434. Based on the above analysis, The Ombudsman considered allegation (d) substantiated other than alleged.

Allegation (e) - Inconsistency in replies

435. In the letter dated 13 September to the complainant, CFS indicated the investigation of FEHD had been completed. However, in the letter dated 29 December, FEHD mentioned the telephone conversations with the complainant on 14 and 30 November and the investigation was still underway, while it failed to indicate FEHD were actually following up the new enquiries and requests made by the complainant during the two telephone conversations. It was possible that the complainant might find the inconsistency in two written replies. In light of the above, The Ombudsman considered allegation (e) partially substantiated.

436. Overall, The Ombudsman considered this complaint partially substantiated and urged FEHD to –

(a) remind its staff to comply with departmental guidelines/code of practice when performing duties, as well as maintain proper record and act flexibly in case of unexpected events;

(b) reinforce training to ensure that staff are familiarised with the requirements and guidelines of the Code, instruct them to act in compliance with the Code when handling information requests, and consult the Access to Information Officer or senior management if in doubt; and

(c) convey the clear message and pay attention to the wording used in the response to the complainant to avoid misunderstanding.

Administration's response

437. FEHD accepted The Ombudsman's recommendations and has taken the following actions according to respective recommendations –

(a)&(c) FEHD instructed district heads in an internal meeting on 30 July 2013 to remind its staff to comply with the departmental guidelines/code of practice when performing duties, and maintain proper record and act flexibly in case of unexpected events. The message should be clear and the wording should be carefully selected in the response to the complainant in order to avoid misunderstanding; and

(b) the Training Section of FEHD has conducted a talk on the Code on 8 August 2013to explain the rules and guidelines of the Code to FEHD staff in different grades.

Food and Environmental Hygiene Department

Case No. 2013/0024(I) – (1) Delay in providing the laboratory test result of a food complaint; (2) Bias in handling the food complaint; (3) Failing to notify the public of the latest information regarding food safety in its website; (4) Unreasonably refusing to provide the guidelines in handling food complaints; (5) Failing to respond to the complainant's enquiries about its handling of food complaints; and (6) Failing to collect food specimens for examination when handling a subsequent food complaint involving the same type of food

Background

438. The complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) on 3 and 16 January 2013.

439. According to the complainant, he lodged the following complaint with FEHD on 11 December 2012 – He bought a bottle of white wine (the White Wine) at Shop A on 29 November and arranged for it to be tested. The White Wine was found to contain the plasticiser of di(2-ethylhexyl) phthalate (DEHP) at a level exceeding the action level (1.5 ppm) of the Centre for Food Safety (CFS) under FEHD. CFS informed the complainant in a letter dated 11 January 2013 that analysis by the Government Laboratory showed that the White Wine contained DEHP at 2.8 ppm; and after conducting risk assessment, CFS concluded that the detected DEHP level was unlikely to pose any risk to human health. CFS later informed him that an action level of 5 ppm had been set for DEHP in spirits (the White Wine was classified as spirits). The White Wine therefore did not contain an excessive amount of DEHP.

440. The complainant's allegations against FEHD could be summarised as below –

(a) During the period between CFS receiving the test report from the Government Laboratory on 27 December 2012 and it sending him a reply on 11 January 2013, CFS had refused to disclose the result to him due to the need of conducting risk assessment. Yet CFS had notified the Mainland authority concerned of the test result before issuing him a reply. White wine of the same type had been on sale in the market all along. He alleged that

CFS delayed disclosing the test result without regard for public safety;

(b) both CFS and the complainant's own test indicated that the White Wine contained excessive amount of DEHP. He accused CFS of wilfully harbouring the wine trader by raising the action level for DEHP in white wine subsequently;

(c) when he visited CFS website later, he found that the webpage still showed the old action level for DEHP in foods (i.e. 1.5 ppm). He then asked a staff member of CFS (Staff A), whether CFS would update the webpage or make the new DEHP action level known to the public. Staff A said no. The complainant accused CFS of not being reasonable and transparent by failing to make the latest information available to the public;

(d) the complainant considered it unreasonable for CFS to refuse to grant him access to the procedures/code of practice for handling food complaint on the grounds that it was internal guidelines;

(e) the complainant called the Controller of CFS on 4 January 2013 and made the following 5 enquiries –

(i) Did CFS have written guidelines on handling public complaints?

(ii) Why the complainant was not informed of the test result as soon as it was available?

(iii) Was there any instruction given to the staff, telling them not to take samples of the same type of white wine in the market?

(iv) Did CFS make any enquiries with the State General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) about his complaint?

(v) Did CFS disclose the test result of the White Wine to AQSIQ?

CFS gave him a written reply on 7 January which did not address the above enquiries; and

(f) he complained to FEHD on 3 January 2013 that the DEHP content of the same kind of white wine for sale in Shop B allegedly exceeded the action level of CFS. FEHD called him on the same day to inform him that officers had been sent to Shop B to investigate. The officer however only took information on the shop and the white wine on sale but failed to collect specimens of the white wine for testing. He considered that FEHD had failed to handle his complaint properly.

The Ombudsman's observations

Allegation (a) - Delay in the disclosure of test result

441. CFS's primary mission is to ensure food safety. The Office of The Ombudsman considered CFS was duty-bound to send the food specimen to the laboratory for testing and to conduct risk assessment subsequently. As to CFS's concern that disclosure of the test result before completion of the risk assessment would be unfair to the retailers concerned as it would give rise to unnecessary speculation from the public and the press alike, the Office of The Ombudsman considered the concern not unreasonable. It was therefore understandable that CFS did not disclose the laboratory test result and risk assessment result fully to the complainant until the risk assessment had been completed. Moreover, CFS gave the complainant a detailed reply (including the laboratory test result) on 11 January 2013 around two weeks after CFS had received the laboratory result (on 27 December 2012), which could not be considered as a delay.

442. The Office of The Ombudsman was also satisfied with FEHD's explanation for disclosing information on the White Wine (including the laboratory test result) to AQSIQ.

443. In light of the above, The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b) - Harbouring the wine trader by raising the action level for DEHP in white wine subsequently

444. FEHD had clarified that the action level for DEHP in foods (i.e. 1.5 ppm) was not applicable to spirits. The Office of The Ombudsman considered it not unreasonable for CFS, arising from the complainant's complaint, to set an action level for DEHP in spirits after conducting risk

assessment with reference to the practice/data of other countries/regions. Furthermore, there was no evidence to support the allegation that FEHD "wilfully harboured" the wine trader.

445. In light of the above, The Ombudsman considered allegation (b) unsubstantiated.

Allegation (c) - Failing to make the latest information available to the public

446. The complainant and Staff A of CFS gave different accounts of what had happened. In the absence of corroborative evidence such as a taped conversation, the Office of The Ombudsman could not determine whether Staff A had explicitly indicated to the complainant that the action level for DEHP in spirits would not be disclosed to the public. Hence, The Ombudsman was unable to make a definite conclusion on allegation (c).

447. CFS had announced the action level for DEHP in spirits on its website on 7 February 2013. FEHD should learn a lesson from this incident and make important information available to the public as soon as possible in the future.

Allegation (d) - Unreasonably refusing to provide the procedures/code of practice for handling food complaint

448. Staff B of FEHD did refuse to provide the complainant with the requested document on the grounds that it was a restricted document. Evidently, both Staff B, when handling the complainant's request, and FEHD, when first responding to the Office of The Ombudsman's inquiry, were unaware of the fact that even if a request for information was made without citing the Code on Access to Information (the Code), it should be handled in accordance with the provisions of the Code. Otherwise, Staff B would not have refused the complainant's request for information simply because the requested document was a "restricted document" and FEHD would not have argued that "the complainant did not make explicit reference to the Code when he requested access to the document". Hence, The Ombudsman considered allegation (d) substantiated.

449. Although the Office of The Ombudsman agreed after reviewing the document in question that FEHD's refusal was justified for reasons set out in the Code, there were inadequacies in the way CFS handled the complainant's request for information as below –

(i) Staff B, who was not a directorate-grade officer, should have consulted his supervisor regarding the complainant's request; and

(ii) he should also have informed the complainant of the review and appeal channels.

450. FEHD should learn lessons from this incident and rectify the above irregularities and deficiencies.

Allegation (e) - Failure to address enquiries

451. Although the CFS finally wrote to the complainant on 11 January 2013 informing him of the investigation result of his complaint, the Centre did not answer, in its letter dated 7 January as well as in other letters, the five enquiries raised by the complainant. Hence, The Ombudsman considered allegation (e) substantiated. FEHD should make improvements accordingly.

Allegation (f) - Failure to collect specimens for testing

452. As CFS had started investigation of the DEHP content in white wine and Shop B had suspended the sale of the products, it was indeed unnecessary for FEHD to collect specimens from that shop for examination. Hence, The Ombudsman considered allegation (f) unsubstantiated.

453. Overall, The Ombudsman considered this complaint partially substantiated.

454. The Ombudsman recommended FEHD to –

(a) instruct staff to make important information available to the public as soon as possible;

(b) provide training to staff to ensure that they understand and follow the Code, the Guidelines on Interpretation and Application of the Code, and the contents and requirements of the Code; and

(c) remind staff that they should provide direct responses to public enquiries.

Administration's response

455. FEHD accepted The Ombudsman's recommendations and will take/has taken the following actions –

(a) FEHD will make important information available to the public as soon as possible through a wide variety of channels including press releases, websites and mobile applications. Moreover, CFS launched its Facebook page on 1 October 2013 with a view to disseminating important information on food safety quickly and directly and facilitating better communication and interaction with the public;

(b) the Training Section of FEHD has conducted a talk on the Code on 8 August 2013, familiarising FEHD staff of different grades with the rules and guidelines of the Code; and

(c) FEHD has issued directions to all division heads on 30 September 2013, requiring them to instruct their staff to provide direct responses to public enquiries.

Food and Environmental Hygiene Department

Case No. 2013/0246 – Failing to promptly collect food specimens for laboratory test when handling a food complaint

Background

456. The complainant felt sick after consuming ice-cream at a fast food shop. Suspecting the ice-cream to be the cause of his sickness, he lodged a complaint with the Food and Environmental Hygiene Department (FEHD). FEHD later informed him that its staff had inspected the shop, but no specimen of ice-cream had been collected.

457. It was not until 19 days later that FEHD staff took from the shop some specimens of ice-cream for laboratory test. The complainant alleged that FEHD had delayed collecting specimens of the ice-cream and had thus given the shop time to destroy the evidence.

The Ombudsman's observations

458. Shops selling unhygienic food could lead to dire consequences. The Office of The Ombudsman considered it improper of FEHD staff not to have collected food specimens from the shop until 19 days after the incident.

459. In this light, The Ombudsman considered the complaint substantiated and urged FEHD to –

(a) provide training to staff to ensure that they understand the guidelines and the procedures for handling food complaints and that they handle food complaints promptly and carefully in accordance with the guidelines; and

(b) improve and enhance the coordination and communication in handling food complaints between its District Environmental Hygiene Offices (DEHOs) and the Centre for Food Safety (CFS).

Administration's response

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

(a) FEHD has reminded staff to be thoroughly conversant with the relevant guidelines and strictly adhere to the procedures in handling food complaints. Training course on food control has also been provided for staff to enhance their knowledge about handling of food complaints; and

(b) to enhance the coordination and communication between DEHOs and the CFS in handling food complaints, FEHD issued guidelines to each DEHO and the Food Complaint Section of CFS on 9 October 2013, instructing the Section to, upon receiving referrals of food complaints from DEHOs, handle the complaints dedicatedly and reply to the enquiries made by the complainants.

Food and Environmental Hygiene Department

Case No. 2013/0443 – Ineffective control of illegal extension of business area by a fixed-pitch cooked food stall

Background

461. On 3 February 2013, the complainant lodged a complaint with the Office of The Ombudsman in writing against the Food and Environmental Hygiene Department (FEHD).

462. The complainant alleged that a stall (the Stall) had occupied the pavement in order to extend its business area substantially and this had caused obstruction to the passage. The complainant had complained to FEHD, but the situation remained the same. He considered that the problem persisted because of FEHD's ineffective enforcement action.

The Ombudsman's observations

463. FEHD's records showed that FEHD had taken enforcement action against the obstruction caused by the Stall. However, the site visits by staff of the Office of The Ombudsman revealed that FEHD's enforcement action was indeed ineffective. The Office of The Ombudsman believed that the original intent of the Fixed-Pitch (Cooked Food or Light Refreshment) Hawker Licence was to allow the licensee to sell take-away/eat-in cooked food or light refreshment with only a few seats at the stall. However, the Stall blatantly placed a disproportionate number of tables and chairs to serve its customers. Given the seriousness of the problem, FEHD could not evade the responsibility.

464. FEHD did not impose on the licence of the Stall any condition restricting its business area. It was normal that the Stall placed on the pavement as many tables and chairs as possible to reap more profits. In the absence of such a licensing condition, FEHD officers were bound to encounter difficulties when taking enforcement.

465. As a matter of fact, FEHD has the power to control the number of tables and chairs placed in a stall as well as the business area of a stall. Section 49(1) of the Hawker Regulation provides that –

"Where a licensee who holds a fixed-pitch hawker licence authorising him to deal in drink or cooked food …… the Director (of FEHD) may, by endorsement on his licence, permit him (the licensee) to place in accordance with this section (Section 49(1) of the Hawker Regulation) in any area approved by him in the immediate vicinity of the pitch such number of tables, stools, and chairs as he specifies in the endorsement."

466. In this case, FEHD should have specified at an early stage in the licence of the Stall the number of tables and chairs allowed to be placed in the immediate vicinity of the Stall in order to provide its enforcement staff with an objective standard so that they could step up enforcement action when necessary, lest the situation deteriorates out of control.

467. FEHD's slack regulatory action on the business area of the Stall not only encouraged the Stall to obstruct the road, but also ignored the food safety issues involved in preparation of food in such a small cooking area for a relatively large number of customers. FEHD should review the case thoroughly.

468. In view of the above, The Ombudsman considered this complaint substantiated.

469. The Ombudsman recommended FEHD to –

(a) consider specifying in all Fixed Pitch (Cooked Food or Light Refreshment) Hawker Licences the number and location of tables and chairs that the licensee is allowed to place. FEHD may consult the respective District Council on the details, if necessary; and

(b) in this case, step up inspection and enforcement, and conduct blitz operation at different times of the day in order to achieve a strong deterrent effect.

Administration's response

470. FEHD accepted the recommendations and has taken the follow-up actions below –

(a) Having regard to the public's request to preserve and revitalise

the hawking trade, FEHD reviewed the hawker licensing policy in 2008/09 and consulted the Legislative Council (LegCo). With the support of the LegCo, FEHD implemented a series of measures. One of the measures was that when processing applications for succession, transfer or issuing new licences for a Dai Pai Dong, FEHD would explore the room for relaxing the existing limit of placing two tables and eight stools in front of the stall having regard to objective factors, such as stall location, and seek District Council's views. As there are only a few Dai Pai Dongs in Hong Kong, FEHD will adopt the approach set out in the LegCo Paper when issuing a new licence for a Dai Pai Dong. FEHD will specify the seating area having regard to objective factors such as the stall location and in the light of the actual situation. Besides, FEHD will step up enforcement against the Dai Pai Dongs which cause environmental hygiene nuisances;

(b) as a matter of fact, the actual circumstance of each Dai Pai Dongs is different. FEHD considered that it would be more pragmatic and feasible to improve the environment from an overall perspective by imposing conditions relating to environmental improvement when processing applications for succession or transfer of licences; and

(c) since late August 2013, where resources permit, FEHD has conducted irregular patrols of the area concerned to contain the problem of obstruction caused by the tables and chairs of the Stall. The situation has improved. Moreover, FEHD would conduct blitz operation on the Stall at different times of the day, when necessary.

Food and Environmental Hygiene Department

Case No. 2013/0508 – Failing to take action against illegal subletting of market stalls

Background

471. On 14 February 2013, the complainant lodged a complaint with the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD).

472. The complainant alleged that he had been trying to bid for a cooked food stall in a cooked food centre under FEHD, but unsuccessful. He learned that certain stall tenants of the cooked food centre held two stalls at the same time, one of which was operated by themselves and the other was sublet to other people (the irregularity). He reported the irregularity to FEHD, but the situation prevailed. The complainant alleged that FEHD failed to address the irregularity.

The Ombudsman's observations

473. FEHD admitted that in this incident, the subject District Environmental Hygiene Office (DEHO) failed to conduct a thorough investigation into the irregularity according to the Operational Manual for Markets (the Operational Manual). However, the Office of The Ombudsman could not ascertain whether it was the failure of FEHD to update the Chinese translation of the Operational Manual in its intranet or any other reasons that resulted in the negligence of DEHO. In any case, it was a fact that the DEHO's investigation into the irregularity was ineffective. As such, The Ombudsman considered this complaint substantiated.

474. The Ombudsman recommended FEHD to draw experience from the incident and urge all DEHOs to exercise strict control over the operation of markets according to the Operational Manual.

Administration's response

475. FEHD has implemented the recommendation made by The Ombudsman by issuing an instruction in August 2013 to all DEHOs on the need to exercise strict control over the operation of markets according to the Operational Manual.

Food and Environmental Hygiene Department

Case No. 2013/1085 – Failing to take effective enforcement action against illegal extension and obstruction of public places by two grocery stores

Background

476. In February 2012, the complainant complained to the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD) for failing to take effective enforcement action against the operator(s) of two shops with the same name (Shops A and B), which had caused obstruction and hazard by placing goods and paraphernalia on the pavement. The Office of The Ombudsman completed the investigation in May 2012. In the concluding reply, The Ombudsman urged FEHD to revise its enforcement strategy of "warning before enforcement" and institute prosecution against the shops immediately if they relapse.

477. The complainant had subsequently written to the Office of The Ombudsman several times, alleging that the shop operator(s) had failed to rectify the irregularities. The Office of The Ombudsman had sent a reply to the complainant informing him of the follow-up actions taken by FEHD and urged FEHD over and over again to revise its enforcement strategy.

478. Afterwards, the complainant contacted the Office of The Ombudsman again by mail and by phone, reiterating that the shop operator(s) had failed to rectify the irregularities. In March 2013, the officers of the Office of The Ombudsman inspected the shops and found that the problem of irregularities was indeed very serious –

(a) The operator(s) of both shops placed a large quantity of goods and containers on the pavement and the area they occupied was even extended to the shop fronts of several neighbouring shops; and

(b) The goods placed in front of the two shops were all with price tags and there were staff selling goods and receiving payments at the side.

The Ombudsman's observations

479. The Office of The Ombudsman's officers conducted site inspections twice. On both occasions, it was found that the shop operator(s) had placed a large quantity of goods and containers on the pavement, occupying more than half of the pavement surface, and their staff were found to have blatantly engaged in hawking activities on the pavement. Undoubtedly, the street obstruction caused by both shops and their illegal hawking activities have reached a degree of "seriousness that warrants immediate prosecution". However, the Office of The Ombudsman noted from the number of warnings and prosecutions made by FEHD against Shops A and B that –

(a) although FEHD had indeed taken actions against the shops, and stepped up immediate prosecutions as per the recommendation of the Office of The Ombudsman, there were still a considerable number of inspections where only warnings but not prosecutions were made against the irregularity of the two shops; and

(b) most of the prosecutions made were of the offence of causing street obstruction rather than the more severe offence of illegal hawking.

480. Given less than ten prosecutions were instituted by FEHD against each of Shops A and B each month and that the shop operators were charged with the minor offence of causing street obstruction predominantly, the Office of The Ombudsman considered that it was hard to have any substantive deterrent effect on habitual offenders like the operator(s) of these two shops. Based on the analysis above, The Ombudsman considered this complaint partially substantiated.

481. The Ombudsman urged FEHD to –

(a) further step up inspections of the shops and take stringent and decisive enforcement actions, which should include instituting immediate prosecution once irregularities are detected; and

(b) institute more prosecutions for the offence of illegal hawking in accordance with section 83B of the Public Health and Municipal Services Ordinance (the Ordinance), so that the offenders would face more serious consequences, and to seize the equipment and commodities of the shops under section 86 of the Ordinance in order to achieve a stronger deterrent effect.

Administration's response

482. FEHD accepted The Ombudsman's recommendations and has further stepped up inspections of the two shops and taken stringent and decisive enforcement actions, including instituting immediate prosecutions and charging the offender(s) with illegal hawking under section 83B of the Ordinance, where appropriate. FEHD will continue to keep a close watch on the shops and take stringent enforcement actions. It would also review the enforcement strategy from time to time, as appropriate, in order to enhance the effectiveness of its regulatory measures.

Food and Environmental Hygiene Department

Case No. 2013/1304 – Failing to take enforcement action against passage obstruction caused by a market stall tenant

Background

483. On 13 April 2013, the complainant lodged a complaint with the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD).

484. The complainant alleged that a stall operator (Stall Operator A) had persistently occupied a passageway in a market managed by FEHD, causing serious obstruction to market users. The complainant complained to FEHD many times between 2010 and 2012. However, there had been no improvement and the problem worsened.

The Ombudsman's observations

485. According to FEHD's Operational Manual for Markets (Operational Manual), stall operators are not allowed to place any commodities beyond the display platforms of their market stalls. Otherwise, FEHD will take enforcement action.

486. FEHD indicated that it conducted numerous inspections and took enforcement actions against Stall Operator A between July 2011 and May 2013. However, the actions taken by FEHD were loose. The staff of the Office of The Ombudsman found during their site inspections on 17 June and 9 September 2013 that Stall Operator A still placed the commodities in the passageway, causing obstruction to market users.

487. FEHD denied that enforcement actions depended on the individual staff's own judgement. However, it was a fact that FEHD did not provide any objective standard for staff to determine the seriousness of stall operators' unauthorised occupation of market passageway and the level of regulatory actions to be taken. Such market management practices were undesirable.

488. In fact, FEHD failed to monitor Stall Operator A properly, resulting in the persistent occupation of the market passageway, causing obstruction to market users. In view of the above, The Ombudsman considered this complaint substantiated.

489. The Ombudsman urged FEHD to formulate more objective and clearer regulatory standards and guidelines for its staff to follow so as to curb the problem of unauthorised occupation of market passageway and obstruction to market users.

Administration's response

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

(a) FEHD would review the relevant guidelines when appropriate. While FEHD is of the view that the current legislation and guidelines are clear and appropriate, it has instructed the staff concerned again to closely monitor the obstruction problem in the market and strictly follow the guidelines set out in the Operational Manual. Staff have been reminded that the width of a passageway in markets should not be less than 1 metre under any circumstances;

(b) through a meeting with the relevant Market Management Consultative Committees, FEHD explored the feasibility of drawing a line outside the stalls to re-demarcate the area for placing commodities. After the meeting, it was decided that there was no need to re-demarcate the area for placing commodities, but enforcement action would be stepped up to keep market passageways unobstructed; and

(c) in accordance with the prevailing practices, FEHD would terminate the tenancy of a market stall if the tenant concerned committed four offences under the Public Health and Municipal Services Ordinance within a period of 12 months. However, if the tenant has not committed four offences under the Ordinance within the past 12 months at the signing of a renewed tenancy agreement, his/her violation history would become null and void. After a preliminary study, FEHD reckoned that the inclusion of a tenant's violation history in a new tenancy agreement might require his/her written consent at the signing of the new or

renewed tenancy agreement. Since the procedure was complicated and involved the amendment of tenancy terms, FEHD is further studying its feasibility carefully.

Food and Environmental Hygiene Department

Case No. 2013/1890 – (1) Asking the complainant's 12-year-old son for consent to enter the flat in the absence of any adult household member for inspection of air-conditioners; (2) Entering the flat with shoes on, thus making the floor dirty; (3) Asking the son of the complainant to produce his identity card for record purpose; (4) Requesting the son of the complainant to climb up and down to switch on the air-conditioners,; and (5) Treading on the complainant's bed

Background

491. On 23 May 2013, the complainant complained to the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD).

492. Allegedly, on 23 May 2013, an FEHD Health Inspector (Inspector A) visited the complainant's flat to inspect the air-conditioners inside when only the complainant's 12-year-old son (the Boy) was at home. The complainant found Inspector A reckless and irresponsible in the following ways –

(a) Asking the Boy for consent to enter the flat in the absence of any adult household member;

(b) entering the flat with his shoes on, thus making the floor dirty;

(c) asking the Boy to produce his identity card for record purpose;

(d) requesting the Boy to climb up and down to switch on the air-conditioners; and

(e) treading on the complainant's bed.

The Ombudsman's observations

Allegation (a) - entering the flat in the absence of an adult household member

493. The Office of The Ombudsman noted that Inspector A had, in the presence of the caretaker, revealed his identity and the purpose of his visit when asking for the Boy's consent for his entering the flat in the performance of his duty.

494. The officers of the Office of The Ombudsman had interviewed the Boy and found that he had no difficulty in making intelligent responses to questions. Moreover, the fact that the Boy was left alone in the flat at the time of Inspector A's visit indicates to some extent that his parents consider him having the ability to cope with unexpected visits.

495. In the circumstances, the Office of The Ombudsman did not see much problem in Inspector A asking for the Boy's consent for entering the flat, especially in the presence of the caretaker.

Allegation (b) - entering the flat with shoes on, thus making the floor dirty

496. FEHD officers were not obliged to take off their shoes before entering residential premises for performing their duty. However, the Office of The Ombudsman considered that provided doing so would not hamper the effective and efficient performance of their duties, FEHD officers should consider acceding to such requests if made so as to avoid allegations of being inconsiderate and insensitive. They should take reasonable measures to prevent and remedy any damage or soiling.

497. The Office of The Ombudsman did not have evidence that Inspector A's shoes had soiled the floor of the complainant's flat or that he had been requested to take off his shoes.

Allegation (c) - asking the Boy to show his identity card for record purpose

498. The Office of The Ombudsman agreed with FEHD that it was necessary for Inspector A to make a record of his visit for follow-up action, including basic information about the Boy. However, the Office of The Ombudsman doubted his need to collect so much personal data of the Boy, including his name, Chinese commercial code and identity card number.

Allegation (d) - asking the Boy to climb up and down to switch on the air-conditioners

499. The Ombudsman considered there was no evidence that the Boy had any difficulties in reaching the air-conditioners.

Allegation (e) - treading on the complainant's bed

500. In treading on the complainant's bed, Inspector A was doing what he considered to be necessary for the discharge of his duty, i.e. to locate the source of water dripping. There was no corroborative evidence to show that Inspector A had obtained the Boy's consent before treading on the bed. If he had, the Office of The Ombudsman deemed it appropriate for the same reasons as stated in paragraph 494 above. In any case, The Ombudsman considered it more important that FEHD officers should take reasonable measures to prevent and remedy any damage or soiling thus caused. In this regard, Inspector A did take off his shoes and FEHD was considering the claim for laundry expenses.

501. Treading on other's bed was generally regarded as a discourteous act. Therefore, the Office of The Ombudsman also considered it appropriate for FEHD to have apologised to the complainant's family and reminded Inspector A to be more considerate and sensitive.

502. All in all, The Ombudsman considered this complaint unsubstantiated but recommended FEHD to –

(a) consider drawing up some general guidelines to advise staff on how to handle cases where there is only a small child or senile person on the premises to be investigated;

(b) take reference from this case and remind staff to be considerate and sensitive when entering residential premises; and

(c) produce guidelines for staff on collection of personal data in circumstances like this case, in consultation with the Office of the Privacy Commissioner for Personal Data if necessary.

Administration's response

503. FEHD accepted The Ombudsman's recommendations and reminded staff on 3 March 2014 and issued guidelines on 13 March 2014 on the following issues –

(a) When only a small child or senile person (unable to assist in the investigation) is present at the time of investigation, the investigation officer should consider making further arrangements for investigation;

(b) the investigation officer is required to be considerate and sensitive and to take reasonable measures to prevent soiling of one's residential premises; and

(c) the investigation officer should adhere to relevant departmental guidelines on collection of personal data, including the requirement that the purposes of and means for any collection of personal data must be lawful and fair, adequate but not excessive, necessary and directly related to the functions/activities of the department.

Food and Environmental Hygiene Department

Case No. 2013/2082 – Failing to properly handle a complaint of water dripping from air-conditioners.

Background

504. On 5 June 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD). According to the complainant, he lived in Flat 1B of a building. In May 2013, he called 1823 Call Centre to complain about water dripping from the air-conditioners at the upper Flat 2B. About a week later, Staff A of FEHD replied that he had conducted a site inspection and did not find any water dripping from the air-conditioners. The complainant did not accept this and requested Staff A to further follow up on his complaint. Staff A promised to continue the follow-up action. Since then, FEHD had not contacted the complainant.

505. The complainant alleged that FEHD was sloppy in following up on the water dripping problem. He was also dissatisfied that FEHD did not inform him of the result of the follow-up action.

The Ombudsman's observations

506. According to the investigation of the Office of The Ombudsman, the FEHD staff had indeed followed up on the water dripping problem. However, as FEHD stated, there were inadequacies in the initial investigation of its staff. Fortunately, the water dripping problem was eventually resolved. In conclusion, The Ombudsman considered this complaint partially substantiated.

507. The Ombudsman urged FEHD to step up its staff training. In particular, FEHD should remind staff to actively handle complaints against dripping air-conditioners in accordance with the guidelines in order to eliminate water dripping nuisance as soon as possible.

Administration's response

508. FEHD accepted the recommendation and has all along provided training for staff on handling of water dripping from air-conditioners. In late September 2013, FEHD issued an instruction reminding District Environmental Hygiene Offices to properly and actively handle complaints against water dripping from air-conditioners in accordance with the guidelines.

Food and Environmental Hygiene Department

Case No. 2013/2307 – Failing to take effective enforcement action to tackle the problem of water dripping from air-conditioners in a multi-storey building

Background

509. On 21 June 2013, the complainant lodged a complaint to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD).

510. According to the complainant, he usually waited for bus at a bus stop outside the subject building. In the past two years, he had repeatedly lodged via the 1823 Call Centre complaints to FEHD about water dripping from air-conditioners of the subject building, which caused him nuisance (water dripping problem). But, FEHD had never replied to his complaints and the water dripping problem persisted.

511. On 29 and 31 July 2013, the complainant complained to the Office of The Ombudsman that the water dripping problem of the subject building was becoming increasingly serious and such problem was also found in a nearby building.

The Ombudsman's observations

512. According to the investigation of the Office of The Ombudsman, notwithstanding that the complainant had, since 2011, repeatedly complained to a District Environmental Hygiene Office (DEHO) of FEHD in summer about water dripping from air-conditioners of the subject building causing nuisance to passers-by, the problem persisted.

513. After the Office of The Ombudsman's intervention, DEHO deployed more staff to conduct investigation and took enforcement action against several flats with dripping air-conditioners. As a result, the water dripping problem was resolved quickly.

514. After reviewing the records provided by DEHO, the Office of The Ombudsman accepted that in July 2011 and June 2012, DEHO staff had informed the complainant of the progress of the investigation.

515. Overall, the Office of The Ombudsman considered that DEHO had followed up on the complaint lodged by the complainant, but its actions were not effective. In the light of the above, The Ombudsman considered this complaint partially substantiated.

516. Water dripping from air-conditioners occurs mostly in summer. After receiving such complaints, FEHD should gather sufficient evidence and identify the sources of dripping water as soon as possible to solve the problem. Otherwise, the problem would simply recur in the next summer. In view of the above, The Ombudsman urged FEHD to fully enhance monitoring of its staff's follow-up actions against cases of dripping air-conditioners in order to avoid delays or omissions, otherwise it would cause people to suffer from water dripping problem for a long time.

Administration's response

517. FEHD accepted The Ombudsman's recommendation and has enhanced the monitoring of its staff's follow-up actions on cases of dripping air-conditioners. Moreover, in the summer of 2014, FEHD hired temporary Water Dripping Nuisance Control Officers, on a pilot basis, to expedite the handling of complaints about dripping air-conditioners.

Food and Environmental Hygiene Department

Case No. 2013/2419 – Failing to properly investigate a water dripping case

Background

518. On 28 June 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD).

519. According to the complainant, in December 2011, she and her family moved into the flat where they were currently living. Between April and September 2012, water constantly dripped from the air-conditioners of the flats above (the concerned flats), causing nuisance to her and her family (water dripping problem). Hence, she complained to FEHD. However, the water dripping problem was not mitigated and even recurred in February 2013.

520. In February 2013, the complainant and her husband lodged via the 1823 Call Centre (the Call Centre) a complaint to FEHD about the water dripping problem (the 2013 complaint). Since then, they had not received any reply from FEHD. In mid-June, the complainant called FEHD to enquire about the progress. A FEHD staff member (Staff A) replied that she had conducted numerous site inspections, but she was unable to reach the occupier of the flat concerned. Staff A suggested the complainant to contact the occupier of the flat concerned to solve the water dripping problem directly. Since then, Staff A had not contacted the complainant again.

521. The complainant alleged that FEHD failed to properly handle her complaint and as a result the water dripping problem persisted. She was also of the view that Staff A had a perfunctory attitude, which was against work ethics.

The Ombudsman's observations

522. According to the record of the Call Centre, the complainant's husband lodged substantive complaints about the water dripping problem on 26 February and 29 April 2013. But the staff of the District

Environmental Hygiene Office (DEHO) concerned alleged that as indicated by the complainant's husband, he only wished to report the problem to FEHD for record purpose. This was utterly inconceivable. The Office of The Ombudsman would not rule out the possibility of misunderstanding in the process. In any event, the fact was the first complaint date was 26 February instead of 12 May for the 2013 complaint.

523. Having visited the flat concerned several times without being able to enter it, DEHO staff only repeatedly issued Notice of Appointment (NA) and Notice of Intended Entry (NIE) to its occupier. The staff failed to follow the departmental guidelines by revisiting the flat concerned seven working days after the NA was issued or three working days after the NIE was issued. In addition, FEHD staff did not actively use other means (including making enquiries with the management office of the building) to understand the water dripping problem and to ascertain when the occupier of the flat concerned would be at home so that a visit could be arranged. These were indeed inadequacies.

524. The Office of The Ombudsman was unable to verify whether the staff concerned had wrongly thought that the water dripping problem was lasting "all day". In any event, the staff did not record the time of investigation in three of her six investigations. She was lax in keeping proper records.

525. In sum, after receiving the 2013 complaint on 26 February 2013, DEHO did not issue a Nuisance Notice until 9 July, which took more than four months. Even if the factor of rainy days (according to records of the Hong Kong Observatory, there were not too many days with heavy rain in May and June) was taken into account, it would be difficult to argue that there was no delay. Hence, The Ombudsman considered this complaint substantiated.

526. The Ombudsman urged FEHD to enhance instruction for staff. In particular, FEHD should remind staff to actively handle complaints against dripping air-conditioners in accordance with the guidelines and to record the details of investigations (including the date, time, location and result of the investigation, etc.). This could enhance work efficiency so that each case of water dripping nuisance could be resolved as soon as possible.

Administration's response

527. FEHD accepted The Ombudsman's recommendation and has enhanced instruction for staff and reminded them to actively handle complaints against dripping air-conditioners in accordance with the guidelines and to record the details of investigations.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2013/1887A (Buildings Department) – Delay in handling a complaint about unauthorised canopies

Case No. 2013/1887B (Food and Environmental Hygiene Department) – Failing to tackle obstruction of walkways by shops and restaurants

Background

528. On 20 May 2013, the complainant complained to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and Buildings Department (BD).

529. Allegedly, the operators of many shops (including restaurants) located in the vicinity of the complainant's home often placed goods, tables and chairs outside their premises, causing serious obstructions to the walkways (the obstruction problem). Some shop operators even illegally erected canvas canopies to the premises, jeopardising the safety of pedestrians (the canopy problem). He started to report the obstruction problem to FEHD years ago, but the staff indicated that the department was unable to take enforcement actions as the shops were located within a "rural" area. Since late 2011, he had also repeatedly reported the canopy problem to BD. However, on the grounds of busy schedule and insufficient manpower, BD did not follow up on the problem every time the complainant reported such problem to it.

530. The complainant alleged that FEHD and BD were ineffective and allowed the obstruction problem and the canopy problem to persist.

The Ombudsman's observations

FEHD

531. Although records showed that FEHD had indeed followed up on the problem of unauthorised extension of business area by shops in the vicinity of the location under complaint, the problem still persisted. FEHD should step up its enforcement actions.

532. Given the resolution of District Management Committee of the area in question that some shop operators were allowed to extend their business to tolerated areas, the Office of The Ombudsman held that shop operators should have complied with the relevant requirements. If shop operators were found to have conducted business outside the tolerated areas, FEHD should strictly take enforcement actions. FEHD's prevailing mode of operation, i.e. "warning before enforcement" had limited deterrent effect, and it was far too lenient, particularly towards the recalcitrant shop operators.

533. In the light of the above analysis, The Ombudsman considered the complaint against FEHD partially substantiated.

534. The Ombudsman recommended FEHD to institute immediate prosecutions against recalcitrant offenders without prior warning, to show the department's determination in combating the offence.

BD

535. Regarding the canopy problem, BD had indeed taken follow-up actions in accordance with the established policy after receiving the report from the complainant. Hence, The Ombudsman considered the complainant's allegation against BD unsubstantiated.

Administration's response

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

(a) FEHD staff had, taking into account the actual circumstances, stepped up inspections and enhanced its enforcement efforts in the area under complaint. Between the time when the referral from the Office of The Ombudsman was received in June 2012 and the end of June 2014, FEHD made a total of 86 prosecutions against offending shop operators for street obstruction by goods, 21 arrests of illegal hawkers with seizures of their goods, and 55 seizures and confiscations of goods abandoned by hawkers. Meanwhile, FEHD also instituted 43 prosecutions against the persons-in-charge of food premises for breaches of the relevant requirements detected during inspections to the vicinity of the location under complaint by the department's officers and in

joint operations with the Police. During the same period, FEHD suspended the licences of nine food premises for seven days and three food premises for 14 days under the Demerit Points System; and

(b) FEHD would continue to keep a close watch on the location and step up enforcement actions having regard to the actual circumstances in order to upkeep environmental hygiene and curb illegal hawking activities carried out by illegal hawkers on the street.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2013/3317A&B – Mishandling of a water seepage complaint

Background

537. On 23 August 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Joint Office (JO) set up by the Food and Environmental Hygiene Department and Buildings Department.

538. The complainant was the owner of Floor A of an industrial building. According to the complainant, there was severe water seepage at various locations on the ceiling of Floor A since 2010. In response to a number of reports from the complainant, JO sent its staff to the flat above Floor A (Floor B) to carry out investigation and colour water test in its toilet and drainage outlets, but the source of water seepage could not be identified. However, JO did not perform colour water tests at other locations on Floor B.

539. The complainant alleged that JO failed to handle properly the report on water seepage on Floor A, thereby leading to the failure in identifying the source of water seepage after a prolonged period of time.

The Ombudsman's observations

540. The Office of The Ombudsman showed sympathy on the complainant for suffering from the water seepage nuisances for several years. The seepage locations on Floor A included the toilet ceiling and the ceiling in the office (and workspace). JO identified various sources of seepage on three different occasions and issued nuisance notices requiring the owner of Floor B to carry out necessary repairs. Regarding the water seepage on the toilet ceiling, the Office of The Ombudsman opined that JO had taken follow-up actions in accordance with the established procedures, including conducting various non-destructive tests and assessing the possibility of other sources of seepage. As JO could not establish the sources of seepage on the toilet ceiling on Floor A, it had no alternative but to cease the follow-up actions in accordance with the established procedures.

541. As for the water seepage on the ceiling in the workspace on Floor A, according to the established procedures, JO had, in principle, the responsibility to conduct a ponding test in the area above the seepage position (i.e. the floor slab of the cold storage on Floor B) so as to complete the three-stage test. Nevertheless, having regard to the actual circumstances and the various difficulties in conducting the test, the Office of The Ombudsman opined that it was excusable for JO to decide not to conduct the ponding test.

542. Given the above analysis, The Ombudsman considered this complainant unsubstantiated.

543. That said, the Office of The Ombudsman considered that, as the floor slab of the cold storage on Floor B was very likely the source of water seepage, it would be unfair to the complainant if JO put aside the case and let the water seepage continue to pose nuisance to Floor A. The Office of The Ombudsman strongly urged JO to consider using alternative testing methods to ascertain whether the floor slab of the cold storage was the source of water seepage.

544. Eventually, JO decided to arrange a consultancy company to use new technologies (including infrared imaging with infrared camera and microwave three-dimensional moisture modeling with microwave scanning device) in order to ascertain whether the floor slab of the cold storage is the source of water seepage.

545. The Ombudsman urged JO to complete the aforementioned two tests expeditiously and report the results to the complainant.

Administration's response

546. JO accepted the recommendation and has attempted to use alternative testing methods to ascertain whether the floor slab of the cold storage was the source of water seepage. In March 2014, JO performed further tests on Floor A using new technologies (including infrared imaging with infrared camera and microwave three-dimensional moisture modeling with microwave scanning device) in order to ascertain whether the floor slab of the cold storage is the source of water seepage. JO is still analysing the results of the tests.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2013/2103A&B – Shirking responsibility in handling a complaint about water seepage and blockage of drainage pipes

Background

547. On 6 June 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and Buildings Department (BD).

548. According to the complainant, she rented and lived in Flat 1C of a building. In August 2012, due to complaints from other flats, BD staff visited Flat 1C for investigation. It was found that several spots in the bottom part of the wall inside the flat were affected by water seepage. She complained to the visiting BD staff (Staff A) about the problem. Staff A promised to follow up, the complainant then repeatedly called Staff A with a view to enquiring about the progress of the case and telling him that there was water seepage into Flat 1C through the cracks on the external wall of the building. However, she was often unable to reach Staff A. In addition, BD told the complainant that the case of Flat 1C would be referred to FEHD for follow-up actions, but since then she had not received any reply.

549. Later in 2012, in addition to the aforesaid water seepage, water often gushed into Flat 1C (the problem was particularly serious on rainy days) through the bottom part of the wall separating the two bedrooms of the flat and through the outlet and pedestal water closet in the toilet. The flat was flooded as a result. The complainant lodged via 1823 Call Centre (the Call Centre) a complaint with FEHD. FEHD staff later visited Flat 1C twice for investigation. FEHD subsequently told the complainant that it had no more investigation to conduct for her case, but would refer it to BD for follow-up actions. Subsequently, she repeatedly called the staff in charge of the case (Staff B) at a District Environmental Hygiene Office of FEHD to enquire about the progress of the case. However, she was often unable to reach him.

550. The complainant alleged that FEHD and BD shirked responsibility without properly following up her complaint.

The Ombudsman's observations

FEHD

551. The Office of The Ombudsman was of the view that FEHD had referred the issues of unauthorised building works and subdivided flats to BD for follow-up actions in accordance with the established procedures without shirking responsibility. However, the Office of The Ombudsman noted that in addition to the inadequacies FEHD had admitted of not replying to the complainant timely, FEHD staff also had the following inadequacies in the course of handling the case –

> According to the complaint lodged by the complainant on 8 September 2012, it seemed that the situation about water containing rust outside the doors of Flat 1C and 1A differed from the ordinary water seepage at the ceiling. But Staff B did not seek information about the situation from the complainant or the management office of the building. Only based on his observation and the water seepage test mentioned by the Call Centre upon its referral of the complainant's case, Staff B considered that it was a water seepage case. On 5 November 2012, he referred the case to the Joint Office for Investigation of Water Seepage Complaints (JO) set up by FEHD and BD for follow-up actions. Staff B's action was perfunctory. In fact, after JO staff discovered that the flood in Flat 1C was caused by the blockage of drainage pipes, the case was referred back to Staff B on 26 March 2013 for follow-up action. This wasted more than four months to no purpose.

552. In view of the above, The Ombudsman considered the allegation against FEHD partially substantiated.

BD

553. After examining relevant records, the Office of The Ombudsman was satisfied with the explanations made by BD regarding its follow-up action on the complainant's case. Having regard to the nature of the case, BD made referral in line with its established procedures and the division of duties among the departments. BD's follow-up action was appropriate in general.

554. According to the information provided by the complainant and BD, the Office of The Ombudsman believed that BD officer with whom the complainant contacted in August 2012 was staff of the consultant as assigned by BD staff in the JO to handle the case. Regarding the complainant's allegation that she reported to Officer A but had neither received any reply from nor been able to reach Officer A, the staff of the consultant could not recall the details. In the absence of objective records, the Office of The Ombudsman was unable to ascertain the truth and therefore would not make any comment.

555. Based on the above analysis, The Ombudsman considered the allegation against BD unsubstantiated.

556. The Ombudsman recommended that FEHD should:

(a) make flexible deployment of manpower to avoid delays in handling cases due to shortage of manpower; and

(b) remind staff to timely inform complainants of the progress and results of their cases.

557. In addition, The Ombudsman urged BD to expedite instigation of prosecution against the owners of the flat roofs.

Administration's response

558. FEHD accepted The Ombudsman's recommendations and has taken the following follow-up actions –

(a) Arrangement has been made for flexible deployment of manpower to avoid delays in handling cases due to shortage of manpower; and

(b) staff have been reminded to timely inform complainants of the progress and results of their cases.

559. BD accepted The Ombudsman's recommendation and has instigated prosecution against the owners of the flat roofs for failing to comply with the removal orders.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2013/3299A&B – (1) Mishandling a water seepage complaint; (2) failure to inform the complainant of the progress of the water seepage investigation; and (3) shirking responsibility in handling a complaint about water dripping at the external wall of a building

Background

560. On 22 August 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Joint Office for Investigation of Water Seepage Complaints (JO) set up by the Food and Environmental Hygiene Department (FEHD) and the Buildings Department (BD) and BD per se.

561. According to the complainant, she lodged a report in end 2010 with JO through her building management office about water seepage on the bathroom ceiling in her flat (Flat A).

562. Investigation conducted by JO revealed that the source of seepage was a damaged drainage pipe connected to the floor slab of the bathroom at the flat above Flat A (i.e. Flat B). JO subsequently issued a nuisance notice (Notice) requiring the owner of Flat B to carry out necessary repairs.

563. Follow-up inspection made by JO in November 2011 revealed that the said drainage pipe had been repaired properly but the water seepage in Flat A persisted. JO subsequently engaged a consultant to conduct professional investigation (including ponding tests for floor slabs and water spray tests for walls in the bathroom of Flat B).

564. In early 2012, the complainant found that there was persistent dripping outside the bathroom window of Flat A and subsequently reported it to JO.

565. The tests conducted by the consultant confirmed that the seepage on the bathroom ceiling of Flat A was caused by the defective water proofing of the floor slab of the bathroom and shower cubicle of Flat B. JO hence issued a Notice in July requiring the flat owner to carry out the

necessary repairs.

566. JO staff inspected Flat A in December 2012 and found that the seepage had stopped, hence did not take any further follow-up actions. At the end of the same month, the complainant reported to JO that seepage in Flat A recurred.

567. In February 2013, JO staff conducted confirmatory ponding test on the bathroom floor slab in Flat B. Meanwhile, the complainant approached the staff to enquire about the progress of JO's follow-up on the report about dripping outside the bathroom window of Flat A. The staff replied that JO was only responsible for investigating defective drainage pipes and water proofing inside a flat while issues of external drainage pipes were to be followed up by BD. As BD had already sent a letter requiring the owner of Flat B to repair the external drainage pipes, the staff recommended her to contact BD on matters relating to dripping outside the bathroom window of Flat A.

568. In the same month, the complainant made a report to the Water Supplies Department (WSD), alleging that leakage of the water supply pipes of Flat B caused water seepage in Flat A. In March, WSD sent a written reply to the complainant stating that its staff had carried out a "30-minute water meter observation test" (meter test) at Flat B but the meter did not indicate any water flow. WSD therefore concluded that the seepage problem in Flat A was not related to the water supply pipes of Flat B and would refer the matter to JO for follow-up. WSD further stated that JO should carry out "water pressure tests" on the water supply pipes of Flat B. However, when she contacted JO, JO said that the "water pressure tests" should not be carried out by JO.

569. In May, JO staff inspected Flat A to check the result of the confirmatory test conducted earlier at Flat B but did not find any colour water stains on the ceiling. JO staff advised the complainant that in view of the above test result, JO would first observe the seepage condition for three months; if seepage at Flat A persisted after three months, JO could only repeat the tests on the drainage outlets and water proofing of Flat B. Subsequently, JO informed the complainant about the investigation findings in writing. JO also stated that its staff found water dripping from the ceiling and external walls of Flat A during their inspection and suspected that the fresh water/flushing water pipes of Flat B were defective. Since the handling of complaints about fresh water/flushing water pipes fell under the purview of WSD, JO had referred the case to WSD for follow-up.

570. WSD subsequently informed the complainant in writing that WSD had conducted meter tests on four occasions at Flat B between February and June, and in none of them did the meter indicate any water flow. WSD therefore concluded that the seepage problem in Flat A was not related to the water supply pipes of Flat B and would refer the seepage problem of Flat A to JO for follow-up.

571. In connection with the above, the complainant alleged that –

(a) regarding the report about seepage on the bathroom ceiling of Flat A –

(i) JO did not conduct any tests on the water supply pipes of Flat B to ascertain if the pipes were the source of seepage. The complainant considered JO should have also conducted such test in the early stage of investigation;

(ii) JO stated that it could only repeat the tests on the drainage outlets and water proofing of Flat B even if the seepage persisted. She considered such repetitions a waste of time;

(b) regarding the report on dripping outside the bathroom window of Flat A, JO and BD had never advised her of the progress of the case in writing; and

(c) JO and BD passed the buck to each other, and did not follow up her report properly.

The Ombudsman's observations

Allegation (a) - Failing to carry out tests on the water supply pipes of Flat B; and wasting time and causing delay by repeating the same tests

572. After reviewing relevant records, the Office of The Ombudsman was satisfied with JO's statements about its following up of the water seepage on the bathroom ceiling of Flat A. Regarding the failure of JO to conduct reversible pressure test on the water supply pipes of Flat B at the early stage of investigation, the Office of The Ombudsman considered JO's explanation reasonable.

573. The Office of The Ombudsman also considered it justifiable and reasonable for JO to revive investigation, including conducting reversible pressure test on the water supply pipes according to established procedures, having regard to changes in the condition of water seepage at Flat A.

574. Based on the above analysis, The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b) - Failing to inform the complainant in writing of the progress of handling the case of dripping outside the bathroom window of Flat A

575. After reviewing the relevant records, the Office of The Ombudsman considered that JO had timely informed the complainant in writing of the progress of handling the defective waste water pipe and the report on dripping outside the bathroom window.

576. The Office of The Ombudsman noted that although BD had apprised the complainant's husband of the follow-up actions, there were inadequacies on the part of BD in responding to his enquiries as follows –

(a) It was not until two months after receiving enquiries from the complainant's husband on 24 February 2012 and 18 January 2013 that BD apprised him of the follow-up actions taken through the 1823 Call Centre. Although BD was at that time engaged in investigation and issuing a repair order to the owner of Flat B, the delay in giving the complainant a reply was unsatisfactory; and

(b) the complainant's husband enquired on 28 April 2012 whether the department had specified a date for the owner of Flat B to complete the repair of the damaged pipes. It took as long as four months for the department to advise him (on 7 September) that a repair order would be issued to the owner of Flat B. Although BD considered it necessary to continue monitoring of the dripping condition outside the bathroom window of Flat A before giving him a reply, it did not give him any interim reply. Besides, the reply of September did not address his question.

577. Based on the above analysis, The Ombudsman considered allegation (b) against JO unsubstantiated and that against BD substantiated other than alleged.

Allegation (c) - Passing the buck to one another and failing to follow up the complainant's report properly

578. The Office of The Ombudsman considered that JO had made referrals in accordance with the established procedures and division of work among departments, having regard to the nature of the case, and had not shirked its responsibility. Its follow-up actions on the case of water seepage at Flat A were generally appropriate.

579. However, the Office of The Ombudsman noted that when JO instructed the consultant on 31 January 2012 to follow up the findings of the test conducted in December 2011, the consultant, though pressed by JO, did not submit the investigation report to JO until 28 May (nearly four months later). It showed that there were inadequacies on the part of JO in its monitoring of the consultant's work.

580. In handling the complaint of dripping outside the bathroom window of Flat A, the Office of The Ombudsman also noted delays on the part of BD as follows –

(a) BD sent a letter to the occupants of Flat B on 12 April 2012, informing them of its intention to issue a repair order for the defective pipes on the external wall of their bathroom and advising early arrangement of the repairs. But it was not until 7 September (nearly five months later) that BD conducted a follow-up inspection.

(b) BD staff told the complainant's husband on 7 September 2012 that BD would ascertain the ownership details of Flat B in October and then issue a repair order to the owner of Flat B. However, it was only after the complainant's husband had lodged another report on 18 January 2013 (three months later), that BD issued a repair order on 25 January 2013 to the owner of Flat B.

581. Based on the above analysis, The Ombudsman considered allegation (c) against both JO and BD partially substantiated.

582. Overall speaking, The Ombudsman considered the complaint against FEHD (in the name of JO) unsubstantiated and that against BD (in the name of JO and BD per se) partially substantiated.

583. The Ombudsman recommended BD to –

(a) monitor the work of the consultants engaged by JO properly in order to ensure timely follow-up of each water seepage case by the consultants and avoid delay; and

(b) remind its staff that they were required to handle each report and inform the informant of the investigation progress/findings in a timely manner.

Administration's response

584. BD accepted the recommendations and has taken the ensuing follow-up actions –

(a) BD has reminded its staff in JO to step up its monitoring of the consultants' work in order to ensure timely follow-up of each water seepage case by the consultants and avoid delay; and

(b) BD has reminded its staff that they were required to handle each report and inform the informant of the investigation progress/findings in a timely manner.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2013/3335A (Food and Environmental Hygiene Department) – (1) Delay in handling a water seepage complaint; and (2) Failing to accede to the complainant's requests in the course of the water seepage investigation

Case No. 2013/3335B (Buildings Department) – (1) Delay in handling a water seepage complaint; (2) Failure to conduct a ponding test at the master bathroom of the premises immediate above the complainant's; and (3) Unreasonably ending the water seepage investigation

Background

585. On 25 August and 26 September 2013, the complainant complained with the Office of The Ombudsman against the Joint Office (JO) set up by the Food and Environmental Hygiene Department and Buildings Department.

586. According to the complainant, he reported to JO through the estate property management agent (the management agent) of his housing estate on 27 August 2012 that there was water seepage in his leased-out flat (Flat A). On 4 September 2012, at the request of the complainant, staff of the management agent called JO and left a message requesting that JO should send all copies of the replies to the complainant's correspondence address, and that staff from the management agent had to be present during investigation. On 13 September 2012, JO staff measured the moisture content of the ceiling in Flat A. Subsequently, JO informed the complainant by mail that, as the moisture content of the ceiling did not exceed the threshold level, JO would not follow up the case. However, the water seepage at Flat A persisted.

587. Upon repeated requests of the complainant, JO commenced a new round of investigation in January 2013 (since then Flat A had been vacated). On 2 March, JO carried out colour water tests at the drainage outlets of the flat above Flat A (Flat B), but could not confirm the source of water seepage. On 28 March 2013, JO informed the complainant by mail that a consultant would be appointed to conduct further investigation.

588. On 4 June 2013, short circuit occurred in Flat A while the consultant staff were carrying out investigation in the flat. On 20 June 2013, the management agent called JO to enquire about the progress of the case, and was informed that the consultant was drafting an investigation report.

589. On 28 August 2013, JO informed the complainant by mail that the consultant had to review part of the contents of the investigation report in order to confirm that all the sources of water seepage had been covered by the investigation. On 4 September 2013, JO informed the complainant by mail that, since the source of water seepage could not be established after carrying out various non-destructive tests, JO would cease its investigation.

590. The complaint against JO can be summarised as follows:

(a) JO's delay in handling his water seepage case and disregard of public safety. The complainant had lodged his report as early as in August 2012, but JO failed to follow up with due diligence, and was thus unable to identify the source of water seepage so far. During the course of events, water seepage persisted in Flat A, and there had even been an occurrence of short circuit;

(b) JO failed to meet the following requests of the complainant –

(i) informing staff of the management agent of the building to be present during the investigation carried out on 13 September 2012;

(ii) sending replies to his correspondence address. JO sent a letter in end 2012 to Flat A with the effect that the tenant of the flat, after reading the contents of the letter, had once refused to let JO staff enter the flat for investigation;

(c) JO claimed in its reply of 4 September 2013 that various non-destructive tests had been carried out, which was not true. The fact was that the consultant did not carry out ponding test for the floor slabs in the master bathroom of Flat B. The complainant suspected that the consultant amended the investigation report to cover up this mistake; and

(d) as JO did not carry out ponding test in Flat B, its decision to cease investigation was unreasonable.

The Ombudsman's observations

Allegations (a), (c) and (d)

591. After reviewing relevant records (including the investigation report of the consultant, the monitoring records of the water seepage location at Flat A and photos on the floor slabs in the master bathroom of Flat B), the Office of The Ombudsman accepted the statements made by JO regarding its follow-up on the case of Flat A.

592. Regarding allegation (a), JO in general had timely followed up on the complainant's case and told him about the progress and findings of the investigation. The Ombudsman considered this allegation not substantiated.

593. Regarding allegation (c), the Office of The Ombudsman accepted JO's explanation that there was no evidence that the consultant had falsified the investigation report as to whether ponding tests had been carried out. The Ombudsman considered this allegation unsubstantiated.

594. Regarding allegation (d), the Office of The Ombudsman sympathised with the complainant as water seepage had caused nuisances to Flat A. According to the established procedures, JO, in principle, had the responsibility to conduct ponding tests in the area above the seepage spot (i.e. the floor slab in the master bathroom of Flat B) in order to complete the tests for seepage investigation. Nevertheless, an electrical fluorescent light tube without waterproof device was installed on the floor slab of the bathroom and the occupant refused to remove the light tube for the consultant staff to conduct the ponding test. The consultant staff opined that the ponding test would damage the electrical fluorescent light tube and might even cause electricity leakage. JO took the view that under normal circumstances, the occupant of Flat B would not wet the floor slab in order to avoid damaging the electrical fluorescent light tube and causing electricity leakage. Therefore, seepage from the floor slab should be unlikely. Furthermore, carrying out of the test would meet with lots of difficulties. The level of the floor slab in the bathroom was higher than that in the master room and no door threshold had been installed at the bathroom door frame. Even if sufficient preventive measures were taken by the consultant staff, it would be very likely for

the colour dye used in the ponding test to flow into the master room, affecting the result of the test and wetting or damaging the decoration of the flat. Considering the aforementioned on-site situations and difficulties of conducting ponding tests , The Ombudsman took the view that JO's decision not to conduct the ponding test was excusable. As such, The Ombudsman considered this allegation also unsubstantiated.

595. That said, JO could not rule out the possibility that floor slabs in the master bathroom of Flat B were the source of water seepage. If JO left the matter unattended, the nuisance caused by water seepage to Flat A would persist. It would be unfair to the complainant. During its investigation, the Office of The Ombudsman therefore urged JO to consider adopting other testing methods to ascertain whether the floor slab in the master bathroom of Flat B was the source of water seepage.

Allegation (b)

596. Regarding allegation (b), in the absence of independent corroborative evidence (e.g. recording of telephone conversation), The Ombudsman could not ascertain whether JO had received the management agent's referral of the complainant's request for notifying the staff of the building management office to be present during the investigation on 13 September 2012. Besides, the dates between the management agent starting to send letters to the complainant at his correspondence address (16 May 2013) and the management agent requesting JO to send letters to his correspondence address (22 May 2013) were very close. As such, The Ombudsman was inclined to be satisfied with JO's explanation i.e. not until JO received the management agent's letter dated 22 May 2013 did they learn about the complainant's correspondence address and thereafter, JO sent the letters to his correspondence address at the request of the management agent. Based on the above analysis, The Ombudsman considered allegation (b) unsubstantiated.

Administration's response

597. JO accepted the recommendation. On 18 February 2014, JO conducted two tests (i.e., the use of the infrared camera and microwave scanning device to make infrared imaging and microwave three-dimensional moisture modelling), which were recently introduced as a pilot scheme, to track the source of water seepage on the ceiling of the complainant's flat. Subsequently, JO staff found that the water stain

at the seepage spot had dried up. Since seepage had stopped, JO ceased the investigation of the seepage case according to its established procedures and informed the complainant of the investigation findings in writing.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2013/3858A(I) (Food and Environmental Hygiene Department) – Staff being unhelpful to complainant enquiring about case progress

Case No. 2013/3858B(I) (Buildings Department) – Delay in processing request for internal guidelines on handling water seepage complaints, and refusing the request

Background

598. On 25 September 2013, the complainant complained to the Office of The Ombudsman against the Joint Office for Investigation of Water Seepage Complaints (JO), made up of staff from the Buildings Department (BD) and the Food and Environmental Hygiene Department (FEHD).

599. Allegedly, on 2 September 2013, the complainant telephoned a BD/JO Officer (Officer A), requesting a "full set of regulations and guides that JO uses in processing water seepage complaints" (the Regulations and Guides). Officer A told him that the Regulations and Guides were "internal materials" and that she needed to consider the matter before replying to his request.

600. On 23 September, the complainant telephoned an FEHD/JO Officer (Officer B) to enquire about his request. Officer B told him to contact BD/JO direct, stating that FEHD/JO had nothing to do with his request.

601. On 7 October, the complainant telephoned Officer A to repeat his request. Officer A told the complainant that the Regulations and Guides could not be released to him because they were "internal guidelines".

602. The complainant was dissatisfied that –

(a) BD staff had delayed in processing his request for information ;

(b) BD staff had refused his request for information; and

(c) FEHD staff had been unhelpful in attending to his enquiry.

The Ombudsman's observations

Allegations (a) and (b)

603. According to the complainant, his request for the Regulations and Guides was first made on 2 September. However, BD maintained that the request was made on 7 October and Officer A then did not categorically refuse to provide the complainant with the information requested.

604. Whether BD staff had delayed in processing the complainant's request for information and refused his request as at those junctures, in contravention of the provisions of the Code on Access to Information (the Code), hinges upon the truthfulness of the complainant's and BD's versions of the event, particularly with regard to the date of the complainant's request for the Regulations and Guides (2 September or 7 October) and whether Officer A had refused his request outright on 7 October.

605. In the absence of independent corroborative evidence, The Ombudsman was unable to verify either version. Hence, The Ombudsman found allegations (a) and (b) inconclusive.

606. The Office of The Ombudsman noted that on 28 November, Officer A eventually replied to the complainant, enclosing the following documents –

(a) a copy of sections 12, 126 and 127 of the Public Health and Municipal Services Ordinance;

(b) a set of notes to owners/occupiers of premises, entitled "General Procedures for Investigating Water Seepage Problems by the Joint Office"; and

(c) a self-help pamphlet on conducting water seepage tests, entitled "Water Seepage Test DIY".

607. That was 52 days after the complainant made his request for information (on 7 October, according to BD). By the standard stipulated in the Code, that constituted a delay, for which BD apologised.

608. Moreover, what the complainant had requested was the Regulations and Guides, and Officer A had also told the complainant that she would need to locate the relevant documents from the "internal manual" of JO. Hence, it was clear that the complainant was actually looking for information on JO's procedures and internal guidelines, but not the notes to owners/occupiers and self-help pamphlet as provided.

609. The Ombudsman recommended that BD/JO to reconsider the complainant's request and furnish him with whatever pertinent information that can be and should be provided under the Code. In case of refusal, BD/JO should, in accordance with the Code, give the complainant a valid reason.

Allegation (c)

610. In the absence of independent corroborative evidence, the Office of The Ombudsman was unable to ascertain the contents of the complainant's tele-conversation with Officer B. The Ombudsman therefore also found allegation (c) inconclusive.

611. In sum, The Ombudsman found this complaint inconclusive.

Administration's response

612. BD accepted the recommendation and has dispatched a full set of Regulations and Guides to the complainant in June 2014.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2013/0624(I) – (1) Wrong issuance of a Nuisance Notice to the complainant; (2) Refusing to provide the photographs taken inside the flat below the complainant's during the investigation of a water seepage complaint; and (3) Repeatedly requesting to conduct water seepage tests in the complainant's flat

Background

613. On 25 February and 19 March 2013, the complainant wrote to the Office of The Ombudsman to lodge a complaint against Joint Office for Investigation of Water Seepage Complaints (JO), which made up of staff from the Food and Environmental Hygiene Department (FEHD) and Buildings Department (BD). According to the complainant, he was the owner of a flat in a building (Flat A). Between mid-2010 and July 2011, JO staff visited Flat A several times for investigating water seepage complaint (the first complaint) lodged by the flat below and conducted a colour water test at the drainage outlets, a ponding test on the floor slab of the bathroom, and a spray test on the walls of Flat A. On 14 November 2011, JO issued a Nuisance Notice stating that the investigation had indicated water seepage from the floor slab in the shower enclosure of Flat A's bathroom (including the bottom and enclosing walls of its bathtub) to the flat below. JO requested the complainant to carry out repair works to abate the water seepage nuisance.

614. The complainant questioned JO's test results and requested JO to provide him with the test report, including photographs showing the water seepage in the flat below. JO provided him with the test report, but refused to give him the photographs on the grounds that they "contained personal privacy".

615. On 12 March and 2 April 2012, a consultant commissioned by the complainant had conducted investigation and water seepage test twice. The conclusion showed that there was no evidence to indicate that the bathroom of the flat below was affected by water seepage or that Flat A was the source of water seepage. The complainant submitted the investigation reports to JO. Meanwhile, he did not carry out repair works in accordance with the Nuisance Notice.

616. On 23 July 2012, JO staff visited Flat A to conduct confirmatory tests. On 13 August, JO staff visited the flat below to check the results of the confirmatory tests, and did not find on the flat's ceiling the colour water used in the tests. The water seepage had ceased. The complainant's consultant was also present on the above two days to conduct its own tests, the results of which were consistent with the ones mentioned above. On 22 November, JO issued a letter to the complainant to inform him of the above situation and its decision to stop following up the case.

617. On 3 January 2013, JO received another water seepage complaint (the second complaint) from the flat below. JO planned to visit Flat A for investigation. The complainant requested JO to give him the grounds for entering his flat for investigation again and to provide photographs showing the water seepage in the flat below. JO informed the complainant of the status of the case, but refused to provide him with the photographs. JO also told him that it would apply to the Court for a "Warrant to Effect Entry into Premises" if its staff was denied access to Flat A.

618. Overall, the complainant alleged that in handling the above water seepage complaints, JO had the following inadequacies –

(a) The investigation and test results regarding the first complaint were not accurate, thus misjudging that Flat A was the source of water seepage. As a result, JO wrongly issued the Nuisance Notice to the complainant;

(b) the photographs showing the water seepage in the flat below did not contain personal data. But, JO refused to provide them to the complainant on the grounds that it "contained personal privacy"; and

(c) JO requested to visit Flat A again for tests after receiving the second complaint without fully considering the result of the investigation into the first complaint (i.e. the failure to prove water seepage from Flat A) and the possibility of other sources of water seepage (e.g. the flat below was conducting renovation works at that time or seepage from the external wall). This caused nuisance to the complainant and his family.

The Ombudsman's observations

Allegation (a)

619. In accordance with the established procedures, JO/the consultant had conducted various stages of water seepage investigation and tests. Based on the investigation results, JO confirmed the defective water proofing of the floor slab in Flat A's main bathroom and issued the Nuisance Notice to the complainant. The Office of The Ombudsman considered that JO's action was not unreasonable. The complainant claimed that as he had never poured water onto the floor slab, it was impossible to cause water seepage. But, JO had to be impartial in taking enforcement actions. It simply could not overturn the objective results of its investigation just because of the complainant's claim.

620. The results of the water seepage tests conducted by the complainant's consultant between March and April 2012 did not yield evidence showing that there was water seepage in the bathroom of the flat below or that the bathroom of Flat A was the source of water seepage. According to the complainant, he had not carried out repair works requested by JO on the floor slab of his bathroom before the tests. The Office of The Ombudsman was unable to trace the reasons for the inconsistency in the results of investigation tests conducted by JO and the complainant's consultant. Nevertheless, there were insufficient grounds to overturn JO's test results obtained between July and August 2011, which were supported by evidence. Based on the above analysis, The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b)

621. When conducting investigation in the flat below, JO took photographs that showed how its ceiling was affected by water seepage. These photographs were what the complainant requested JO to provide. In general, this kind of photographs only showed ceilings/walls affected by water seepage, and it was difficult to use such photographs to identify or ascertain any personal identity. Hence, this kind of photographs did not constitute the personal data under Personal Data (Privacy) Ordinance (the Ordinance). As a result, the provisions under the Ordinance regarding the protection of the privacy of individuals in relation to personal data were not applicable. Even if the photographs related to this case contained some personal data, in accordance with legal advice and internal guidelines, JO could still provide them to the complainant after deleting the personal data.

622. JO did not provide the complainant with the photographs showing the water seepage on the ceiling of the flat below in accordance with the above-mentioned legal advice and internal guidelines. The Office of The Ombudsman did not find such action reasonable.

623. The reason why the owner/occupier of the flat below lodged a water seepage complaint to JO was simply that he/she wanted the person responsible for the water seepage to rectify the problem. The Office of The Ombudsman considered that for the purpose of fairness, JO should accede to the request of the side under complaint by providing him/her with the investigation results and all data showing the water seepage so that he/she would be convinced. Hence, the owner/occupier of the flat below basically had the responsibility to allow JO to provide the complainant with photographs showing the water seepage on the ceiling of his/her flat. JO should explain to the owner/occupier instead of asking for his/her permission.

624. In the light of the above, the Office of The Ombudsman considered that JO should have provided the complainant with the photographs showing the water seepage in accordance with the legal advice sought and internal guidelines, and failing to do so constituted a violation of the Code on Access to Information (the Code). As such, The Ombudsman considered allegation (b) substantiated.

Allegation (c)

625. JO has given the reasons for visiting Flat A again for investigation and tests regarding the second complaint. The Office of The Ombudsman accepted JO's explanation. Given the recurrence of water seepage in the flat below, it was JO's duty to investigate again in accordance with established procedures. It would be negligence of duty if JO did not do so. In addition, JO had considered other factors and possibilities of seepage. Based on the above analysis, The Ombudsman considered allegation (c) unsubstantiated.

626. Overall, The Ombudsman considered this complaint partially substantiated.

627. The Ombudsman recommended that JO should –

(a) provide the complainant with the photographs as soon as possible; and

(b) provide training for staff to ensure that they clearly understand the contents and comply with the requirements of the Code and internal guidelines.

Administration's response

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

(a) The relevant photographs were sent to the complainant by post on 17 September 2013; and

(b) training and case sharing talks have been organised for staff in order to enhance their understanding of and compliance with the Code and the relevant internal guidelines.

Food and Environmental Hygiene Department and Environmental Protection Department

Case No. 2013/1809A (Food and Environment Hygiene Department) – Failing to properly handle a complaint about disposal of domestic refuse and construction waste

Case No. 2013/1809B (Environment Protection Department) – Failing to properly handle a complaint about disposal of construction waste

Background

629. On 13 May 2013, the complainant (a company) complained to the Office of The Ombudsman against Food and Environmental Hygiene Department (FEHD) and Environmental Protection Department (EPD).

630. The complainant was commissioned to provide management services for a private housing estate. As it alleged, two large refuse bins of FEHD had been placed outside a Taoist temple (the location) near the housing estate for a long period of time. In early May 2013, the complainant found that a large quantity of construction waste and refuse were always accumulated at side of the two refuse bins. They gave off offensive odours and provided a breeding ground for mosquitoes, causing nuisance to environmental hygiene. After the complainant lodged a complaint through the 1823 Call Centre, FEHD cleared the refuse at the location and referred the problem regarding the alleged illegal dumping of construction waste to EPD for follow-up. Afterwards, refuse was accumulated again at the same location, but FEHD refused to arrange for clearance claiming that the location with accumulation of refuse was on a private lot. In view of the fact that accumulation of refuse was found at side of the large refuse bins of FEHD, the complainant queried the explanation given by FEHD.

631. EPD also refused to take follow-up action on the grounds that the location with accumulation of construction waste was on a private lot after the site inspection conducted by its staff.

632. As the problem of refuse and construction waste persisted, the complainant alleged that FEHD and EPD had failed to follow up its complaint properly.

The Ombudsman's observations

633. According to the investigation of the Office of The Ombudsman, FEHD had all along followed up the problem closely. It arranged for immediate cleansing services whenever domestic refuse was found at the location. As for the construction waste, FEHD initially mistook that the location was on Government land and thus requested the Lands Department to follow up according to the established division of labour among Government departments, and for this reason it did not clear that type of waste together with domestic refuse. Nevertheless, the Office of The Ombudsman noted that at the beginning the site was not an enclosed area. According to FEHD's explanation, although the large refuse bins of the department had been placed there for a long period of time, the owner of the lot had never raised objection. The Office of The Ombudsman considered that FEHD's initial misunderstanding was by no means inexcusable as it was really difficult for FEHD to find out at the outset that the lot was not Government land.

634. EPD had also promptly responded to the company's complaint, and taken reasonable action in accordance with the internal guidelines.

635. In the light of the above analysis, The Ombudsman considered the allegation against FEHD and EPD unsubstantiated.

636. The Ombudsman urged FEHD, having regard to the experience of this case, to verify land ownership as soon as possible in handling cases about alleged illegal dumping of waste in future, especially in rural areas where the boundary between private and Government lots may not be apparent so that appropriate follow-up actions can be taken as early as practicable.

Administration's response

637. FEHD accepted The Ombudsman's recommendation. In handling subsequent cases of alleged illegal disposal of waste, staff have immediately verified land ownership and taken appropriate follow-up actions.

Food and Environmental Hygiene Department and Lands Department

Case No. 2013/3851A&B – Shirking responsibility in controlling the problem of illegal occupation of bicycle parking spaces by restaurants

Background

638. On 25 September 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

639. According to the complainant, the public bicycle parking spaces on a street (the subject location) were illegally occupied. A large number of articles, such as restaurant tables and chairs, oil drums, planks and parasols, were placed at the location and this situation has persisted for several years. Nevertheless, both FEHD and LandsD claimed that the issue was outside their jurisdiction. The complainant considered that both departments were shirking responsibilities.

The Ombudsman's observations

FEHD

640. The Office of The Ombudsman considered that while FEHD had conducted inspections after receiving the complaint, it failed to take enforcement actions prior to the intervention by the Office of The Ombudsman. Consequently, the subject location was occupied by various articles for a prolonged period of time and the situation was quite undesirable.

641. FEHD did not take enforcement actions on the grounds that the owner(s) of those articles could not be identified and that the articles did not cause obstruction to scavenging operations. Nevertheless, FEHD was in fact empowered by the law to take enforcement actions as follows –

(a) In this case, the large number of articles occupying the public place had obviously caused obstruction to scavenging operations by cleansing workers. FEHD should clear away the articles as soon as possible by invoking the provisions governing obstruction to scavenging operations;

(b) the tables and chairs placed at the subject location by the nearby restaurants for conducting business should be regarded an illegal extension of business area. Had FEHD conducted more frequent inspections during weekends and holidays, these irregularities would not have gone undetected. FEHD was clearly lax in enforcing the law; and

(c) the restaurants, which blatantly sold cooked food in the public place, were in nature no different from illegal itinerant cooked food hawkers. FEHD should proactively consider instituting prosecutions against these restaurants for illegal hawking and seizing their paraphernalia on the spot so as to exert a stronger deterrent effect.

642. It was unnecessary for FEHD to await inter-departmental joint operations as it was already empowered to tackle the problem at the subject location.

643. Based on the above analysis, The Ombudsman considered the allegation against FEHD substantiated.

LandsD

644. LandsD repeatedly emphasised to the complainant, the Office of The Ombudsman and the 1823 Call Centre that the location was an area managed by the Transport Department (TD), and that District Lands Office (DLO) of LandsD would only "assist" TD in enforcement or "assist" in the joint operation to be coordinated by District Office. LandsD even suggested the complainant to ask TD to follow up on the case. The views of LandsD were questionable.

645. As TD pointed out, the subject location was unallocated Government land. LandsD as the management agent of Government land could not shirk its responsibility for regulating illegal occupation of Government land. LandsD should proactively take enforcement actions against the objects occupying the subject location under the Land (Miscellaneous Provisions) Ordinance instead of assuming the role of

"assisting" other departments in enforcement actions only at their requests. While LandsD did not completely denied its powers and duties to tackle the problem at the subject location, its passive attitude towards enforcement inevitably gave the impression that it was trying to shirk its responsibility.

646. All in all, The Ombudsman considered the allegation against LandsD partially substantiated.

647. Overall speaking, The Ombudsman considered this complaint substantiated and urged FEHD to step up enforcement actions in accordance with the relevant legislation mentioned in paragraph 641 above, and take measures, including conducting more frequent inspections during weekends and holidays, to vigorously combat the problem of occupation of the location for storage/operation of business.

648. Besides, The Ombudsman expected DLO to play a more active role in future. Apart from continuing to take part in inter-departmental joint operations, DLO should also discharge its duty of regulating Government land by initiating inspections and enforcement actions.

Administration's response

649. FEHD has implemented The Ombudsman's recommendation. To tackle the problem of illegal occupation of bicycle parking spaces at the location for storage/operation of business by restaurants, FEHD has stepped up enforcement actions, including increasing the frequency of inspections, mounting special operations during weekends or holidays, and conducting joint operations with other departments.

650. LandsD accepted The Ombudsman's recommendation. Apart from continuing to take part in inter-departmental meetings and joint operations, DLO will carry out inspections and enforcement actions and has reminded its staff of LandsD's role in dealing with bicycle parking spaces on unallocated Government land.

Food and Environmental Hygiene Department and Lands Department

Case No. 2012/4729A (Food and Environmental Hygiene Department) – Failing to take enforcement action against some shops for illegal extension of business area

Case No. 2012/4729B (Lands Department) – Failing to take enforcement action against shops which illegally occupied Government land

Background

651. On 6 and 21 November 2012, the complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD). Since Lands Department (LandsD) was involved in this case, he also indicated the intention of complaining against LandsD on 20 February 2013.

652. According to the complainant, he found a number of shops extending their business area by occupying the walkway in a side lane (the subject location) since November 2011. The shop operators had built platforms and placed goods shelves on the road surface, causing serious obstruction to pedestrians. He therefore lodged complaints with FEHD. Although FEHD staff had inspected the subject location, they simply took photos at the scene without taking enforcement action against the shop operators who had violated the regulations. The shops even left behind a large amount of refuse during night time, which had to be cleaned up by FEHD. Subsequently, FEHD claimed that the case of shops occupying Government land for building platforms had been referred to LandsD for follow-up. However, the aforesaid illegal occupation of Government land persisted.

653. The complainant alleged that the problem persisted due to FEHD's failure to take effective enforcement action, and LandsD also failed to follow up properly on the problem of occupying Government land.

The Ombudsman's observations

FEHD

654. Shops occupying public walkway at the subject location for operating business not only caused street obstruction but also constituted illegal hawking. Despite FEHD staff's patrol at the subject location every day and their issue of warnings to persons who had violated regulations, such enforcement actions taken by FEHD were primarily limited to a few prosecutions instituted for the offence of "street obstruction". It would not be surprising that such actions were ineffective.

655. As regards the problem of shops leaving behind refuse at the subject location at night, the Office of The Ombudsman considered the situation not too bad after examining photos provided by the complainant and those taken by FEHD staff during their inspections.

656. Given the above analysis, The Ombudsman considered the allegation against FEHD partially substantiated.

LandsD

657. The Office of The Ombudsman considered it understandable that the relevant District Lands Office (DLO) of LandsD, given its limited resources, could only handle cases involving shop-front platforms in priority. But DLO was too slow in responding to Transport Department's advice on the insufficient width of the access, as no immediate consideration was given to upgrading the case to a higher priority for enforcement action. It was fortunate that DLO, after receiving FEHD's referral of the complaint, consulted relevant departments on the matter for further actions.

658. It was the responsibility of LandsD, as the Government land administrator, to take enforcement action against the illegal occupation of Government land in front of the shops at the subject location, and there should be no delay in action. Given the above analysis, The Ombudsman considered the allegation against LandsD partially substantiated.

659. The Ombudsman urged –

(a) FEHD to continue to closely monitor the irregularities caused by shops at the subject location and take more stringent enforcement actions, including instituting immediate prosecutions against recalcitrant offenders without prior warnings and engaging in active collection of evidence for charging offenders with illegal hawking, which was a more serious offence, so as to achieve deterrent effect; and

(b) LandsD to closely follow up on the cases and fulfil its duty as the Government land administrator by taking prompt enforcement actions.

Administration's response

660. FEHD accepted The Ombudsman's recommendation. From May 2013 to mid-July 2014, FEHD staff had issued a total of 115 summonses under the Summary Offences Ordinance (Cap. 228) and the Food Business Regulation (Cap. 132X) to operators of shops (including those selling fruits, vegetables and fresh meat) who had illegally placed miscellaneous articles such as goods or utensils outside their shops at the subject location and caused obstruction of passages. During the period, FEHD staff also arrested a person selling fruits at shop front and charged the person with the offences of illegal hawking and causing street obstruction, and seized the goods abandoned by hawkers in two cases. Moreover, FEHD issued a total of five Fixed Penalty Notices in respect of cleanliness offences at the subject location from January to mid-July 2014. At present, the situation of obstruction of the walkway at the subject location has been improved with a clear passage for pedestrians, thus constituting no environmental nuisances.

661. LandsD accepted The Ombudsman's recommendation and conducted a joint operation with relevant departments in June 2013 to post notices under the Land (Miscellaneous Provisions) Ordinance (Cap. 28) on the concerned platforms/steps at the subject location. Upon expiry of the notices, all shop operators/owners under concern had complied with the requirements under the notices by clearing all the concerned platforms/steps.

Food and Environmental Hygiene Department and Lands Department

Case No. 2012/4897A (Food and Environmental Hygiene Department) – Shirking responsibility in handling a complaint about obstruction caused by illegal hawkers

Case No. 2012/4897B (Lands Department) – Delay in handling a complaint about obstruction caused by illegal hawkers

Background

662. On 13 November 2012, the complainant lodged a complaint with the Office of The Ombudsman against a District Lands Office (DLO) of the Lands Department (LandsD) and the Food and Environmental Hygiene Department (FEHD).

663. According to the complainant, several hawkers erected parasols and sold paper offerings at the side of the road off a columbarium, causing obstruction to pedestrians.

664. In September 2012, the complainant complained to DLO and FEHD respectively. However, DLO delayed following up on the case, and FEHD shirked the responsibility of hawker control to DLO. The complainant alleged that the problem persisted because both DLO and FEHD had failed to follow up the problem properly.

The Ombudsman's observations

LandsD

665. DLO had indeed conducted site inspections after receiving the complainant's complaint about illegal occupation of Government land. Having considered that the case was not serious in nature, DLO only put it on record in accordance with the established procedures instead of taking immediate action. From this perspective, DLO did not delay following up with the complainant's complaint.

666. Nevertheless, DLO only realised that it was a repeat case when reviewing the case three months after the complaint was lodged. It showed that DLO staff apparently did not follow up on the complaint diligently in the first place and failed to take early land control action in view of the nature of the case.

667. Given the above analysis, The Ombudsman considered the allegation against LandsD substantiated other than alleged.

FEHD

668. The Office of The Ombudsman reviewed FEHD's records and confirmed that every time after receiving a complaint from the complainant, FEHD had conducted inspections and informed the complainant of the inspection result. In this light, The Ombudsman considered that FEHD did not shirk its responsibility to DLO and the allegation against FEHD was therefore unsubstantiated.

669. Nevertheless, the Office of The Ombudsman noticed that the shop operator placed the goods in front of the concerned shop, such way of displaying goods should have constituted illegal hawking. FEHD should step up inspections and collect evidence of illegal hawking in order to institute prosecutions.

670. The Ombudsman recommended –

LandsD

(a) to remind its staff to examine each case carefully so as to take action according to the nature of the case as early as possible;

(b) to take appropriate land control action in the light of the observations of the Office of The Ombudsman during its site inspection; and

FEHD

(c) to step up inspections and collect evidence of illegal hawking in order to institute prosecutions.

Administration's response

671. LandsD accepted The Ombudsman's recommendations and has taken the following actions –

(a) The Ombudsman's recommendations were circulated to all DLOs and all staff members of DLOs were reminded to examine each case carefully. If there are signs that recurrent cases or situations worsen, such case should be accorded a higher priority according to the procedures so that appropriate land control action could be taken as soon as possible;

(b) (i) for illegal occupation of Government land, DLO staff should post a notice at the site under section 6 of the Land (Miscellaneous Provisions) Ordinance (Cap. 28) (the Ordinance) requiring the occupation to cease before a specified date. DLO would monitor and post the aforesaid notice if required. However, as the Ordinance mainly targets occupation of unleased land by illegal structures, it is not effective against movable objects occupying Government land; and

(ii) in order to more effectively tackle concrete stands and traffic cones that violate the Road Traffic (Traffic Control) Regulations as they occupy carriageways/pavements, DLO will refer such cases to the Police for consideration of follow-up action and enforcement. The Police confiscated five traffic cones at the subject location in a joint operation with FEHD in the past. The Police said in its reply that it would keep monitoring the situation. DLO would also continue to keep an eye on the situation. As DLO later found that the concrete stands were placed on the carriageways and pavements occasionally, joint operations with FEHD were conducted again in May and June 2014 respectively. The occupier removed the concrete stands each time before the expiry of the notice period. DLO would continue to monitor the situation according to applicable procedures and follow up on the problem suitably.

672. FEHD accepted The Ombudsman's recommendation and has given stern warnings to the shop operator to refrain from carrying on illegal hawking activities in the public places on the shop front and stepped up inspections to the concerned shop. With FEHD's close monitoring, no illegal hawking or obstruction on the shop front was found. FEHD will continue to monitor the shop and strengthen the collection of evidence of illegal hawking. If illegal hawking activities are observed, FEHD will institute prosecutions and seize the commodities in accordance with sections 83B and 86 of the Public Health and Municipal Services Ordinance (Cap. 132).

Food and Environmental Hygiene Department and Lands Department

Case No. 2013/1036A (Food and Environmental Hygiene Department) – Failing to take enforcement action and shirking responsibility in respect of obstruction caused by a curtain shop

Case No. 2013/1036B (Lands Department) – Failing to take enforcement action and shirking responsibility in respect of illegal occupation of Government land by a curtain shop

Background

673. On 26 March 2013, the complainant complained to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

674. According to the complainant, the operator of a shop selling curtain fabrics (the shop) often placed a metal platform, goods and miscellaneous articles on the pavement in front of the shop and caused obstruction to the passageway. The complainant complained to FEHD in October 2012, but FEHD did not follow up on the case and the situation of street obstruction persisted. She complained to FEHD about the above situation again in November. However, FEHD staff replied that the placement of a metal platform in front of the shop was not within the jurisdiction of FEHD and suggested that the complainant to lodge the complaint with other Government departments. She then lodged a complaint with the District Lands Office (DLO) of LandsD. However, DLO staff replied that as FEHD was unable to make any arrangement with their office for mounting a joint operation, DLO could not follow up on the case. As a result, both FEHD and DLO took no follow-up actions and the irregularities caused by the shop persisted.

675. The complainant alleged that the obstruction problem remained unsolved due to the failure of both FEHD and LandsD to take appropriate enforcement actions against the irregularities caused by the shop as well as their shirking of responsibility towards each other.

The Ombudsman's observations

FEHD

676. According to the investigation of the Office of The Ombudsman, FEHD had indeed taken actions in response to the complaint against the shop which caused street obstruction.

677. Given the wide walkway outside the shop and the low pedestrian flow there, FEHD had not taken enforcement action against the shop by invoking section 4A of the Summary Offences Ordinance (i.e. the "street obstruction" provision). The Office of The Ombudsman considered it understandable.

678. Nevertheless, based on the information provided by the complainant and FEHD's inspection records, as well as on-site inspection by the staff of the Office of The Ombudsman, the shop indeed occupied the public place at its shop front for a long time for placing a platform and miscellaneous articles. The situation was unsatisfactory.

679. The metal platform placed by the shop operator before May 2013 at the said location was not of an enclosed type and as a result refuse easily accumulated under the platform. This, coupled with the large amount of miscellaneous articles placed on the pavement outside the shop, would cause obstruction to scavenging operations. The Office of The Ombudsman therefore considered that FEHD, as the department responsible for maintaining environmental hygiene, should still invoke section 22 of the Public Health and Municipal Services Ordinance ("provision on obstruction to scavenging operation") more frequently during enforcement actions.

680. As for the complainant's allegation that FEHD staff had told her the placement of a metal platform in front of the shop was not within the enforcement purview of FEHD and asked her to lodge the complaint with other Government departments, FEHD denied the allegation. The Office of The Ombudsman did not intend to comment on this in the absence of corroborative evidence.

681. Given the above analysis, The Ombudsman considered the allegation against FEHD partially substantiated.

682. The Ombudsman recommended that FEHD should invoke the "provision on obstruction to scavenging operation" more frequently during enforcement actions when handling cases of a similar nature in future.

LandsD

683. Both the follow-up actions and explanation of DLO showed that DLO duly performed its duties by following up on the case and taking enforcement actions including arranging joint operations and posting notices, causing the removal of the metal platform in front of the shop.

684. Hence, The Ombudsman considered the allegation against LandsD unsubstantiated.

685. LandsD had moved a step forward by extending its enforcement target from fixed structures occupying Government land to platforms and goods placed in front of shops for a prolonged period. LandsD's practice was commendable. Nevertheless, the Office of The Ombudsman questioned whether it was necessary for LandsD to wait until inter-departmental joint operations to take such enforcement actions. The Ombudsman urged LandsD to review this issue.

Administration's response

686. FEHD accepted The Ombudsman's recommendation and will invoke the "provision on obstruction to scavenging operation" more frequently during enforcement actions when handling cases of a similar nature, and has also instructed District Environmental Hygiene Offices to implement the improvement measure.

687. LandsD accepted The Ombudsman's recommendation and agreed that DLOs might take a more flexible approach of handling cases depending on the circumstances of each case.

Food and Environmental Hygiene Department and Lands Department

Case No. 2013/2680A (Food and Environmental Hygiene Department) – Failing to take enforcement action to tackle the problem of illegal extension of business area and obstruction of pedestrian passageway caused by the stall operators of a cooked food market

Case No. 2013/2680B (Lands Department) – Failing to take effective enforcement action against illegal occupation of Government land by the stall operators of a cooked food market

Background

688. On 18 July 2013, the complainant complained to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

689. The complainant alleged that the operators of the stalls of a cooked food market (CFM) next to the bus and the green minibus terminus had set up permanent structures with iron pipes and canvass on the pavement to illegally extend their business areas, resulting in obstruction of pedestrian passageway. At weekends, they even occupied the carriageway. Besides, some stalls had installed split type air-conditioners on the planter of the playground of the adjacent street. Such irregularities had persisted for over ten years.

690. The complainant alleged that FEHD and LandsD condoned these illegal stalls, without taking enforcement action against the structures and objects which obstructed the road or occupied Government land.

The Ombudsman's observations

FEHD

691. The problem of illegal extension of business area and occupation of Government land by the CFM stalls had existed for a long time. The stall operators had not complied with the agreement made in 1984 (In March 1984, the New Territories Regional Services Department's Sha

Tin Office had a meeting with the CFM stall operators, Sha Tin District Office and Sha Tin District Board members. It was agreed that the stall operators might (1) install retractable canopies which did not project more than three metres from the external wall of the CFM; and (2) set tables and chairs within the radial distance of three metres in front of their stalls during peak hours (provided that no obstruction was caused to pedestrians), and such tables and chairs had to be promptly taken back when they were no longer needed.).

692. FEHD was responsible for managing CFMs and enforcing the concerned Public Health and Municipal Services Ordinance. FEHD was duty-bound to take action against the CFM stall operators, who had breached the tenancy agreement and even violated the law by blatantly extending their business areas onto Government land.

693. According to the terms and conditions of the tenancy agreement, FEHD could terminate the tenancy of persistently non-compliant stall operators. The Office of The Ombudsman considered that enforcement of the tenancy agreement by FEHD should be the most direct and effective measure to combat the unauthorised activities of the stall operators. FEHD cited the 1984 agreement as the reason for refraining from enforcing the tenancy agreement and this was indeed unreasonable. The stall operators had long been breaching the said agreement. FEHD should have enforced the tenancy agreement to prohibit them from committing further violations.

694. In fact, the unauthorised activities of the stall operators were becoming more rampant, causing considerable nuisance and inconvenience to the public. Notwithstanding FEHD's prosecutions against the stall operators for causing obstruction in the public area, it obviously did not help improve the situation. FEHD should strictly enforce the tenancy agreement. In case any stall operator was obdurate, FEHD should terminate his tenancy and forbid him to conduct business in the CFM.

695. In August 2013, FEHD decided to enforce the tenancy agreement against the non-compliant stall operators of the CFM, but it exercised discretion to allow a grace period for them to demolish the canopies and unauthorised structures. Moreover, a lenient approach was adopted towards stalls placing paraphernalia (e.g. tables and chairs) outside their stall areas and continued initiating prosecutions which carried no deterrent effect at all. This approach was against FEHD's prevailing enforcement policy concerning CFMs. The Office of The Ombudsman

considered that FEHD should enforce the tenancy agreement decisively to deter future non-compliance.

696. In view of the above, The Ombudsman considered the allegation against FEHD substantiated.

697. The Ombudsman urged FEHD to commence enforcement of the tenancy agreement as soon as possible. FEHD should rely on the tenancy agreement to immediately forbid the stall operators to place tables, chairs and paraphernalia beyond the permitted stall area. Moreover, the stall operators had twice requested to extend the deadline for demolition of unauthorised structures. FEHD should closely monitor the progress of the demolition works to avoid procrastination.

LandsD

698. The Office of The Ombudsman considered it understandable for the District Lands Office (DLO) of LandsD to have initially referred the problem of illegal extension of business area to Government land by the stalls to FEHD, which was the department responsible for managing the CFM. When the relevant departments met with FEHD to discuss ways to solve the problems, DLO also indicated it could take land control actions to dovetail with FEHD's enforcement measures. That enforcement actions would not be taken by DLO at that juncture was a decision of the inter-departmental meeting.

699. The Ombudsman therefore considered the allegation against LandsD unsubstantiated.

700. The Ombudsman urged DLO to closely monitor the unlawful occupation of Government land by stall operators of the CFM, given the problem had been serious and persistent for years. If it was found that the breach had yet to be purged after the grace period granted by FEHD, DLO should take decisive land control action to completely solve the problems.

Administration's response

701. FEHD accepted the Ombudsman's recommendation. In late April 2014, FEHD staff issued verbal warnings to seven stall operators who had violated the tenancy agreement. On 2 and 16 May, FEHD issued the first and the second warning letters respectively. On 8 June,

FEHD staff inspected the CFM again and found that all the unauthorised structures had been demolished by the stall operators.

702. LandsD accepted The Ombudsman's recommendation. DLO has been keeping in touch with FEHD regarding this case, in order to offer timely assistance and participate in joint operations to clear the extended structures occupying Government land. DLO learnt from FEHD lately that the unauthorised extensions of the cooked food stalls had been cleared but structures, in a relatively mobile form, were subsequently erected again. FEHD is discussing with the stall owners to identify ways to solve the problem. FEHD considers that joint operations with DLO are not necessary for the time being. DLO will stay in touch with FEHD.

Food and Environmental Hygiene Department and Lands Department

Case No. 2013/2812A&B – (1) Failing to seriously and promptly follow up a complaint about illegally displayed banners; and (2) Condoning the illegal display of banners by a District Councillor by leaking information on a removal operation to her

Background

703. On 24 July 2013, the complainant complained to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

704. According to the complainant, a Councillor (Councillor A) illegally displayed banners outside the entrance of her housing estate (the subject location) for a prolonged period. Since early 2013, the complainant and the management company of the housing estate repeatedly lodged complaints with relevant Government departments, including FEHD and LandsD. However, the two departments shirked their responsibilities to each other without following up the problem. It was not until early June 2013 did the two departments conduct a joint operation to remove the banners.

705. On the date of the joint operation, the complainant noticed that all unauthorised displayed banners had been "coincidentally" removed in advance, but they reappeared after the staff of the two departments left. The management company then called FEHD again to request it to immediately deploy staff to the site for follow-up action. However, FEHD replied that the matter had to be followed up during the next joint operation of the two departments.

706. The allegations against FEHD and LandsD can be summarised as follows –

(a) failing to seriously follow up and promptly act on the complaint of unauthorised banners; and

(b) allegedly conniving with Councillor A by leaking information of the joint operation to her in advance.

The Ombudsman's observations

FEHD

707. After receiving the complaint lodged by the complainant, FEHD had increased the number of inspections and arranged special operations at weekends. These actions proved that FEHD had followed up this complaint in a proactive manner.

708. As regards FEHD's failure to take immediate action on the same date when the complaint was received, FEHD explained that it had to act jointly with the District Lands Office (DLO) of LandsD for confirming that the banners had been displayed without authorisation before taking enforcement actions, since DLO was the authority for the management and approval of the display of roadside non-commercial banners. Hence, FEHD could only launch operations in tandem with the schedules of DLO contractors even though a complaint had been received. The Office of The Ombudsman accepted FEHD's explanation. In any event, FEHD did take improvement measures afterwards.

709. FEHD had successfully removed unauthorised banners of Councillor A during inspections and subsequently recovered removal cost from her. The Office of The Ombudsman held that there was no evidence of FEHD conniving with Councillor A.

710. Given the above analysis, The Ombudsman considered the allegations against FEHD unsubstantiated.

LandsD

711. After DLO received the complaint, its contractor conducted a number of inspections with FEHD and was willing to cooperate with FEHD in carrying out immediate joint operations when necessary. It showed that DLO had duly followed up on the complaint, and there was no evidence of DLO conniving with Councillor A.

712. The Ombudsman therefore considered the allegations against LandsD unsubstantiated.

713. The Ombudsman made the following recommendations –

(a) As shown in this complaint and the cases referred by the District Office, unauthorised banners were often displayed at weekends or during holidays. As these irregularities persisted and were frequently found, FEHD should step up special operations at weekends to further deter unauthorised acts;

(b) if the situation showed no sign of abating, FEHD should consider prosecuting the offender under the relevant ordinance to enhance the deterrent effect if there was enough evidence; and

(c) since LandsD is responsible for implementing the Management Scheme, it is the responsibility of DLO to monitor the unauthorised display of banners at non-designated spots. In this case, although Councillor A had been allocated designated spots for the display of banners, she still put up unauthorised banners at non-designated spots. It was obviously a case of knowingly violating the law. LandsD should consider issuing a stern warning to Councillor A and step up inspections of the subject location (which has become a "black spot") by DLO apart from joint operations. FEHD should be contacted for follow-up action once irregularities were found to enhance the effectiveness of the enforcement actions.

Administration's response

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

(a) Between September 2013 and June 2014, FEHD and LandsD conducted 72 joint operations, including 16 special operations at weekends, in the vicinity of the subject location. During the operations, FEHD staff removed two banners of Councillor A, one from the entrance to the subject location on 24 September 2013 and the other from the railing of the pavement outside a plaza (i.e. opposite the entrance to the subject location) on 6 November 2013. Subsequently, FEHD staff recovered the removal cost from Councillor A under Section 130 of the Public Health and Municipal Services Ordinance; and

(b) made a request to LandsD on 18 November 2013 to step up regulatory actions according to the "Management Scheme for the Display of Roadside Non-commercial Publicity Materials Implementation Guidelines" (the Guidelines) against the irregularities caused by Councillor A. LandsD then wrote to Councillor A on 2 December, requesting her to strictly adhere to the requirements on display of non-commercial publicity materials (NCPMs). After the removal of Councillor A's banner by FEHD on 6 November and LandsD's letter of 2 December, the situation had improved. FEHD and LandsD found no unauthorised display of Councillor A's banners in the vicinity of the subject location during a number of subsequent joint operations.

715. That said, FEHD will keep in view the situation at the subject location and maintain close contact with LandsD for conducting joint operations to combat unauthorised display of non-commercial publicity materials. Should the situation deteriorate, FEHD would consider instituting prosecutions against the offenders to enhance deterrence.

716. LandsD accepted the recommendation and has issued a warning letter to Councillor A reminding her to duly comply with the terms and conditions in LandsD's approval letter issued in accordance with the Guidelines, i.e. she should display NCPMS at the designated spots allocated to her only, and adhere to requirements in the Guidelines. Councillor A was further reminded that any detection of unauthorised display of NCPMs would be referred to FEHD for follow-up actions and removal without any advance notice.

717. In addition, LandsD has designated the subject location as "black spot" in the district and carried out 20 inspections at the subject location during the period from November 2013 to January 2014, including five special inspections conducted on Saturday or Sunday. So far no NCPMs were detected during those inspections. LandsD will continue to monitor the black spot as identified from time to time and liaise closely with FEHD on any appropriate enforcement action.

Food and Environmental Hygiene Department, Buildings Department and Housing Department

Case No. 2013/0779A (Food and Environmental Hygiene Department) – (1) Shirking responsibility in handling a water seepage complaint; (2) Delay in handling a water seepage complaint; and (3) Poor staff attitude

Case No. 2013/0779B (Buildings Department) – Shirking responsibility in handling a water seepage complaint

Case No. 2013/0779C (Housing Department) – (1) Shirking responsibility in handling a water seepage complaint; and (2) Delay in handling a water seepage complaint

Background

718. Between 7 and 22 March 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD), Buildings Department (BD) and Housing Department (HD).

719. The complainant resided in a flat of a Home Ownership Scheme estate. He alleged that in January 2013, he complained to the Joint Office for Investigation of Water Seepage Complaints (JO), made up of staff from FEHD and BD, that the short circuit of the exhaust fan in his flat might be due to the seepage from the above flat. On 5 February, having conducted an inspection to his flat, JO staff told the complainant that the matter was outside JO's purview and the case would be referred to BD and HD for follow-up action. Subsequently, HD staff conducted an inspection to the complainant's flat and the complainant also called BD to make enquiries. However, both BD and HD replied that the case should be handled by JO. In early March, the complainant called Staff A of JO. After negotiation, JO finally agreed to conduct another inspection to his flat on 14 March.

720. The complainant's allegations against JO, BD and HD are summarised as follows –

(a) JO, BD and HD shirked responsibilities to each other and refused to follow up on his case. They also did not inform him of the reasons for not taking follow-up action;

(b) JO and HD procrastinated in following up on his complaint, including delaying an inspection to his flat; and

(c) during a telephone conversation with Staff A of JO in early March, the complainant requested JO staff to conduct an inspection to his flat as soon as possible. Staff A however responded that "I have to follow up on many things. It's not just your flat", which reflected his poor attitude.

The Ombudsman's observations

Allegation (a) - JO, BD and HD shirking responsibility to each other

721. After reviewing relevant records, the Office of The Ombudsman was satisfied that JO, BD and HD had taken actions to follow up on the situation dissatisfied by the complainant. The Office of The Ombudsman was of the view that JO, BD and HD had followed up the complaint within their respective purviews without shirking responsibility. In addition, JO and HD had duly informed the complainant/court management office of the progress/result of the investigation. Since BD did not directly receive the complaint, it was normal that it did not give a reply to the complainant. Hence, The Ombudsman considered allegation (a) unsubstantiated.

722. That said, the complaint lodged by the complainant involved issues such as water seepage and the building's structure, which fell within the purview of various departments. JO, BD and HD repeatedly referred the case among each other, which inevitably caused confusion to the complainant. If JO and HD (BD did not receive the complaint directly) had clearly and timely explained to the complainant their respective scopes of responsibilities, the confusion could have been avoided.

Allegation (b) - JO and HD's delay in following up on the case

723. The reason why JO did not receive the referral from HD on 11 January 2013 could no longer be traced. Overall speaking, JO did not delay its follow up actions on the case. As for the allegation that JO

did not properly refer to HD the issue of a defective drainage pipe on the external wall of the above flat, JO had admitted its inadequacies and reminded its staff to make improvement.

724. Although HD followed up timely on this complaint in general, it did not carry out the draining test on the pipes at the flat above during both its investigations on 28 December 2012 and 27 February 2013. HD only carried out such a test on 2 April 2013, and the result confirmed that there was seepage in a pipe on the external wall of the flat above. It indeed showed HD's inadequacy in its earlier follow-up actions. Fortunately, HD had taken remedial measures to avoid occurrence of similar situation.

725. In the light of above analysis, The Ombudsman considered the allegation against JO substantiated other than alleged; and that against HD partially substantiated.

Allegation (c) - Poor attitude of JO staff

726. Since the versions given by the complainant and Staff A of JO were different, and in the absence of independent supporting evidence (e.g. telephone recording), the Office of The Ombudsman was unable to verify the content of the two's conversation and Staff A's attitude at the time. Hence, The Ombudsman considered allegation (c) inconclusive.

727. Overall speaking, the complainant's complaint against FEHD (in name of JO) was substantiated other than alleged; that against BD unsubstantiated; and that against HD partially substantiated. In relation to allegation (c), The Ombudsman urged JO to learn a lesson from this case, reminding its staff concerned to make improvement in case he/she had committed an irregularity or to take measures to guard against an irregularity in future in case he/she had not.

Administration's response

728. FEHD accepted the recommendation and has reminded its staff concerned to explain the department's responsibilities to complainants clearly and to handle referrals carefully and properly so as to avoid delays in future.

Food and Environmental Hygiene Department, Buildings Department and Housing Department

Case No. 2013/3820A (Food and Environmental Hygiene Department) – Mishandling a water seepage complaint

Case No. 2013/3820B (Buildings Department) – (1) Mishandling a water seepage complaint; (2) failure to monitor the outsourced consultant company in conducting water seepage tests; and (3) failure to reply to the complainant regarding his water seepage complaint

Case No. 2013/3820C (Housing Department) – Failing to reply to the complainant regarding his water seepage complaint

Background

729. On 24 September 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Joint Office for Investigation of Water Seepage Complaints (JO) set up by the Food and Environmental Hygiene Department (FEHD) and Buildings Department (BD), and the Housing Department (HD).

730. The complainant was the owner of a flat (Flat A) in a public housing estate under the Tenants Purchase Scheme (TPS) of the Hong Kong Housing Authority (HA). He alleged that in mid-2007, water seepage was found on the ceiling of the bathroom in Flat A. At that time, the flat above (Flat B) had not been sold and it was owned by HA. The complainant lodged a complaint with HD, which did not follow up properly. In March 2010, HA sold Flat B to its then tenant under TPS. On the other hand, the complainant lodged numerous complaints with JO about the water seepage problem in Flat A. But JO always replied that it had to cease its investigation because the source of water seepage could not be identified. Meanwhile, the water seepage in Flat A persisted and worsened.

731. The complainant made the following allegations against HD and JO –

(a) HD had never given the complainant a reply regarding his water seepage complaint. He suspected that HD delayed following

up on the seepage problem in Flat A so that the responsibility of resolving the problem could be shirked to the new owner of Flat B after it was sold;

(b) JO did not properly follow up his water seepage complaint, resulting in the deterioration of the seepage problem in Flat A;

(c) JO commissioned a consultant to conduct a water seepage test, but no JO staff was present to supervise the conduct of the test. The complainant questioned whether the consultant's staff had properly carried out the test and made the records; and

(d) In order to enquire about the progress of the case and to request the investigation report, the complainant called JO repeatedly (the latest call was made between July and August 2013) and left messages for it to reply. But he did not receive any reply.

The Ombudsman's observations

Allegation (a) – HD's procrastination in its follow up and failure to render a reply

732. After reviewing relevant records, the Office of The Ombudsman believed that HD and the relevant management companies had, immediately before and after selling Flat B, taken follow-up actions regarding water seepage on the ceiling of bathroom in Flat A. There was no evidence showing that HD delayed in following up the case until the sale of Flat B in order to shirk its responsibility to the new owner. As regards why HD did not render a reply to the complainant, the Office of The Ombudsman accepted its explanation that the complaint should be followed up by the management company. The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b) - JO failing to properly follow up the water seepage complaint

733. After reviewing the relevant records, the Office of The Ombudsman was convinced that JO had conducted investigation according to established procedures the complaint lodged on 6 August 2010 (the first Complaint) and the one lodged on 16 April 2012 (the second Complaint). As it was unable to ascertain the source of the water seepage in Flat A by conducting various feasible non-destructive tests, it

was understandable that JO had to cease its follow-up action. The effectiveness of non-destructive tests was inevitably limited, but JO could not carry out any destructive test which would damage the property of the public. In handling other water seepage cases in the past, the Office of The Ombudsman had urged JO to explore more effective non-destructive tests. It asked JO again to step up the efforts to explore other non-destructive tests.

734. Nevertheless, the Office of The Ombudsman considered that JO had the following delays in the course of handling the water seepage case of Flat A –

(a) Regarding the first Complaint, on 22 October 2010, JO was not able to ascertain the source of water seepage in the course of reviewing the result of the colour water test conducted at the drainage outlets. But, it was not until the end of January 2011 (three months later) that JO commissioned a consultant to conduct Stage III investigation.

(2) Regarding the second Complaint, on 16 October 2012, JO received the analytical report, which confirmed that the water seepage sample obtained in Flat A did not contain the colour water used in the colour water test conducted at the drainage outlets in Flat B. But it was not until the end of December (more than two months later) that JO commissioned a consultant to conduct Stage III investigation.

735. The Office of The Ombudsman understood that JO had a large number of complaints to handle and was facing manpower shortage. Under such constraints, JO staff had in fact worked hard to follow up on the cases. However, the fact was that JO had indeed slightly delayed in its following up of the complainant's case. Hence, The Ombudsman considered allegation (b) partially substantiated.

Allegation (c) - JO did not send anyone to supervise the consultant carrying out the tests

736. JO explained that, according to established procedures, they were not obliged to send anyone to supervise the consultant's staff carrying out the investigation and tests. For the water seepage case of Flat A, JO vetted the investigation reports in respect of the first and second Complaints submitted by the consultant before informing the complainant by mail about the investigation findings.

737. The Office of The Ombudsman accepted the explanation of JO. In fact, it was all because of the shortage of staff that JO had to engage consultants to carry out water seepage investigations on its behalf. It was indeed difficult for JO to send staff to conduct on-site supervision for each and every case. The Ombudsman considered allegation (c) unsubstantiated.

Allegation (d) - JO staff did not reply to phone calls

738. The complainant alleged JO did not replied to his voice message but JO did not find any of his message record. Hence The Ombudsman considered allegation (d) inconclusive. Nonetheless, JO admitted its inadequacies in handling calls and reminded its staff to make improvement.

739. Overall speaking, The Ombudsman considered the complaint against JO partially substantiated and that against HD unsubstantiated.

740. Regarding the complaint lodged by the complainant on 6 August 2013(the third Complaint), up to March 2014, it had been many months since JO staff visited Flat A for investigation on 29 October 2013. The Ombudsman urged JO to do its best to assist the complainant to eliminate the water seepage nuisance by expediting its investigation, including making reference to the findings of HD in recent months (new suspected water seepage areas were identified by HD in Flat A) and exploring the possibility of other sources of water seepage (including the external wall, other flats on the floor of Flat B, and the flat two floors above). The Ombudsman also urged JO to inform the complainant timely of the progress/result of his case.

Administration's response

741. JO accepts The Ombudsman's recommendation. Between April and July 2014, JO staff visited Flat B on four occasions for investigation of the water seepage. However, nobody answered the door. During the period, JO issued a "Notice of Appointment" and then a "Notice of Intended Entry". To address the discontent of the occupier of Flat B, JO also explained to her in writing the reasons for entering her flat again for investigation and testing and advised her to facilitate the work. In late July, JO issued a "Notice of Intention to Apply for Warrant of Entry" to the occupier. In mid-August, JO inspected the complainant's

flat and found that the seepage persisted. JO applied to the court for the Warrant of Entry in late August in order to enter Flat B for investigation. JO had contacted the complainant several times to inform him of the latest progress of the case.

Food and Environmental Hygiene Department, Environmental Protection Department and Drainage Service Department

Case No. 2013/2747A, B&C – Mishandling a complaint about street obstruction and discharge of waste water by shops

Background

742. On 18 July 2013, the complainant (the owners' corporation of a residential estate) complained to the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD), Environmental Protection Department (EPD) and Drainage Service Department (DSD). As alleged by the complainant, operators of some shops on both sides of a nearby street of its residential estate (the subject location) had placed their goods on the pavement outside their premises for a prolonged period and discharged waste water anywhere, thus obstructing passages and putting pedestrians at the risk of slipping and falling, and even possibly leading to water pollution. The complainant had repeatedly lodged complaints with FEHD, EPD and DSD about the above problems. Meanwhile, the complainant also alleged that the waste water produced during FEHD's street washing operations would flow into the storm water drains and cause pollution too. The complainant suggested EPD to provide additional sewers in the vicinity of the subject location to address the problem. Subsequently, EPD referred the complainant's suggestion to DSD for follow-up but the suggestion was not accepted by DSD.

743. The complainant alleged that the three departments failed to follow up on the case properly and the above situation was not improved but worsened.

The Ombudsman's observations

FEHD

744. According to the investigation of the Office of The Ombudsman, FEHD did take enforcement actions and institute prosecutions against the offending shops at the subject location. However, according to the Office of The Ombudsman's observations, operators of most of the shops

still blatantly placed goods for sale at the shop fronts and the problem of street obstruction was extremely serious at the subject location. The shops even had transactions with customers at the shop fronts. On top of the implications on food safety and hygiene, hawking of food/goods in public places in such a manner is in itself an act of "illegal hawking". Nevertheless, FEHD failed to exercise its authority to institute prosecutions for the offence of "illegal hawking".

745. In fact, the Office of The Ombudsman noticed that the number of complaints received by FEHD in 2013 about street obstruction by the shops at the subject location was more than double of the numbers in 2011 and 2012 even though FEHD and the Police had mounted a number of joint operations every year. It reflected that FEHD's mode of operation then could not produce any deterrent effect on the shop operators at the subject location. The enforcement actions were ineffective and hence the problem was worsening.

746. Based on the above analysis, The Ombudsman considered the complainant's allegation against FEHD partially substantiated.

EPD

747. After reviewing relevant records, the Office of The Ombudsman accepted the explanation by EPD regarding their follow-up of the subject issue, including the complaint in question. EPD had taken appropriate follow-up actions, including referring complainant's suggestion of providing additional sewer to DSD for further action.

748. In the light of above, The Ombudsman considered the complainant's allegation against EPD unsubstantiated.

DSD

749. After studying the relevant records, the Office of The Ombudsman was satisfied with the progress made by DSD in following up on the complainant's case. Regarding the complainant's suggestion of providing additional sewer, DSD had conducted investigation and study, yet it eventually did not accept the suggestion. From the administrative perspective, the Office of The Ombudsman was of the view that there was nothing wrong with DSD making the decision after considering the operational practicality.

750. Hence, The Ombudsman considered the complainant's allegation against DSD unsubstantiated.

751. The Ombudsman recommended FEHD to –

(a) continue taking strict enforcement actions and step up inspections and prosecutions in collaboration with the departments concerned at the subject location with a view to enhance the effectiveness of combating irregularities caused by the shops; and

(b) review the current enforcement strategy, and engage in active collection of evidence of "illegal hawking" as committed by the operators of those shops in order to institute prosecutions.

Administration's response

752. FEHD accepted The Ombudsman's recommendations and has taken the following follow-up actions –

(a) FEHD would continue taking stringent enforcement actions at the subject location, as well as working in collaboration with the Police to step up joint enforcement operations, such as carrying out inspections and enforcement actions in the morning and evening daily during the peak period of illegal shop front extension at Chinese New Year Eve with a view to enhance the effectiveness of combating irregularities caused by the shops. So far, the situation has improved; and

(b) FEHD would continue to review and improve its enforcement strategy and has instructed enforcement officers to engage in active collection of sufficient evidence for prosecuting the "illegal hawkers".

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

Case No. 2012/5026A (Food and Environmental Hygiene Department) – Failing to tackle pavement obstruction and environmental hygiene problems caused by construction materials shops

Case No. 2012/5026B (Environmental Protection Department) – (1) Failing to tackle air pollution problem caused by construction materials shops; and (2) Failing to attend the relevant District Council meetings

Case No. 2012/5026C (Lands Department) – Failing to tackle pavement obstruction problem caused by construction materials shops

Background

753. On 26 October 2012, the complainants lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD), Lands Department (LandsD) and Environmental Protection Department (EPD).

754. According to the complainant, since 2006, some construction material shops, in particular Shop A, at a section of a street (the street section) had been occupying the pavement with bricks and sand, with the loading and unloading of the construction materials from the pavement and onto and out of trucks. Pedestrians were forced to step onto the carriageways and the entrance/exit of the car park of the building was also blocked. Moreover, the sand dumps had become breeding grounds for sand fleas and produced clouds of dust, causing environmental hygiene nuisance and air pollution. Despite repeated complaints to FEHD, LandsD and EPD, the problem remained unsolved.

755. The complainants' allegations are summarised below –

(a) FEHD's Hawker Control Team refused to take enforcement actions against the shops by the excuse that there was insufficient evidence to prove the selling of construction materials by the shops at the shop fronts. FEHD's Cleansing & Pest Control Section simply informed the shop operators to remove the construction materials obstructing the pavement without instituting any prosecution. But once the Section finished its street washing operation, the shop operators would put their goods back to the same place and the situation of pavement obstruction persisted. Both team/section failed to take effective enforcement actions;

(b) LandsD was also ineffective in enforcement since only a warning notice was posted on the construction materials stacked at the shop front and no further action was taken, as long as the shop removed the materials before the deadline;

(c) (i) EPD carried out on-site tests in response to the residents' repeated complaints about the dust-induced air pollution, but took no further action other than simply giving an oral reply; and

(ii) EPD did not attend District Council meetings or the relevant joint meetings for discussion on solving the problem.

The Ombudsman's observations

FEHD

756. According to the information provided by the complainant and the District Council, the obstruction problem caused by construction materials had all along been serious on the street section. The law enforcement departments should normally have taken rigorous actions and regulatory measures against the irregularities but FEHD handled the problem of pavement obstruction by Shop A and the shops on the street section mainly through verbal warnings with only a few cases of prosecutions from 2009 to 2012, failing the expectation of Steering Committee on District Administration. The magnitude of law enforcement did not match the seriousness of the irregularities.

757. Given the worsening situation of pavement obstruction on the street section in 2012, the District Council had explicitly requested FEHD to step up prosecutions. However, FEHD merely increased the number of "Notices to Remove Obstruction" but the number of prosecutions dropped to one in 2012. It was apparent that little deterrent effect could be produced on the offending shops. The Office of The Ombudsman was doubtful about FEHD's determination in resolving the problem.

758. The Office of The Ombudsman accepted FEHD's explanation for not invoking the "illegal hawking provision" if there was no on-the-spot hawking of the construction materials placed in front of the Shop A. Nevertheless, the Office of The Ombudsman considered that FEHD should invoke the "provision on obstructions to scavenging operations" by posting a notice first and seizing the construction materials after a grace period in order to produce deterrent effect. FEHD should take such enforcement actions when situations warrant, and if not, it should institute immediate prosecutions against the recalcitrant offenders by invoking the "street obstruction provision".

759. Given the above analysis, The Ombudsman considered the allegation against FEHD partially substantiated.

LandsD

760. The Office of The Ombudsman was of the view that concerned District Lands Officer (DLO) of LandsD had taken enforcement actions under its purview by frequently participating in joint operations, conducting pre-operation inspections and posting notices, which led to the temporary removal of the construction materials, thereby easing street obstruction occasionally.

761. However, the Office of The Ombudsman was sceptical about LandsD's enforcement under the Land (Miscellaneous Provisions) Ordinance (the Ordinance). For so long as the construction materials occupying the street section were removed temporarily before the deadline specified in the notice, no action could be taken until another notice was issued in the next round of inspection rather than relying on the previous notice even though the same kind of materials were placed on the Government land afterwards. The Office of The Ombudsman considered that such enforcement practices basically contradicted the spirit and intent of the notice issued under the Ordinance, i.e. an occupier is required to "cease occupying" Government land rather than

"temporarily removing" the construction materials occupying the land. Under such circumstances, the illegal practice of persistently occupying Government land could not be effectively curbed.

762. The Office of The Ombudsman noted that LandsD was seeking legal advice to see if under the existing provisions of the Ordinance, LandsD could invoke immediate removal of construction materials placed on the street section again relying on the notice issued earlier which led to the temporary removal of the same kind of construction materials. The Government was also considering amending the Ordinance to increase the penalties for offences relating to unlawful occupation of unleased Government land for the purposes of enhancing the deterrent effect of the relevant offences.

763. Given the above analysis, The Ombudsman considered the allegation against LandsD partially substantiated.

EPD

764. The Office of The Ombudsman took the view that EPD had duly followed up on the complaints about sand and dust at the street section. As the situation did not give rise to air pollution, it was understandable that EPD did not take any further enforcement action. Moreover, the Office of The Ombudsman accepted EPD's explanation that it did not send any representative to District Council meetings or the relevant joint meetings because it was not invited to.

765. Hence, The Ombudsman considered the alelgation against EPD unsubstantiated.

766. The Ombudsman urged –

(a) FEHD to step up enforcement actions on the street section, including invoking the "provision on obstructions to scavenging operations" whenever possible and continuing to invoke the "street obstruction provision" for combating the problem of pavement obstruction by construction materials; and

(b) LandsD to promptly review its enforcement policy involving movable objects which in effect occupy Government land on a long term basis, so as to effectively curb such illegal practices.

Administration's response

767. FEHD accepted The Ombudsman's recommendation and has stepped up enforcement actions and cleansing work, including deployment of staff for enhancing enforcement and regulatory operations at irregular times every week on the street section. FEHD has also participated in weekly joint operations coordinated by the District Office of the Home Affairs Department in order to crack down obstruction by shops on the pavement. Moreover, FEHD would continue to take stringent enforcement and regulatory actions on the street section to ensure environmental hygiene and cleanliness of the street.

768. LandsD accepted The Ombudsman's recommendation and has taken the follow-up actions as below –

(a) In late 2013, LandsD formed a working group including a representative of the Department of Justice to study how to enhance the effectiveness of enforcement action against persistent illegal occupation of Government land by movable items. The study is still in progress; and

(b) on 9 July 2014, the Government introduced the Land (Miscellaneous Provisions) (Amendment) Bill 2014 into the Legislative Council to amend the Ordinance to increase the penalties for offences relating to unlawful occupation of unleased Government land for the purposes of enhancing the deterrent effect of the relevant offences.

Food and Environmental Hygiene Department, Lands Department and Fire Services Department

Case No. 2013/2689A, B&C – Failing to take effective enforcement action against illegal hawking activities on an emergency vehicular access

Background

769. On 17 July 2013, the complaint lodged a complaint with the Office of The Ombudsman against Lands Department (LandsD), Fire Services Department (FSD) and Food and Environmental Hygiene Department (FEHD).

770. The complainant alleged that the emergency vehicular access (the Access) next to his housing estate was often obstructed by hawking activities and shop extension. He had complained many times to LandsD, FSD and FEHD over the past decade or so, but there had been no improvement. He alleged that the three departments failed to take effective enforcement actions.

771. The complainant also alleged that FSD only carried out tests on the passage of fire trucks through the Access during non-peak hours. As illegal hawkers already left before the tests, the test results were flawed. Neither could FSD prosecute anyone for street obstruction.

The Ombudsman's observations

Lands D

772. Although the Access was located on a Government land, occupation of the area was mainly due to itinerant hawking activities, rather than prolonged occupation of Government land which the Land (Miscellaneous Provisions) Ordinance aimed to tackle. Further, regulating illegal hawking activities was not the main duty of LandsD. The Ombudsman therefore considered the allegation against LandsD unsubstantiated.

FSD

773. FSD had properly followed up on complaints filed by the complainant and other citizens regarding obstruction in the Access. FSD also clarified that the tests on the passage of emergency vehicles were not only carried out during non-peak hours.

774. Based on its professional knowledge and actual circumstances, FSD assessed that, in most of its inspections, the hawking activities on the Access would not lead to situations where FSD's duties were to be hindered. From the administrative perspective, FSD had appropriately handled the issue. Based on the above analysis, The Ombudsman considered the allegation against FSD unsubstantiated.

FEHD

775. FEHD had followed up on the illegal hawking problem on the Access, instead of turning a blind eye to the situation. Nevertheless, considering the problem, especially on an emergency vehicular access, remained unresolved for years and had been the subject of repeated complaints, FEHD failed to achieve its policy objective of taking strict enforcement actions against illegal hawking at such "special locations", i.e. locations which are subjects of repeated complaints on hawking activities.

776. Based on the above analysis, The Ombudsman considered the allegation against FEHD partially substantiated.

777. The Ombudsman urged FEHD to take stringent enforcement actions against the illegal hawking activities on the Access.

Administration's response

778. FEHD accepted The Ombudsman's recommendation and would continue to carry out joint operations with the Police and FSD, as well as closely monitor the situation on the Access. Enhanced enforcement actions against shop extension and illegal hawking activities would be taken with the existing manpower resources.

Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit) and Housing Department

Case No. 2013/2125A&B – Failing to stop the illegal operation of a columbarium and its unauthorised occupation of Government land

Background

779. On 8 June 2013, the complaint lodged a complaint against the Efficiency Unit (EU) and the Housing Department (HD).

780. The complainant lived in a housing estate under the Tenants Purchase Scheme (TPS). On 20 May 2013, the complainant called the hotline of the Food and Environmental Hygiene Department (FEHD) (answered by 1823 Call Centre (the Call Centre) under EU) and lodged a complaint about nuisance caused by water dripping from the air-conditioner of the flat on the upper floor. The Call Centre staff replied the complainant that water dripping problem should be handled by HD. The complainant subsequently called HD on the same date to lodge the complaint on the water dripping problem.

781. Several days after referral by the Call Centre, staff from HD called to inform the complainant that the water dripping problem was not within the jurisdiction of HD and should be followed up by the Owners' Corporation (OC) and FEHD instead. If the complainant agreed, HD could refer the case to OC on behalf of the complainant. The complainant was worried that OC could not resolve the water dripping problem and he therefore requested the staff to refer the case to FEHD. However, the staff replied that in view of the HD internal guidelines, HD staff could not refer the case to FEHD on behalf of the complainant.

782. The complainant made the following allegations against:

(a) EU for providing wrong information that the water dripping problem should be followed up by HD; and

(b) HD for refusing to refer the water dripping problem to FEHD without reasonable justifications.

The Ombudsman's observations

Allegation (a)

783. The Office of The Ombudsman considered that the Call Centre had handled the complaint in accordance with its established procedures and referred the case to HD in the first instance. If the flat involved was a rental unit under the management of HD, HD should be responsible for taking enforcement action. In view of this, The Ombudsman concluded that it was not inappropriate for the Call Centre to refer the complaint to HD. Allegation (a) was considered unsubstantiated.

784. While Allegation (a) was considered not substantiated, The Ombudsman suggested that upon receipt of future cases about water dripping from air-conditioners in TPS estates, the Call Centre should concretely explain to the complainants the reasons and purposes for referring their cases first to HD and also elaborate clearly the role and responsibility of HD in handling water dripping cases in TPS estate (including referring cases not within the jurisdiction of HD to OC and management company for follow-up). This would help avoid complainants' misunderstanding and hence their over-expectation on HD.

Allegation (b)

785. In the absence of independent corroborative evidence, the Office of The Ombudsman was unable to ascertain whether the staff member of HD had refused to refer the water dripping problem to FEHD. As such, The Ombudsman considered allegation (b) inconclusive.

786. However, The Ombudsman noted that in replying the Call Centre on 29 May, the staff member of HD just asked for the termination of the case but did not request that the case be referred to FEHD for follow-up actions. This might lead the Call Centre to misunderstand that HD had already solved the water dripping problem and therefore the Call Centre did not have to follow up further.

787. In view of the above, The Ombudsman urged HD to remind its staff that in respect of similar cases in the future, they had to explain clearly to the Call Centre the actions taken by HD and whether the problems had been solved, so that the Call Centre could consider whether and how to take any follow-up action.

Administration's response

788. EU accepted The Ombudsman's recommendation and has requested HD to inform Call Centre if cases referred were considered not within HD's jurisdiction so that the Call Centre could refer them to other departments for follow up. The Call Centre staff had also been reminded that where the location under complaint was within areas under the management of HD, the Call Centre should alert the complainant that the case would first be referred to HD and if HD, after verification, confirmed that the flat under complaint was a privately owned property (e.g. TPS flats), HD might refer the case to OC and management company of the building for follow-up.

789. HD accepted The Ombudsman's recommendation and has taken corresponding actions to reinforce communication with the staff of the Call Centre in handling water dripping problems. Apart from sending a progress report of cases to the Call Centre on a regular basis, HD will also copy the Call Centre correspondences regarding cases that are not under the purview of HD but have been referred to OC direct for follow-up. A copy of the reports on these referral cases will be sent to the Call Centre for reference and follow-up actions as appropriate. HD has also reminded relevant staff to refer cases directly to relevant government departments, such as FEHD, for follow-up if necessary.

Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit) and Lands Department

Case No. 2013/2964A (Efficiency Unit) – Failing to coordinate with the Lands Department and the Food and Environmental Hygiene Department on removing weeds and litter on a piece of Government land, and requesting the complainant to coordinate with the departments instead

Case No. 2013/2964B (Lands Department) – (1) Refusing to answer the complainant's enquiry about progress of removing weeds; (2) delay in removing weeds on a piece of Government land; and (3) misquoting the complainant in an email to her that she once said she would complain to the Office of The Ombudsman

Background

790. On 2 August 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Efficiency Unit (EU) and Lands Department (LandsD).

791. According to the complainant, on 5 June 2013, she made a complaint to the 1823 Call Centre (the Call Centre) of EU about overgrown weed and refuse problem on the land between the complainant's house and the neighbour's house (the subject location), and this had led to breeding of mosquitoes and other pests. When the complainant called the Call Centre again on 9 July, the staff (Staff A) explained to the complainant that if the Call Centre referred the request for weeding and refuse clearance to LandsD and the Food and Environmental Hygiene Department (FEHD) at the same time, in case FEHD arrived at the subject location earlier than LandsD, FEHD would be unable to clear the refuse, as the weed had not yet been removed. Staff A therefore requested the complainant to call LandsD first and then the Call Centre after confirming the weed was removed. The Call Centre would subsequently refer the request for refuse clearance to FEHD.

792. On the same day, the complainant called LandsD and requested for weeding at the subject location, the staff of LandsD (Staff B) responded that follow-up action would be taken. On 19 July, the complainant called again to enquire the progress with Staff B, she was questioned why not making enquiry with another staff of LandsD (Staff C) instead. After the complainant indicated that she neither know Staff C nor have his/her phone number, Staff B gave Staff C's phone number to the complainant and asked her to call Staff C directly for enquiry. Even on 2 August, LandsD had yet to remove the weed.

793. On 7 August, a staff from District Lands Office (DLO) of LandsD called and informed the complainant that the weed at the subject location had been removed. The complainant requested via email for a written reply with the indication of the boundary and the area where the weed had been removed. On 12 August, DLO replied the complainant by email, in which quoting the telephone conversation that the complainant had said to make complaint with the Office of The Ombudsman on this case. The complainant denied having said such claim. Besides, it was also mentioned in the email that the complainant was dissatisfied about the DLO staff required to consult the supervisor before giving her a written reply. The complainant, however, expressed her discontent was due to the evasiveness and unwillingness of the staff in providing her a written reply.

794. The complaint can be summarised as follows –

(a) The Call Centre of EU did not communicate with LandsD and FEHD to coordinate weeding and refuse clearance of the two departments. Instead, the complainant was asked to make her own arrangement with the two departments;

(b) Staff B of LandsD refused to respond to the complainant's enquiry about the progress of weeding, and even unreasonably questioned why the complainant did not make the enquiry with Staff C;

(c) LandsD delayed weeding at the subject location; and

(d) DLO falsely claimed in its email of 12 August that the complainant said she would complain to the Office of The Ombudsman, and distorted the reason for her dissatisfaction.

The Ombudsman's observations

Allegation (a)

795. As revealed by the telephone recording between the complainant and Staff A on 9 July 2013, Staff A did ask the complainant to call the Call Centre again for a request for refuse clearance by FEHD after LandsD notified her that weeding works had been completed. What Staff A had said inevitably made the complainant feel that the Call Centre wanted to shift the responsibility of coordinating the work of the two departments to the complainant; this was not only unreasonable but also contrary to the established arrangement on coordination among Government departments.

796. Fortunately, at the complainant's insistence, Staff A agreed that the coordination work would be taken up by the two departments and took action accordingly.

797. Based on the analysis above, The Ombudsman considered the allegation against EU partially substantiated.

Allegation (b)

798. Staff B was not the officer handling the case of the complainant, it was normal that Staff B could not immediately answer the complainant's enquiry about the arrangement of weeding. The Office of The Ombudsman considered it justifiable for Staff B to suggest the complainant approaching Staff C directly.

799. Details of the telephone conversation on that day so recounted by the complainant and LandsD were different. In the absence of any corroborative evidence, the Office of The Ombudsman could not ascertain the content and the attitude of both parties when Staff B suggested the complainant to contact Staff C for enquiry. Thus, no comment would be offered in this regard.

800. Overall speaking, The Ombudsman considered allegation (b) against LandsD unsubstantiated.

Allegation (c)

801. DLO had handled the complainant's weeding request according to its established procedures. As there were many rainy days after 19 July, it was understandable that the contractor could not have removed the weeds earlier.

802. In view of the above analysis, The Ombudsman considered allegation (c) against LandsD unsubstantiated.

Allegation (d)

803. The conversation details on 7 August so recounted by the complainant and Staff C differed. In the absence of any corroborative evidence, the Office of The Ombudsman could not ascertain the details of their conversation, not to mention judging who was right or wrong.

804. In view of the above, The Ombudsman considered that allegation (d) against LandsD inconclusive. In any event, the complainant already lodged a complaint with the Office of The Ombudsman on 2 August, therefore it did not matter at all whether she had mentioned over the phone on 7 August that she would file another complaint with the Office of The Ombudsman.

805. In conclusion, the complaint against LandsD was unsubstantiated.

806. The Ombudsman made the following recommendations –

(a) EU should remind staff of the Call Centre when following up on complaints involving multiple Government departments, the departments should be requested to coordinate their work among themselves, and the responsibility of coordination should not be shifted to the complainant; and

(b) Staff B of LandsD should refer the complainant's enquiry to Staff C for response, so that the complainant could save the trouble of calling Staff C separately.

Administration's response

807. EU accepted The Ombudsman's recommendation and has reminded the Call Centre staff to provide clear explanation on case handling arrangements in order to avoid confusion. When following up on complaints that involved multiple Government departments, the departments should be requested to coordinate their work, and such responsibility should not be shifted to the complainant.

808. LandsD accepted The Ombudsman's recommendation. DLO has implemented the recommendation and issued internal guidelines directing staff taking telephone calls from the public to refer enquiries to the relevant subject officer for the latter's direct response.

Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit), Transport Department and Buildings Department

Case No. 2012/3568A, B&C – Delay and buck-passing in handling a complaint about blocking of a pedestrian crossing

Background

809. In mid-June 2012, the complainant called the 1823 Call Centre (Call Centre) under the Efficiency Unit (EU) to complain that a pedestrian crossing at a road junction had been blocked without any alternative traffic arrangement. The Call Centre, unable to tell which department should be responsible, referred the case to the Highways Department (HyD), the Hong Kong Police Force (HKPF), Transport Department (TD) and Building Department (BD), but none of them assumed responsibility.

810. The complainant was dissatisfied that the Call Centre had failed to identify the responsible departments early enough and that the departments involved had shifted the responsibility among one another, resulting in delay in re-opening the pedestrian crossing.

811. A private developer was required under the land lease to install traffic signs and traffic signals on a public road under construction on a certain plot of land it had leased. In May 2012, its contractor was instructed by HKPF to implement some temporary traffic arrangements (TTA) to fence off the pedestrian crossing in question with water-filled barriers. Meanwhile, pedestrians had to use another crossing point farther away.

The Ombudsman's observations

EU

812. This case revealed that the Call Centre had failed to serve effectively as a "one-stop" centre to answer enquiries and receive complaints for the participating Government departments, and to ensure that complaints involving several departments are acted on properly.

813. After referring the case to HKPF in mid-June 2012, for instance, the Call Centre did not actively follow it up until the complainant repeatedly asked about its progress in July. By early August, it was already very clear that no department was willing to take up the case, but the Call Centre waited until late August to escalate it to the departmental coordinator level. EU attributed the delay to the heavy workload after a typhoon. However, the Office of The Ombudsman did not see how a common seasonal phenomenon could have had such a serious impact on the Call Centre's operation.

814. Besides, staff resources were wasted on relaying the complainant's messages time and again to BD despite its repeated denial of responsibility. The Call Centre also failed to chase HKPF for a prompt reply and did not identify this case as a "buck-passing" case when both TD and BD refused to take it up. Instead, it merely kept passing the complainant's messages around. Such incompetence had greatly affected its ability in helping to resolve cross-departmental complaints.

TD

815. TTA and installation of traffic signals are matters under TD's purview and the authorised person (AP) had contacted TD direct in late June to report progress of the traffic signal construction. Nevertheless, TD denied responsibility right away and advised the Call Centre to re-assign the case to another department. While the Call Centre had once indicated that TD was not required to take further action on the case, the Office of The Ombudsman believed that TD being the authority of traffic management should exercise judgement as to whether a matter falls within its purview or not.

816. Moreover, TD failed to realise that the complaint had not been resolved when HKPF urged it to take up the case on 1 August 2012. It finally agreed to follow up the matter in mid-September. The Office of The Ombudsman considered this a vivid example of a department shirking its responsibility.

BD

817. The subject matters of this complaint did not fall within BD's jurisdiction and BD had no obligation to act as the coordinator on all matters arising from the private development project in question (of which BD was the approving authority). Nevertheless, BD had referred the building plans submitted by AP to relevant Government departments

for comments, which meant that the Department could have referred other matters arising from the project to these departments for their attention and action as well. In addition, the Call Centre had taken the case to BD on several occasions. If BD had been more sensitive and liaised with AP to see whether there was any useful information for the Call Centre, the complaint could have been resolved earlier.

818. In the light of the above, The Ombudsman considered the complaint against EU and TD substantiated, and the complaint against BD unsubstantiated. The Ombudsman recommended –

(a) EU to review the effectiveness of the remedial measures and case monitoring system of the complaint handling team in six months and thereafter periodically, and re-evaluate the escalation mechanism for "buck-passing" cases;

(b) TD to provide guidelines for staff to take up complaints involving matters under TD's purview; and

(c) BD to remind staff to be more sensitive to repeated complaints concerning projects supervised by the department.

Administration's response

819. EU accepted The Ombudsman's recommendation and has reviewed the effectiveness of the remedial measures and case monitoring system of the Call Centre. For more efficient escalation, once a case has been identified as buck-passing, the Call Centre's complaint handling team aims to instigate direct intervention within two working days from the date of denial of responsibility by the responsible departments. Escalation will be made progressively to departmental case officers, Departmental Coordinators and Complaint Officers until the matter is resolved.

820. TD accepted and has implemented The Ombudsman's recommendation. TD updated the Departmental Instruction 1.1.6 – Complaint Handling Procedures and Guidelines on 9 April 2014 by including the following paragraph –

"**Complaints on Traffic Engineering Works Carried out by Private Developer on Public Roads**

1.1.6.48 Officers should take lead to answer to complaints arising from construction of traffic engineering works, including related temporary traffic arrangement (TTA), by private developer on public roads, regardless of whether the TTA is requested by TD and whether the works site concerned is still under the possession of the private developer."

821. BD accepted The Ombudsman's recommendation and reminded its staff to be more sensitive to repeated complaints concerning projects involving private buildings that are subject to the control of the Buildings Ordinance.

Highways Department and Home Affairs Department

Case No. 2013/0535A&B – Delay in handling a request for the installation of a street light in a village

Background

822. On 15 February 2013, the complainant complained to The Ombudsman against the Highways Department (HyD) and Home Affairs Department (HAD).

823. Allegedly, on 17 February 2010, the complainant requested HyD to install a street light in a certain village in Tuen Mun (the Request). HyD forwarded the Request to HAD for consideration. Since then, the complainant had enquired of HyD and HAD many times about progress of the Request. The two departments assured her repeatedly that the matter was being dealt with. However, there was no sign of installation work.

824. The complainant considered HyD and HAD to have delayed handling the Request.

The Ombudsman's observations

825. The Office of The Ombudsman accepted the reasons given by HAD and HyD as to why the Request could not have been included in the Public Lighting Programme (PLP) 2010/2011. The Office of The Ombudsman also found that both departments had acted in accordance with their procedures.

826. However, the fact remained that the concerned village light (the Village Light) was not installed until 23 months after approval was given by the Public Lighting Vetting Committee in March 2011. That was longer than the average time of 19 months taken for completion of such projects, and the average time itself was by no means a high standard. The following delays were particularly obvious –

(a) The District Office (DO) under concern did not arrange a site meeting with various parties to determine the location of the Village Light until 2 August 2011, almost 3.5 months after HyD had informed DO of the Public Lighting Vetting Committee's approval of the Request on 26 April.

(b) HyD had allowed the Village Light project to remain dormant from August 2011 to February 2012, which the Department had attributed to the change of contractor.

827. Accordingly, The Ombudsman considered this complaint against HyD and HAD partially substantiated. The Ombudsman –

(a) urged HyD to review its procedures to make improvement;

(b) recommended HAD to take reference from this case and strived to speed up its liaison/consultation work in future; and

(c) suggested HAD to make it clear at the outset to requestors of village lights that inclusion of a request in PLP of a certain year did not mean that the works would be completed within the year. This would help to manage requestors' expectation.

Administration's response

828. HyD accepted The Ombudsman's recommendation and decided to implement a target time of 4 months for the completion of design work upon initial determination of village light location with applicants and village representatives, regardless of other factors such as change of contractors.

829. HAD accepted The Ombudsman's recommendations and had conveyed the investigation result of the case to all DOs concerned for their information and reminded them of the importance to speed up liaison work in similar cases in the future. HAD also required DO staff to make it clear at the outset to requestors of village lights that inclusion of a request in PLP of a certain year did not mean that the works would be completed within that year. DOs were also recommended to consider including such information in the replies or acknowledgement slips for village light applicants to avoid unnecessary misunderstanding.

Home Affairs Bureau

Case No. 2013/1403 – Unreasonably refusing to provide policy support to an application for short-term tenancy of Government land

Background

830. On 22 April 2013, an association (the Association) complained to the Office of The Ombudsman against the Home Affairs Bureau (HAB). Allegedly, in 2012, the Association applied to the Lands Department (LandsD) for short-term tenancy of a piece of land for providing "leadership and language training for youngsters including minorities, a museum of British-Chinese soldiers, a meeting platform for veterans and the Association's office" (the Application). LandsD referred the Application to HAB for policy support.

831. Between 8 June and 7 December 2012, the Association submitted information to HAB, including its Memorandum of Association, Articles of Association and schedule of programmes from April 2012 to March 2013.

832. However, HAB considered that most of the Association's purposes were not related to youth development, nor were its youth programmes or services substantial and sustainable. On 17 January 2013, HAB informed the Association that it had difficulty in providing policy justifications from the youth development policy perspective to support Application. On 9 March 2013, HAB further told the Association that the Application was outside its youth development policy purview. The Association thus complained to the Office of The Ombudsman that HAB had "rejected (the Application) without satisfactory/apparent reason".

The Ombudsman's observations

833. As can be seen from HAB's website, the mission of HAB is, inter alia, to promote youth development and preserve intangible cultural heritage.

834. When HAB considers policy support on use of Government land for some activity, HAB will first consider the merits of the proposed activity with regard to the track record of the NGO, the effectiveness of the activity, and whether the activity is in line with HAB's prevailing policy. HAB will also consider whether the activity has a genuine need for a fixed venue. Finally, HAB will consider whether to support payment of nominal rent or concessionary premium by the NGO for the use of the land.

835. Having reviewed the information supplied by the Association, the Civic Affairs Division (1) (CAD(1)) of HAB was of the view that most of the Association's objectives were not directly related to youth development policy. Hence, CAD(1) considered itself not in a position to provide policy support for the Application.

836. CAD(1) further considered it inappropriate to refer the Application to relevant division in the Bureau because (i) the youth-related materials submitted by the Association were flimsy and inadequate and there was no track record on its youth development programmes; (ii) no information concerning the non-youth purposes (including museum/heritage) had been submitted by the Association to the Bureau; and (iii) there was no detailed operation plan and financial information to demonstrate the Association's sustainability or proposal on the medium to long-term development of the site.

837. On the whole, the Office of The Ombudsman accepted HAB's explanation. The Bureau had reasons for not providing policy support to the Application. However, HAB's replies to Association of 17 January and 9 March 2013 had hardly set out its reasons as mentioned above. The Ombudsman therefore considered the complaint partially substantiated.

838. The Ombudsman urged HAB to take reference from this case and to remind staff of the need to give applicants clear and precise reasons for the Bureau's decisions.

Administration's response

839. HAB accepted The Ombudsman's recommendation and would remind the staff to give applicants clear and specific reasons for the Bureau's decisions in future.

Home Affairs Department

Case No. 2011/2847(I) – Unreasonably deleting the personal particulars of the Chairman and Secretary of a Rural Committee who prepared the accounts of the Committee from the copy of accounts provided to the Committee

Background

840. On July 24, 2011, the complainant lodged a complaint with the Office of The Ombudsman against a District Office (DO) of Home Affairs Department (HAD).

841. The complainant claimed that on 9 March 2011, he as the Chairman-elect of a Rural Committee sent an email to HAD indicating that as there would be a new term of Rural Committee, and the Rural Committee had not kept copies of its past financial statements, he requested HAD to provide the Rural Committee with the financial statements submitted by the Rural Committee to HAD from 1999 to 2003.

842. DO issued interim replies to the complainant on April 21 and May 26 the same year. DO replied to the complainant on June 2 that it had the Rural Committee's financial statements for the period of April 2000 to December 2003, but these documents contained the names and post titles of the then Chairman Mr A and the then Secretary Mr B, which were personal data of Mr A and Mr B (data involved), DO therefore would have to delete such data before providing the financial statements to the complainant. The complainant opined that as Mr A and Mr B were representing the Rural Committee when they submitted the financial statements to HAD, he objected to DO's deletion of the data involved but to no avail.

843. The complainant criticised DO for, without valid grounds, deleting the data involved before providing him with copies of the financial statements.

The Ombudsman's observations

844. According to the Code on Access to Information (the Code), government departments may refuse to provide information under their charge to members of the public if they have special grounds (such as when privacy of an individual is involved). However, taking legal advice into consideration, the Office of The Ombudsman opined that –

(a) although the names and post titles of Mr A and Mr B were personal data, the financial statements in the possession of DO came from the Rural Committee. As such, if DO was to provide copies of the financial statements to the Rural Committee, there would be no issue of revealing personal data (including the names and post titles of Mr A and Mr B) contained in the financial statements;

(b) as Mr A and Mr B were former Chairman and Secretary of the Rural Committee, which were public officers, their names and post titles were in effect in the public domain; and

(c) the purpose of Rural Committee's annual submission of financial statements to DO with names and titles of the Chairman and Secretary was to ensure Rural Committee's accountability to DO regarding its use of public funds. As the Chairman-elect, the complainant would be able to better understand the financial situation of the Rural Committee in the past years by obtaining complete copies of past financial statements from HAD, which could be considered relevant to the exercising of the duties of the Chairman-elect. In other words, the complainant's request for financial statements with the data involved in effect met the requirements as laid down in Principle 3 of data protection in the Personal Data (Privacy) Ordinance[3] and paragraph 2.15 (a) of

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[3] Principle 3-use of personal data:
Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than –
(a) the purpose for which the data was to be used at the time of the collection of the data; or
(b) a purpose directly related to the purpose referred to in paragraph (a).

the Code[4]. The question of whether information contained in complete copies of the financial statements could be used for other purposes should not be a factor of consideration.

845. Based on the reasons mentioned above, DO should have provided complete copies of the financial statements to the complainant and there would be no need to obliterate or delete the data involved. The Ombudsman considered this complaint substantiated.

846. The Ombudsman urged HAD to provide complete copies of the financial statements to the complainant as soon as possible. In regard to Mr B's identity number as stated in the financial statements, if HAD considered that it was particularly sensitive or not relevant to the purpose of the Rural Committee's financial accountability and therefore did not wish to disclose it to the complainant, The Ombudsman had no objection.

Administration's response

847. HAD accepted the recommendation of The Ombudsman. DO sent by mail a complete set of copies of the financial statements for the period from April 2000 to December 2003 to the complainant on 8 July 2013.

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[4] Para. 2.15 of the Code specifies that –
Information about any person (including a deceased person) other than to the subject of the information, or other appropriate person, unless –
(a) such 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, or
(c) disclosure is authorised by law, or
(d) the public interest in disclosure outweighs any harm or prejudice that would result.

Home Affairs Department

Case No. 2012/2577 – (1) Providing a wrong contact telephone number on a notice issued about an election of floor representative; (2) Failing to provide the telephone number of the subject case officer; (3) Delay in returning a telephone call; and (4) Unreasonably refusing to handle a complaint about the result of a floor representative election.

Background

848. On 23 July 2012, the complainant lodged a complaint with the Office of The Ombudsman against a District Office (DO) of the Home Affairs Department (HAD). The complainant claimed that he was a flat representative of a floor ("Floor B") of a public housing estate ("Building A"). On 24 June 2009, DO assisted households of Floor B to conduct the election of floor representative ("the election concerned") for the formation of a Mutual Aid Committee for Building A. In the evening of the election, only four flat representatives (including the complainant) attended "the election concerned". A staff of DO suggested that the representative of a flat (Ms A) be the floor representative. The complainant and another flat representative queried that the staff's suggestion would improperly affect "the election concerned", and they left the meeting with the other flat representative (three in total). As a result, no floor representative was elected. On the next day, he called DO to lodge a complaint, but no reply had been received since then.

849. On 1 June 2012, a notice was posted in Building A by DO signed by its Mr B ("the election notice") stating that DO intended to arrange for elections of floor representatives for a number of floors of the building. Noting that Floor B had not been included, the complainant called Mr B at the number shown on "the election notice" to enquire about the issue ("the issue concerned"). However, he found that the number did not belong to DO and was unable to contact Mr B.

850. On 7 June 2012, the complainant called DO to enquire about "the issue concerned". The staff responded that Mr B would reply to him later but did not provide him with the telephone number of Mr B. As the complainant had not received any call from Mr B, he called DO on 6 July 2012 asking for his telephone number. On the same date, the complainant called Mr B and raised "the issue concerned". Mr B

replied that he would call back after checking the records.

851. On 18 July 2012, the complainant called Mr B again as he had not received any reply. Mr B said that according to the records of "the election concerned", Floor B had successfully elected its floor representative on 24 June 2009. The complainant told Mr B about "the election concerned" and said that the flat representatives attending "the election concerned" had not signed to acknowledge the election result. The complainant questioned the result and requested Mr B to follow up on the matter ("the request concerned"). However, Mr B refused for reason that the complainant's claim regarding "the election concerned" was just an one-sided opinion.

852. The complainant made the following complaints against DO –

(a) The enquiry telephone number provided on "the election notice" was incorrect;

(b) when he called on 7 June 2012, the staff member of DO did not provide him with Mr B's telephone number;

(c) there was a delay in Mr B's reply to "the issue concerned"; and

(d) it was unreasonable for Mr B to refuse to follow up on "the request concerned".

The Ombudsman's observations

Allegation (a)

853. Both DO and the property management company of Building A claimed that they had deployed staff to post "the election notice". The Office of The Ombudsman did not rule out the possibility that the two parties had arranged for posting of "Version 2" and "Version 3" of "the election notice" respectively on 1 June 2012. DO advised that Floor B was not among the locations where its staff had posted "Version 2" while the Housing Department (HD) claimed that the service agent had posted "Version 3" in the lobby of the ground floor and the lift lobbies of the relevant floors of Building A. The Ombudsman inferred that the "Version 1" of the notice, which was obtained by the complainant from Floor B, might be the "Version 3" posted by the management company.

854. The English letter faxed by DO did not state clearly that HD or the service agent need not post "the election notice" for DO. The Ombudsman did not rule out the possibility that the management company had difficulty in fully understanding from the letter the intention of DO and assigned a security guard to post "Version 3" in Building A. In view of this, the Office of The Ombudsman did not consider that the dispute in respect of the provision of a wrong enquiry telephone number in "Version 1" was caused by the mishandling of the management company.

855. "Version 1" of "the election notice" obtained by the complainant might not have been posted by DO staff. However, if DO had not faxed the wrong version of "the election notice" (i.e. "Version 3") to the management company, the dispute over the wrong enquiry telephone number would not happen at all.

856. As such, The Ombudsman considered that DO needed to bear certain responsibility on the issue. Allegation (a) was partially substantiated.

Allegation (b)

857. In the absence of independent corroborative evidence (such as sound recordings), the Office of The Ombudsman was unable to ascertain whether the complainant did call DO on 7 June 2012, or whether the staff of DO refused to provide Mr B's telephone number.

858. Therefore, The Ombudsman considered allegation (b) inconclusive.

Allegation (c)

859. In view of Mr B's explanations, the Office of The Ombudsman ascertained with the complainant, who was unable to confirm whether he had given his contact telephone number to Mr B during their telephone conversation on 6 July 2012.

860. In view of the above, The Ombudsman considered allegation (c) unsubstantiated.

Allegation (d)

861. As to whether Mr B had refused "the request concerned" raised by the complainant for the reason that the complainant's claim regarding "the election concerned" was just a "one-sided opinion", the complainant and DO had their own version of the story. In the absence of independent corroborative evidence, The Ombudsman was unable to ascertain the truth of the matter. Hence, The Ombudsman considered allegation (d) inconclusive.

862. Summing up the findings, The Ombudsman considered this complaint partially substantiated.

863. Besides, in relation to "the election concerned", the Office of The Ombudsman made enquiries with two flat representatives by questionnaires. In response, both of them claimed that they had not elected any person as the floor representative of Floor B in the evening of "the election concerned". This was inconsistent with the results of the investigation conducted by Mr D of DO. The findings of DO's enquiry in July 2013 were also unable to substantiate investigation results of Mr D.

864. The Office of The Ombudsman noted the following problems regarding "the election concerned" –

(a) the records of DO showed that the flat representatives attending "the election concerned" did not acknowledge the results by signing the Flat Representative Attendance Record and Election Results. Therefore, the document can only prove the flat representatives attended "the election concerned" but cannot serve as sufficient evidence that the floor representative was elected by the flat representatives present; and

(b) after the completion of "the election concerned", DO has not announced the election results by posting a notice in Building A to ensure fairness, openness and impartiality.

865. The Ombudsman recommended HAD to conduct a comprehensive review on the existing procedures for handling the elections of floor representatives to avoid similar disputes over election results in future.

Administration's response

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

(a) a sample proforma has been prepared for use by all DOs to record the details of floor election results clearly. It includes fields for name of attendees, name of candidate(s), signature of a flat representative in attendance as witness, and signature of the elected flat representative(s) for confirmation; and

(b) HAD has asked all DOs to post a notice to announce election results to the households of relevant floors in a timely manner, even if the elections of other floor representatives have not yet completed.

Home Affairs Department

Case No. 2013/0080(I) – Refusing to disclose information on approved Enhancing Self-Reliance Through District Partnership Programme projects that had failed to remain sustainable after the funding period in the past six years

Background

867. On 8 January 2013, the complainant (a company) complained to the Office of The Ombudsman against the Home Affairs Department (HAD). Allegedly, in January 2012, the complainant submitted an application for funding under the Enhancing Self-Reliance Through District Partnership (ESR) Programme of HAD (the Application). In October 2012, the ESR Secretariat informed the complainant that the Application was unsuccessful. Afterwards, the complainant requested HAD to provide information, covering the previous six years, on those approved ESR projects that had failed to remain sustainable after the funding period ("the Information"), but to no avail.

868. The complainant complained to the Office of The Ombudsman that HAD had unreasonably refused its request for the Information.

The Ombudsman's observations

869. After the Application was rejected in October 2012, the complainant wrote to the Chief Executive's Office as well as the office of a Legislative Councillor, expressing its dissatisfaction with the result of the Application.

870. The complainant also wrote to HAD several times, querying its decision of rejecting the Application. The complainant alleged that HAD should have given it a fair chance as the Department had approved many other ESR projects that had ended up being failures.

871. Among its emails to HAD, the complainant mentioned only in two emails ("Email A" & "Email B"), about "collapsed projects" in the past six years. The relevant parts of the two emails were as follows –

Email A

"… it is incredible to come out quite a number of the selected applicants had been closed down in the past six years."

Email B

"… as a gatekeeper for public money, you are obliged to disclose all the applications involved in the 12th batch to the public. At the same time, the previous collapsed projects in the past 6 years should also be revealed to the public. We challenge you to invite ICAC to seek for evidence to prove there is no suspicious cover-up …."

872. HAD considered Emails A and B to be sole expressions of dissatisfaction with its decision on the Application and not exactly a request for the Information.

873. In January 2013, HAD replied to the complainant that none of the approved ESR projects had ceased operation during the funding period and around 80% were still in operation. The complainant had since not made any further enquiry or put up a request for the Information.

874. It could be seen from the above that prior to its complaint to the Office The Ombudsman, the complainant had in fact not made any explicit request for the Information. Accordingly, it was not unreasonable for HAD not providing the Information.

875. The Ombudsman therefore considered the complaint unsubstantiated. Since the complainant had made it clear to The Ombudsman that it wanted the Information, The Ombudsman urged HAD to accede to its request.

Administration's response

876. The Ombudsman's recommendation has been implemented. In July 2013, HAD provided the complainant with a list of projects approved under the ESR Programme but had ceased operation in the past six years.

Home Affairs Department

Case No. 2013/2884(I) – Failing to properly handle a request for information

Background

877. On 30 July 2013, the complainant lodged a complaint on behalf of a Rural Committee against a District Office (DO) of the Home Affairs Department (HAD).

878. The complainant claimed that on 10 June 2013, in the capacity of the Chairman of the Rural Committee, he sent an email to DO, pointing out that the Rural Committee often had to issue certification letters to affirm the status of indigenous villagers or fishermen so that they could be eligible for burial in "permitted burial ground". The past certification letters issued by the Rural Committee were required for the Rural Committee to determine whether someone's family was indigenous villagers or fishermen. For such reason, he requested DO to provide him with copies of certification letters affirming the indigenous status of the deceased, issued by the Rural Committee between 1983 and the end of March 2011(certification letters involved). The Rural Committee agreed that DO could remove the information of the applicants concerned from the certification letters involved. However, Rural Committee's request for the certification letters involved had to be kept confidential. On 29 July 2013, DO replied that before providing copies of the certification letters involved, DO would inform applicants concerned and persons who had issued the certification letters involved (the data subjects concerned).

879. The complainant alleged that DO's intention to "inform" the data subjects concerned was unreasonable and cumbersome.

The Ombudsman's observations

880. The Office of The Ombudsman considered that as the certification letters involved as held by DO originated from the Rural Committee, if DO was to provide copies of these letters to the Rural Committee, there was no issue of revealing the personal data therein (including that of the data subjects concerned) to an outside party.

881. In addition, obtaining copies of the certification letters involved would enable the Rural Committee to determine whether the families concerned were or were not indigenous villagers or fishermen. As such, its request for certification letters involved could be considered relevant to the exercising of its duty to issue the certification letters. In other words, the Rural Committee's request for copies of certification letters involved which contained personal data complied with the requirement as stated in Principle 3 of data protection in the Personal Data (Privacy) Ordinance[5], and the requirement as stipulated in paragraph 2.15 (a) of the Code on Access to Information[6].

882. In view of the foregoing, the Office of The Ombudsman considered that DO's intention to "inform" was unnecessary. As the Rural Committee had requested DO not to do so and also not to reveal the Rural Committee's request for copies of certification letters involved to other parties, DO should not have insisted. The Office of The Ombudsman further queried how DO would be able to "inform" the data subjects concerned while not revealing that the Rural Committee was the party requesting the certification letters involved. This might only lead to doubts and speculations from the data subject concerned, and hence would waste time and efforts.

883. The Ombudsman considered this complaint substantiated and recommended HAD to request DO to provide copies of certification letters involved to the Rural Committee directly as soon as possible, without the need to inform the data subjects of the certification letters involved beforehand.

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[5] Principle 3-use of personal data:
Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than –
(a) the purpose for which the data was to be used at the time of the collection of the data; or
(b) a purpose directly related to the purpose referred to in paragraph (a).

[6] Para. 2.15 of the Code specifies that –
Information about any person (including a deceased person) other than to the subject of the information, or other appropriate person, unless –
(a) such 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, or
(c) disclosure is authorised by law, or
(a) the public interest in disclosure outweighs any harm or prejudice that would result.

Administration's response

884. HAD accepted the recommendation of The Ombudsman. On 29 January 2014, DO sent by mail copies of the certification letters issued by the Rural Committee between June 1983 and January 2011 for affirmation of the status of indigenous villagers or fishermen of the deceased to the Rural Committee for its record.

Home Affairs Department and Hong Kong Housing Society

Case No. 2012/5819A&B – Failing to provide the public with sufficient copies of application forms for the sale of a subsidised housing project

Background

885. The Hong Kong Housing Society (HKHS) had requested the Home Affairs Department (HAD) to distribute copies of its application form (the Form) for new subsidised housing flats at the latter's District Offices (DOs) from 21 December 2012 to 18 January 2013.

886. On 24 December 2012, the complainant went to the Tsuen Wan District Office (TWDO) for a copy of the Form, but the staff there said that all copies had already been given out. He was advised to obtain a copy from another collection point, or to download the Form from the HKHS website. The complainant was dissatisfied with the arrangements for distribution of the Form.

The Ombudsman's observations

887. DOs are tasked with the distribution of information brochures and application forms for Government departments and other organisations. Regarding the arrangements for distributing the Form, Dos had to follow the instructions of HKHS. Before the complainant turned up at TWDO for a copy of the Form, HKHS had indicated that it would not supply DOs with additional copies. TWDO staff, therefore, advised the complainant to try other methods, as set out in the "out-of-stock arrangement" (i.e. if the Form ran out of stock, DOs should advise members of the public to try the other collection points designated by HKHS or download one from the HKHS website).

888. The Office of The Ombudsman found that HAD had asked HKHS for more copies of the Form in a timely manner on 21 December, and yet HKHS did not supply additional copies to DOs until 27 December. That the Form ran out of stock at TWDO on 24 December and the complainant could not obtain a copy there was no fault of TWDO.

889. In this light, The Ombudsman considered the complaint against HAD unsubstantiated.

890. The Office of The Ombudsman noted that HKHS had decided on the quantity of the Form to be printed based on experience. Copies had been supplied to nearly 300 collection points (including TWDO) in the territory. As it was expected that public demand for the Form might exceed supply, HKHS formulated the "out-of-stock arrangement" and informed HAD of that arrangement at the end of November 2012. The Form had also been uploaded on the HKHS website for public use.

891. When notified by TWDO on 24 December that the Form was out of stock, HKHS immediately arranged additional printing. The additional copies were delivered to various DOs on 27 December. HKHS argued that the complainant could have tried another collection point nearby. Furthermore, there were still some days before the opening of application on 28 December. Even if the Form was out of stock temporarily, people wishing to make an application could obtain a copy in time by other means.

892. Understandably, HKHS had to decide on a certain quantity of the Form to be printed based on experience in order to avoid waste of resources. Nonetheless, HAD had, on the first day of distribution (i.e. 21 December) notified HKHS that public demand for the Form was overwhelming and asked for additional copies. Yet HKHS did not arrange additional printing immediately and refused to supply additional copies. It only decided to print more copies three days later. HKHS was slow in responding to the changing situation.

893. The application deadline was 18 January 2013, but the Form had already run out of stock at TWDO by 24 December 2012. HKHS argued that the complainant could have tried another collection point. However, there was no telling if any copy was available there. HKHS's "out-of-stock arrangement" had taken no account of the feelings of those who could not get a copy of the Form from designated collection points.

894. In the light of the above, The Ombudsman considered the complaint against HKHS substantiated and urged HKHS to learn from this experience and gauge closely public demand for its printed materials and to arrange additional printing in a timely manner. HKHS should also enhance its cooperation with those departments or organisations asked to distribute its materials to avoid similar incidents in the future.

Administration's response

895. HKHS accepted the recommendation and will increase the quantity of relevant printed materials at the collection points near the site of the housing project next time when its subsidised housing flats are put on sale in a similar manner. Additional printing will also be arranged in a timely manner as and when necessary.

Home Affairs Department, Food and Environmental Hygiene Department and Lands Department

Case No. 2013/1504A, B&C – Failing to resolve the problem of illegal parking of bicycles

Background

896. On 29 April 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Home Affairs Department (HAD) and Food and Environmental Hygiene Department (FEHD). The Office of The Ombudsman subsequently found that the Lands Department (LandsD) was also involved in the case. The complainant agreed that the Office of The Ombudsman should regard LandsD as the subject of complaint as well.

897. According to the complainant, there were many bicycles illegally parked at the exits of an MTR Station, posing danger to pedestrians (the problem of illegal parking of bicycles). The complainant alleged that the departments concerned failed to take effective measures to resolve the problem of illegal parking of bicycles, and as a result the problem persisted for many years.

The Ombudsman's observations

898. According to the investigation of the Office of The Ombudsman and the explanations of three departments concerned, the three departments had duly performed their respective functions and conducted a number of joint clearance operations against the problem of illegal parking of bicycles. While the effectiveness of enforcement was less than satisfactory at the time, considering that there were legal issues pending clarification and the supply of legitimate parking facilities for bicycles was still in severe shortage, it was understandable that the problem of illegally parked bicycles could not be resolved completely at the time.

899. As such, The Ombudsman considered this complaint unsubstantiated.

900. That said, The Ombudsman urged that –

(a) LandsD should conclude the relevant legal study with the Department of Justice (DoJ) as soon as possible; and

(b) HAD should continue to actively explore with the Transport Department (TD) means to increase the provision of bicycle parking facilities in the district.

Administration's response

901. LandsD accepted The Ombudsman's recommendation. A working group with representatives from DoJ was set up to study ways to enhance the effectiveness of enforcement action against repeated unlawful occupation of Government land by movable objects. The study is still in progress.

902. HAD accepted The Ombudsman's recommendation. The concerned District Office (DO) has been taking a proactive approach in understanding residents' and District Councillors' concerns and suggestions in relation to the insufficient supply of bicycle facilities in the district. It has also been directing feasible proposals to relevant departments for follow-up actions in a timely manner. Upon receiving The Ombudsman's suggestion in September 2013, DO consulted TD regarding the additional provision of bicycle parking spaces within the district. At the time, TD advised that a total of about 430 bicycle parking spaces would be introduced in two areas in the district.

903. In addition, to better facilitate bicycle parking, TD has been proactive in developing double-deck bicycle parking spaces that were compatible with the road condition in Hong Kong. Starting from 30 October 2013, TD commenced a trial of these parking spaces near the exit of the MTR Station under concern. TD has since been providing seven upper-deck parking spaces alongside 15 lower-deck ones under the trial, thereby increasing the total number of bicycle parking spaces in the district.

904. HAD will continue its effort in closely liaising with TD and relevant departments, as well as exploring feasible proposals of additional provision of bicycle parking facilities.

Hospital Authority

Case No. 2013/0042 – Refusing to meet with the complainant to discuss her case

Background

905. The complainant was an employee of a hospital (the Hospital) and underwent a surgery in the Hospital and, suspected medical negligence during the clinical management process, lodged a complaint against the Hospital on 13 August 2012. Upon receipt of the Hospital's written reply on the investigation findings on 15 October, the complainant expressed her dissatisfaction to the Hospital in person, by phone and by mail on 18 and 19 October, 14 November, and 17 December. She also requested to meet in person or speak on phone with the Patient Relations Officer who handled the case (the case PRO) to discuss her queries and seek other information in respect of her case. However, her request was rejected.

906. The reason of the Hospital refusing the complainant's request was that the case had been investigated and a written reply was made in accordance with the established complaints handling system. Having no further comment or response to make, the Hospital suggested the complainant appealing to the Public Complaints Committee (PCC) if she was still dissatisfied with the Hospital's reply. Dissatisfied with the above handling, the complainant lodged a complaint to the Office of The Ombudsman against the Hospital Authority (HA).

The Ombudsman's observations

907. The Office of The Ombudsman considered that it was not unreasonable for the complainant, upon receipt of the Hospital's reply, to request direct communication with the case PRO for clarification of the reply. Although the written reply represented the Hospital's overall position and not the case PRO's personal opinion, the complainant's request to communicate by phone or in person with the case PRO, who should be most familiar with the case, was not inappropriate. If the Hospital could arrange her to meet with the case PRO direct (by phone or through pre-scheduled interview), it should be able to address her concerns in more details, or even take this as an opportunity to resolve

any misunderstanding to avoid the subsequent complaint. Should the Hospital decide not to accede to the request, sound justifications should be provided.

908. The Office of The Ombudsman noted that the Hospital had explained in its written reply that the case had been handled and the complaint had been replied, there was no further information to be provided by the Hospital and hence further interview or phone discussion was not necessary. However, HA, in response to the Office of The Ombudsman's subsequent inquiry, explained that the Hospital did not decline the complainant's request for an interview, but only considered it appropriate for the duty officer to meet with her upon reviewing the ground of her request. HA accepted that even if the Hospital's position on the case remained unchanged, listening to the complainant's concerns would enhance mutual understanding. The Office of The Ombudsman opined that if the Hospital, having reviewed the complainant's request, considered it appropriate for her to be interviewed by the duty officer, the Hospital should inform her of such a view and respond to her queries, rather than just reiterating the Hospital's stance as stated in the written reply, and suggesting her appealing to the PCC if dissatisfied.

909. The Office of The Ombudsman also considered that the Hospital's response had given the complainant and the Office of The Ombudsman an impression that the Hospital did not find it necessary to accede to complainant's request and further discuss the case with her by meeting in person or even speaking on phone. While the Hospital never provided the complainant any justification of refusal, such handling was undesirable. In the handling of previous cases against HA, the Office of The Ombudsman noted that the concerned hospital often interviewed the complainant after the issue of the written reply. The Ombudsman therefore considered that handling the complainant's request for an interview in the present way was not HA's established policy. In fact, there was no established policy in HA stipulating that hospitals would not further meet with the complainant to discuss the case after the issue of a written reply. In view of the above, The Ombudsman considered the complaint against HA substantiated.

910. The Ombudsman recommended HA to review whether there was a need to issue guidelines in handling requests from complainant for meeting in person or discussing on phone with his/her case officer; or to notify various hospital offices in writing the appropriate way in handling such requests.

Administration's response

911. HA accepted The Ombudsman's recommendation and has undertaken a review on the need to issue guidelines in handling requests from complainant for meeting in person or discussing on phone with his/her case officer. The result of the review was that HA would, upon receiving the above request, assign a duty PRO or staff to meet with the complainant. Further interview by the case PRO or concerned hospital staff would be arranged based on actual circumstance. HA's Complaint Management and Patients Engagement Committee discussed the relevant subject at its meeting in January 2014 and has disseminated to all hospital clusters the appropriate way in handling the above requests.

Hospital Authority

Case No. 2013/0778 – Mishandling the complainant's booking of antenatal check-up service

Background

912. The complainant, a permanent resident of Hong Kong, went to a public hospital (Hospital A) under the Hospital Authority (HA) to book her first appointment of antenatal check-up. Failing to provide her address proof on the spot, she proposed to submit the address proof by fax or post later that day but the staff of Hospital A refused her booking.

913. She found this unreasonable as she believed that the staff there were able to check her records in the computer system because she had received regular medical treatment in other public hospitals. She also alleged that HA had failed to publicise the requirement of address proof on its website.

The Ombudsman's observations

914. On the understanding that Hospital A had to limit its antenatal check-up services to residents within its cluster, the Office of The Ombudsman agreed that it was necessary to require an address proof from the patient. However, if Hospital A could ascertain that the patient was a permanent resident in Hong Kong eligible for obstetrics and gynaecology (O&G) services at public hospitals, the Office of The Ombudsman did not see why Hospital A must reject the booking simply because she could not provide an address proof on the spot. Even if it was later found that she should be attending another public hospital, Hospital A would at most be just taking up the first appointment and then refer her case to the right hospital.

915. Moreover, if HA allowed, though not encouraged, a patient to make a booking by fax or mail, then Hospital A should also allow her to submit address proof by fax or mail afterwards. When the complainant complained to the Patient Relations Office, the latter still advised her to make another trip to the hospital with her address proof or arrange a relative to help her make the booking. The Office of The Ombudsman considered it unreasonable for the hospital to turn away a pregnant patient,

who had already taken a day off from work to make her booking in person, just because of administrative hurdles relating to HA's requirement of address proof.

916. HA should consider allowing patients who have forgotten to bring along their address proof to submit it later by fax or mail or even during the first appointment, rather than leaving it to the discretion of senior staff of the O&G Department. Otherwise, it would create unnecessary pressure on the frontline staff.

917. During investigation, the Office of The Ombudsman perused the relevant pamphlet and other related information on HA's website on antenatal check-up. It was found that the pamphlet contained no information about the booking procedures. Moreover, different hospitals had different requirements of address proof in their booking procedures. As the general information on HA's website and the information on individual hospitals' websites could be different, it was difficult for the public to know precisely the booking procedures and documents required for a particular hospital. In the view of the Office of The Ombudsman, HA should seriously consider explaining clearly the booking procedures in the relevant pamphlet and standardising its requirement of address proof.

918. In view of the above, The Ombudsman considered the complaint substantiated and recommended that HA should –

(a) review hospitals' compliance with the current booking procedures for O&G service and consider allowing the expectant mothers to produce the address proof by fax or mail after the in-person booking is made or during the first appointment;

(b) improve the dissemination of information on its websites to ensure that the information about booking procedures for O&G service is easily accessible, accurate, clear and consistent; and

(c) consider standardising hospitals' requirement on address proof.

Administration's response

919. HA accepted The Ombudsman's recommendations and has taken the following actions –

Recommendation (a)

HA has reviewed public hospitals' compliance with the current booking procedure for O&G service. If address proof is not available at the time of booking, expectant mothers or their relatives may submit later the address proof in person or by fax before the first appointment.

Recommendations (b) and (c)

Public hospitals have standardised the address proof requirement and will accept address proof issued within the past six months for booking O&G service. Information on this requirement and the relevant booking procedures has been updated and publicised at HA's website to provide clear, accurate and consistent information. HA has also notified the Department of Health (DH) about the standardised antenatal booking procedures and has sought the latter's assistance to update information on DH's Family Health Service website.

Hospital Authority

Case No. 2013/1392 – Refusing to release an official guideline on the determination of case complexity and failing to answer the complainant's query

Background

920. The complainant lodged a complaint against the Hospital Authority (HA) for refusing to release an official guideline and failing to answer his query.

921. The complainant was advised that the doctors of the private clinic of Queen Mary Hospital (the Hospital) had the discretion to charge different levels of consultation fees according to the complexity of a case. The complainant was concerned that if the doctors at the same time would share part of the revenue of the clinic, there would be a conflict of interest unless there was a mechanism to avoid this. He was told by the Hospital that there was an official guideline on the determination of the complexity of a case in its private clinic (the Relevant Guideline) but the Hospital refused to provide it (allegation (a)). The complainant also enquired if doctors of the clinic share part of the clinic's revenue. However, the Hospital failed to give a definitive answer on this (allegation (b)).

The Ombudsman's observations

Allegation (a)

922. According to its own guideline on Code on Access to Information (the Code) implemented by HA, information held by HA should be made available unless there are reasons to withhold. Even if a request for information was not made explicitly under the Code, the Hospital should still follow the spirit of the Code to release the information unless there are valid reasons. It was noted that the Hospital did not give any valid reasons to justify its refusal to provide the Relevant Guideline to the complainant. Even if the Hospital's replies had largely expounded the most relevant part of the Relevant Guideline regarding the charging principles, given that the complainant had clearly and repeatedly requested a copy of the Relevant Guideline, the Office of

The Ombudsman could not see any valid reason for the Hospital to refuse the complainant's request. The Ombudsman therefore considered allegation (a) substantiated.

Allegation (b)

923. The Hospital had indicated in its reply to the complainant dated 11 January 2013 that the surplus charges did not go into the doctors' own pockets. When the complainant continued to ask whether the doctors would share part of the revenues received by the department concerned, the Hospital replied emphasising that the revenue generated from private patient service was under strict control and internal scrutiny. It was clear that the doctors concerned would not get any additional pay from the revenue generated by private consultations. However, since the income generated would be used for staff training and development of their respective departments, theoretically it was possible that the doctors might get some intangible or indirect benefits by classifying more cases as complex. The Ombudsman considered that HA should do everything possible to avoid the perception that individual doctors might be tempted to over classify. This could be done by a strict control and internal scrutiny system to ensure a proper use of the revenue generated from private consultations.

924. The Office of The Ombudsman noted that replies given by the Hospital to the complainant went in this direction but fell short of clearly pointing out how the internal control system could avoid potential conflict of interest. The Ombudsman considered allegation (b) partially substantiated.

925. With the above, The Ombudsman considered the complaint overall partially substantiated and recommended that HA should –

(a) release the Relevant Guideline to the complainant;

(b) enhance its staff's awareness of the application of the Code. In particular, it should remind its staff that they should adhere to the principles of the Code even when the request for information is not made explicitly under the Code, and reasons should be quoted in case of refusal; and

(c) provide training to staff on answering enquiries and complaints to ensure that key issues related in enquiries and complaints are properly addressed and avoid an impression of being evasive.

Administration's response

926. HA accepted recommendations of The Ombudsman and has taken the following actions –

(a) HA has issued the Relevant Guideline to the complainant;

(b) to strengthen the application of the Code and enhance the staff's awareness on the application of the Code, HA re-designated, in March 2014, 36 Access to Information Officers in hospitals and HA Head Office to handle issues related to application for access to information. HA also arranged with the Constitutional and Mainland Affairs Bureau to conduct, on 21 May 2014, a briefing on the Code on Access to Information for its staff; and

(c) with a view to enhancing the competency of its staff in preventing and managing complaints, HA Head Office will continue to organise regular complaint management training. The training includes seminars and workshops to facilitate the sharing of experience and methods among staff in handling complex complaints and enquiries.

Housing Department

Case No. 2012/4344 – Impropriety in handling the complainant's request, upon divorcing her husband, for splitting their application for public rental housing

Background

927. The complainant complained against the Housing Department (HD) for not handling properly her request for splitting an application already registered in Public Rental Housing (PRH) Waiting List.

928. In October 2008, the then husband of the complainant applied for PRH, together with the complainant and their son; the applicant was the then husband of the complainant.

929. The complainant subsequently filed for divorce. After obtaining a Decree Absolute, she went to HD in August 2011 to make a request personally for splitting the PRH application. She claimed that she had also completed and submitted a PRH Application Form with herself being the applicant there and then.

930. In January 2012, HD conducted separate interviews with the complainant and her ex-husband. During the interview with her ex-husband, he confirmed in writing that he had made false declaration in respect of his income. HD therefore decided to cancel his PRH application.

931. On 26 July, HD notified the complainant that her request for splitting the PRH application was rejected because her ex-husband's PRH application had been cancelled. As the complainant was dissatisfied, HD gave her a verbal reply on 24 August and a written reply on 29 October, explaining again that the original PRH application of her ex-husband was cancelled and could not be reinstated.

The Ombudsman's observations

932. As PRH are valuable resources to the community and should be used prudently, HD must carefully scrutinise applications, otherwise it will be unfair to other applicants on the Waiting List. The complainant's

ex-husband had made false declaration and HD was obliged to cancel his PRH application. Since the application had been cancelled, HD could not reinstate it notwithstanding the complainant's request for splitting application.

933. However, the problem was that HD failed to inform the complainant timely about the cancellation of the original application, thus causing her delay in submitting a new application. HD admitted that there was delay in handling the case, and had therefore exercised discretion of granting six months' credit of waiting time and also apologised to the complainant. The case was settled after all.

934. In view of above, The Ombudsman considered this complaint partially substantiated.

935. The Ombudsman welcomed the following improvement measures taken at HD's initiative and urged HD to review the implementation of these measures from time to time, to ensure that expected results could be achieved –

(a) The computer system of HD was upgraded at the end of 2011 to generate monthly reports on outstanding requests for changes of the application information for staff at the managerial grade to conduct regular review so as to step up monitoring of the progress of these cases;

(b) additional staff were provided in 2012/13 to handle new applications so that flexible deployment of staff can be arranged to cope with any sudden upsurge in workload; and

(c) internal guidelines were issued to remind the staff to conclude false declaration cases as soon as possible; as for cases that warrant cancellation of applications, written notifications should be given to applicants as soon as possible without the need of obtaining the decisions of the Prosecutions Section.

Administration's response

936. HD accepted the recommendation and has taken the following measures –

(a) Staff at the managerial grade regularly review the computer-generated monthly reports on outstanding requests for changes of the application information and closely monitor the progress of these cases;

(b) additional staff have been provided since 2012/13 to handle applications so that flexible deployment of staff can be arranged to cope with any sudden upsurge in the workload; and

(c) internal guidelines have been issued to remind the staff to conclude the false declaration cases as soon as possible and, for cases that warrant cancellation of applications, to give written notifications to applicants as soon as possible without the need of obtaining the decisions of the Prosecutions Section.

Housing Department

Case No. 2013/1118 – Improper handling of a complaint about banner erection in a public housing estate

Case No. 2013/1578 – Deviation from the current policy on banner erection in a public housing estate

Background

937. The complainant complained about the Housing Department (HD) for –

(a) procrastinating and not handling seriously his complaint against an "illegal" banner erection in a street opposite to a public rental housing (PRH) estate; and

(b) not following the Department's established policy in the sense that while "District Council (DC) Members in the PRH estate who are from other constituencies" was not within the second priority category for banner erection, this item was allowed when handling the banner erection matters of the concerned PRH estate.

The Ombudsman's observations

938. An Estate Management Advisory Committee (EMAC), chaired by the estate's Housing Manager of HD or the estate's Property Service Manager, is comprised of the Chairman or an elected representative from each Mutual Aid Committee (MAC) in the estate, the Chairman or an elected representative from the commercial tenants' association in the estate, the elected DC Member(s) whose constituency covers the estate and the appointed DC Member from the local Area Committee. EMACs provide a platform for PRH tenants to participate extensively in and offer their views on estate management, thereby strengthening the communication between tenants and HD in this respect and cultivating a partnership between the two for the creation of a better estate environment. As such, conclusions drawn from EMACs' discussion should have reflected tenants' views. There is nothing wrong for HD to accept the views, but as the management authority, it has the

responsibility to make a judgment about EMACs' opinions. HD should have justification, which should be made known to the public, for accepting the opinions or not.

939. In this case HD had repeatedly told the complainant that the new display spot in question was provided out of respect for the EMAC's decision, but it had failed to elaborate why it accepted the EMAC's opinions. In this connection, it was understandable for the complainant to accuse HD of putting EMAC's opinions above its own consideration. In fact, according to HD's Estate Management Division Instruction (EMDI), while the EMAC concerned should be consulted if the number of display spots had to be increased, all eligible applicants for banner erection should be notified at the same time. In other words, all eligible applicants enjoyed equal opportunities to apply for the display of banners at new display spots. The new display spot in question, however, was allocated to DC Member A without going through an open application process. Although HD claimed that it had to respect and accept the EMAC's opinions, its staff members had the responsibility to clarify the departmental instructions with EMAC and to explain why HD did not launch an open application process for the new display spot. It was regrettable that HD had failed to do so.

940. Moreover, as HD had clearly told the complainant that the banner in question was only allowed to be displayed until 31 March 2013, it should handle the case in a timely manner. Nevertheless, the Administration Unit had put the case on hold due to the facts that HD Headquarters had not yet clarified the definition of second priority category and the ballot scheduled for 22 March 2013 was cancelled. As a result, the complainant was increasingly dissatisfied with the continuous display of DC Member A's banner in dispute. The Office of The Ombudsman considered that staff members of HD's Administration Unit had indeed failed to promptly address the issues brought about by the banner in question. Nor had they actively reflected to HD Headquarters the urgency to clarify the policy guidelines and urged it to deal with the case speedily. Moreover, the staff members had not considered removing the banner in question for the time being so as to set the record straight. It was not unreasonable for the complainant to accuse HD of its delay in handling his case seriously.

941. In view of the above, The Ombudsman considered allegation (a) substantiated.

942. In its email of 12 April 2013, HD Headquarters clarified to the internal staff members concerned the definition of second priority category under the rules on the application for banner erection. The clarification was relayed to the complainant by the staff members of the Administration Unit on 26 April 2013. Unfortunately, HD took no corresponding actions concurrently. Apart from the staff members concerned of HD, the public (including the complainant and eligible applicants for banner erection) could hardly know about the revised rules on the application for banner erection. As the departmental website had not been updated when the complainant lodged a complaint with the Office of The Ombudsman again on 8 May 2013, the complainant did not believe what HD's staff members said. Although what the staff members said was true, HD had failed to promulgate the revised rules to the affected public at the same time, which gave rise to this complaint. Indeed, there was room for improvement on HD's administrative efficiency.

943. In view of the above, The Ombudsman considered allegation (b) partially substantiated.

944. A ballot was held by HD on 22 March 2013 to determine the allocation of the ten display spots at the PRH estate in question with effect from 1 April 2013. To ensure fairness, it was proper to arrange for the applicants to be present and participate in the ballot in person while it was reasonable for HD to ask the attendees to produce the authorisation from the applicants concerned before the ballot took place. The fact that the ballot was not held that day as scheduled was because of the early departure of the complainant rather than the authorisation letters. The Office of The Ombudsman, however, noticed that HD did not have a clear approach in the ballot arrangements as there was no directive on how to handle the early departure of applicants who participated in the ballot. The staff members simply cancelled the ballot that day after considering the views of other applicants, and made no arrangement for another ballot for the allocation of display spots with effect from 1 April 2013. It was not until 3 May 2013 that a ballot was arranged for the allocation of display spots with effect from 1 June 2013. The problem of allocating the display spots for the period between 1 April and 31 May 2013 was thus left unresolved, which was undesirable.

945. The Office of The Ombudsman opined that although the ballot arrangement was not directly relevant to the two complaints made by the complainant, there were deficiencies in HD's approach which required improvement.

946. The Ombudsman made the following recommendations to HD to improve its service –

(a) To strengthen the training for its staff members to ensure that they are familiar with the rules set out in departmental guidelines and to enhance their ability and sensitivity in handling different opinions of EMACs;

(b) to review its internal workflow to ensure that in disseminating information on any measure to the public, all the dissemination channels should be updated at the same time; and remind its front-line staff members to take actions within the time frame that they had pledged as far as practicable and to give the parties concerned a timely explanation should they failed to do so to seek the latter's understanding; and

(c) to consider drawing up clear guidelines on the allocation of display spots by ballot for the compliance of its front-line staff members.

Administration's response

947. HD accepted all recommendations made by The Ombudsman and has taken the following actions –

(a) On strengthening the training for its staff members to ensure that they are familiar with departmental guidelines and to enhance their ability and sensitivity in handling different opinions of EMACs, and on reminding its front-line staff members to take actions within the time frame that they have pledged as far as practicable, and to give the parties concerned a timely explanation should they fail to do so as to seek the latter's understanding. HD arranged a practical workshop on estate management practice on 25 July 2014 for sharing the experience in handling this case; and

(b)&(c) besides, HD has conducted an internal review to ensure that when disseminating information on any measure to the public, all dissemination channels will be updated simultaneously. Moreover, guidelines on the allocation of display spots by ballot have been drawn up at the end of August 2014.

Housing Department

Case No. 2013/3822 – Unreasonably refusing to re-schedule an eligibility vetting interview with the complainant in respect of his application for public rental housing and thereby turning down his application

Background

948. On 24 September 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Housing Department (HD). According to the complainant, he applied to HD for public rental housing (PRH) in February 2012. Since his application had reached the investigation stage, HD asked him to attend an interview scheduled for 2 April 2013. At that time, the complainant was working in Canada and he had already bought a ticket to return to Hong Kong on 7 September that year, so he sent a letter to HD on 27 March and 24 May respectively to request for postponing the interview to a date after 7 September.

949. On 29 July 2013, HD replied the complainant that the interview would be postponed to 12 August. Should the complainant fail to attend the interview, HD would assume that he was no longer interested in applying for PRH. HD would therefore take appropriate actions, including cancelling his application.

950. As the complainant could not return to Hong Kong by the end of August, he sent HD a letter on 7 August again to request for rescheduling the interview to a date after 7 September. HD, however, turned down his request and subsequently cancelled his PRH application.

951. The complainant alleged that HD failed to handle his case flexibly on account of his situation.

The Ombudsman's observations

952. The Office of The Ombudsman opined that it was not inappropriate for HD to cancel the complainant's application based on the available objective information, and according to established eligibility criteria and procedures. The Ombudsman, therefore, considered the allegation against HD unsubstantiated.

953. Nevertheless, HD's explanations showed that one of the main reasons for cancelling the complainant's application was his failure to comply with the rule that "the applicant and all family members must be residing in Hong Kong". However, in its reply to the complainant dated 23 August 2013, HD did not fully explain the reasons for refusing his application. Although the complainant had explained to HD repeatedly the reason for his failure to attend the scheduled interview, HD simply notified the complainant that his application for PRH was cancelled because he "failed to attend the scheduled interview". The way that HD notified the complainant of its decision to cancel his application had inevitably made him feel that HD was inconsiderate.

954. Moreover, the Office of The Ombudsman noted that HD had cancelled the complainant's PRH application on 13 August, but one day before notifying him of the review result, i.e. 22 August, HD informed him that it could not approve his request for postponing the interview again. This indicated that there was confusion in the timing of releasing information by HD and it would easily cause misunderstanding.

955. In view of above, The Ombudsman considered that the allegation against HD substantiated other than alleged.

956. The Ombudsman recommended that in the future, when HD cancels any PRH application, a clear explanation should be given to the applicant in a timely manner.

Administration's response

957. HD accepted the recommendation. To enable PRH applicants to fully understand the reasons for cancelling their applications, HD has reminded its staff concerned to, when handling cancellation cases in the future –

(a) clearly explain to applicants the reasons of the relevant decisions and to notify the applicant of the vetting result only after the completion of the "quality assurance" review of each case; and

(b) list out all the reasons for cancelling a PRH application in the notification letter.

Lands Department

Case No. 2013/0745(I) – (1) Refusing to disclose the current rental amount of the short-term tenancy for a piece of Government land to the complainant, who intended to bid for renting the Government land in an upcoming open invitation for tenders; and (2) Continuously renewing the short-term tenancy for the Government land with the same tenant in the past years, thus obstructing open competition

Background

958. On 5 March 2013, the complainant lodged a complaint with the Office of The Ombudsman against a District Lands Office (DLO) of the Lands Department (LandsD).

959. The complainant's allegations against DLO are as follows –

(a) The complainant intended to bid for the tenancy of a piece of Government land (Site A) and asked DLO to disclose, before the tender closing date, the rental then paid by the tenant at that time for his reference in submitting a tender. But his request was turned down by DLO on the grounds that the tenant did not give consent to the disclosure. The complainant alleged that the decision of DLO was contrary to the Code on Access to Information (the Code); and

(b) DLO had repeatedly renewed the tenancy of Site A with the tenant in the past for more than ten years without putting it up for open tender, which was contrary to the principle of fair competition.

The Ombudsman's observations

Allegation (a)

960. The Office of The Ombudsman noted that LandsD had prudently sought legal advice that the rental of the tenancy of Site A, being information held by LandsD for the tenant, amounted to "third party information" under the Code. Furthermore, it had not been a practice of

LandsD to disclose such rental information of similar short term tenancies (STTs). The tenant of Site A therefore had a legitimate expectation that LandsD would not disclose the rental of the site.

961. Given that the tenant of Site A had refused to give consent to disclose the rental of the tenancy, any disclosure of such information against the will of the tenant must be justified by an overriding public interest. Regardless of whether the rental in question undoubtedly amounts to information held by the Government for a third party referred to in the Code, it was definitely information related to a third party (the tenant) who had never explicitly or implicitly indicated that DLO might disclose such information. As no overriding public interest was involved, LandsD's decision of not disclosing the rental to the complainant was justified.

962. Given the above analysis, The Ombudsman considered allegation (a) unsubstantiated.

963. That said, Government land is public resource. The income from the rental of Government land is, like land sale proceeds, a matter which the public has the right to know. Such information may serve as a reference for prospective tenderers and allow public oversight of the rentals to ensure that they are set at a reasonable level, thus preventing underhand dealings between tenants and LandsD's staff. LandsD has agreed to review the STTs by incorporating a clause in the tenancy agreement to the effect that any adjusted rentals might be disclosed. With the inclusion of such clause, a tenant, in signing the tenancy agreement, should have known and consented to the disclosure of rentals of subsequent renewals. In that case, such information may be made public without contravening the Code or triggering any dispute.

Allegation (b)

964. DLO sought an assessment of Site A's projected usage from the Civil Engineering and Development Department (CEDD) approximately every three years between 2003 and 2012 and it was told every time that the site would be developed within three years. Hence the tenancy was renewed quarterly and the rental adjusted to the market value every three years without putting up Site A for tender.

965. The commencement of the development plan for Site A had repeatedly been postponed for a total of ten years from November 2006 to mid-2016, which was actually beyond DLO's control and expectation. Nevertheless, if DLO had inquired CEDD about the latest position of the commencement of the development plan without waiting for about three years every time, then a three-year gap might be available in an earlier time and Site A could be put up for tender sooner. In that case, more income would have been generated from awarding the tender to the highest bidder and the public could have been able to bid for the tenancy of Government land in a level playing field.

966. Given the above analysis, The Ombudsman considered allegation (b) partially substantiated.

967. Overall speaking, The Ombudsman considered this complaint partially substantiated and urged LandsD to –

(a) make the disclosure of STT renewal rentals a normal procedure for public information and monitoring; and

(b) work with CEDD to explore ways to improve the notification mechanism on development plans for Government land so as to have early knowledge of the latest position of when a plan would commence and decide whether the site should be let by tender.

Administration's response

968. LandsD accepted the recommendations of The Ombudsman, and has made implemented the following measures –

(a) LandsD has incorporated a clause in the new tenancy agreement allowing the Government to disclose the renewal rental without the need to seek the tenant's consent. In addition, the existing tenants, when issued with a notice of revised rental for tenancy renewal, will be required to agree to the disclosure by the Government of the renewal rental without seeking their consent. When receiving an enquiry on the renewed rental, LandsD will handle it in accordance with the Code; and

(b) LandsD has issued revised guidelines specifying that when arranging re-tender of a site, the concerned DLO should seek confirmation from the works department that they do not object

to the proposed tenancy term regarding the re-tender. If the works department raise objection against the proposed tenancy term, the existing STT will be renewed with the existing tenant. In general, LandsD will grant STTs for an initial fixed term, thereafter renewable at regular intervals, usually for a shorter duration, whereby either party could terminate the tenancy upon its expiry. The concerned DLO will also consult the works department every year so as to decide whether the concerned site should be re-tendered.

Lands Department

Case No. 2013/1342(I) – Refusing to provide documentary proof that the complainant and his family members were registered occupants of a squatter hut

Background

969. The complainant alleged that someone had taken possession of the squatter hut which used to be the residence of his family (the Hut). In March 2013, he wrote to the Squatter Control Office (SCO) of Lands Department (LandsD) to request documents that could prove that they were the registered inhabitants of the Hut. However, SCO refused his request. He therefore lodged a complaint with the Office of The Ombudsman.

The Ombudsman's observations

970. The Code on Access to Information (the Code) and its Guidelines stipulate that all requests for information, whether made with specific reference to the Code or not, should be handled in accordance with the provisions of the Code. The Guidelines also recommend that, if possible, a copy of the original record containing the requested information should be provided. The Government department concerned should by no means withhold information on account of the purpose of the request.

971. In the investigation of the Office of The Ombudsman, it was found that although in the complainant's letter of March 2013 to SCO, the complainant had gone into some details to explain why he wanted the information, what he requested was clear and specific, i.e. SCO's records about him and his family members as registered inhabitants of the Hut. He had not asked SCO to confirm their right to occupy the Hut or the land concerned.

972. It was true that the requested records cannot prove the complainant's right of occupancy of the Hut. However, under the Code, it was not necessary or appropriate for SCO to consider the purpose of his request at all. It was therefore improper of SCO to reject his request on the grounds that such information would not serve his purpose.

973. In the view of the Office of The Ombudsman, SCO should have simply confirmed to the complainant that his name was on the list of registered inhabitants of the Hut, with a rider that such information cannot prove his right to occupy the land. Unfortunately, it was not until the complainant made a further request under the Code towards the end of May that SCO confirmed that his name was on the list. That was indeed an undue delay.

974. Moreover, SCO cited third party information as its reason for refusing to release to the complainant the full list. While that was a legitimate reason under the Code, the so-called "third parties" in this case were none other than the complainant's own family members. SCO could have advised the complainant to obtain consent from his family members or submit a joint request with them for the list. That would not only relieve SCO's concern about disclosing third party information, but also be in line with the approach recommended by the Guidelines of the Code, i.e. to provide the requestor with a copy of the original record containing the requested information.

975. In the light of the above, The Ombudsman considered the complaint substantiated.

976. The Ombudsman recommended that LandsD provide the complainant with a copy of the full list of registered inhabitants of the Hut, if the complainant managed to obtain his family members' consent to the disclosure of the information.

Administration's response

977. LandsD accepted the recommendation. To enable staff to have a better understanding of the contents of the Code, LandsD has organised talks on the Code and invited relevant staff of LandsD and staff from the Office of the Privacy Commissioner for Personal Data as speakers. During the talks, apart from explaining the Code, speakers also quoted cases for discussion by the participants so as to enhance their understanding of the Code and its application with a view to deepening their awareness of compliance with the Code and protection of personal data.

978. LandsD has asked all district SCOs to ensure that all frontline staff have full understanding of the contents and principles of the Code, in particular the application of the Code in handling applications for access to squatter survey records and squatter occupancy survey records.

979. LandsD has also written to the complainant to explain its earlier decision of not disclosing the information of the third party (i.e. his family members in the occupancy survey record) in accordance with the provisions of the Code and suggested that he ask his family members to join him as co-applicants or to seek their consent in applying for a copy of the record.

Lands Department

Case No. 2013/3301(I) – Failing to provide precise, consistent and complete information on the relevant requirement for the complainant to prove his intention to return to and reside in Hong Kong in respect of his Small House application

Background

980. On 26 August 2013, the complainant complained to the Office of The Ombudsman against the District Lands Office (DLO) of Lands Department (LandsD).

981. Allegedly, in processing a Small House (SH) application of the complainant, DLO had repeatedly requested him to provide documentary evidence to prove his intention to return to and reside in Hong Kong. He tried time and again to ascertain from DLO the kind of documents required and the duration of his stay in Hong Kong necessary to substantiate his intention to reside here (residency requirement), but to no avail. When he asked the LandsD for the same information under the Code on Access to Information (the Code), he was given some examples of documentary support and was told that there was no specific residency requirement.

982. DLO declined to further process the complainant's application because his documentary evidence was insufficient and he had not stayed long enough in Hong Kong.

983. The complainant was dissatisfied that DLO had provided him with incomplete/confusing information about the SH policy and stalled his SH application without specifying what kinds of documents were necessary to prove his intention to return to and reside in Hong Kong.

The Ombudsman's observations

Documentary Proof for Intention to Return to and Reside in Hong Kong

984. On the issue of one's plan or intention to return to reside in Hong Kong, the practical situation may vary from person to person. The

Office of The Ombudsman considered it impracticable for DLO to specify what documents the complainant should submit to prove such intention. The general examples given to the complainant by the LandsD (e.g. a local business registration certificate) were helpful references. After all, the onus was on SH applicants to convince LandsD by providing relevant supporting documents.

985. That said, the Office of The Ombudsman noted that less than two months after DLO invited the complainant to provide documents to prove his intention to return to reside in Hong Kong, he turned sixty. In other words, he might be exempt from having to produce the said documents to prove such intention. LandsD, however, kept him in the dark about such exemption on the presumption that he would not be able to meet all the five exemption conditions. Such lack of transparency on the part of LandsD had deprived him of the opportunity to attempt such means to strengthen his case.

Information on SH Policy

986. The Office of The Ombudsman noted that since 22 June 2012, the complainant had turned to repeatedly ask DLO to explain the residency requirement. It was not until 29 November that LandsD gave him the answer, which suggested that there was not a prescribed duration of time for an overseas applicant to stay in Hong Kong in order to satisfy DLO as regards his intention to continue to reside in Hong Kong.

987. However, in the course of inquiry by the Office of The Ombudsman, LandsD replied to the complainant on 18 November 2013, suggesting that there was indeed a prescribed percentage of time (50%) for residency, for an overseas applicant to observe, even though DLO retained full discretion in considering whether an application should be approved.

988. The foregoing showed that DLO's response to the complainant's repeated enquiries, one of which was specifically made under the Code, about the residency requirement was imprecise, inconsistent and incomplete, if not wrong. The Office of The Ombudsman considered DLO to have failed to properly provide the complainant with the relevant information for SH applications upon request, which went against the requirement of the Code.

989. Based on the above analysis, The Ombudsman found the complaint against LandsD partially substantiated.

990. The Ombudsman urged LandsD to take reference from this case and remind staff to provide complete, precise and consistent information to the public.

Administration's response

991. LandsD accepted the recommendation and has taken the following actions –

(a) LandsD has issued a memo to remind all New Territories DLOs to provide complete, precise and consistent information to SH applicants when handling their SH applications or requests for information, in particular, the details of the conditions for exempting aged overseas applicants from the requirement to provide documentary evidence of residency in Hong Kong; and

(b) LandsD is reviewing the relevant guidelines which set out the criteria for applications for SH grants on Government land from villagers living overseas and will make appropriate amendments in due course.

Lands Department, Buildings Department and Planning Department

Case No. 2012/4105A (Lands Department) – Failing to take further enforcement action against an unauthorised structure that was in breach of the land lease

Case No. 2012/4105B (Buildings Department) – Delay in taking further enforcement action against an unauthorised structure after issuing a demolition order

Case No. 2012/4105C (Planning Department) –(1) Failing to take control action against an illegal development on private land; and (2) failing to inform the Town Planning Board of the illegalities of the development before the Board processed a planning approval application in respect of the development

Background

992. On 5 October 2012, the complainant lodged a complaint with the Office of The Ombudsman against the Lands Department (LandsD), Building Department (BD) and Planning Department (PD). According to the complainant, he was one of the stakeholders of a Tso Tong lot (the subject lot). Someone (the subject persons) carried out unauthorised building works (the subject UBW) on the subject lot without the consent of the stakeholders involved. But the relevant government departments failed to take proper enforcement actions.

993. The allegations against the government departments concerned can be summarised as follows –

(a) Between February and April 2011, the relevant District Lands Office (DLO) of LandsD confirmed that the subject UBW on the subject lot was in breach with provisions in the land grant, and registered with the Land Registry a warning letter sent to the subject persons (i.e. imposing an encumbrance). However, no further regulatory action was taken by DLO against the subject UBW;

(b) BD confirmed in early 2011 that the subject UBW contravened the Buildings Ordinance and belonged to the category of UBW that required priority enforcement action. Removal order was served on 19 March 2011, requiring the subject persons to remove the subject UBW within 30 days. However, the subject UBW still existed due to delay in BD's enforcement action;

(c) PD conducted a site inspection in March 2011 and suspected that the development on the subject lot illegal. PD undertook to continue monitoring the situation but there had been no appropriate regulatory actions taken thereafter; and

(d) PD did not properly inform the Town Planning Board (TPB) of the irregularities of the subject UBW or the objection of the complainant and other stakeholders, hence leading to TPB's approval to the subject persons for making the subject lot for temporary commercial and office use; illegal development was thereby legalised.

The Ombudsman's observations

Allegation (a)

994. The Office of The Ombudsman was of the view that DLO had fulfilled its duty in taking enforcement actions against irregularities on the subject lot in accordance with provisions of the land grant.

995. After imposing the encumbrance, it was pursuant to the decision of the Lands Affair (Lease Enforcement and Land Control) Review Committee that DLO did not take any further action on the subject case for the time being. The Office of The Ombudsman found DLO's practice of handling cases with encumbrance in batches not ideal but understandable given the department's constraint of resources. On the other hand, DLO was following the established procedures in handling the owner's application for legalising the subject UBW.

996. In view of above, The Ombudsman considered the allegation against LandsD unsubstantiated.

Allegation (b)

997. At the early stage of the case, BD needed to wait for the results of application for "Certificate of Exemption" and also the voluntary removal of the subject UBW by the tenant of the subject lot. Such doing was understandable.

998. However, BD only followed up on the case again two months after the expiry of the extended deadline of the removal order. Furthermore, it was not until four months after BD made its initial enquiry with LandsD regarding the "Certificate of Exemption", but to no avail, did BD make another enquiry with LandsD. While BD had to handle a substantial number of cases, considering the subject UBW belonged to the category of UBW that required priority enforcement action, BD should have followed up the subject case more actively when no reply was available from LandsD on their earlier enquiry. After all, making another enquiry to LandsD would not take up too much time of BD staff or affect BD's work progress on other cases.

999. Thereafter, in order to confirm whether a retrospective "Certificate of Exemption" would be granted by LandsD following the grant of the planning permission for the subject lot by TPB, BD made another enquiry to LandsD. This was a prudent approach.

1000. Based on the above analysis, The Ombudsman considered that the complaint against BD partially substantiated and urged BD to learn from this case and closely monitor the progress of cases in future after issuance of removal orders, so as to avoid delays in enforcement action against UBWs.

Allegations (c) and (d)

1001. Since the use of the subject structure above the subject lot was unclear during its construction, it was difficult for PD to ascertain whether it complied with the land use stated on the Outline Zoning Plan (OZP). The Office of The Ombudsman found it reasonable that PD referred the case to DLO and BD to consider whether enforcement actions needed to be taken from the perspectives of land grant provisions and whether the subject structure was UBW. After confirming that the subject structure was in breach with OZP, PD issued an enforcement notice in accordance with procedures and took concrete enforcement actions. As TPB received a planning application thereafter and the application was approved, the enforcement notice needed to be

withdrawn, it was therefore reasonable that PD did not take any further enforcement action.

1002. PD duly reflected in its submission to TPB all relevant information, including the fact that the subject structure on the subject lot was in breach with land grant provisions, the Buildings Ordinance and land use, as well as the objection filed by the complainant and others. In view of the above, The Ombudsman considered the allegations against PD unsubstantiated.

Administration's response

1003. BD did not accept the recommendation. Following up the removal order two months after the expiry of its extended deadline was in accordance with BD's priority and the time taken was not unreasonable. BD only made another enquiry to LandsD about four months later for the result of the application for "Certificate of Exemption" because no such information was received from LandsD. BD should not be blamed for such delay. During that period, the subject persons requested BD to suspend its enforcement action as they had submitted an application to PD for a planning permission in support of their application to LandsD for a 'Short Term Waiver' (STW). Under such circumstances, BD needed to wait for the respective decisions of TPB and LandsD on the planning application and STW application, prior to instigating any prosecution. BD enforced the removal order again after obtaining confirmation from LandsD that "Certificate of Exemption" would not be issued. Notwithstanding the Office of The Ombudsman's view that the subject structure was under the category of priority enforcement action hence it should be followed up more actively, all cases requiring issuance of removal orders indeed belong to priority enforcement action category, they would still have to be handled in sequence. As such, BD had already followed up the case actively. Given the constraint of resources, BD considered that the complaint should not be partially substantiated on the basis that it should be "followed up more actively ".

1004. BD has informed the Office of The Ombudsman of its alternative solution.

Lands Department, Food and Environmental Hygiene Department and Home Affairs Department

Case No. 2013/0879A (Lands Department) – Failing to properly follow up and shirking responsibility in respect of illegal parking and rental of bicycles on a piece of Government land

Case No. 2013/0879B&C (Food and Environmental Hygiene Department & Home Affairs Department) – Failing to properly follow up and shirking responsibility in respect of illegal parking and renting of bicycles at a certain place

Background

1005. On 15 March 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Home Affairs Department (HAD), Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

1006. According to the complainant, since early 2013, there were bicycles illegally parked at an open space (Location A) of a village in the New Territories, occupying Government land, and someone was engaged in bicycle renting activities there. The complainant therefore complained to HAD, FEHD and LandsD.

1007. LandsD indicated to the complainant that since the bicycle renting activities under complaint did not involve illegal erection of structures on Government land and the regulation of hawkers' activities did not fall under its purview, LandsD could not offer assistance. FEHD replied that enforcement action could not be taken as a hawker licence was not required for running a bicycle renting business. Nevertheless, FEHD had referred the matter about illegal parking of bicycles to HAD, requesting it to arrange for a joint clearance operation. HAD informed the complainant that it would mount joint operations with relevant departments to remove the illegally parked bicycles and that the problem of bicycle renting activities had been referred to FEHD and LandsD for follow-up.

1008. The complainant alleged HAD, FEHD and LandsD of failing to properly address the issues of illegal parking and renting of bicycles, shirking responsibilities and condoning the irregularities, thus causing

obstruction and inconvenience to nearby residents.

The Ombudsman's observations

HAD

1009. The relevant District Office (DO) of HAD had followed up on this case in line with its purview, and performed the role of coordination and liaison by facilitating relevant departments to conduct a number of joint operations. There was no evidence showing that DO had shirked its responsibilities or condoned the irregularities.

1010. Hence, The Ombudsman considered the allegation against HAD unsubstantiated.

FEHD

1011. FEHD had indeed followed up on the illegal parking of bicycles at Location A in accordance with the established procedures within its own jurisdiction. It also took appropriate actions, including conducting a number of inspections and taking part in joint operations to remove the illegally parked bicycles. There was no evidence indicating that FEHD had shirked its responsibility or condoned the irregularities.

1012. Moreover, FEHD explained it could not institute prosecutions against the person(s) who engaged in the bicycle renting business because renting of bicycles was not covered in the interpretation of "hawker" in the legislation. The Ombudsman accepted in principle the explanation given by FEHD.

1013. In view of the analysis above, The Ombudsman considered the allegation against FEHD unsubstantiated.

1014. That said, the Office of The Ombudsman noticed that there were increasing commercial activities of various kinds (including promotional activities, trading of commodities, and the bicycle renting activities as in this case) being conducted in public places in Hong Kong. In some districts, such activities were even more vibrant than the traditional on-street hawking activities. The Office of The Ombudsman considered that the impacts on the public brought about by those commercial activities and the traditional on-street hawking activities were more or less the same, both likely causing obstruction to scavenging operations

and passageways and affecting environmental hygiene. Since FEHD agreed that it had law enforcement responsibilities for these problems and based on this reason, consideration should be given to including on-street commercial activities, such as renting of bicycles, in the scope of activities regulated by FEHD.

1015. In fact, the interpretation of "hawker" in the current legislation is too narrow and cannot keep abreast of the updated development. For instance, the legislation covers "selling of any goods or merchandise", but not activities concerning renting of goods. The Ombudsman considered it necessary for the Government to review the relevant legislation, including the extension of the scope of on-street commercial activities to be regulated so as to fit the latest situations.

LandsD

1016. In respect of illegal parking of bicycles, the relevant District Lands Office (DLO) of LandsD indeed took part in the joint operations to clear illegally parked bicycles according to the established procedures. Pursuant to section 6(1) of the Land (Miscellaneous Provisions) Ordinance (the Ordinance) that land control action was taken by DLO during the joint operations. Therefore, it was doubtful for DLO to claim that tackling illegal parking of bicycles was not under its purview. It was even unreasonable for DLO to claim that the issue of bicycle renting on Government land was not within its purview.

1017. The area underneath the nearby footbridge of Location A (Location B) was a piece of Government land. FEHD and DO inspected Location A on a number of occasions, during which bicycle renting activities and publicity banners were spotted. It was an indisputable fact that the said Government land was continuously occupied for bicycle renting business. The Office of The Ombudsman was of the view that, LandsD and its DLO, being responsible for managing Government land, could not shirk their responsibility of taking action against such unlawful occupation of Government land. Even though difficulties were encountered in enforcing section 6(1) of the Ordinance, it did not mean that the issues could be set aside. LandsD or DLO had to monitor the situation closely and take enforcement action under section 6(1) of the Ordinance more often to deter the persons involved as far as possible. The fact was that bicycle renting activities at Location B has waned after the enforcement action. If LandsD considered the provision inadequate to tackle this kind of situation, it should consider introducing legislative amendments or seeking a better measure.

1018. Based on the above analysis, The Ombudsman considered the allegation against LandsD partially substantiated.

1019. In conclusion, The Ombudsman considered this complaint partially substantiated and urged –

(a) FEHD to review the relevant legislation in order to enable it to take effective enforcement actions against various on-street commercial activities which affect environmental hygiene; and

(b) LandsD to step up inspection and enforcement action against unlawful occupation of Government land at Location A concerned.

Administration's response

1020. FEHD did not accept The Ombudsman's recommendation. The core function of FEHD was to maintain environmental hygiene. Its priority was accorded to problems involving obstruction to scavenging operations, unauthorised extension of business areas by food premises and illegal hawking. Renting of bicycles was not covered in the interpretation of "hawker" in the legislation. If the interpretation on "hawker" was extended and broadened loosely to cover other on-street commercial activities not involving the selling of goods, the definition of "hawker" might become too wide and unclear and it would be difficult to enforce the law effectively. As there was other existing legislation dealing with the problems affecting environmental hygiene, FEHD found no justification for including on-street commercial activities not involving the selling of goods into the definition of "hawker". Hence, FEHD had no intention for the time being to revise the legislation. That said, if any commercial activities (including bicycle renting activities) are found to be obstructing scavenging operations or passageways, FEHD will take enforcement actions under the Public Health and Municipal Services Ordinance or carry out inter-departmental joint operations. The Office of The Ombudsman noted the position of FEHD and indicated no intention to further pursue the case

1021. LandsD accepted The Ombudsman's recommendation and has instructed its DLOs to provide details of the existing procedures for regulating illegal bicycle parking and the constraints of invoking the Ordinance when responding to complainants about illegal bicycle parking.

LandsD has also asked DLOs to step up inspection and enforcement action against unlawful occupation of Government land at Location A. According to records, DLO has participated in four joint clearance operations arranged by the Working Group on Tackling Illegal Bicycle Parking under the relevant District Management Committee at the relevant locations between October 2013 and June 2014.

Legal Aid Department

Case No. 2013/1824 – Ignoring the complainant's request to conduct his lawsuit in Chinese

Background

1022. In January 2010, the complainant was granted legal aid by the Legal Aid Department (LAD) to file for a divorce. As he did not understand English, he told the panel lawyer appointed by LAD that all documents should be provided in Chinese. To his dismay, most documents he received subsequently in relation to his case were in English. The legal costs increased as a result, as he needed translation or the lawyer to explain to him over the telephone the content of the documents.

1023. The complainant lodged a complaint with LAD. LAD replied that it was inevitable that lawyers would have to provide translation or interpretation of documents for him during the course of legal proceedings. Subsequently, he also received from LAD an English bill of assessed legal costs. He, therefore, complained to the Office of The Ombudsman, alleging that LAD had been unfair in handling the matter, ignored his request to conduct the lawsuit in Chinese and discriminated against the Chinese language.

The Ombudsman's observations

1024. Article 26 of the International Covenant on Civil and Political Rights stipulates that all persons are entitled to the equal protection of the law without any discrimination on language or any other ground. We, therefore, considered it necessary to ensure that the aided persons are well informed of their rights at the earliest opportunity and thereby able to make the appropriate choice of language.

1025. The Office of The Ombudsman was of the view that the crux of this complaint was whether the complainant had been informed at the proper time of the available choice of language in proceedings and the implications of such choice. The Office of The Ombudsman noted that, in response to The Ombudsman's comments in an inquiry in 2009, LAD advised the Law Society of Hong Kong (HKLS) to urge its members to

enhance transparency for the aided persons in legal aid cases by informing them of the available language choice in proceedings. In August 2009, HKLS issued a circular to its members on this. Nevertheless, after assigning cases to panel lawyers, LAD normally would not ask them to report whether there were any discussions on language choice with the aided persons in accordance with the circular.

1026. In this case, the complainant should have instructed his lawyer to prepare the petition for divorce in Chinese before the commencement of proceedings. The Office of The Ombudsman believes that many aided persons who would want their cases to be conducted in Chinese were not fully aware that they could and must give instructions in this regard before the proceedings started. They might only realise the actual implications of language choice after learning about the legal costs and then express dissatisfaction at that stage.

1027 LAD's function is to assign lawyers to represent the aided persons in taking legal action. The Department is not a party to the litigation, nor will it play the role of a lawyer in giving legal advice to the aided persons, such as which language should be used in conducting their cases. Hence, LAD's reply to the complainant explaining the general practices and chargeable fees of lawyers was in line with its established function and procedures. There was no maladministration on its part. However, this case revealed the need for further improvement in the current system.

1028. In the light of the above, The Ombudsman considered the complaint unsubstantiated. However, there was room for improvement in LAD's current practices. The Ombudsman recommended that LAD should review its current procedures and allow aided persons to indicate in writing their language preference when applying for legal aid. LAD should then pass such information to the assigned lawyers.

Administration's response

1029. LAD accepted the recommendation and indicated that a number of factors, in addition to the preference of the aided persons, were involved in determining the language to be used in a proceeding, which is subject to the final decision of the judge. In view of The Ombudsman's concern about the choice of language in legal proceedings, LAD has revised the documents to be completed by legal aid applicants concerning the details of their cases, and included a reminder to applicants of the

need to discuss language choice and its implications with their lawyers once their applications were approved. Applicants are also asked to indicate in the relevant documents their language preference. LAD can then pass the relevant documents to the lawyers, such that they will be aware of the aided person's language preference when considering whether to accept an assignment.

Leisure and Cultural Services Department

Case No. 2013/0496 – Failing to take proper follow-up action against an organisation having priority booking rights when it repeatedly failed to use an artificial turf pitch it had booked

Background

1030. The complainant alleged that a national sports association (the NSA) failed on several occasions to use an artificial turf pitch it had booked, resulting in a waste of resources. LCSD however did not take any punitive action against it. This might encourage abuse of priority booking rights by eligible organisations.

1031. The complainant also noted that the NSA had conducted activities unrelated to its own sport at the artificial turf pitch in early April 2013. He considered LCSD to have failed to monitor the NSA to ensure proper use of its facilities.

The Ombudsman's observations

1032. When imposing penalties on organisations which had abused their priority booking rights and thus wasted venue resources, LCSD would mainly look at the number of violations involved. Therefore, proper records of non-compliance are essential. his case revealed that LCSD had failed to keep proper records in this respect. As a result, a "second advisory letter" (instead of a "first warning letter") was issued to the NSA in late January 2013.

1033. Moreover, LCSD guidelines did not mention that separate incidents of non-compliance could be combined and treated as one. The guidelines only stated that organisations would be spared the penalty if they could provide satisfactory explanations and justifications for non-compliance. Regarding the two incidents of non-compliance at the end of 2012, the NSA cited "players on vacation" as the reason. The Office of The Ombudsman doubted if that was acceptable. Had LCSD treated each incident of non-compliance separately, the NSA would have already violated the rules four times and had its priority booking rights suspended for a year. To combine and treat separate incidents of non-compliance as one could easily lead to misunderstanding of

favouritism towards the NSA and undermine the deterrent effects of the guidelines.

1034. On the allegation that the NSA had misused the venue in early April 2013, the footage captured on the surveillance cameras at the pitch should have been useful in establishing the truth. Nevertheless, the venue manager did not follow departmental guidelines and arrange to retain for a longer time the video footage relating to complaints. The complainant lodged a complaint with LCSD in mid-April, while this Office asked LCSD for further information pertaining to this case on 22 April. Nevertheless, LCSD replied that the video footage (normally kept for not more than a month) had already been deleted. In other words, the truth could never be established because of a procedural oversight by LCSD staff.

1035. Overall, the complaint against LCSD was substantiated. The Ombudsman recommended that LCSD –

(a) impose penalties properly by issuing "verbal advice", "advisory letters" and "default notices" to non-compliant priority users, implement improvement measures effectively, and ensure proper maintenance and management of such records;

(b) review the prevailing "Guidelines on the Implementation of Penalty System for Bookings/Uses of Land-based Leisure Facilities" (the Guidelines), consider using the date of non-compliance as the criterion in counting incidents of violation, and include provisions to require scrutiny of each incident of violation involving priority users; and for cases where discretion is exercised, explain the rationale and record the conclusion in detail; and

(c) step up staff supervision and training to ensure that video footage captured on surveillance cameras is properly kept for the purpose of complaint handling.

Administration's response

1036. LCSD accepted the three recommendations made by The Ombudsman and has taken the following actions –

(a) LCSD has reminded the staff concerned to issue advisory letters or default notices to non-compliant priority users according to the penalty system stated in the Guidelines. To ensure proper filing and easy retrieval of records, the District Leisure Services Office (DLSO) concerned has prepared a register of non-compliance cases of priority users. The register is kept as booking documents and contains summary information such as the dates, arrangements and file reference numbers of non-compliance cases, facilitating the staff to refer to the records promptly and accurately and make decisions on the penalties in accordance with the Guidelines.

The new register of non-compliance cases enables the staff to monitor more effectively the use of the venue by and non-compliance of the hirers. Venue staff can also give appropriate reminders to the organisations concerned based on these monitoring records;

(b) LCSD implemented new penalty arrangements on 1 June 2014 after completing a review to tighten up the penalty for non-compliance. New internal guidelines on the arrangements, incorporating additional provisions for examining and deliberating on non-compliance cases of priority users, and requiring that rationale be explained and conclusion be recorded in detail for cases where discretion is exercised, have been issued to our staff. Considering that the previous penalty, which suspended the priority booking status of non-compliant NSAs for a year and rendered it impossible for the NSAs to book any venue in all districts as priority users, would force the NSAs to nearly stop all training and activities for as long as a year and have a huge impact on the training and competitions for and long-term development of the sports concerned, LCSD has revised the penalty level after the review. Instead of being suspended for all land-based facilities for a year, the non-compliant NSAs will have their priority booking status for the land-based facilities in the same district suspended for six months. At the same time, LCSD has adopted a more stringent approach in issuing default notices. If an organisation cancels a booking and fails to notify LCSD at least 20 days before the day of use without reasonable explanation, LCSD will immediately issue the first default notice (instead of an advisory letter under the previous arrangements). If an organisation commits the breach again for the same venue and receives the second default

notice within 12 months from the date of the first default notice, its priority booking status for the land-based facilities in the same district will be suspended for six months. LCSD believes that the revised arrangements can, on the one hand, expedite the implementation of the penalty to have a greater deterrent effect and, on the other hand, avoid imposing too harsh a penalty to the detriment of the development of the sport concerned; and

(c) DLSO concerned has reminded its staff to seek approval from their superiors for keeping the video footage concerned for a longer time when handling an investigation or complaint case. LCSD has arranged to circulate the "Guidelines on Installation and Operation of CCTV System in Leisure Venues" to staff on a quarterly basis. The relevant guidelines have also been incorporated into the staff training courses on facility management in order to promote the awareness and proper application of the guidelines. LCSD has advised staff in other districts to observe and enforce the above arrangements.

Leisure and Cultural Services Department

Case No. 2013/0736 – Lacking in transparency in allocating performance venues

Background

1037. In early 2013, the complainant applied twice to book one of the Leisure and Cultural Services Department (LCSD) performance venues (Venue A) but both applications were rejected as Venue A was fully booked from May to September 2013. When he checked the programme schedule on LCSD's website, however, he found many vacant time slots during the said period. He called LCSD to enquire but was told that the programme schedule should not be used as the means of checking the availability of venues. He considered LCSD to be lacking in transparency in allocating its venues.

The Ombudsman's observations

1038. The Office of The Ombudsman understood that LCSD had established procedures for processing applications and an assessment system for dealing with cases where there were more than one applicant trying to book the same time slot at a performance venue. Nevertheless, LCSD was not transparent enough in releasing sufficient information to the public on its marking and weighing of applications under the assessment criteria.

1039. During its investigation, the Office of The Ombudsman noticed that despite a very high rate of unsuccessful booking, some time slots of Venue A were left vacant for no apparent reasons. LCSD argued that it was due to keen competition rather than applicants' lack of knowledge of the venue availability. As less competitive applicants might be willing to accept any vacant time slots, the Office of The Ombudsman believed that letting potential applicants know the availability would not only allow new and less competitive groups to have more performing opportunities to gain experience, but also help enhance the utilisation rate of the venue.

1040. Moreover, the Office of The Ombudsman were not convinced that there might be practical difficulties for LCSD to disclose the available sessions. While the Office of The Ombudsman did not doubt that LCSD had to consider a wide range of factors such as the nature of the proposed function, duration of the booking, operational feasibility of accepting the booking, stage set-up, logistics and contingency requirements, the Office of The Ombudsman trusted that LCSD had the expertise to make, and should have made an educated estimation on the days and sessions available before opening booking every month for ordinary bookings.

1041. The present case revealed LCSD's lack of transparency in processing applications for booking performing venues in that it failed to inform applicants of the availability of venues in advance. As a result, valuable public resources were under-utilised while applicants who could have chosen other feasible vacant time slots could not book the venue.

1042. In the light of the above, The Ombudsman considered the complaint substantiated and recommended that LCSD –

(a) review the existing practice of processing booking applications of performing venues with a view to enhancing the transparency of processing procedures; and

(b) specifically, consider updating periodically the booking status of the venues and releasing such information to the public through its website and other channels.

Administration's response

1043. 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 broad assessment criteria with respective weighting percentage to make the processing procedures more transparent.

1044. LCSD gave a detailed account of the above follow-up measures in the progress report submitted to The Ombudsman in March 2013. The information was made known to the public in April 2013. The Ombudsman further requested LCSD in June 2013 to consider disclosing the assessment procedures in greater detail.

1045. LCSD accepted recommendation (a) and conducted another review exercise in 2014, which included a survey to collect details on venue booking arrangements of 48 local and overseas performing arts venues; an impact assessment on detailed disclosure; as well as consultation with local experts in the field. After critical review, LCSD will provide a brief description on the preferred art forms for individual venues that suit their purposes/designs as a further step to enhance the transparency of processing procedures. A progress report to the Office of The Ombudsman was submitted in early September 2014. In its reply of end-October, the Office of The Ombudsman asked LCSD to report on the public's reaction to its new arrangements six months after the arrangements took effect.

1046. LCSD has not accepted recommendation (b) as it is technically infeasible to periodically update the booking status of venues and release such information to the public through its website and other channels. First, the booking status of the performing arts venue is constantly changing to suit hirers' programming needs. Successful applicants may release their allocated sessions, partially or totally, or make alterations even after booking confirmation at a later stage.

1047. Furthermore, the mode of operation and booking arrangement of LCSD's performing arts venues are different from the leisure and sports venues of LCSD as the former involves a wide variety of booking applications with different and unique venue set up and technical requirements. To ensure that these functions/activities are carried out smoothly, the venue management has to exercise professional judgement in assessing the requirements of different applicants when processing their booking applications. It is also necessary to allow sufficient flexibility in the allocation of the booking slots to cater for special pressing and unforeseen situations such as change of production schedules, change of stage configuration/other facilities to cater for unanticipated technical difficulties as well as urgent maintenance. Such flexibility is essential for LCSD to serve hirers in their best interest and maintain the highest standard of its service.

1048. In view of the above, the booking status and availability of vacant slots are subject to change which renders the information uploaded onto obsolete and inaccurate within a short spectrum of time. Moreover, uploading the booking status of each and every performance venues on the website or other channels will cause confusion and misunderstanding to the public due to the complicated booking situation. LCSD will however continue to explore means to provide more information on the

bookings for performance venues. LCSD submitted a progress report to the Office of The Ombudsman in early September 2014. In its reply of end October, the Office of The Ombudsman asked LCSD to keep considering the release of information on available vacant slots to the public, and to submit a progress report to the Office of The Ombudsman in six months' time.

Leisure and Cultural Services Department

Case No. 2013/1099 – Mismanagement of a swimming pool in the New Territories

Background

1049. The complainant lodged a complaint against Leisure and Cultural Services Department (LCSD) for mismanagement of a swimming pool, which had led to his daughter being injured while attending a backstroke training course at the pool. The complainant alleged that when his daughter attended a backstroke training session organised by a swimming club at a swimming pool on 7 March 2013 (the material day), no backstroke turn indicators were placed 5 metres away from each end of the pool as a safety hint. As a result, his daughter failed to turn around in time and got cut on the left forehead by the sharp edges of the pool wall tiles. The complainant alleged that the pool-in-charge had ignored the earlier complaints in which swimmers had sustained head injury and cut by the pool wall tiles, and had not responded to the request from a parent of a swimmer to place backstroke turn indicators at the pool and repair the pool tiles. It was only after his daughter's accident that backstroke turn indicators were provided. The complainant further accused the pool-in-charge of mishandling the case as he summoned an ambulance directly instead of through the 999 hotline as requested by the coach of the swimming club on the material day.

The Ombudsman's observations

1050. The Ombudsman found the following improprieties on the part of LCSD –

Failing to keep proper records of incidents occurred at the swimming pool in question and its follow-up actions

1051. The Office of The Ombudsman found that as at mid-July 2013, there were in total 14 cases of swimmers sustaining cuts or abrasions from the floor or wall tiles of the swimming pool in question. However, for 11 of these cases, LCSD could not provide records of its follow-up actions. The Office of The Ombudsman considered that LCSD had failed to monitor the operation of the swimming pool properly. Nor had

LCSD ensured that recurring incidents at the pool were properly recorded by the staff as future reference for improvement of its facilities and services. There was also a lack of consistent practice among staff in recording incidents at the pool and the suggestions/complaints of swimmers/hirers. The complainant provided statements from the parents of four other trainees who had been cut by the pool tiles, or had bumped against them in the absence of any backstroke turn indicator, during training sessions. The parents clearly indicated the location of the injuries, and two of them claimed that their children had received treatment at the treatment room of the pool. However, LCSD said that it had only received one complaint regarding rugged tiles. The Office of The Ombudsman had reasons to believe that the pool staff did not record each and every accident, and any follow-up actions would not be verified.

Failing to handle accidents at the swimming pool in accordance with established procedures

1052. It was clearly stated in LCSD's Guidelines on Management of Public Swimming Pools that if victims of pool accidents required further treatment at hospital, officers-in-charge of swimming pools should dial "999" for ambulance service. In the present case, however, the pool staff failed to act in accordance with the Guidelines. Neither did the management staff exercise supervision to rectify the mistake after receiving accident reports.

Failing to take active steps to follow up the request for the provision of backstroke turn indicators

1053. LCSD received a suggestion from the coach of a swimming club on 28 January 2013 that backstroke turn indicators be provided in the training pool for trainees' safety. However, there was no information indicating that the department had followed up the suggestion. Instead, the suggestion was set aside, simply because no trainee from the swimming club had been injured as a result of the absence of backstroke turn indicators and no similar suggestion had been received. The indicators were put up in haste after the complainant's daughter had been injured.

1054. The Office of The Ombudsman took the view that LCSD, as the authority in charge of public swimming pools, has the responsibility to provide a safe swimming environment for swimmers, to consider actively the suggestions/complaints regarding pool facilities raised by swimmers and hirers, and to put relevant information on record properly for future

reference. However, it was shown in this case that LCSD failed to keep a proper record of swimmers' suggestions/complaints and the follow-up actions taken. In handling cases of swimmers accidentally injured and requiring hospital treatment, the front-line staff did not act in accordance with the relevant guidelines, while the management failed to exercise supervision and rectify the situation after receiving reports of such cases. Moreover, despite receipt of hirers' suggestion, LCSD did not proactively examine whether the proposal was constructive and feasible, on the grounds that no swimmers had been injured. In general, LCSD's handling of the case was unsatisfactory. That said, pool accidents could be attributed to various factors. The Office of The Ombudsman could not state categorically that mismanagement of pool facilities was the primary immediate cause of the injury sustained by the complainant's daughter.

1055. In conclusion, The Ombudsman considered the complaint against LCSD partially substantiated and recommended LCSD to –

(a) review the record system and monitoring mechanism in handling suggestions/complaints from swimmers and accidents in LCSD swimming pools;

(b) circulate the Guidelines on Management of Public Swimming Pools to the staff regularly so as to enhance their familiarity with the guidelines and to strengthen the monitoring of front-line staff to ensure their compliance with the departmental guidelines; and

(c) fully review the provision of Backstroke Turn Indicator in all of LCSD's swimming pools with regard to its effectiveness to the safety of swimmers and its feasibility.

Administration's response

1056. LCSD accepted The Ombudsman's recommendations and has taken follow-up actions as set out below –

(a) LCSD has completed its review of the procedures and monitoring mechanism for recording swimmers' suggestions/complaints and handling accidents at public swimming pools. Procedures for handling complaints have been incorporated into the existing Guidelines on Management of Public Swimming Pools and management staff are reminded

to handle complaints accordingly. All complaints (including verbal ones) should be recorded properly, and all correspondence relating to written complaints filed. To facilitate the work of pool staff in conducting search, compiling statistics, monitoring and taking follow-up actions, all complaints (including verbal ones) are recorded in a complaints register. Officers-in-charge of swimming pools will submit the registers to the respective pool managers/Assistant Leisure Services Managers each month for inspection and follow-up of the investigation work and progress of complaint cases. As regards telephone/verbal complaints, LCSD staff will clearly log the details of telephone/verbal complaints/suggestions received and handled by swimming pools, maintain a proper record, and take appropriate follow-up actions.

LCSD has also revised the guidelines for handling victims of swimming pool accidents, which spells out the arrangements for dealing with minor injury cases at public swimming pools. A standard record form for such cases/relevant treatment is also devised for use at all pools. For injury cases that do not involve venue facilities, services or other matters requiring follow-up actions, a record will be duly completed and filed. If an injury case is related to venue facilities, services or other matters that require follow-up actions, the staff handling the case should immediately notify the officer-in-charge of the venue who, together with the senior lifeguard, will take appropriate follow-up actions, such as checking for any damage to venue facilities. If repair or other follow-up work is required, details of such should be put down in the record form, which will be kept in a dedicated file for follow-up actions. Venue managers/Assistant Leisure Services Managers are required to inspect these files on a monthly basis and closely monitor the progress of follow-up actions. LCSD sent an e-mail to all district offices on 25 March 2014, instructing them to comply with the above guidelines, to maintain a proper record of swimmers' suggestions/complaints and minor injury cases, and to monitor follow-up actions on complaints.

LCSD has taken steps to remind district offices to re-circulate the guidelines for handling victims of swimming pool accidents twice a year, i.e. in April when the new swimming season begins and in November when heated pool service commences. Section heads are also reminded to strengthen the monitoring of

front-line staff to ensure their compliance with the departmental guidelines.

LCSD will strengthen staff training in this respect. The related guidelines have already been included in the training contents of the Induction training and regular Pool Management courses. In future, LCSD will also update the course contents regularly and draw trainees' attention to the updated guidelines, The Ombudsman's Report and department's improvement measures implemented.

(b) To ensure consistent practices and arrangements are adopted by front-line staff in the management of swimming pools, LCSD has issued the Guidelines on Management of Public Swimming Pools for internal reference and compliance. When the Guidelines, which cover various areas of work at swimming pools, are updated, the department will notify district and venue staff by email and upload the latest version to the LCSD Information Centre on the intranet for easy reference by front-line staff. To further enhance staff familiarity with the Guidelines, an email was issued on 3 December 2013 asking all district offices to circulate the Guidelines to their staff. Starting from 2014, LCSD has taken steps to remind district offices to recirculate the Guidelines twice a year, i.e. in April when the new swimming season begins and in November when heated pool service commences. Section heads are also reminded to strengthen the monitoring of front-line staff to ensure their compliance with the departmental guidelines. As for the summoning of ambulances, venue managers were reminded again at the swimming pool management meeting held between the Aquatic Venues Unit and district management staff on 13 September 2013 that officers-in-charge of the venues should dial "999" for ambulance service when injured persons require treatment or examination at hospital.

(c) LCSD has conducted a comprehensive review of the arrangements concerning the provision of backstroke turn indicators at the public swimming pools under its purview. Having sought and considered the views of the relevant National Sports Association and the management staff of district swimming pools, LCSD drew up and issued on 15 April 2014 a guideline on the provision of backstroke turn indicators for all public swimming pools.

In accordance with the guideline, the officers-in-charge have evaluated whether the swimming pools should erect backstroke turn indicators as a long term measure or put up other sign(s) to alert swimmers. Factors considered include the usage of the pools, the views of group/individual users, layout of the venue and pool deck areas, availability of access/space, potential obstruction to the lifeguard's line of sight, and possible impact on the staffing arrangements for emergency life-saving services. Following the review, the below arrangements have been put in place at various swimming pools from April 2014 –

(1) Arrangements for 50-metre main pools

Since April 2014, the following arrangements have been implemented for the 29 50-metre main pools managed by LCSD:

(i) backstroke turn indicators are erected at 17 swimming pools as a long term measure;

(ii) for seven swimming pools where, due to the physical environment of the respective venues (e.g. potential obstruction to the lifeguard's line of sight), provision of backstroke turn indicators as a long term measure is infeasible, thick ropes in a contrasting colour to the backdrop are suspended over the whole width of the pools as a hint for swimmers to turn around; and

(iii) for the remaining five swimming pools where, due to the physical environment of the respective venues, provision of backstroke turn indicators or thick ropes as a long term measure is infeasible, lane dividers with red buoys on the two 5-metre ends are used at hired lanes as a hint for swimmers to turn around.

(2) Arrangements for the provision of backstroke turn indicators at the secondary pools, multi-purpose pool and training pools

(i) There are 14 secondary pools, one multi-purpose pool and 31 training pools under the management of LCSD. Having regard to the training needs of individual districts, LCSD has, as a long term measure, erected

backstroke turn indicators at the secondary pool of Kwun Tong Swimming Pool, and the training pools of Tuen Mun North West Swimming Pool and Ping Shan Tin Shui Wai Swimming Pool.

(ii) As for the remaining secondary pools, multi-purpose pool and training pools, lane dividers with red buoys on the two five-metre ends are used at hired lanes as a hint for swimmers to turn around.

Leisure and Cultural Services Department and the Treasury

Case No. 2013/1933A&B – Faulty procedures for handling applications for refund of hire charge for unused sessions of recreation and sports facilities

Background

1057. On 25 May 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Leisure and Cultural Services Department (LCSD) and the Treasury.

1058. The complainant claimed that she had originally booked a tennis court at a playground (the Playground) of LCSD for a certain session on 8 February 2013. Due to inclement weather, the booking was rescheduled for another session on 26 March 2013. However, the venue could not be used on that day, again because of inclement weather. Subsequently, she applied online, at the end of March, for reallocation of the booking to 21 May 2013. As the hire charge payable for the 21 May session was lower, she could get a refund of the difference.

1059. On 2 April 2013, the complainant went to the Playground to submit an application form for refund and received a receipt, which contained such information as the booking permit number, facility, venue, court number and date, etc.

1060. In early May, the complainant received a refund cheque issued by the Treasury. The LCSD booking permit number, facility, venue, court number and date were shown on the refund cheque. However, the complainant found that apart from the venue and the facility, other information shown on the payment advice (including the booking permit number) did not tally with that indicated on the receipt in question, rendering it difficult to trace the application relating to the refund.

1061. The complainant approached the Playground for enquiries, bringing with her the Treasury's refund cheque. After checking the records, the venue staff found that the date referred to the booking permit number on the payment advice was 8 February (i.e. the date of the original booking). After that date, the booking was rescheduled twice – first postponed to 26 March, and then to 21 May (i.e. the date stated on the refund cheque issued by the Treasury).

1062. She asked the Playground staff why the booking permit number and the date of use as shown on the Treasury's refund cheque did not tally with the number and date provided for her refund application. The staff explained that they were required by the Treasury to provide it with all information related to the refund applications, including the record of the reallocation arrangements.

1063. The complainant then contacted the Treasury on the telephone number provided by the Playground staff to seek further clarification. The staff told her that according to established practice, only the booking permit number of the hirer's original booking would be shown on the refund cheque, regardless of the number of reallocation arrangements made.

1064. The complainant was dissatisfied with the way in which The Treasury and LCSD handled applications for refund of booking, so that the applicants would be unable to check the information.

The Ombudsman's observations

1065. The Treasury had clarified that the information shown on the payment advice was solely decided by LCSD but not related to the Treasury. Hence, The Ombudsman considered the complaint against the Treasury not substantiated.

1066. The Office of The Ombudsman considered that LCSD should not be blamed for adopting the booking permit number of the original booking paid by the hirer as the reference number for the refund application to ensure that no duplicate applications are lodged. Moreover, as explained by LCSD, information such as the booking permit number for the hirer's original booking, the venue eventually used and the date of use were shown on the payment advice. Hirers could ascertain the refund in relation to a particular application simply by checking their booking/reallocation Acknowledgement Slip. The Ombudsman, therefore, considered the complaint against LCSD unsubstantiated.

1067. Nevertheless, there was room for improvement in the refund procedures of LCSD. The Ombudsman recommended LCSD to –

(a) review what information should be set out on the payment advice and the Acknowledgement of the refund application form to facilitate the checking of information by refund recipients as far as possible; and

(b) in the long run, having regard to its actual operational needs, explore the feasibility of allowing venue hirers to submit refund applications and receive a refund through the Leisure Link System (LLS), so as to further enhance the handling procedures.

Administration's response

1068. LCSD accepted The Ombudsman's recommendations, and has taken the following actions –

(a) LCSD has revised the form on "Application for Refund of Hire/Admission Charges of Leisure Facilities" by adding a new item "Reference Number (First Booking Permit Number)" in Part I and Part III (i.e. the Acknowledgement). When receiving and processing refund applications from the public, the staff have to fill in the Reference Number (First Booking Permit Number) in the form, and return to applicants the completed Acknowledgement at Part III with the Reference Number (First Booking Permit Number) duly entered. The revised refund application form was issued to district staff and the relevant arrangements were implemented on 6 December 2013. The "Guidelines for Refund of Fees and Charges for Use of Leisure Facilities and Recreation and Sports Facilities under LCSD" were updated accordingly in June 2014; and

(b) LCSD has been closely monitoring the situation of LLS. LCSD would further consider enhancement of its service, including the feasibility of allowing venue hirers to submit refund applications and receive a refund through LLS, when a major overhaul of LLS took place.

Marine Department

Case No. 2013/0584 – (1) Unreasonably requiring the submission of certain documents for the application of Operating Licences for fishing vessels; and (2) issuing Operating Licences to fishing vessels without the necessary documents

Background

1069. On 18 February 2013, the complainant lodged a complaint with the Office of The Ombudsman against the Marine Department (MD). According to the complainant, in 2010 he commissioned a shipyard in the Mainland to construct eight fibre glass fishing sampans ("fishing vessels") and was issued with an Approval-in-Principle Letter (the Letter) by MD. In April 2011, MD issued an Operating Licence to one of the "fishing vessels". In May of the same year, MD issued a letter to remind him that he was required to produce thereafter certain documents issued by the Mainland authorities for arrival clearance for his newly constructed fishing vessels, including the Port of Exit Permit for Vessels ("Document 1") issued by the Maritime Safety Administration of the Mainland, and an Export Declaration ("Document 2") issued by the Mainland Customs. Application to MD for Operating Licences for the remaining seven "fishing vessels" could only be made when the relevant documents were ready.

1070. The complainant explained to MD repeatedly that the Mainland authorities would not issue "Document 1" and "Document 2", but his explanation was not accepted by MD. At the same time, the complainant noted that MD had issued Operating Licences to certain "fishing vessels" without the necessary documents.

1071. The complainant was dissatisfied with MD for –

(a) unreasonably requiring him to submit "Document 1" and "Document 2"; and

(b) issuing Operating Licences to "fishing vessels" without the necessary documents.

The Ombudsman's observations

Allegation (a)

1072. MD proceeded to issue two notices to require "fishing vessel" owners to submit "Document 1" for arrival clearance before seeking clarification from the Harbour Superintendence Bureau in the Mainland on whether Mainland authorities would issue "Document 1" to "fishing vessels". MD's practice, though with a good intention of deterring newly constructed fishing vessels from leaving the Mainland without complying with the proper departure clearance, was indeed inappropriate.

1073. In addition, had MD extensively consulted industry operators prior to the preparation of the notice, it would have realised that the problems involved in requiring applicants to submit "Document 1" and "Document 3"[7]. Thus, the introduction of two amendments to the notice[8] between May 2011 and December 2012 would have been spared and the complainant's application for an Operating Licence unhindered.

1074. In light of the above, The Ombudsman considered allegation (a) substantiated.

Allegation (b)

1075. When those "fishing vessels" arrived in the waters of Hong Kong, they did not meet the requirements for application for an "arrival clearance"[9], nor could they produce "Document 2" and "Document 3". To prevent those vessels from being stranded in Hong Kong, MD exercised discretion to issue Operating Licences to them after

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7 Provisional Fishing Vessel Safety Navigation Certificate.

8 MD issued "Notice 2" to replace "Notice 1" on 31 October 2011, and a new notice ("Notice 3") to replace "Notice 2" on 17 December 2012. "Notice 3" detailed the procedures for fishing vessels newly constructed in the Mainland to be surveyed and to apply for a Hong Kong licence, and the documents to be submitted. It no longer required applicants to submit "Document 1" but states that "Document 2", endorsed by the Mainland Customs as proof of the vessel's lawful departure from the Mainland, and "Document 3", issued by the Register of Fishing Vessel of the Mainland to ensure the seaworthiness of the vessel for coming to Hong Kong, were to be submitted.

9 Under Section 3(1) of the Merchant Shipping (Local Vessels) (General) Regulation, where a local vessel arrives in the waters of Hong Kong, an application for an "arrival clearance" shall be made to MD within 24 hours after the arrival.

ascertaining their compliance with safety standards. The Office of The Ombudsman considered the practice undesirable and it was adopted when MD was left with no other alternative.

1076. In the light of the above, The Ombudsman considered allegation (b) partially substantiated. However, The Ombudsman was of the view that the Administration must handle similar situations with care in future to prevent other vessels from following suit.

1077. In sum, this complaint was partially substantiated. The Ombudsman urged MD to learn from this case and consult stakeholders before drawing up administrative measures to prevent a recurrence of similar situations in future.

Administration's response

1078. MD accepted The Ombudsman's recommendation. On 21 August 2013, the day following the receipt of the investigation report, MD instructed the sections concerned to consult relevant stakeholders before making any changes to the practices or requirements regarding public service in future to prevent a recurrence of similar situations.

Office of the Privacy Commissioner for Personal Data

Case No. 2013/2497 – (1) Unreasonably classifying the complainant's complaint against a property management company for making video and audio recording of visitors as unsubstantiated;(2) Having inconvenient channels of complaint for the public; (3) Disclosing the complainant's personal particulars to the property management company under complaint; and (4) Delay in handling the complainant's complaint

Background

1079. Between 3 July and 2 August 2013, the complainant lodged complaints to the Office of The Ombudsman against the Office of the Privacy Commissioner for Personal Data (PCPD). According to the complainant, on 10 June 2013, he found that an estate's management office (the Management Office) carried out video and audio recording at its indoor reception counter without informing those who entered the monitored area (including the complainant) of such act and thus lodged a complaint with PCPD against the Management Office for a suspected breach of the requirements under the Personal Data (Privacy) Ordinance (the Ordinance).

1080. On 5 July, a complaint officer of PCPD (Officer A) informed the complainant by phone that as the video and audio recordings collected by the Management Office were not used, they did not amount to "personal data". However, because such act of recording was not appropriate, PCPD would issue a letter to the Management Office to require improvement on its part. The complainant objected to Officer A's reply, but Officer A was adamant and pointed out that given the complainant's complaint was unsubstantiated, PCPD would not direct the Management Office to delete the video and audio recordings relating to him as requested.

1081. On 12 July, PCPD sent a letter to the complainant informing him that –

> "…… after ascertaining the case details from [the complainant] during the telephone conversation on (5 July), (Officer A) had explained [to him] the relevant requirements under the Ordinance. [The complainant] then agreed to the issuance of a

letter to (the Management Office) by [PCPD] to express [his] concerns over the (CCTV) video and audio recording and to inform them of the matters to note when installing closed circuit television (CCTV). In this connection, PCPD had issued a letter to the Management Office, disclosing [the complainant's] identity, to relay his concerns and recommend good practices relating to the installation of CCTV....."

1082. The complainant's complaint against PCPD are summarised below –

(a) The complainant did not agree with Officer A that because the video and audio recordings collected by the Management Office had not been used, they were not considered as "personal data", and it was not reasonable for Officer A to conclude as a result that his complaint was unsubstantiated. PCPD stated that Officer A had elaborated on his view on the complaint concerned by reference to a Court of Appeal precedent. However, the complainant did not recall that Officer A had ever mentioned the above precedent to him.

(b) When the complainant lodged a complaint with PCPD over the phone on 10 June, PCPD's staff member informed him that a complaint must be made either in writing on PCPD's complaint form or in person. After learning that the complainant was unable to obtain a complaint form online, by fax or in person during the telephone conversation on 10 June, the staff member did not suggest to the complainant to write a complaint letter instead. The complainant eventually obtained a complaint form on 12 June and lodged his complaint with PCPD. Thus, the complainant considered that the means provided by PCPD for the public for making a complaint were not convenient.

(c) The disclosure by PCPD of the complainant's identity in the recommendation letter to the Management Office was unreasonable. Moreover, the wordings of the letter dated 12 July from PCPD to the complainant implied that PCPD had made the recommendations to the Management Office on his request and not because PCPD considered there was the need for improvement. Therefore, the complainant considered that PCPD had attempted to shift its own responsibility to him.

(d) Upon receipt of his complaint, PCPD had failed to contact him for more than two weeks, thus delaying the handling of his complaint. PCPD explained that the reply letter dated 12 July had not exceeded the 45-day limit under section 39(3) of the Ordinance. The complainant considered that PCPD's explanation was unreasonable.

The Ombudsman's observations

Allegation (a) - Unreasonably classifying the complainant's complaint as unsubstantiated

1083. PCPD explained that Officer A did not indicate to the complainant that video and audio recordings which had not yet been used did not constitute "personal data". PCPD reiterated that the installation of CCTV by the Management Office appeared not to be for the collection of the complainant's personal data and there was no evidence showing that the Management Office had reviewed the video and audio recordings of the Complainant, resulting in "collection" of his personal data. As the complaint did not involve "collection" of personal data, the Data Protection Principles of the Ordinance did not apply. The Office of The Ombudsman accepted PCPD's explanation and stated that PCPD had legal grounds for deciding not to investigate the complaint. As for the details of the telephone conversation between the complainant and Officer A, the Office of The Ombudsman considered that due to the lack of objective information (e.g. audio recording), such details could not be verified. The Ombudsman considered allegation (a) unsubstantiated.

1084. Nevertheless, the Office of The Ombudsman opined that although the word "complaint" was defined in the Ordinance, a lay member of the public could find it difficult to ascertain whether his complaint would meet the requirements under section 37 of the Ordinance, or whether the information submitted by him would meet the criteria of the Complaint Handling Policy. As PCPD had not acknowledged formal acceptance of the complaint (in other words, PCPD considered that the complainant's complaint had not met the requirements under section 37 of the Ordinance), the complainant should be informed of the position. Since PCPD's letter to the complainant dated 12 July had not explicitly stated that the complaint did not satisfy the requirements under section 37 of the Ordinance and that PCPD had decided not to carry out an investigation, misunderstanding/disputes could arise, and this is not in accordance with the procedures laid down in the Complaint Handling Policy. Hence, The

Ombudsman considered that allegation (a) was substantiated other than alleged.

Allegation (b - Inconvenient means for making a complaint

1085. There could have been a miscommunication during the telephone conversation between the complainant and the staff member of PCPD. In fact, the public can lodge complaints with PCPD by various means, including by fax, email, mail, PCPD's complaint form and in person. The Ombudsman considered allegation (b) unsubstantiated.

Allegation (c) - Disclosure of the complainant's identity to the Management Office which led the latter to believe that the recommendations were raised by the Complainant

1086. PCPD pointed out that the complainant had indicated his consent to the disclosure of his identity to the Management Office in the complaint form. The complaint form also specified that –

(i) it is voluntary for the complainant to supply to PCPD his personal data;

(ii) all personal data submitted by the complainant will only be used for purposes which are directly related to his complaint; and

(iii) personal data submitted by the complainant may be transferred to parties who will be contacted by PCPD during the handling of his complaint including the party being complained against or other parties concerned.

1087. PCPD also explained that the complainant complained against the Management Office for collecting his personal data. Although he could not provide evidence in support of his allegation, PCPD could not rule out the possibility that the Management Office did collect his personal data. Hence, PCPD considered it necessary for the Management Office to ascertain the identity of the complainant for examining whether it had ever collected his personal data and to take appropriate measures to comply with the requirements in PCPD's guidance note. For this reason, PCPD had disclosed the complainant's identity in the recommendation letter to the Management Office for their follow-up.

1088. The Office of The Ombudsman was of the view that it would have been clearly reasonable for PCPD to disclose the complainant's identity to the Management Office on carrying out an investigation into his complaint. However, in this case PCPD had decided not to carry out an investigation, and simply recommended to the Management Office good practices of installing CCTV. Therefore, it was not necessary for PCPD to disclose the complainant's identity to the Management Office. Such disclosure might cause the Management Office to review the video recording which captured images of the complainant, thereby amounting to collection of his personal data and which was clearly against his wish. If PCPD could not at the time rule out the possibility that the Management Office did collect the complainant's personal data, PCPD should have enquired with the Management Office in this regard instead of arbitrarily refusing to investigate into the complainant's complaint.

1089. As to whether the Management Office would assume that the recommendations in PCPD's letter dated 12 July 2013 were made on the complainant's request, the Office of The Ombudsman, after examining the letter, confirmed that the letter clearly indicated that the recommendations were made by PCPD, and thus believed that the Management Office would not mistakenly think that the recommendations were made on the complainant's request.

1090. Given the above analysis, The Ombudsman considered allegation (c) partially substantiated.

Allegation (d) - Delay in handling complaint

1091. PCPD explained that the complainant's case was received at the time when the new provisions of the Personal Data (Privacy) (Amendment) Ordinance 2012 on the regulation of direct marketing activities came into effect in April 2013. The complaint intake between April and June more than doubled. Despite this, in view of PCPD's tight resources, PCPD had tried hard to handle these cases as quickly as possible. As regards the complainant's case, Officer A had called him to enquire about the details of his complaint on the 21st day after receiving his complaint and replied to him in writing on the 28th day, which were within the time limit under section 39(3) of the Ordinance.

1092. The Office of The Ombudsman opined that from the perspective of customer service delivery, it would have been much better if PCPD had contacted the complainant sooner after receipt of his complaint. However, in view of the situation that PCPD found itself at the material

time, the Office of The Ombudsman believed that PCPD had diligently handled the complainant's case in a timely manner. The Ombudsman therefore considered allegation (d) unsubstantiated.

1093. In sum, this complaint was partially substantiated and substantiated other than alleged. The Ombudsman recommended that –

(a) in relation to the decision not to carry out an investigation because the complaint does not satisfy the requirements under section 37, PCPD should clearly inform a complainant in writing that his/her complaint did not meet the requirements under the section (with reasons) and PCPD's decision not to carry out an investigation;

(b) PCPD should avoid unnecessarily disclosing a complainant's identity to a third party; and

(c) PCPD should consider introducing in PCPD's performance pledge the time limit for responding to complaint cases which do not meet the requirements under section 37 of the Ordinance.

Administration's response

1094. PCPD accepted all three recommendations made by The Ombudsman. Regarding recommendation (a), PCPD agrees that in future, to avoid misunderstanding when handling similar cases, it will inform complainants in accordance with its Complaint Handling Policy if their cases will not be investigated. PCPD will also briefly explain its views on the cases (including the criteria that a complaint must meet under section 37 before its acceptance, and the reasons why these criteria are not met in the circumstances). This has been implemented with effect from 6 March 2014.

1095. Regarding recommendation (b), PCPD will decide whether to disclose a complainant's identity according to the circumstances of the case. As the statutory regulator under the Ordinance, PCPD will certainly observe the requirements under the Ordinance in the use of personal data.

1096. As for recommendation (c), PCPD has implemented The Ombudsman's recommendation of introducing a new performance pledge, namely, in at least 75% of non-investigated complaint cases (including complaint cases not satisfying the requirements under section 37 of the Ordinance), complainants will be informed of the result in writing within 45 days of PCPD's receipt of the complaint cases. To achieve this new performance target, PCPD has augmented its manpower. The new performance target was announced on PCPD's website on 1 July 2014 and took effect on the same date.

Radio Television Hong Kong

Case No. 2013/0094(I) – (1) Refusing to provide the complainant with the records RTHK made for his complaints; and (2) Delay in responding to the complainant's request for information

Background

1097. The complainant was a visually impaired person. He called the Office of The Ombudsman on 8 January 2013 to lodge a complaint against the Radio Television Hong Kong (RTHK) and alleged that between April and July 2012, he lodged a number of complaints with RTHK over the phone. He also requested RTHK to provide him with records of the complaints on a number of occasions. However, RTHK refused to provide such records (allegation (a)). Regarding the request made on 30 April 2012, RTHK delayed in responding and only gave him a brief reply on 5 June (the complainant later revised the date as 6 June), contrary to the requirements stipulated in the Code on Access to Information (the Code) (allegation (b)).

The Ombudsman's observations

Allegation (a)

1098. As RTHK's telephone system was not equipped with recording function (except for voicemail service), RTHK of course could not provide any recording of the complaint calls for the complainants. Furthermore, the Office of The Ombudsman found it understandable that RTHK could not provide the complainant with the transcript of the complaints or record the details on CD-ROMs because of resources constraints.

1099. RTHK confirmed that while none of the complainant's complaint calls were recorded, the staff who spoke to the complainant on the phone did jot down the main points of the conversations ("records of main points"). However, as the records were internal documents, RTHK would not provide the complainant with the records. Also, because of resources constraints, RTHK would not provide the complainant with the transcript of such records.

1100. It should however be noted that what the complainant requested was the "records" of his complaints. "Records of main points" were also the "records" of his complaints and did not fall within the categories of information the disclosure of which might be refused as defined in Part 2 of the Code. It was not in compliance with the principle of the Code for RTHK to refuse to provide the complainant with a copy of such records solely on the ground that the information was an internal document. In fact, providing a copy of such records to the complainant did not seem to involve substantial resources. The Office of The Ombudsman was hence of the view that RTHK should provide a copy of the "records of main points" to the complainant.

1101. In view of the above analysis, The Ombudsman considered allegation (a) substantiated.

Allegation (b)

1102. After scrutinising the aforementioned records of main points by RTHK, the Office of The Ombudsman was of the view that there were no evidence showing that the complainant had requested for the records of his complaints from RTHK on 30 April 2012. The allegation that RTHK gave a brief reply to the complainant on 5 or 6 June was untrue. The Ombudsman considered allegation (b) unsubstantiated.

1103. Overall, this complaint was partially substantiated. The Ombudsman recommended RTHK to –

(a) provide the complainant with the "records of main points" about his complaints as soon as possible; and

(b) remind staff to precisely record telephone conversations with complainants for future reference.

Administration's response

1104. RTHK accepted The Ombudsman's recommendations and has taken the following actions –

(a) RTHK provided the complainant with the "records of main points" on 14 June 2013 regarding the telephone conversations between RTHK staff and him from April to July 2012;

(b) reminding staff to precisely record telephone conversations with complainants; and

(c) action is in hand to install a telephone recording system to record telephone conversations with complainants.

Radio Television Hong Kong

Case No. 2013/0587 – Delay in delivering cash prize to the winner of a game programme

Background

1105. The complainant made a complaint to the Office of The Ombudsman on 21 February 2013, alleging that she participated in a game programme of the Radio Television Hong Kong (RTHK) on 13 December 2012 and was told that she had won a cash prize of $1,000. However, RTHK delayed in delivering the cash prize to her. She had made a number of enquiries to RTHK but to no avail.

The Ombudsman's observations

1106. According to RTHK's procedures for granting cash prizes, programme production staff would first verbally obtain the personal particulars from a prize winner and then pass the information to the accounting section, which would contact the Treasury to issue and send the cash prize cheque by mail to the winner directly. It would normally take 15 working days for the Treasury to issue a prize cheque.

1107. RTHK's records showed that when officer A provided the personal particulars of the complainant to the accounting section, the name and address were incorrect, resulting in the Treasury's unsuccessful delivery of the cheque to the complainant. As a result, upon receiving the complainant's enquiry, RTHK staff had to ask for a copy of her identity card and proof of address to confirm her name and address and to request the Treasury to re-issue the cash prize cheque.

1108. The Office of The Ombudsman considered that the complainant was not able to receive the cheque issued by the Treasury earlier because of incorrect records on the complainant's name and address. The Office of The Ombudsman believed that it was caused by a mistake of officer A. As the earlier records on the complainant's name and address were inaccurate, it was understandable that RTHK had to ask the complainant to provide supporting documents on her identity and address for verification subsequently.

1109. Given that the delay was caused by the mistake of RTHK staff, The Ombudsman considered this complaint substantiated.

1110. The Ombudsman recommended RTHK to revise the procedures for granting of cash prizes and to request its staff to carefully confirm and verify the personal particulars of prize winners in order to prevent recurrence of similar mistakes.

Administration's response

1111. RTHK accepted The Ombudsman's recommendations and has taken the following actions –

(a) The procedures for issuing prizes have been improved as appropriate. Apart from ensuring that the programme production staff would perform their duties to collect and verify the personal particulars of the prize winners, if cash or valuable prizes will be given in a programme, the production unit would follow a set of standardised guidelines and request a prize winner to submit his/her proof of personal particulars, including his/her name, identity card number and contact address, so as to confirm his/her identity; and

(b) in the event that the programme unit or production staff receives a prize winner's enquiry, stating that he/she has not received a prize in cash or in kind, the staff concerned will explain clearly to the prize winner the issuing procedures. After checking the progress, the staff concerned will take the initiative to provide a reply to the prize winner on the progress and the expected date of receiving the prize.

Rating and Valuation Department

Case No. 2012/5867 – (1) Sending the complainant wrong demand notes for rates and Government rent in respect of his property; and (2) Failing to answer the complainant's queries about splitting of account.

Background

1112. On 29 December 2012, the complainant complained to the Office of The Ombudsman against the Rating and Valuation Department (RVD).

1113. Allegedly, as the registered owner of a property in Sai Kung (the Property), the complainant had been paying rates and Government rent under a certain account (Account (a)) since September 2011.

1114. Since May 2012, however, the complainant had received time and again demand notes from RVD for rates and Government rent under two accounts different from Account (a). When he queried the irregularities, RVD staff told him that the "irregularities" had resulted from his application for splitting the account in respect of the Property. Since the complainant had not made such an application and he considered that the aforementioned demand notes should not have been addressed to him, he stopped paying rates and Government rent altogether.

1115. The complainant had asked RVD staff again for clarification and correction. However, RVD took no follow-up action.

1116. In sum, the complainant complained against RVD for –

(a) sending him wrong demand notes for rates and Government rent in respect of the Property; and

(b) failing to answer his queries about splitting of account.

The Ombudsman's observations

Allegation (a)

1117. In the light of the findings of the Office of The Ombudsman, as well as the relevant demand notes and RVD's records that the Office of The Ombudsman had scrutinized, the Office of The Ombudsman was convinced that RVD had properly issued new demand notes to the complainant as a result of the re-assessment of the Rent Rateable Value of the Property. Allegation (a) per se was therefore unsubstantiated.

1118. Nevertheless, the Office of The Ombudsman noted that while RVD had informed the complainant in writing of the reasons for its deletion of assessment and subsequent reassessment, RVD's letters did not highlight the deletion, splitting and creation of accounts involved and explain the purposes of those changes. As a result, the complainant was puzzled.

1119. Accordingly, the Office of The Ombudsman considered allegation (a) substantiated other than alleged.

Allegation (b)

1120. It was evident that RVD had failed to answer the complainant's enquiry responsibly. The Office of The Ombudsman, therefore, considered allegation (b) substantiated.

1111. The Ombudsman considered the complaint to be, on the whole, substantiated and recommended that RVD take reference from this case and improve its communication with the public.

Administration's response

1122. RVD accepted The Ombudsman's recommendation and has taken the following actions –

(a) RVD has revised the standard letter for similar cases to explain the purpose of deletion, splitting and creation of rates and Government rent accounts; and

(b) reminded officers concerned to enhance their communication skills in understanding and addressing public enquiries.

Rating and Valuation Department and Inland Revenue Department

Case No. 2013/0547A (Rating and Valuation Department) – Delay in valuing the complainant's former property

Case No. 2013/0547B (Inland Revenue Department) – Delay in informing the complainant of the amount of stamp duty chargeable.

Background

1123. On 16 February 2013, the complainant lodged a complaint with the Office of The Ombudsman.

1124. Allegedly, the complainant used to be the owner of a flat in a housing estate. The housing estate was demolished and redeveloped into a new building. The complainant was assigned a flat in the new building in exchange for his old flat.

1125. In March 2011, the complainant sold his flat in the new building and deposited $600,000 with his solicitors for settlement of stamp duty for having previously been assigned the flat. However, the Rating and Valuation Department (RVD) took an unduly long time to value the flat for the Inland Revenue Department (IRD) to assess the stamp duty payable. Meanwhile, the complainant enquired of IRD about the progress of his case. However, IRD failed to confirm whether stamp duty was chargeable and if so, the amount.

1126. The complainant was dissatisfied that –

(a) RVD had delayed valuing his flat in the new building; and

(b) IRD had delayed informing him of the amount of stamp duty chargeable.

The Ombudsman's observations

Allegation (a)

1127. One of the RVD's duties was to provide property valuation advice to IRD to facilitate IRD's assessment of stamp duty. In this case, IRD had twice requested RVD to provide valuation advice. In response to IRD's requests, RVD gave its advice in six weeks and two weeks respectively, well within RVD's 4-month target time.

1128. In view of the explanation of RVD, the Office of The Ombudsman was of the view that RVD had not delayed handling the case. The Ombudsman therefore considered allegation (a) against RVD unsubstantiated.

Allegation (b)

1129. Taking into account the compliance of the Stamp Office (SO) with IRD's standing procedures, the complexity of the case and IRD's explanation about the heavy workload of SO, The Ombudsman considered allegation (b) against IRD unsubstantiated.

1130. The Ombudsman recommended IRD to review its procedure for review of outstanding cases and explore the feasibility of –

(a) shortening the two-year time-line for review;

(b) increasing the frequency of review; and

(c) giving priority to needy cases like the complainant's.

Administration's response

1131. IRD accepted recommendations (a) and (c) and SO has taken the following actions –

(a) shortening the interval of reviewing outstanding adjudication cases from two years to 18 months and introducing a bring-up mechanism for long-outstanding cases whereby adjudication cases aged over 18 months are to be reported to SO's Superintendent to ensure that they are being closely followed up by case officers; and

(b) reminding its officers to give priority to finalise urgent adjudication cases.

1132. IRD did not accept recommendation (b). To strike a balance between resources constraints and the need to strengthen the review mechanism, IRD considered that the frequency of review of outstanding adjudication cases should be maintained at twice a year. The Office of The Ombudsman has noted the position of IRD in respect of this recommendation and raised no objection.

Social Welfare Department

Case No. 2013/0076 – (1) Improper handling of complaints against charitable fund-raising activities in public places; (2) Refusing to issue confirmation letter to the complainant upon approval of its application for carrying out charitable fund-raising activities in public places; and (3) Unhelpfulness of staff.

Background

1133. The complainants of this case were two registered charitable organisations (including Organisations A and B) (the Organisations) which had been issued with a number of Public Subscription Permits (PSPs) by the Social Welfare Department (SWD) for conducting public fund-raising activities. In 2012, SWD informed the Organisations a number of times that complaints had been received from members of the public about the volunteers of the Organisations for breaching permit conditions during fund-raising activities, including conducting fund raising outside the designated areas and failure to put on volunteer batches. The Organisations ascertained the situations with their volunteers every time and responded to SWD before the deadlines as requested. However, SWD did not explain whether the complaints were substantiated.

1134. In November 2012, SWD wrote to the Organisations to inform them that as it received numerous complaints against them breaching permit conditions during fund raising, SWD had to suspend the processing of their PSP applications. However, given privacy consideration, SWD refused to provide details of the complaints upon the Organisations' request, making the latter unable to respond to the complaints.

1135. In mid-December, SWD approved that the Organisations could resume their fund-raising activities. The Organisations hence took a number of measures (including briefing volunteers for the fund raising activities about the guidelines of fund raising and sending staff to the relevant areas to monitor the situation) to ensure that the permit conditions would not be breached again. However, SWD wrote to Organisation B again on 24 December that SWD had received another complaint of the public against Orgainsation B.

1136. Allegations raised by the Organisations against SWD could be summarised as follows -

(a) there was impropriety in SWD's handling of complaints from members of the public on fund-raising activities, which included (i) failing to conduct investigation to confirm the credibility of the complaints before referring the public's complaints to the organisations under complaint (including the concerned Organisations) and asking for their response; (ii) refusing to provide the source and details of the complaints as per the request of the organisations under complaint as well as failing to reveal whether the complaints were substantiated after the organisations had responded; and (iii) its complaint handling mechanism was unclear in the sense that SWD did not consider the response of the organisations under complaint but only relied on the number of complaints in determining whether to suspend the processing of PSP applications by the organisations under complaint. Yet there was no clear guideline of SWD on the number of complaints reaching which it would suspend the processing of PSP applications by the organisations under complaint;

(b) the Organisations were verbally informed by SWD at the end of February 2013 that their application for a PSP (for organising charitable fund-raising activities from 8 March to 4 May 2013) was in order. Yet, the Organisations' request for a written confirmation on or before 6 March 2013 was unreasonably turned down by SWD; and

(c) SWD referred a new complaint to Organisation B on 24 December 2012 and requested its response. However, Organisation B was unable to contact two officers of SWD by phone for enquiries. There was no voice mail service for these two officers and other staff members of SWD refused to contact them for Organisation B.

The Ombudsman's observations

Allegation (a)

1137. Having reviewed SWD's mechanism for handling complaints on charitable fund-raising activities in public places and the correspondence

issued by SWD to the Organisations, the Office of The Ombudsman considered that the complaint handling mechanism of SWD was generally reasonable and fair. It was also satisfied that SWD had handled the relevant complaints against the Organisations in accordance with the established mechanism.

1138. The Office of The Ombudsman noted that the "Warning Letters" issued by SWD to the Organisations had conveyed a clear message of their breach of permit conditions (i.e. the complaints were substantiated). However, the "Reminder Letters" issued by SWD bore no clear indication that the Organisations did not breach any permit conditions or that there was no evidence of any breach by the Organisations. Moreover, the use of the Chinese term '警戒' (alert) by SWD was noted in a few 'Reminder Letters'. Considering that the term 'alert' was similar in meaning to 'warning' or could even have a more serious tone, the Office of The Ombudsman was of the view that it was difficult for recipients of the 'Reminder Letters' to get the message that the complaints against them which were under "alert" had actually not been substantiated. As such, The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

1139. The Office of The Ombudsman confirmed that it was indicated in SWD's Notification Letter that due to the breach of permit conditions by Organisation A earlier, the processing of the other PSP applications from Organisation A would only be considered by SWD after the completion of its fund-raising activities previously approved (i.e. 4 March 2013) and the confirmation of no further breach of permit conditions. It was therefore not unreasonable for SWD not to issue a 'Confirmation Letter' on 6 March 2013 (i.e. two days later) for the other PSP application made by Organisation A. In fact, after confirming that Organisation A had no further breach of permit conditions in its fund-raising activities previously approved, SWD had promptly issued a Notification Letter in respect of another application from Organisation A on 7 March 2013. The Ombudsman therefore considered allegation (b) unsubstantiated.

Allegation (c)

1140. SWD denied that its staff had refused to contact relevant colleagues upon Organisation B's request. SWD also explained that it was a common practice for its staff receiving a call to relay the caller's message to the officer(s) concerned. In the absence of any

corroborative evidence, the Office of The Ombudsman was unable to ascertain the situation on that date. As such, The Ombudsman considered allegation (c) inconclusive.

1141. Overall, this complaint was partially substantiated. The Ombudsman urged SWD to revise the style and wording of its 'Reminder Letters' in order to reflect its investigation results of relevant complaints in a clear and accurate manner.

Administration's response

1142. SWD accepted The Ombudsman's recommendation and has revised the style and wording of its 'Reminder Letters' to reflect the investigation results of relevant complaints in a clear and accurate manner by stating that the organisations under complaint had not breached the permit conditions or that the complaints were not substantiated, as well as reminding them to note and comply with the permit conditions.

Social Welfare Department

Case No. 2013/0602 – (1) Making up false information regarding a suspected child abuse case; and (2) bias in handling a staff complaint

Background

1143. The complainant was a service user of an integrated family service centre of the Social Welfare Department (SWD). According to the complainant, he had an interview with Officer A of the Integrated Family Service Centre concerned on 22 September 2012. Alleging later that during the interview the complainant had admitted having used a kitchen knife to threaten his son, Officer A thus treated the case as one of suspected child abuse.

1144. On 28 September 2012, he had another interview with Officer A, during which he enquired when a multi-disciplinary case conference (MDCC) would be held and requested that he be allowed to attend the MDCC. Officer A answered that the MDCC would be held on 4 October 2012. Eventually, the complainant was not invited to the MDCC.

1145. On 29 January 2013, the complainant had an interview with Officer A's supervisors, namely Officers B and C. He asked them why he was not invited to the MDCC. They said that according to Officer A, the complainant had mentioned that as he needed to take a rest, he would not be attending the MDCC, which would be attended by his ex-wife instead. Besides, Officer A claimed that he had consulted the complainant's case doctor, who also advised that the complainant was not suitable to attend the meeting. Officers B and C explained that the problem should have been caused by some misunderstanding in verbal communication between the complainant and Officer A.

1146. The complainant's complaint against SWD can be summarised as follows –

(a) Officer A made the following fraudulent claims:

  (i) The complainant had admitted having used a kitchen knife to threaten his son;

(ii) he had invited the complainant to the MDCC but the latter had expressed his intention not to attend; and

(iii) the case doctor had advised that the complainant was not suitable to attend the MDCC.

(b) Officer B and Officer C, trying to use "misunderstanding in verbal communication" as an excuse for Officer A, were allegedly biased in favour of Officer A.

The Ombudsman's observations

1147. Regarding allegation (a), there were discrepancies between the statements of SWD and the complainant. In the absence of corroborative evidence (e.g. audio recording), the Office of The Ombudsman was unable to ascertain what had actually happened. Therefore, The Ombudsman considered this allegation inconclusive.

1148. However, regarding Officer A's claims that the complainant was invited to attend the MDCC and that the officer was told about the complainant being not suitable to participate in the MDCC after consultation with the case doctor of the complainant, there was simply no documentary record kept by SWD. This was considered undesirable and improvement should be made by SWD.

1149. As for allegation (b), since there was no third party present at the meeting between the complainant and Officer A on 28 September 2012, Officers B and C should not be able to comment on what happened. Nonetheless, it was only reasonable for them to infer from common sense that there might be misunderstanding in verbal communication between the complainant and Officer A. As such, The Ombudsman considered this allegation unsubstantiated.

1150. However, the investigation by the Office of The Ombudsman had found that SWD did not fully comply with the Procedural Guide for Handling Child Abuse Cases (Procedural Guide) when handling the suspected child abuse case involving the complainant –

(a) SWD explained to the Office of The Ombudsman that as the complainant, though being a suspected abuser, had custody over his son and took up the responsibility of looking after the child, and the fact that he maintained regular communication with the

social worker after the suspected child abuse incident, it was deemed necessary to invite him to participate in the MDCC.

Even if the Office of The Ombudsman could accept that Officer A of SWD did invite the complainant to participate in the MDCC, SWD however did not consult all members of the MDCC prior to the invitation as required under the Procedural Guide;

(b) SWD did not comply with the Procedural Guide as it did not inform the complainant that he could make a written submission to the MDCC to express his views; and

(c) SWD also did not record the reason for the complainant's absence in the MDCC's minutes, as required under the Procedural Guide.

1151. In view of the above analysis, The Ombudsman considered that although this complaint against SWD was inconclusive/unsubstantiated, it was substantiated other than alleged.

1152. The Ombudsman recommended SWD to –

(a) provide training for staff to ensure that they understand the content and requirements of the Procedural Guide and would follow up cases accordingly; and

(b) remind staff to keep accurate record of major issues when following up cases.

Administration's response

1153. SWD accepted recommendation (a). Through specific and relevant training programmes organised by the Lady Trench Training Centre of SWD on a regular basis, staff will be given deeper understanding of the content and requirements of the Procedural Guide and their skills and methods for handling and following up suspected child abuse cases will be enhanced.

1154. SWD accepted recommendation (b). Apart from organising training programmes, officers-in-charge at frontline service units and district management would, from time to time, remind staff during supervisory and staff meetings that they should keep accurate record of major issues when following up cases.

Social Welfare Department

Case No. 2013/1349 – Mishandling the complainant's claim for the Old Age Living Allowance

Background

1155. On 17 April 2013, the complainant lodged a complaint with the Office of The Ombudsman against SWD through a Legislative Councillor.

1156. According to the Legislative Councillor, the complainant intended to apply for the Old Age Living Allowance (OALA) newly introduced by SWD. She should have been included in the Phase 1 arrangement, thereby rendering it not necessary for her to make an application proactively but only needed to wait for a "green notification letter" from SWD. However, she did not receive any notification letter and hence called up SWD to enquire. A staff replied that SWD could not include her in the Phase 1 arrangement and issue the "green notification letter" to her as her information shown in the computer records was incomplete; and that SWD had put her in Phase 2 and she should declare her income and assets according to the applicable procedures. She then provided documentary proof to SWD of her eligibility for the Phase 1 arrangement and requested SWD to rectify but in vain.

1157. The complainant was dissatisfied with SWD's confusing arrangements of OALA which had mistakenly put her in Phase 2 and this had caused her unable to receive OALA earlier.

The Ombudsman's observations

1158. While SWD had stressed that the application procedures of Phase 2 were "relatively simple", elderly persons had to submit their applications as well as declare their income and assets in Phase 2. This arrangement was different from that of Phase 1 under which recipients would have automatically received OALA payments and would not be required to provide their declarations on income and assets until 2014. Such convenience was significant to some elderly persons.

1159. Theoretically, all elderly persons meeting the Phase 1 criteria should have been entitled to the same treatment in the same phase. Moreover, the failure to arrange auto-conversion for some elderly persons originally belonging to Phase 1 was due to incomplete records in SWD's computer system. The elderly persons were not responsible for this and it was not appropriate for SWD to ask them to bear with the inconvenience.

1160. Besides, although SWD could make special arrangements, such arrangements did not benefit the complainant or other elderly persons of similar background.

1161. In view of the above, The Ombudsman considered this complaint substantiated.

1162. It was however fortunate that SWD had made special arrangements for the complainant and had provided appropriate assistance to the complainant after all.

1163. The Ombudsman urged SWD to learn from the experience of this case and to make more comprehensive planning before the implementation of any new initiatives in future so as to avoid inconvenience to or annoying members of the public.

Administration's response

1164. SWD accepted The Ombudsman's recommendation. The cause of the present case was that some obsolete data relating to Normal Old Age Allowance had not been transferred to the Department's Computerised Social Security System when the System was launched in 2000. To ensure accuracy and completeness of conversion of existing data, SWD will develop and adopt a set of computer programmes and perform stringent testing and verification procedures. All data in the existing System will be fully converted to the new system.

Social Welfare Department

Case No. 2013/2250 – Mishandling an application by the complainant's mother for Disability Allowance

Background

1165. On 28 June 2013, the Office of The Ombudsman received the complainant's complaint against the Social Welfare Department (SWD). The complainant claimed that his mother had been hospitalised for a stroke in November 2012. During the hospitalisation, his mother made an application to a Medical Social Worker (MSW) of the hospital for Disability Allowance administered by SWD. Before his mother was discharged from the hospital on 17 January 2013, his mother was informed by the MSW that a Medical Officer had assessed her health condition, and considered her eligible for the Higher Disability Allowance (HDA). The MSW also advised that the case of the complainant's mother had been referred to the Social Security Field Unit (SSFU) concerned for follow up.

1166. From end January to March 2013, the complainant called Officer A of the SSFU, who was responsible for handling his mother's case, twice to enquire about the progress of the application. On both occasions, Officer A responded that the Medical Assessment Form (MAF) of the complainant's mother had not been received. However, it was confirmed by the MSW that the MAF had already been faxed to the SSFU.

1167. On 18 April, the complainant called Officer A again to enquire about the progress. Officer A replied that as the MAF had been misplaced, she had not been able to follow up the complainant's mother's case yet. Officer A promised that she would follow up on the case immediately and a home visit was scheduled for either 6 or 7 May. However, Officer A did not conduct the scheduled home visit as she was sick. The complainant had not received any notification of a home visit ever since.

1168. In end May, the complainant called Officer A again, informing the officer that since his mother had applied for the Old Age Living Allowance and hence would not need HDA anymore starting from June, and it would only be necessary for SWD to make the back-payment of

HDA for January to May to his mother. Officer A said that she understood the complainant's request and promised to send a notification of case closure.

1169. As no back-payment of HDA had been received, the complainant called Officer A again on 10 June to enquire about the progress. Officer A replied that she thought that the complainant's mother did not need HDA at all.

1170. The complainant alleged that Officer A did not handle his mother's case properly.

The Ombudsman's observations

1171. Judging from the development of the case, the Office of the Ombudsman considered that Officer A indeed had not handled the case of the complainant's mother properly or in a timely manner. Moreover, Officer A's supervisors at the SSFU concerned did not exert stringent supervision. This was also the reason why the SSFU concerned did not realise in a timely manner that the case had been delayed. The incident reflected inadequacy in SWD's existing mechanism, which had not been effective in monitoring applications to a full extent.

1172. As such, The Ombudsman considered this complaint substantiated and recommended SWD to review and refine its monitoring mechanism, and remind staff at all levels to strictly follow the guidelines and review regularly the progress of cases, in order to ensure the proper and timely handling of each and every application.

Administration's response

1173. SWD accepted The Ombudsman's recommendation and has taken follow-up actions –

(a) SWD's Departmental General Circular No. 2/2007 provides guidance for SWD staff on matters that they should pay attention to and comply with in handling incoming documents to ensure proper handling and delivery of documents. In accordance with the existing mechanism, supervisors of SSFUs receive monthly computer reports of new applications generated from the Computerised Social Security System for them to monitor

the progress of these cases handled by the caseworkers concerned. For applications that are not new, if a caseworker fails to deal with the relevant applications within one month, he/she must report the matter to his/her supervisor. In addition, clerical staff would also send timely reminders to the responsible caseworkers via their supervisors, to remind caseworkers to take early follow-up actions for outstanding cases and to draw the attention of the supervisors of SSFUs to the progress of these cases; and

(b) the Social Security Branch of SWD holds regular Social Security Meetings with the supervising officers from SSFUs to share experiences on handling cases. At a meeting of 10 October 2013, supervisors of SSFUs were specifically reminded by the Department to closely monitor the handling of cases by their subordinate caseworkers, and that cases must be handled and their progress must be monitored in a timely manner in line with the aforementioned mechanism to ensure the proper and timely handling of each application.

Social Welfare Department,
Food and Environmental Hygiene Department
and Lands Department

Case No. 2013/1861A, B&C – (1) Improperly issuing Public Subscription Permits to organisations for carrying out charitable fund-raising activities in public places at the same time and at the same or nearby locations; and (2) improperly issuing Public Subscription Permits with a prolonged period of validity

Background

1174. On 13 May and 18 June 2013, the complainant (a charitable organisation) lodged a complaint with the Office of The Ombudsman against the Lands Department (LandsD), Social Welfare Department (SWD) and Food and Environmental Hygiene Department (FEHD).

1175. According to the complainant, it obtained approvals from LandsD, SWD and FEHD for conducting fund-raising activities at specified locations (for around 30 fund-raising days in total and at one fund-raising location each day). While conducting the fund-raising activities, the complainant noticed that there were other organisations holding fund-raising activities in the vicinity at the same time. The complainant quoted five examples to illustrate.

1176. In respect of the above situations, the complainant made the following allegations against LandsD, SWD and FEHD –

(a) The three departments unreasonably granted approvals to more than one applicant organisation for conducting fund-raising activities at the same location (or nearby locations) in the same period of time. As the fund-raisers of these organisations often conducted their fund-raising activities outside the specified locations allocated to them and occupied the specified locations allocated to the complainant, it adversely affected the complainant's fund-raising activities; and

(b) the three departments indiscriminately approved the applications for conducting fund-raising activities for a period up to half a year in one single permit, thus allowing these organisations to conduct fund-raising activities at different locations at the same

time each day within that half a year period, which had caused unfair competition to the complainant's fund-raising activities.

The Ombudsman's observations

Allegation (a)

1177. According to the investigation of the Office of The Ombudsman, the subject matter of allegation (a) fell within the purview of LandsD (but not SWD or FEHD), LandsD had admitted approving wrongly the Letter of Approval for occupying Government land temporarily to other fund-raising organisations.

1178. The Ombudsman therefore considered allegation (a) against LandsD partially substantiated, but that against SWD and FEHD unsubstantiated.

1179. Nevertheless, during the investigation of the five examples given by the complainant, the Office of The Ombudsman noted the following inadequacies of SWD in following up the concerned examples –

(a) SWD kept no records of issuing warning to one of the organisations that had breached the conditions of Public Subscription Permit (PSP); and

(b) SWD had not informed LandsD in a timely fashion about the notification issued by LandsD to the complainant and another organisation conducting fund-raising activities at the same location in the same period of time.

1180. In view of this, The Ombudsman considered allegation (a) against SWD substantiated other than alleged.

Allegation (b)

1181. According to the established procedures, restricting the period and total number of fund-raising activities was outside the purviews of LandsD and FEHD. The Office of The Ombudsman noted that a PSP issued by SWD was generally valid for a fund-raising organisation to conduct fund-raising activities for a period up to three months. Besides, SWD would not restrict the total number of fund-raising activities. Taking into account the explanations of SWD in not restricting the total

number of fund-raising activities by organisations, the Office of The Ombudsman was of the view that the way SWD handled the matter was not unreasonable.

1182. In view the above, The Ombudsman considered allegation (b) against LandsD, SWD and FEHD unsubstantiated.

1183. Overall speaking, The Ombudsman considered the complaint against LandsD partially substantiated; that against SWD substantiated other than alleged; and that against FEHD unsubstantiated.

1184. The Ombudsman recommended SWD to learn from this case and take follow-up actions vigorously in cases where permit conditions for fund-raising activities had been breached, and make timely referrals to relevant Government departments for follow-up actions in the future.

Administration's response

1185. SWD accepted The Ombudsman's recommendation. SWD believes that those were isolated incidents only. In future, it will handle cases of irregularities more carefully and properly maintain relevant records when faced with similar situations. SWD will also make referrals to relevant Government departments in a timely fashion.

Transport Department

Case No. 2012/3275 – Refusing to take traffic management measures to curb illegal parking at a bus stop

Background

1186. The complainant lodged a complaint against Transport Department (TD) for mishandling the problem of frequent illegal parking of coaches in the vicinity of a bus stop outside a road in Tsim Sha Tsui (the concerned location).

1187. Since 2011, the complainant had made repeated complaints to TD via the 1823 Call Centre about the frequent illegal parking of coaches at the concerned location. Those coaches had even occupied the bus stop area and the middle lane of the road, thereby causing not only traffic congestion but also obstruction to the franchised buses/minibuses observing the stop thereat. It also posed safety threats as buses and minibuses were required to pick up/set down passengers at the middle lane.

1188. In its reply to the complainant, TD expressed that enhancement of enforcement actions by the Police was the only solution to tackle the illegal parking problem of the concerned location. The complainant subsequently suggested TD to impose stopping restriction at the concerned location with double yellow lines as a deterrent, but the suggestion was refused by TD.

1189. The complainant was dissatisfied that TD had just passed the buck to the Police without taking any traffic management measures to tackle the problem. He criticised TD for being incompetent and perfunctory in handling the case.

The Ombudsman's observations

1190. Site inspections conducted by the Office of The Ombudsman confirmed that illegal parking or loading/unloading activities of some coaches at the concerned location had caused obstruction to the franchised buses observing the stop thereat; and the franchised buses were required to pick up/set down passengers at the middle lane.

1191. The Office of The Ombudsman agreed that there was no perfect solution to the problem and TD had to balance the interests of different stakeholders. As TD had already clearly pointed out that according to their professional judgment, the traffic condition of the concerned location was acceptable and had no safety concern; and also considered that the existing traffic design of the concerned location was more appropriate after studying various proposals (including cancellation/further relocation of bus stop, designation of prohibition zones for loading and unloading activities, etc), the Office of The Ombudsman considered that TD had already studied and considered the issue in detail and there was no maladministration on the part of TD.

1192. The Office of The Ombudsman considered that if loading/unloading activities of coaches and other vehicles at the concerned location were found to be affecting the safety of bus passengers or causing serious obstruction to the operation of franchised buses in future, TD should implement practical traffic management and improvement measures to tackle the problem. Since the Police's enforcement actions were considered the most appropriate means to tackle the illegal parking problem at the concerned location by TD under the current situation, the Office of The Ombudsman considered that TD should review the traffic flow and road safety from time to time. If the problem was serious or worsened, TD should reflect the situation to the Police immediately and ask for more stringent enforcement actions as well as having a better understanding of their enforcement plans.

1193. Regarding the replies and follow-up actions that TD made on this complaint, the Office of The Ombudsman noted that TD conducted site inspection immediately after receipt of the initial complaint in March 2011. The bus stop at the concerned location was later relocated in June 2011 as an attempt to address the obstruction caused by coaches/other vehicles. The Office of The Ombudsman considered that the case was handled by TD properly at that time.

1194. However, the Office of The Ombudsman considered that TD did not properly handle the complainant's further complaint lodged in May 2012. The Office of The Ombudsman considered that as TD was well acquainted with the local traffic conditions, it should be aware that the problem pointed out by the complainant was not only about the bus stop, but also the planning of the whole road section. In its replies, TD only reiterated the stance that double yellow lines were not needed at the bus stop. This inevitably gave an impression that TD did not give due regard to the complaint or take it seriously.

1195. Moreover, the complainant repeatedly expressed his concern over the safety of bus passengers at the concerned location. However, it was only at the later stage of the Office of The Ombudsman's investigation that TD pointed out for the first time that the traffic conditions at the concerned location was still regarded as safe. The Office of The Ombudsman considered that the crux of this complaint was whether the traffic conditions of the concerned location were safe and indeed passenger safety was of utmost importance. If traffic safety hazards did exist, TD should carry out measures to safeguard passenger safety. If it was mere illegal parking in general, there would have been different considerations.

1196. As the above shows, TD lacked sensitivity in handling the complaint and it failed to address the major concern of the complainant and provide a concrete response and explanation to the crux of the complaint in its replies. TD also did not fully elaborate on other traffic management options that had been considered, resulting in the complainant feeling that TD did not handle his complaint seriously and acted in a perfunctory manner.

1197. In this case, the staff of TD only filed away the photos taken at the site and reported to their supervisors verbally for discussion after each site inspection. No written records were made. The Office of The Ombudsman considered that even though the practice of TD staff might not violate the Department's regulations, the completeness of documentary records could not be maintained. It was also difficult for the management to monitor the daily work of the frontline staff and the way they handled complaints. The Office of The Ombudsman considered it necessary to ensure the effectiveness of site inspections as precious human resources had been engaged. It would be difficult to make future reference to the findings of the inspections if there were no written records. The Office of The Ombudsman urged TD to review its internal guidelines and require its staff to keep appropriate records on the inspections made in handling complaints.

1198. Given the above analysis, The Ombudsman considered this complaint partially substantiated and recommended TD to –

(a) instruct its staff to provide concrete responses to the concerns raised by the public, take the initiative to give an account of the follow-up actions taken and their results, and strengthen communication with the public when handling complaints; and

(b) review the prevailing guidelines/procedures for conducting site inspections in order to ensure the completeness of the Department's records.

Administration's response

1199. TD accepted the recommendations of The Ombudsman and has taken the ensuing follow-up actions –

(a) TD has instructed case officers to provide concrete responses to the concerns raised by the public, take the initiative to give an account of the follow-up actions taken and their results, and strengthen communication with the complainants when handling complaints; and

(b) TD has completed a review of its existing internal guidelines on handling complaints. The guidelines have been revised to require its staff to maintain proper records of site inspections. Besides, the contents and information so recorded should be commensurate with the complexity of a complaint and accord with the purposes of the site inspections.

Transport Department

Case No. 2012/3834 – Mishandling the complainant's application for the importation of an electric vehicle through parallel import

Background

1200. The complainant applied to Transport Department (TD) for approval to import an electric vehicle (EV) from the United Kingdom. Allegedly, TD had failed to inform him of the safety and charging requirements of his EV and unreasonably imposed the "type approval" standard, which was applicable to authorised agents, on an individual importer like him.

1201. He queried TD's request for a confirmation letter from the manufacturer that the vehicle's electric system was safe to use in Hong Kong because this requirement was not set out in TD's guidelines on vehicle importation procedure. He also complained against TD for refusing to disclose the details of its communication with the manufacturer regarding his EV.

1202. Between September 2012 and May 2013, he had provided a number of supplementary information to and chased TD for the progress of his application. However, a definite answer was yet to receive from TD.

The Ombudsman's observations

1203. The Office of The Ombudsman considered TD to have duly informed the complainant of the basic requirements for the importation of EVs, particularly its major concern on the safety of the charging system because the "Vehicle Construction Approval Requirements for Electric Vehicles" have already set out the requirement of such documentary proof. In fact, TD had also explained to him in detail the technical requirements for both the type approval and individual approval procedures.

1204. Whether the type and configuration of the complainant's EV matched with that of the EVs imported by the authorised dealer in Hong Kong was a matter of professional judgement for TD. TD had explained

that the basic information required for assessment was essentially the same for EVs imported privately and by authorised dealers. Given the paramount importance of safety, the Office of The Ombudsman considered it reasonable to impose the same safety standard upon all EVs, regardless of its importation mode.

1205. Regarding the complainant's allegations about the "authorisation letter" from the vehicle manufacturer and TD's refusal to disclose the details of its communication with the manufacturer, the office of The Ombudsman noted that TD had taken the initiative to contact the manufacturer direct and obtained the relevant information. TD had also repeatedly sought the manufacturer's consent for releasing the information to the complainant, but received no reply.

1206. The exchanges between TD and the complainant showed that TD had responded to the complainant's enquiries without delay. As there were some serious concerns raised by the manufacturer, it was understandable that TD needed to seek further confirmation and wait for the manufacturer's reply before making a final decision on the complainant's application. However, as it was already more than eight months since the complainant had submitted his application, TD should try to make a decision as soon as possible based on the information available so far.

1207. In view of the above, The Ombudsman considered this complaint unsubstantiated. Nevertheless, the Office of The Ombudsman found that there was room for improvement. According to TD's webpage on the importation of vehicles, an individual importer had to go through certain procedures, which were applicable to both EVs and petrol vehicles. As the two types of vehicles had very different areas of concern, the Office of The Ombudsman considered that it might not be appropriate for TD to adopt the same application procedures for them.

1208. The Ombudsman recommended that TD should –

(a) closely liaise with the complainant on the progress of his application, so that he can make an informed decision regarding the arrangement for his electric vehicle;

(b) conduct a comprehensive review on the application procedure for parallel importation of EVs to Hong Kong, and consider whether it is necessary to set up a separate and different set of procedures for EVs; and

(c) consider setting up a dedicated webpage for the importation of EVs, highlighting the special requirements and concerns that are applicable to EVs only.

Administration's response

1209. TD accepted The Ombudsman's recommendations and has taken the following actions –

(a) TD continues to liaise closely with the complainant in this case concerning his application and submitted documents;

(b) TD has reviewed the guidelines relating to importation and registration of EVs, and published on the TD website a set of updated "Guidelines for Importation and Registration of Pure Electric Vehicle (PEV) and Plug-in Hybrid Electric Vehicle (PHEV)" in October 2013; and

(c) TD has set up a new webpage specifically relating to the importation and registration of EVs in October 2013, so that the public can better understand the procedures and requirements for importing EVs and obtain other EV-related information.

Transport Department

Case No. 2012/5388 – Refusing to take up a complaint against a taxi driver because the complainant could not provide the taxi vehicle registration number

Background

1210. The complainant lodged a complaint to the Transport Complaints Unit (TCU) about the poor attitude of a taxi driver. However, TCU did not take up his complaint because he could only provide the driver's name and taxi driver identity plate (TDIP) number but not the taxi vehicle registration number (VRN). He believed that TCU should be able to obtain the driver's information from Transport Department (TD) but TCU maintained that TD would not provide such information. He was dissatisfied with TD's refusal to provide the relevant information for TCU to follow up his complaint.

1211. Currently, TD and the Police are the major Government departments that monitor and regulate taxi services while TCU is the principal agent to receive transport complaints. Complaints amounting to suspected criminal offences such as overcharging and touting will be referred to the Police for investigation, while those about general misbehaviour of taxi drivers will be referred to TD for follow-up actions, normally by way of liaison with the taxi trade and issuance of advisory letters.

The Ombudsman's observations

1212. This complaint arose from TD's refusal to provide the driver's information for TCU to follow up his complaint. However, under the current system established by TCU, the complainant must provide the taxi VRN before TD can issue an advisory letter to the taxi owner. The crux of this case is whether TD's current practice of issuing advisory letters to taxi owners is reasonable and effective in deterring the poor performance and behaviour of taxi drivers.

1213. While the Office of The Ombudsman did not dispute that TD's current practice could help monitor the performance of taxi drivers and deter misbehaving drivers and that the system was largely reasonable and

effective, the Office of The Ombudsman considered there to be room for improvement. Issuing advisory letters to the taxi drivers direct might only have limited effect, yet it could at least provide the useful feedback to them that their behaviour is attracting complaints. In this case, even though the complainant could not provide the taxi VRN, TCU should still take up the complaint.

1214. The Office of The Ombudsman considered that TD/TCU could set up a system to monitor complaints on a driver basis as a supplement to TCU's existing monitoring system on a vehicle basis. It should be more effective in deterring poor performing drivers. To ensure its effectiveness, TD should educate and facilitate the public to jot down the TDIP number of the driver concerned when lodging a complaint. TD might need to consider ways to make it easier for the public to obtain the information such as including it in the taxi receipt.

1215. Furthermore, TD might consider discussing with TCU to remind the public of the need to provide the taxi VRN on its Taxi Complaint Form available on TCU's website. Moreover, TD might consider spelling out this message clearly inside the taxi. As getting a taxi fare receipt could serve as useful evidence for the complaint, TD should step up publicity and advise the passengers to obtain a receipt from the driver in case they want to lodge a complaint.

1216. Finally, the Office of The Ombudsman considered that TD should step up action against repeated offenders. If the number of complaints against a particular taxi or driver reaches a certain level, TD should consider stepping up its actions such as requiring the taxi owner to report back on the follow-up actions taken.

1217. Overall, The Ombudsman considered the complaint unsubstantiated. TD's current system, however, showed area for improvement. The Ombudsman recommended that TD should discuss with TCU the following ways to improve the system of complaint handling on taxi services –

(a) TD should take up a complaint even where only the taxi driver but not the owner can be identified, by issuing an advisory letter to the driver;

(b) in addition to monitoring complaints on a vehicle basis, TCU should set up a system to monitor complaints on a driver basis where the complainant can provide the TDIP number of the

driver concerned and, on receipt of further complaints against the same driver, refer both complaints to TD or the Police for follow up;

(c) TD should consider ways to educate and facilitate the public to obtain and record the driver's TDIP number so as to enhance the effectiveness of recommendation (b) above;

(d) TD should consider step up follow-up actions with the taxi owner upon receiving repeated complaints against a particular taxi or driver, such as requiring the owner to explain or report his/its rectification measures;

(e) TCU should remind the public, by a message on the Taxi Complaint Form, of the importance to record the taxi VRN when lodging complaints against taxi drivers;

(f) TD should explore the feasibility of reminding passengers, through the information notice inside taxis, of the need to record the taxi VRN (as well as the TDIP number of the driver, as aforementioned) when lodging complaints against the driver;

(g) TD should step up publicity to advise passengers to obtain a receipt from the driver if he/she wants to lodge a complaint; and

(h) TD should step up publicity on the Taxi Driver Commendation Scheme (the Scheme) to encourage well performing drivers and enhance the professional image of the industry.

Administration's response

1218. TD and TCU accepted all recommendations put forth by The Ombudsman and have taken the following actions as per recommendations (a) to (h) above –

(a) TD and TCU have since October 2013 accepted complaints without information on taxi VRN (i.e. the taxi owner cannot be identified) but with TDIP number and/or the driver's name. Between October 2013 and June 2014, TCU received five complaints with the identification of taxi drivers only. TD issued an advisory letter to each of these drivers;

(b) TCU completed the modification of its system in January 2014 in order to record and monitor complaints on a "driver" basis. Repeated complaints on the same driver would be referred to TD and/or the Police for follow up;

(c) & (g) TD updated its webpage, posters, flyers as well as notice stickers inside taxi compartments in December 2013 to remind passengers that they might use information on TDIPs or fare receipts to lodge a complaint;

(d) based on the information provided by TCU after modification of its complaint monitoring system in January 2014, TD would issue letters to owners/drivers who were the subjects of repeated complaints to request reports of rectification measures taken;

(e) TCU revised its "Taxi Complaint Form" in December 2013 to remind the public to record taxi VRN, information displayed on TDIPs or to obtain fare receipts if they would like to lodge a complaint against any taxi driver;

(f) TD had arranged to include a reminder in notice stickers inside taxi compartments from December 2013 onwards to remind passengers that complaints might be lodged by using taxi VRN, information displayed on TDIPs or fare receipts; and

(h) TD took the opportunity of the award presentation ceremony of the Scheme held in January 2014 to arrange more radio air time for publicity in order to encourage taxi drivers to provide quality taxi service. Meanwhile, stories of the taxi drivers commended by the Scheme would be published in the Taxi Newsletter for drivers. To better promote the Scheme and enhance the professional image of the taxi trade, TD had since December 2013 printed QR codes on notice stickers inside taxi compartments and taxi information plates displayed at major taxi stands for direct linkage to the website of the Quality Taxi Service Steering Committee.

Transport Department

Case No. 2013/2265 –Unreasonably requiring first-time applicants for Private Service (Limousine) Hire Car Permit to provide hiring records as supporting document

Background

1219. The complainant complained against the Transport Department (TD) for its mishandling of his application for "Hire Car Permit - Private Service (Limousine)" (the permit). The complainant planned to invest in the hire car business and had secured agreement from his client to enter into a contract for using his hire car service. In making enquiry on his permit application, he understood from TD that an applicant was required to submit hiring records of his clients for using the same type of hire car in the past three months as supporting document. The complainant considered that the service contract signed with his client was sufficient proof of his genuine demand for the permit. TD staff however replied that failure to provide such hiring records might render his application unsuccessful, and suggested him to outsource his hire car service to other permit holders and then produce the corresponding three-month hiring records as supporting document. The complainant tried to find other permit holders to operate the service but was rejected as he was seen as a competitor. The complainant considered TD's requirement unreasonable to first-time applicants of the permit.

The Ombudsman's observations

1220. The Office of The Ombudsman considered that there was a need for TD to comply with the law by requiring the permit applicants to produce information to justify that their hire car service was reasonably required. However, a first-time applicant might query how he could provide the hiring records of the past three months when his permit was yet to be issued. As noted from TD's explanation in this case, an applicant in fact has three options –

(a) to rent hire cars operated by other permit holders to serve his clients for three months and then provide such records to TD;

(b) to provide his client's records of using the same type of hire car service in the past three months; or

(c) to provide a written statement or explanation for consideration of the Contract Hire Car Permits Selection Board (the Selection Board) in case he is unable to produce any hiring records.

1221. The Office of The Ombudsman considered that the requirement of providing hiring records for the past three months was not particularly difficult to meet, given the fact that the majority of the applicants were able to provide such hiring records. As for applicants who could not provide such hiring records, the Selection Board would accept their applications after considering their written statements. It showed that TD had exercised certain flexibility when enforcing the legal requirements. The Office of The Ombudsman also agreed with TD's views that exempting first-time applicants from submitting hiring records might create a loophole. The Office of The Ombudsman therefore accepted TD's explanation that a consistent set of assessment criteria should be applied to all first-time and renewal applications.

1222. On the other hand, TD's requirement for first-time applicant to provide hiring records for the past three months would inevitably lead to query. There was no clear information provided in the permit application form in this regard. The Office of The Ombudsman understood that on the enquiry by an applicant, TD staff would explain to the applicant that if he was unable to produce any hiring records, he might provide other supporting documents, supplementary information, or other information he considered relevant to support his application for consideration of the Selection Board. TD would also let applicants know that they could submit "other documents or information" not listed in the application form and provide a telephone number for enquiry by the applicants. An applicant would however miss the above information if he did not make any enquiry.

1223. The Office of The Ombudsman considered that TD should provide more specific explanations in the application form, particularly on how first-time applicants could obtain the required hiring records, and if they were unable to provide such records, they might make a written statement to elaborate the reasons for consideration of the Selection Board. It would help avoid deterring first-time applicants from applying lest they believe that permits would not be issued without producing any hiring records.

1224. In view of the above analysis, The Ombudsman considered the complaint unsubstantiated but there was room for improvement for TD. The Office of The Ombudsman recommended TD to provide more specific explanations in the application form, particularly on how first-time applicants could obtain the required hiring records, and if they were unable to provide such records, they might make a written statement to elaborate the reasons for consideration of the Selection Board, lest first-time applicants be deterred from applying due to the unavailability of hiring records.

Administration's response

1225. TD accepted the recommendation made by the Office of The Ombudsman. Since March 2014, TD has revised the list of "Required Documents" enclosed to the permit application form to remind first-time applicants that they could consider submitting any other supporting documents or information if they are unable to provide any hiring/deployment records. TD has also updated the relevant webpages.

Transport and Housing Bureau and Transport Department

Case No. 2012/4018 – Mishandling the complainant's application for the importation of an electric vehicle through parallel import

Background

1226. The complainant lodged a complaint against the Transport and Housing Bureau (THB) and the Transport Department (TD) for maladministration in the handling of his application for importation of an electric vehicle (EV).

1227. In July 2012, the complainant purchased an EV directly from Japan (the model of which was believed to be the same as sold by the local agent and used by the Hong Kong Government) and obtained approval of noise emission compliance from the Environmental Protection Department (EPD). However, having received information of the EV from the complainant in mid-August, TD requested the complainant to supply more documentary proof of compliance with the relevant requirements. The complainant opined that TD did not properly handle his application, and thus lodged a complaint to the Office of The Ombudsman. Through a mediation meeting arranged by the Office of The Ombudsman, a settlement was reached between both parties on 20 September. TD subsequently informed the complainant on 5 October that a formal reply from the manufacturer of the EV (the manufacturer) had been received, confirming that the design of his EV was not suitable for use in Hong Kong. Therefore TD was unable to process his application.

1228. The complainant later shipped the EV back to Japan for resale. He informed TD that the Japan Customs had required him to provide a written proof of TD's formal denial of issuance of vehicle licence, together with formal documentary proof from the manufacturer.

1229. The complainant expressed the following dissatisfaction with THB and TD –

(a) TD received confirmation from the manufacturer earlier that the design of the complainant's EV (Japan version) was not suitable for use in Hong Kong. The complainant opined that such information was different from his understanding from his agent.

He therefore requested TD to forward the original copy of the correspondence with the manufacturer to him, but was refused. The complainant was dissatisfied that TD rejected his request without reasons. TD had sent an English version of its email to the complainant stating that the department could not process the application regarding his EV. However, the email only quoted the words of the manufacturer. The complainant was skeptical about TD's saying that the Department had contacted the manufacturer direct on his behalf, and therefore hoped to obtain the original copy of the correspondence for verification;

(b) the complainant said that he bought the EV by means of parallel import, and this might affect the interests of the local agent. He had reasons to believe that TD had actually only communicated with the local agent regarding his application and did not receive any reply from the manufacturer at all. The complainant was not satisfied that TD had been avoiding his questions;

(c) the complainant opined that TD had exchanged information with the local agent regarding his application. Under the influence of the agent, TD was making his application difficult;

(d) the complainant said that prior to the delivery of his EV to Hong Kong, he had called and emailed various departments to enquire about the licensing requirements. At that time, TD had neither mentioned to the complainant that safety certificates from the manufacturer must be submitted nor that any requirement on compatibility of electricity supply system was in place. The complainant was not satisfied that during his application for importation of the EV, TD had not mentioned that safety certificates and the relevant basic safety requirements from the manufacturer must be provided. When the complainant checked against the required vehicle inspection certifications on TD's website afterwards, he found a new clause requiring the submission of further information from the manufacturer. The complainant felt that TD had changed its requirements, leaving him at a loose end and causing misunderstanding;

(e) the complainant opined that the replies given by TD staff were incomplete and inaccurate without a full account of the details and the guidelines concerned, resulting in the complainant wrongly assessing the requirements for importing the EV. He opined that if TD staff had informed him of the relevant

requirements earlier, he would not have suffered such a huge loss; and

(f) the complainant said that TD had little knowledge about importation requirements of EVs. However, THB entrusted TD to fully handle matters concerning licensing and examination requirements without inviting professional advice from other departments, such as the Electrical and Mechanical Services Department (EMSD). That was a case of misplacing decision-making power.

The Ombudsman's observations

Allegations (a) and (b)

1230. According to the Government's Code on Access to Information, where information requested is held for, or was provided by, a third party under an explicit or implicit understanding that it would not be further disclosed, the department concerned may refuse to disclose the information. As such, the Office of The Ombudsman considered it appropriate for TD to obtain consent of the manufacturer prior to releasing their original correspondence to the complainant.

1231. Having examined the email records between TD and the manufacturer, the Office of The Ombudsman confirmed that TD had sent an email to the manufacturer on 25 September enquiring whether the model of the complainant's EV was applicable to the Vehicle Certification Agency (VCA) certification and test report; whether the charging system of the EV was safe for use in Hong Kong; whether the EV had the same battery as its Hong Kong version; and whether there were any points to note when using the EV. A staff of the manufacturer replied on 27 September, stating that VCA report and certification were not applicable to the model of the complainant's EV model. He also pointed out that although the batteries used were the same, the basic configuration standards of the Japan and the Hong Kong versions were different, and that no official maintenance support was provided for the complainant's EV. To avoid personal injury and property loss, the manufacturer strongly advised that only vehicles already approved to be roadworthy by the respective market should be used.

1232. The Office of The Ombudsman had also examined the subsequent emails of TD, confirming that the Department had contacted the manufacturer a few times direct to seek their consent for releasing the email records to the complainant, but received no reply.

1233. In view of the above, the Office of The Ombudsman considered allegations (a) and (b) unsubstantiated.

Allegation (c)

1234. TD had indeed consulted the manufacturer on the electrical safety of the EV via the local agent in July 2012. The Office of The Ombudsman had reviewed the relevant emails and found that the complainant's application had never been mentioned. There were direct exchanges between TD and the manufacturer afterwards (paragraphs 1231 and 1234 above refer). The Office of The Ombudsman considered that there was no evidence suggesting intervention from the local agent in TD's handling of the complainant's application and the communication between TD and the manufacturer. As such, allegation (c) was considered unsubstantiated.

Allegations (d) and (e)

1235. The Office of The Ombudsman noticed that the complainant mentioned in his first enquiry with the 1823 Call Centre on 18 July 2012 that he had ordered an EV from Japan. In an email to the complainant in early August 2012, TD had already clearly informed the complainant that "…when importing electric vehicles, individuals should provide documentary proof issued or endorsed by the manufacturer of the electric vehicle of the compatibility of the electrical system (including the charging system) of the vehicle with the electricity supply system in Hong Kong, confirming there would be no danger. Vehicles that are suitable for use in other regions may not be suitable for use in Hong Kong". A copy of the "Vehicle Construction Approval Requirements for Electric Vehicles" was also attached to the email for reference. The Office of The Ombudsman considered that TD had already stated the basic requirements (i.e. the documentary proof issued or endorsed by the manufacturer of the EV of the compatibility of the EV's electrical system with the electricity supply system in Hong Kong) in a timely manner upon receipt of the complainant's initial enquiry. During its subsequent handling of the complainant's application, TD had all along maintained its position of regarding electrical safety as a licensing prerequisite.

1236. Although there were changes to the clauses listed on the relevant webpage during the period, updating of webpage is considered a routine duty of Government departments. After studying the changes, the Office of The Ombudsman found that there was no special mention of the requirements for importation of EVs on the webpage before the update. The Office of The Ombudsman believed that as the complainant's application was the first case attempting to import an EV to Hong Kong by means of parallel import, there was no special mention of the relevant requirements on the webpage before that. Therefore, the complainant had to make enquires to TD in this regard specifically, and TD had reverted to the complainant in time. With the experience gained from the case, TD consequently enhanced the relevant information on the webpage. Such arrangement was considered reasonable and responsible. The Office of The Ombudsman considered that although there was no special mention of the requirements for EVs on the webpage at the beginning, it did not mean that there were inconsistency in TD's approval criteria and principles. Therefore, the Office of The Ombudsman did not see that TD had changed its guidelines or caused misunderstanding and confusion.

1237. On the other hand, upon studying the relevant webpage, the Office of The Ombudsman considered that there was room for improvement. According to the guidelines on the webpage, parallel import of vehicles was required to go through several procedures. First, such vehicles should comply with the exhaust and noise emission standards of EPD. Second, upon importation, the vehicles should meet the declaration requirements of the Hong Kong Customs. Third, before registration and licensing, the vehicles should be sent to TD for examination, which could only be done after importation. Fourth, vehicle registration and licensing should be made. Lastly, first registration tax should be calculated.

1238. The aforementioned procedures applied to both EVs and non-EVs, the Office of The Ombudsman however considered that as far as legislation and technology were concerned, these two types of vehicles had different areas of concern. For non-EVs, the main areas of concern were probably exhaust and noise emission compliance and calculation of first registration tax. That explained why the first step in the guidelines was to make application to EPD for approval and to declare dutiable value to the Customs afterwards. When submitting application to TD, the vehicles were already imported to Hong Kong.

1239. The areas of concern for EVs were different. With zero emission of exhaust gas, EVs were only required to comply with the noise regulation of EPD and were exempted from the first registration tax. That said, TD imposed stringent requirements on their electrical system. Although a reminder that read "Before importing a vehicle, you are reminded to ensure that it meets the applicable requirements for registration in Hong Kong" was included on TD's webpage, and there was also special mention that additional information issued by the manufacturers were required for EVs and plug-in hybrid electric vehicles, the Office of The Ombudsman considered that as there were such stringent requirements imposed on EVs by TD, members of the public, prior to purchase of such vehicles, should confirm with TD whether the model and electrical system comply with TD's requirements.

1240. As such, the Office of The Ombudsman proposed THB and TD to fully review the application procedures of importation of EVs and consider whether a separate set of application procedures should be put in place for EVs. For example, vehicles should have obtained model confirmation and approval from TD before importation. TD should also liaise with other relevant departments and consider amending the approving departments (such as whether EPD should give exemption approval on each EV; whether the Customs should be informed of the dutiable value) and engaging other relevant departments in the process (such as EMSD and the Fire Services Department).

1241. In view of the government policy on EVs, The Office of The Ombudsman also considered that more people would be interested in importing such vehicles in future. THB and TD should consider setting up a dedicated webpage on importing EVs, clearly listing the major requirements and the application procedures.

1242. In the light of the above, the Office of The Ombudsman considered allegations (d) and (e) unsubstantiated. However, there was room for improvement in the current practice.

Allegation (f)

1243. THB mentioned in its response that comments from other departments, including EMSD, were taken into account in considering import and licensing of EVs. The Office of The Ombudsman considered it reasonable for TD to play the role of a gate-keeper to ensure road safety considering that vehicles ran on the roads of Hong Kong. In fact, as shown from the complainant's email of 25 September, EMSD had

indicated that their "Technical Guidelines on Charging Facilities for Electric Vehicles" were not the licensing requirements for EVs in Hong Kong. As such, the Office of The Ombudsman considered allegation (f) unsubstantiated.

1244. To sum up, the Office of The Ombudsman considered that TD had endeavoured to assist the complainant and there was no evidence suggesting maladministration. Nevertheless, the Office of The Ombudsman considered it unfortunate that the complainant had suffered considerable loss for shipping the imported EV back to Japan for resale. The Office of The Ombudsman hoped that TD would learn from this case and improve the application procedures and information provision, so as to better tie in with the government policy of promoting wider use of EVs.

1245. Given the above analysis, The Ombudsman considered this case unsubstantiated and recommended THB and TD to –

(a) conduct a comprehensive review on the application procedures for importation of EVs, and consider whether it should set up a separate set of application procedures for EVs; and

(b) consider setting up a dedicated webpage on importing EVs, and to clearly list out the major requirements and the application procedures.

Administration's response

1246. THB and TD accepted the recommendations made by the Office of The Ombudsman, and has taken the following actions –

(a) TD has reviewed the guidelines relating to importation and registration of EVs, and published on TD's website a set of updated "Guidelines for Importation and Registration of Pure Electric Vehicle and Plug-in Hybrid Electric Vehicle" in October 2013; and

(b) TD has launched a new webpage specifically relating to the importation and registration of EVs in October 2013, so that the public can better understand the procedures and requirements for importing EVs and obtain other EV-related information.

Vocational Training Council

Case No. 2013/3142 – Providing false information in the prospectus, thereby misleading the students that they would be awarded a recognised professional qualification upon completion of the programme

Background

1247. The complainant had attended a three-year higher diploma programme in energy management (the Programme) at one of the schools of the Hong Kong Institute of Vocational Education (School A) under Vocational Training Council (VTC) from 2004 to 2007. According to the prospectus of the Programme, the diploma was recognised by the Electrical and Mechanical Services Department (EMSD) for registration as an Electrical Worker. However, the complainant subsequently learned that EMSD did not recognise that qualification. He therefore complained to the Office of The Ombudsman that VTC had provided false information, thereby misleading the students.

The Ombudsman's observations

1248. Clearly, School A had released incorrect information to students when it opened the Programme. The Office of The Ombudsman found VTC's error in such crucial information unacceptable. Furthermore, the problem did not come to VTC's notice during the vetting process. This showed that not only were the staff members concerned negligent, but VTC's vetting procedures for new courses were themselves faulty.

1249. Moreover, VTC should have acted immediately after being notified by the graduates concerned in January 2012, contacted EMSD to discuss the possibility of retrospective recognition of academic qualification, and informed other graduates, arranged for them to take supplementary classes, so as to minimise the impact of the problem on them. In this incident, VTC took remedial action only after the intervention of the Office of The Ombudsman. Its response was much too slow, showing its lack of accountability.

1250. In the view of the above, The Ombudsman considered this complaint substantiated and recommended VTC to –

(a) revise the vetting procedures for new courses to require its schools to confirm the recognition of professional qualification, so that similar problems would not occur; and

(b) where there are issues significantly affecting graduates, inform all those affected and take due remedial action promptly.

Administration's response

1251. VTC accepted The Ombudsman's recommendations and has taken/will take the ensuing follow-up actions –

(a) VTC is reviewing the existing mechanism for programme development with a view to strengthening the procedures for application for professional recognition of the programme. VTC expects that under the revised procedures, the progress of application will be reported periodically to, and closely monitored by, the programme board and the academic committee concerned. Also, the academic disciplines will be required to check the accuracy of the information given in the prospectus of their programmes; and

(b) where significant issues affecting graduates are identified, all those affected would be informed promptly and appropriate remedial actions would be taken in a timely manner.

Part III
– Responses to recommendations in direct investigation cases

Buildings Department

Case No. DI//316 – "Special Procedures" of Buildings Department for Handling Unauthorised Building Works (UBW) Cases Involving Celebrities

Background

1252. Since mid-2011, Buildings Department (BD), which is responsible for dealing with unauthorised building works (UBW), had been using a set of special procedures for handling UBW cases involving celebrities (celebrity cases). Those procedures ("special procedures") were meant for answering public queries as soon as possible by conducting site inspection and investigation speedily "on the same day of receiving a UBW report", or "within a few days at the latest", to ascertain the existence of the alleged UBW items. On completion of its investigation, BD will take further actions in accordance with its general policy and procedures for handling UBW cases, i.e. it will not be particularly stringent or lenient in its actions just because a celebrity is involved.

1253. As the public had expressed concern about the Administration's handling of celebrity cases, The Ombudsman initiated a direct investigation to identify any inadequacies in the "special procedures".

The Ombudsman's observations

Too Slow and Passive in Announcing the New Procedures

1254. The Office of The Ombudsman considered it justified for BD to adopt the "special procedures" so that it could quickly address queries from the public and the media about celebrity cases. Nevertheless, the "special procedures" are, after all, different from the procedures for handling ordinary UBW cases. The Administration should have promptly apprised the public of the details and rationale after deciding to adopt those procedures. It should not have waited over half a year, and until being asked by the media, before disclosing that a set of "special

procedures" was already in place for dealing with celebrity cases. The Administration's announcement of the "special procedures" was indeed too slow and passive.

Lacking Written Guidelines on the New Procedures

1255. By the date the Office of The Ombudsman completed this investigation, BD had already implemented the "special procedures" for more than two years and dozens of cases had been handled with those procedures. However, BD had never produced any written guidelines on them. Without such written guidelines, different officers might have different understanding of the work requirements, thereby prone to discrepancies in their ways of handling matters.

Often Delaying Enforcement Actions

1256. In most celebrity cases, BD had managed to conduct a site inspection on the same day of receiving a UBW report, or within a few days at the latest, in accordance with the "special procedures". However, there were often delays in its subsequent enforcement actions. In some cases –

(a) no advisory letters urging the owners to commence rectification works were issued for more than six months after the UBW items had been confirmed;

(b) no statutory orders were issued more than one year after the grace period specified in the advisory letters; and

(c) warning letters preceding prosecutions were only issued to the owners more than six months after the deadlines stated in the statutory orders.

1257. The delays observed above were also commonly found in other UBW cases, not just those involving celebrities. Indeed, this has an impact on public safety.

1258. The Ombudsman makes the following recommendations to BD –

(a) To take reference from this study and, when implementing new measures in future that may affect the public, announce the details and the reasons as soon as possible;

(b) to document the "special procedures", setting out the objective, rationale and working guidelines for staff to follow; and

(c) to probe into the reasons for delays in handling UBW cases and try to find a solution to the problem.

Administration's response

1259. BD accepted The Ombudsman's recommendations and has taken the following actions –

(a) BD would announce the details and the reasons as soon as possible when implementing new measures in future that might affect the public.

(b) BD has amended the relevant internal instructions with appropriate explanatory notes for staff reference.

(c) BD has always attached great importance to building safety in Hong Kong. Based on the premise of effective use of resources, BD adopts a risk-management principle in setting its enforcement priorities. In response to public concerns about building safety, BD has implemented a revised enforcement policy against UBW since April 2011 by broadening the scope of "actionable" UBW to include UBW on rooftops and podiums as well as those in yards/courtyards and lanes of private buildings, irrespective of their degree of risk to public safety or whether they are newly constructed. As a result, the number of UBW reports has soared since then. In order to handle the influx of reports, BD has to prioritise the enforcement actions against "actionable" UBW so that they can be carried out in an orderly manner. That said, a monitoring and assessment mechanism is in place where immediate enforcement action will be taken against those UBW which have become dangerous to ensure public safety.

1260. Moreover, BD has implemented a series of improvement measures, including re-arranging work priorities and streamlining work procedures to enhance efficiency. Existing resources will be redeployed and additional resources provided to strengthen the clearance of backlog statutory orders.

Constitutional and Mainland Affairs Bureau

Case No. DI/238 – The Access to Information Regime in Hong Kong

Background

1261. Freedom of information (FOI) or access to information (ATI) is a fundamental right of citizens. However, instead of having specific laws governing FOI or ATI, Hong Kong only has an administrative code, namely, the Code on Access to Information (the Code), introduced in 1995. The Code, which is currently under the charge of Constitutional and Mainland Affairs Bureau (CMAB), requires bureaux and departments (B/Ds) to make available Government-held information to the public unless there is a reason specified by the Code to withhold it (exemption provision).

1262. Despite CMAB's noticeable efforts in recent years to improve the administration of the Code, complaint cases handled by the Office of The Ombudsman show that some B/Ds still do not fully understand the Code and do not properly apply its provisions. Besides, major developments have been taking place in many other jurisdictions to keep up with the public's need and expectations for open and accountable government. These include legislation for FOI.

1263. In light of the above, The Ombudsman initiated this direct investigation to further identify inadequacies/problems in Hong Kong's ATI regime, with reference taken from other jurisdictions. The findings were as follows.

The Ombudsman's observations

Lack of Legal Backing

1264. Under Hong Kong's purely administrative regime, some of the key components of FOI legislation as found in other jurisdictions are completely absent, in particular, binding decisions by adjudicating body and sanctions for non-compliance, while other key components are not adequately manifested, for example, coverage of public organisations, proactive disclosure of information, regular reporting of work and advocacy for ATI.

Limited Coverage of the Code

1265. The Code covers only two public organisations, with all other public organisations being free to choose whether to adopt the Code. And even if they decide to do so, they will still be outside the formal coverage of the Code and CMAB's oversight.

Restrictive Scope of Monitoring

1266. The statistics monitored by CMAB merely cover public requests for information using the specified Code request form or making explicit reference to the Code, whereas the Code in fact stipulates that all requests for information, irrespective of whether they are made in the name of the Code, be dealt with in the spirit of the Code. Hence, there are conceivably a large number of information requests, B/Ds' handling of which is not monitored by CMAB.

Lack of Understanding and Inconsistent/Erroneous Application of the Exemption Provisions

1267. Many B/Ds still do not fully understand the spirit and letter of the Code, as a result of which the exemption provisions are applied or not applied by B/Ds according to their own interpretations. There are, in particular, inconsistencies among B/Ds, and often errors, in applying the exemption provisions "third party information" and "personal data (privacy)". There are insufficient guidelines and B/Ds have no access to authoritative advice in this regard.

Lack of Review

1268. Unlike the exemption provisions in the FOI laws in many other jurisdictions, those in the Code do not have a specified term of validity. There is also no built-in mechanism for regular review of the exemption provisions in the Code, while other jurisdictions continually review and refine their categories of exemptions, to the effect of narrowing them down and reducing their term of validity for enhancing the public's ATI. Furthermore, there is a lack of established channel for CMAB to consult other experts and opinion leaders on its work relating to ATI to keep up with the community's expectations.

Inadequacies in Proactive Disclosure and Regular Reporting

1269. At present, the information routinely provided by B/Ds to the public is general in nature and does not include administrative manuals, guidelines, instructions and other documents which have a bearing on B/Ds' decisions that affect the public. In other jurisdictions, proactive disclosure of such kinds of documents is required by law. Furthermore, compared with other jurisdictions' comprehensive quarterly/annual reports, the quarterly press releases issued by CMAB merely contain scanty statistical data not useful for the public's understanding of the Code and B/Ds' compliance with the Code.

Inadequate Promotion and Public Education

1270. CMAB's designated website on the Code (www.access.gov.hk) provides meagre information about the Code. The websites of other jurisdictions contain guidance on various aspects of FOI, precedent cases to explain the FOI law and the exemption provisions, and the channels for the public to seek advice. CMAB's Announcements in the Public Interest, though appearing on radio/television not infrequently merely give rudimentary messages, without highlighting the underlying principles of the Code such as openness and transparency.

1271. The Ombudsman recommended that the Government –

(a) should consider introducing a law to underpin citizens' right of ATI, covering information held by both B/Ds and public organisations, to be overseen by an independent body with enforcement powers.

1272. Before such a law is enacted, the Government should –

(b) explore ways and means by which B/Ds can have access to authoritative expert advice and clear guidelines on handling information requests that appear to involve personal data;

(c) set up an independent body to advise CMAB on matters relating to ATI;

(d) draw up and implement a phased programme of subjecting public organisations to the Code and to CMAB's oversight;

(e) review its definition of "information request" for the purpose of

monitoring B/Ds' compliance with the Code, so as to cover those requests made without citing the Code;

(f) make more information available to the public and consider introducing "disclosure logs" so as to facilitate the public's understanding and scrutiny of B/Ds' performance;

(g) significantly increase the amount, breadth and quality of information that it regularly provides to the public about the Code and its application;

(h) establish a mechanism for regularly reviewing the Code to keep up with the times, in particular its exemption provisions to ensure that they are not excessive and are clearly defined, and that their term of validity is specified where possible;

(i) devise and maintain a compendium of cases on specific topics relating to the administration of the Code and the application of exemptions to facilitate both B/Ds' and the public's understanding;

(j) enhance publicity to promote the channels for the public to seek advice on matters relating to the Code;

(k) provide more advice and support to B/Ds to help them with interpretation and application of the Code, particularly for those exemptions in the Code that are subject to frequent queries and complaints from the public; and

(l) reinforce training for staff, including exposure to knowledge and best practices on implementation of FOI legislation in other jurisdictions.

Administration's response

1273. For recommendations (a), (c), and (h), the Law Reform Commission (LRC) is conducting a comprehensive comparative study on the relevant laws in overseas jurisdictions, with a view to considering whether measures to improve the access to information regime should be implemented in Hong Kong, and, if so, how these measures should be implemented. CMAB will carefully study any recommendations the LRC may have on this and then consider on the way forward.

1274. On recommendation (b), B/Ds can seek legal advice from the Department of Justice on matters relating to access to information as and when required. Should specific input be required on any special legal issues, counsel experienced in those areas of law will be consulted.

1275. On recommendation (d), CMAB has liaised with the 22 public organisations under The Ombudsman's purview to discuss disclosure and oversight arrangements. CMAB will take forward the matter in the light of their views.

1276. On recommendation (e), CMAB is reviewing the scope of monitoring having regard to the practices in the jurisdictions covered in The Ombudsman's report.

1277. On recommendations (f), (g), (i), (j), and (k), CMAB is taking steps to enrich the content of the Code website and provide for more information to be made available publicly. As a first step, the following information has been added onto the website of the Code –

(a) Press releases relating to statistics of the Code which are issued quarterly;

(b) television and radio APIs relating to the Code; and

(c) address, email, and fax number, to which enquiries relating to the Code could be sent.

Other information will be added as and when ready.

1278. On recommendation (l), CMAB has included information relating to best practices in overseas jurisdictions in staff training materials.

Department of Health

Case No. DI/278 – Control of Healthcare Professions Not Subject to Statutory Regulation

Background

1279. From time to time there were media reports suggesting that public health might be at risk as a result of emergence of new types of treatments that have healthcare implications or involve substandard service provided by unqualified practitioners. Repeated incidents concerning improper beauty treatments also pointed to the need for tighter monitoring and review of the regulatory regime for healthcare professions. In this connection, The Ombudsman initiated a direct investigation to examine whether the current control mechanism is sufficient and identify areas for improvement.

1280. Department of Health (DH) all along adopted a risk-based approach to consider which healthcare profession should be statutorily regulated. The major considerations included the nature and scope of work of the professions and the risks associated with their practices. For unregulated healthcare professions, DH emphasised that voluntary society-based registration could be an effective alternative to statutory control.

1281. However, the direct investigation of the Office of The Ombudsman revealed that DH failed to discharge such duties as it had not conducted systematic risk analysis and regular review on the need for putting any healthcare professions under statutory control. Also, DH had no monitoring mechanism on the operation of unregulated healthcare personnel and their societies.

The Ombudsman's observations

1282. While statutory control will allow DH to closely monitor qualified healthcare personnel and prevent unqualified personnel from practising, The Ombudsman accepted that not all healthcare professions need to be regulated by statutory control. However, DH must be vigilant on any risks and practices of unregulated healthcare personnel may bring to the public. From information provided by DH, no

effective mechanism was in place to monitor the service standards of unregulated healthcare personnel and review the need for statutory regulation. The Ombudsman observed the following deficiencies –

(a) Lack of comprehensive complaint information for risk analysis;

(b) lack of information exchange with relevant parties for collecting complaint information for risk analysis;

(c) no monitoring of society-based registration systems and service standards of their members;

(d) no review mechanism on the need to put unregulated healthcare personnel under statutory control; and

(e) lack of communication with societies of unregulated healthcare personnel.

1283. The Ombudsman recommended DH to –

(a) collect relevant complaint statistics for conducting regular risk-based analyses;

(b) enhance communication with the law enforcement agencies, related organisations and societies for gathering relevant complaint information for risk-based analyses;

(c) consider providing guidance to societies of healthcare personnel not statutorily regulated on monitoring the qualification and service standard of their members;

(d) follow up cases related to malpractice of unregulated healthcare personnel in order to assure that the service provided meets the standard;

(e) examine the complaint statistics periodically for analysing whether more stringent regulation should be introduced to a particular group of healthcare personnel;

(f) discuss with its policy bureau to map out a long-term review strategy for the scope and ways to strengthen regulatory control of unregulated healthcare personnel and also the need for putting them under statutory control; and

(g) enhance communication with societies of unregulated healthcare personnel for exchanging opinions regularly.

Administration's response

1284. DH accepted all recommendations made by The Ombudsman and has taken the following actions –

On recommendations (a), (b), (d) and (e)

(i) In addition to its own complaint channels, DH collaborates closely with law-enforcement agencies such as the Police and the Customs and Excise Department to facilitate investigation of malpractice. An information sharing arrangement has also been made with the Consumer Council (CC) to monitor the trend of complaints received by CC against the healthcare services provided by the 15 types of healthcare personnel of health services functional constituency; and

(ii) the information from CC and other agencies would be used for assessing risks that the practice of these unregulated healthcare practitioners may bring to the public, and for determining if more stringent regulation should be introduced to a particular group of healthcare practitioners.

On recommendations (c), (f) and (g)

(iii) Food and Health Bureau and DH met with the professional associations of unregulated healthcare personnel in March 2014, when preliminary ideas were exchanged about a possible mechanism to promote good standards of health care service and to provide better information to anyone looking for services provided by these health care practitioners; and

(iv) having regard to overseas experience, DH is studying the feasibility of setting up a voluntary registration scheme for healthcare professions not statutorily regulated at the moment, under which healthcare personnel from interested disciplines who have met prescribed standards in respect of training and qualifications, professional conduct and technical competence etc. will be eligible for entering professional registers accredited

by DH. The accreditation mechanism seeks to strengthen the current society-based registration arrangements of the healthcare professions and ensure that their practitioners are up to the standards expected of them and subject to proper censure where they are not. DH will continue to engage the professional associations in taking forward the proposal.

Food and Environmental Hygiene Department

Case No. DI/304 – Regulation of sale of chilled meat

Background

1285. Shops selling chilled meat such as chilled pork and chicken must hold a Fresh Provision Shop (FPS) Licence issued by Food and Environmental Hygiene Department (FEHD). One of the licensing conditions is that chilled meat must be kept in a refrigerator and stored at a temperature between 0°C and 4°C. Violation of this licensing condition was, however, quite common. Some shops even appeared to be selling chilled meat fraudulently as fresh meat.

1286. The Ombudsman, therefore, initiated a direct investigation to identify any inadequacies in FEHD's regulation of shops selling chilled meat.

The Ombudsman's observations

Risks to Consumers Posed by Improper Storage

1287. After consulting a microbiologist cum expert in infectious diseases, the Centre for Food Safety and the Department of Health, the Office of The Ombudsman came to the conclusion that as much time has elapsed before chilled meat from slaughterhouses reaches retail shops, chilled meat must be kept at a low temperature at the shops; otherwise, pathogens on the meat surface would grow quickly and might produce heat-resisting toxins, posing a health risk to consumers.

Irregularities in Shops

1288. The investigation officers of the Office of The Ombudsman had inspected 46 shops selling chilled meat and found one or more types of irregularities in over 60% of them (29 shops). Such irregularities included chilled chickens being displayed in plastic boxes with no refrigeration, and chilled chickens being displayed without their wrappings on open shelves with no refrigeration, apparently for sale as fresh chickens. When the Office of The Ombudsman inspected those shops again a month later, such irregularities were still found in about

half of them (21 shops).

FEHD's Regulatory System

1289. FEHD categorised most of the shops selling chilled meat as "low risk" and so inspected those shops only once every 20 weeks. Where irregularities were found, FEHD's health inspector would issue a "verbal warning" to the licensee and advise him/her to rectify the irregularities within two days, after that a review inspection would be conducted. If the licensee failed to do so, FEHD would issue a "warning letter" valid for six months to him/her and allow six days for rectification. Should he/she receive a total of three "warning letters" during the six-month validity period, FEHD might cancel his/her licence. Nevertheless, if the health inspector found only "minor" irregularities, he/she would just issue an "informal verbal warning" instead of the aforesaid "verbal warning" and there would not be any review inspection.

1290. FEHD imposed strict licensing conditions on chilled meat shops, requiring the operators to keep chilled meat at a low temperature. However, FEHD's monitoring of the shops was very lax. As a result, the stringent requirement was there for nothing. The inadequacies of FEHD's regulation of sale of chilled meat included –

(a) infrequent inspections were conducted only every five months, rendering the six-month validity period of its verbal warning virtually useless;

(b) the "informal verbal warnings" being almost totally ineffective as they had no binding effect and there was no follow-up mechanism;

(c) there being no clear guidelines as to the definition of "minor" irregularities, with enforcement action entirely up to individual officers' judgement;

(d) excessive grace periods of two days and six days allowed for rectification of irregularities; and

(e) too much leniency in not setting any restrictions on new licence applications from shop operators whose licences had been cancelled.

1291. The Ombudsman made a total of eight recommendations to FEHD, which included –

(a) to suitably raise the risk category of shops selling chilled meat and increase the frequency of inspections;

(b) to define "minor" irregularities clearly;

(c) to strictly require prompt action by shop operators to rectify their irregularities;

(d) to impose restrictions on new applications from any person whose licence has been cancelled (or from his/her representative) for related licences in respect of the same premises;

(e) to expedite the processing of licence applications for FPSs;

(f) to conduct more rigorous investigation on cases of sale of chilled meat as fresh meat;

(g) to publicise information about shops with persistent irregularities; and

(h) to enhance publicity and public education.

Administration's response

1292. FEHD generally accepted recommendation (a). FEHD has since late November 2013 increased the frequency of surprise inspections to and lengthen the observation period of FPSs, which have been issued with warnings against improper storage of chilled meat/poultry, so as to enhance the effectiveness of the regulatory regime and the deterrence against related breaches. FEHD considers that the inspection arrangement for licensed food premises of low, medium and high risk under the existing Risk-based Inspection System needs to be maintained. Increasing inspection frequency to all FPSs selling chilled meat/poultry irrespective of their risk category would not only go against FEHD's established operational strategy of prioritising allocation of resources to inspections of licensed food premises with higher risk and lower hygiene standards, but would also be unfair to law-abiding operators. Through the implementation of the aforesaid enhanced regulatory mechanism, FEHD can enhance the monitoring of FPSs found

with irregularities and curb the malpractice of improper storage of chilled meat/poultry with reasonable allocation of resources.

1293. FEHD accepted recommendation (b). FEHD has issued clear guidelines on minor breaches and enforcement actions, having regard to food safety requirements, and ensured strict observance by inspection officers. If FPSs are found with minor breaches, inspection officers will issue warnings to licensees under the established procedures and conduct follow-up inspections within specified periods. If FPSs are found with repeated minor breaches, enforcement action will be taken under the Warning Letter System with follow-up inspections to ensure continuous compliance with the relevant requirements.

1294. FEHD accepted recommendation (c). FEHD implemented a new set of guidelines in June 2013 to further tighten the regulatory measures by requiring all FPS licensees to take immediate rectification actions upon receipt of a warning for the storage of chilled meat/poultry at improper temperatures in FPSs. If a licensee has been issued with three written warnings within a period of six months and subsequent breach(es) is/are detected, FEHD will consider cancelling the licence.

1295. FEHD accepted recommendation (d). FEHD will refuse processing of application for any FPS licence from the licensee or his/her representative, business partner or business proprietor in relation to the same premises for a period of 12 months from the date of cancellation of the FPS licence, if the licence has previously been cancelled due to repeated breaches of licensing conditions that govern temperature control in the storage or display of chilled meat/poultry, or due to sale of frozen/chilled meat/poultry as fresh meat/poultry. FEHD has also included such information in the application form for reference by the applicants.

1296. FEHD accepted recommendations (e) and (f). FEHD has been adopting business facilitation measures for the processing of licence applications. In addition, FEHD has been taking stringent enforcement actions against shops which have no intention to apply for licences. FEHD has arranged courses for relevant staff to enhance their ability and efficiency in investigating cases of sale of chilled meat as fresh meat in FPSs and in collecting evidence to prosecute those offenders.

1297. FEHD accepted recommendation (g). FEHD would release information through the media about FPSs with licence cancelled by FEHD due to repeated breaches. In addition, FEHD has uploaded onto its website the list of food premises, including FPSs, with licence cancelled by FEHD from 2014 onwards for public information.

1298. FEHD accepted recommendation (h). FEHD has published pamphlets and posters on proper storage of chilled meat and poultry so as to promote public awareness that chilled meat and poultry must be stored and displayed for sale at a temperature between 0°C and 4°C in FPSs and remind the public to report breach of such licensing condition to FEHD. The pamphlets and posters have been disseminated for issue and posting through different channels for publicity as well as uploaded to FEHD's website for public information.

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

Case No. DI/246 – Public Records Management in Hong Kong

Background

1299. Government records management and archiving of public records in Hong Kong are the responsibilities of the Government Records Service (GRS) under a purely administrative regime. Elsewhere in the world, many jurisdictions have introduced specific laws to protect their archives, requiring proper creation and management of records, with penalty provisions to ensure compliance.

1300. In the light of the above, The Ombudsman initiated this direct investigation to determine whether Government's public records management is in keeping with modern standards of open and accountable administration and affords adequate protection of records for public access. The Office of The Ombudsman's findings are as follows.

The Ombudsman's observations

Lack of Legal Backing

1301. GRS' discharge of its responsibilities is not underpinned by law. It relies on compliance by bureaux and departments (B/Ds) with the administrative manuals and instructions that it issues from time to time. Despite the issuance of a set of mandatory records management requirements in 2009, GRS has no effective way of ensuring B/Ds' compliance, especially since its stipulations do not carry any legal force.

Lack of Effective Measures to Ensure Compliance

1302. GRS monitors B/Ds' compliance mainly through B/Ds' self-assessment surveys and GRS' records management studies. However, the surveys may not accurately reveal B/Ds' real practices, while most studies covered only limited aspects of some records of the B/Ds concerned, and, therefore, hardly help ensure B/Ds' compliance with GRS' stipulations. There is no independent advisory body to enable public engagement and scrutiny.

1303. Robust measures are also lacking for ensuring B/Ds' compliance with GRS' stipulations on records creation. GRS' current role in ensuring B/Ds' timely transfer of records for its appraisal is passive, and its monitoring is loose. GRS relies on B/Ds' initiative to report loss or unauthorised destruction of records. As some such incidents are not reported to GRS, the real magnitude of the problem is not known. Among the cases reported to GRS, very few of the wrongdoers were subject to disciplinary or administrative action.

Limited Coverage of Current Regime

1304. With the exception of two, GRS' administrative requirements on records management do not cover the hundreds of public organisations, many of which provide important services to the community. In other jurisdictions, their public records laws or archives laws require the records of both government agencies and public organisations to be subject to the same level of scrutiny and accessibility by the public.

Workload and Staffing

1305. There continues to be huge backlogs within GRS in vetting of records disposal schedules, appraisal of records and accessioning of records. Such backlogs affect efficient and effective records management. Yet, GRS has only got 12 Archivists, three Curators and 15 Executive Officers (EOs), and the EOs are nonprofessional officers subject to frequent turnover.

Lack of Transparency

1306. Under the current regime, there is no systematic proactive dissemination of information to the public about individual B/Ds' records management policy and practices.

Need for Review Regarding Records Closure and Disclosure

1307. The current closure period of 30 years and the factors for consideration of disclosure have never been reviewed. This stands in stark contrast to the other jurisdictions which have carried out liberalising reforms in recent years to further facilitate public access and minimise obstacles to freedom of information.

Failure to Manage Electronic Records

1308. Despite Government's promotion of the use of electronic means of communication, most B/Ds are still using the print-and-file approach whereby staff are required to convert email records into printed form for management, storage and archive purposes. Government is fully aware that this approach is unreliable and prone to omission and loss, but has spent over ten years without even being able to specify a timetable for full implementation of an electronic recordkeeping system (ERKS). Such tardiness and inability to catch up with the times means that more records may fail to be captured and be lost forever.

1309. The Ombudsman recommended GRS to –

(a) seriously consider introducing a law on public records and archives to strengthen Hong Kong's management of public records, covering not only B/Ds but also public organisations, particularly those providing essential services to the public;

1310. Pending legislation, the Government should –

(b) make more efforts to urge public organisations to follow its requirements and standards on records management;

(c) further promote donation of records with archival value from public organisations to GRS;

(d) set up an independent body to advise the Administration Wing of the Chief Secretary for Administration's Office and GRS on records management policies, practices and actions;

(e) review the staffing of GRS, so as to enable it to handle its heavy workload with efficiency and professionalism and to clear its backlogs expeditiously;

(f) review the requirements on disposal schedules, having regard to the circumstances and public expectations, to determine whether there is a need for a longer retention period of certain kinds of records;

(g) provide specific guidelines to B/Ds on how to carry out reviews of disposal schedules to ensure their reviews are focused and relevant;

(h) review its arrangement for B/Ds' deferral of transfer of records to GRS, to ensure that approvals for deferral are well justified;

(i) conduct regular auditing of the records management practices of each B/D to gauge the magnitude of the problem of loss and unauthorised destruction of records;

(j) reinforce its training and education for government officers on careful handling of records;

(k) regularly disseminate information about the disposal of records of B/Ds so as to facilitate public understanding and enable public scrutiny of the B/Ds' disposal (in particular, destruction) of records;

(l) review its system of closure of records including the closure period and the criteria for approving/refusing access to records;

(m) map out as soon as possible a clear and comprehensive implementation plan of ERKS and electronic records management (ERM) with timelines for all parties concerned;

(n) as a matter of priority, conduct studies to gauge the electronic records management situations in B/Ds, with a view to identifying problems in the different practices among B/Ds and plugging existing loopholes; and

(o) provide B/Ds with specific and practical guidelines on the management of the hybrid of paper, electronic and other forms of records.

Administration's response

1311. GRS' response is as follows –

(a)&(d) For recommendations (a) and (d), the Archives Law Sub-Committee of the Law Reform Commission (LRC) is now conducting a detailed study to review the current regime relating to the management and preservation of, and access to government or public records with a view to considering whether reform is needed. GRS has been actively participating

in the LRC study, especially on the comparative analysis of relevant overseas legislation. The Government will examine carefully the recommendations to be made by LRC, before mapping out the way forward on the question of introducing a law on public records and archives in Hong Kong and the setting up of an independent body to advise the Administration Wing and GRS on records management policies, practices and actions.

(b)&(c) The Administration accepts recommendations (b) and (c). GRS has already issued a publication entitled "Good Records Management Practices" to some public organisations in 2011 and organised a seminar for statutory bodies on records management in October 2013. As an on-going effort, we will continue to provide advice and assistance to such organisations. For example, GRS has been providing general advice on records management, archives administration and setting up of an electronic records keeping system to some public organisations such as the Hospital Authority and the Consumer Council. In addition, GRS is planning to host another seminar on records management in the fourth quarter of 2014 to share and update our records management practices with statutory bodies. In addition to the 49 statutory bodies covered by the 2013 seminar, GRS is planning to extend the invitations of the upcoming seminar to more statutory bodies. Besides, GRS is implementing a series of measures to further promote donation of records with archival value from these organisations through, for example, holding meetings with them and organising the seminars mentioned above. We will render advice and assistance as appropriate to the public organisations which intend to donate records to GRS or to establish their own archives or information resources centres.

(e) The Administration accepts recommendation (e). To cope with the increased workload and to clear the existing backlog, 28 additional posts have been created by GRS in the past three years. Additional resources will also be sought and deployed for GRS to further strengthen its manpower provision in future. In addition, a consultancy study has been commenced to critically examine the staffing and skills mix of GRS and to make recommendations for improvement. It is expected that the study will be completed in early 2015.

(f)&(g) The Administration accepts recommendations (f) and (g). GRS will take various initiatives to promote the good practice among all B/Ds that all disposal schedules should be reviewed at least once every five years to determine whether amendments are required. A check list has been issued to assist B/Ds to review the retention periods and disposal actions set out in their disposal schedules. We are conducting research and drawing reference to overseas practices with a view to providing more specific guidelines in the existing check list to better facilitate B/Ds to take into account public expectations and other legal and operational requirements in reviewing their disposal schedules. In particular, B/Ds will be advised to set the length of the retention period at the duration required to meet the legal and operational requirements on one hand and to transfer records with archival value to GRS in an expeditious manner on the other.

(h) The Administration accepts recommendation (h). A letter was issued on 21 March 2014 to all B/Ds reminding them of the importance of minimising deferral of transfer of time-expired records having archival value/potential archival value to GRS. B/Ds were also advised that any deferral of transfer should be approved by a directorate officer in the B/Ds concerned at the level of deputy secretary / deputy head of department and GRS should be consulted in advance. In processing B/Ds' requests for deferral, GRS would critically examine the need of withholding the transfer of the time-expired records and whether or not there are alternative means for the transferring agencies to have access to the information contained in these archival records after transfer.

(i) The Administration accepts recommendation (i). GRS will continue with its established programme to conduct departmental records management reviews on individual B/Ds. In the past two years, four such reviews have been conducted by GRS, making a wide range of recommendations to improve different aspects of the records management work of the B/Ds concerned. We will seek additional resources to sustain and enhance the efforts made by GRS in this regard, enabling it to undertake departmental reviews for more B/Ds on an ongoing basis.

(j) The Administration accepts recommendation (j). GRS has been providing training courses to government officers on different aspects of records management including development of business rules and ways to follow up cases of loss / unauthorised destruction of records. Seven seminars on business rules were conducted in July and August 2014. As an on-going effort, GRS will continue to review and refine the content of the future regular training courses and the seminars on records management with a particular emphasis on prudent handling of records. A comprehensive training programme will be drawn up for the coming three years.

(k) The Administration accepts recommendation (k). Pending the outcome of the LRC study, GRS is considering various initiatives to enhance the transparency of disposal of records, including publishing annual report on its website to provide vital statistics on its major functions and activities and to facilitate public understanding of different aspects of the records management work of the Government as well as its archival collection. Besides, GRS is examining the feasibility of uploading onto its website more information about record disposal as well as newly released records with a view to enhancing transparency and public understanding.

(l) The Administration accepts recommendation (l). GRS will review its system of closure of records including the closure period and the criteria for approving/refusing access to records in the context of considering the recommendations to be made by the LRC. In the meantime, GRS will seek to institutionalise the appeal channel on access to records and make it transparent to the public.

(m) The Administration accepts recommendation (m). The Electronic Information Management Steering Group (EIMSG) convened by the Government Chief Information Officer is reviewing the implementation progress of electronic information management as well as the implementation plan for B/Ds to carry out initiatives relating to ERKS and ERM. In particular, EIMSG will consider the pace of service-wide implementation of ERKS and determine an appropriate timeline for B/Ds to develop or adopt ERKS. Members of the EIMSG, including GRS, the Office of the Government Chief Information Officer

and the Efficiency Unit are working closely together to provide more concrete support for B/Ds with a view to promoting a wider rollout of ERKS in the Government.

(n) The Administration accepts recommendation (n). GRS and OGCIO will jointly conduct a study to assess the management of electronic records in B/Ds. A survey will be conducted and site investigations carried out for those B/Ds which require in-depth studies. The study is planned to be completed in the second quarter of 2015.

(o) The Administration accepts recommendation (o). GRS has published seven electronic records management publications and guidelines for compliance and reference by B/Ds since 2009. GRS plans to draw up specific records management guidelines to assist B/Ds in managing both electronic and non-electronic records under a hybrid records management environment. The plan is to complete the guidelines by early 2015.

Transport Department

Case No. DI/254 – Mechanism of Transport Department for Monitoring the Frequencies of Franchised Bus Services

Background

1312. The Office of The Ombudsman from time to time received complaints from members of the public against Transport Department (TD) for failing to properly monitor the operations of franchised bus companies. They alleged that certain bus routes were plagued with problems of delayed or even lost trips. In this connection, The Ombudsman initiated a direct investigation to examine the issue.

1313. According to the Public Bus Services Ordinance (the Ordinance) (Cap 230), a franchised bus company shall, at all times during the franchise period, maintain to the satisfaction of TD a proper and efficient public bus service. It shall also keep proper records in respect of the operational data of its bus service and regularly furnish such records to TD. Currently TD has granted six franchises to five franchised bus companies, which now operate different bus routes throughout the territory, delivering a total of around 1.4 billion passenger-trips on average annually.

1314. If a franchised bus company fails to comply with the relevant laws or clauses of its franchise, the Chief Executive-in-Council may impose a financial penalty on the bus company or revoke its right to operate any specified routes or its franchise altogether.

The Ombudsman's observations

Lost and Delayed Bus Trips

1315. Between 2008 and 2012, the lost trips rates of one major bus company showed signs of decline in 2012, but the rates of other bus companies were on a rising trend.

1316. Furthermore, the Office of The Ombudsman's site inspections and scrutiny of the operational records of several bus routes revealed that

there were delays in bus frequencies ranging from one to 30 minutes, while delays in one to five minutes being the most common (around 80%).

Inadequate Monitoring of Bus Service Frequencies

1617. TD monitored the service frequencies of bus companies mainly through the following means –

(a) requiring the bus companies to conduct "system audits" on their own internal control systems;

(b) reviewing the operational records furnished by the bus companies; and

(c) conducting various forms of surveys and site inspections.

1318. All bus companies are required to maintain records in respect of the following matters and furnish the verified records to TD after seven days –

(a) the time at which each bus is dispatched from the terminus on each route;

(b) the number of journeys and the total kilometres travelled daily by each bus on each route;

(c) the number of lost trips daily in relation to each route due to various reasons; and

(d) the number of bus drivers on duty each day and the number of reserved drivers each month.

1319. TD had sufficient channels for gathering the operational data on bus service frequencies, and the data collected were quite substantial and comprehensive. However, TD had not fully utilized these records to make in-depth examination into issues of serious public concerns, such as delayed bus trips and the dispatch of special buses.

Discrepancy between TD's Definition of Lost Trips and Public Expectations

1320. A service schedule was issued for each bus route specifying the service level to be maintained by the bus company, including the service hour and frequencies in different time periods. According to the definition currently adopted by TD, lost trips occurred when the number of journeys actually travelled each day was less than the number specified in the service schedule for that bus route.

1321. In the event of contingency or when temporary traffic arrangements were implemented due to festivals or special occasions, bus companies would adjust the frequencies of bus services according to actual needs. Special buses might also be dispatched directly to an intermediate bus stop to clear the backlog of passengers there. These special buses were counted into the frequencies of bus services and so no lost trips would incur as a result.

1322. TD considered that delays in bus journeys would not necessarily result in lost trips. While delays were undesirable, it would still be acceptable if the bus companies, in cases where individual buses failed to leave on schedule, could take remedial actions and arrange for the next bus on the schedule to depart as soon as possible to avoid lost trips.

1323. The Ombudsman considered delayed bus services as including the following four situations –

(a) there were lost trips at certain time periods, and the total number of journeys travelled on that route fell short of the required number for that day, resulting in lost trips on that day as a whole;

(b) there were lost trips at certain time periods, but the frequencies of bus services in other periods were greater than the required number, resulting in no lost trips on that day as a whole;

(c) some buses skipped certain bus stops under special arrangements; and

(d) a bus failed to arrive at a bus stop on time and the delay was roughly equivalent to the scheduled interval between two buses.

1324. In TD's view, only situation (1) was regarded as lost trips. However, from the passengers' perspective, situations (1) to (4) should all be regarded as lost trips. There was obviously a significant discrepancy between TD and the public in the definition of lost trips and delayed bus services.

1325. The Ombudsman considered from the view of passengers, serious delays and special bus trip arrangements were no different from lost trips. Hence, TD should quickly review its definition of lost trips and consider dividing a day into different time periods for the purpose of calculating the number of lost trips.

Failure to Solve Traffic Congestion

1326. Traffic congestion was one of the two major causes of lost bus trips. Between 2008 and 2012, three major bus companies recorded an increasing trend in their lost trip rates caused by traffic congestion. Increase in the number of vehicles and illegal parking of vehicles might lead to traffic congestion. The Ombudsman considered that TD should closely monitor the situation and assess whether the increasing number of vehicles would affect the travel speed of buses. It should also review the state of illegal parking and its impact on buses jointly with the bus companies and other Government departments concerned from time to time in order to work out improvement measures.

1327. In addition, TD should step up its publicity of the bus route rationalisation and let the public know about the significance and advantages of such arrangements.

Too Slow in Spotting the Problem of Shortage of Bus Drivers

1328. Another major cause of lost bus trips was the shortage of drivers. The problem of lost trips caused by the shortage of bus drivers was particularly serious in 2010 and 2011 which a leading bus company was mostly affected. Meanwhile, the same problem in another bus company was becoming more serious in 2011 and 2012.

1329. Although it is the bus companies' responsibility to employ adequate drivers, TD should note the problem at an early stage and promptly follow up whenever there was any hint of a shortage of bus drivers among the bus companies.

System of Sanctions Ineffective

1330. While a system of sanctions was in place in case the bus companies violated the relevant laws or clauses of their franchise, the fines lacked deterrent effect, and the revocation of individual routes or the franchise altogether would not help to improve bus services in most cases. Moreover, it would take some time before the above statutory penalty could be imposed. In handling the problem of lost bus trips, TD only relied on the issuance of reminders or warning letters, which the efficacy is doubtful.

Lack of Clear Guidelines on Handling Bus Complaints

1331. As regards complaints about bus services relating to irregular service frequencies, lost trips or delays, TD would require the bus companies concerned to give an explanation and submit their relevant operational records for examination. Depending on the situation, TD might also verify the information furnished by the bus companies and conduct surveys on the bus routes.

1332. The Ombudsman understood that TD officers could not possibly verify all the information provided by the bus companies or arrange route surveys on every single complaint with the limited resources. However, if there were a large number of complaints about a certain route, or when a complainant had repeatedly lodged the same complaint, TD should consider verifying the information provided by the bus company and replying complainants with a full explanation in order to address their concerns.

1333. Currently, TD did not have any guidelines to assist its officers to determine in what circumstances verification of information or site investigation would be warranted. The Ombudsman was of the opinion that TD should consider drawing up such guidelines.

1334. In replying to complainants, TD should endeavour to provide sufficient and specific information and data. A detailed explanation of its follow-up actions could also help to clear their doubts.

1335. The Ombudsman recommended TD to –

(a) step up verification of operating records submitted by bus companies;

(b) review the current system of sanctions;

(c) request data from the bus companies on the reported lengthened journey time. Subject to the situation, to review with the concerned bus companies to see whether the journey time of individual bus routes should be adjusted, the routes should be revised or bus rationalisation should be implemented; or to clarify and inform the public of the actual situation;

(d) gauge closely if the increase in the number of vehicles would lead to traffic congestion and affect the travel speed of buses;

(e) review the state of illegal parking and its impact on buses jointly with bus companies and other Government departments concerned from time to time in order to work out improvement measures;

(f) step up publicity for bus route rationalisation plans to facilitate their implementation and let the public understand the importance and advantages of such plans;

(g) quickly review its definition of lost trips and consider calculating lost trip rates separately for different time periods;

(h) examine the problem of delayed bus trips and conduct relevant data analysis. Where necessary, TD should require the bus companies to include those relevant data as well in their regular submission of operational records;

(i) continue to monitor the problem of bus driver shortage in the bus companies. Once there is a hint of such shortage, it should take follow-up actions as soon as possible and urge the bus companies concerned to solve the problem promptly;

(j) discuss with the bus companies the major reasons for inadequate buses and vehicle breakdowns, and work out appropriate improvement measures;

(k) analyse the reasons for lost trips grouped under "other reasons", study whether some reasons can be grouped into categorised items, and find out solution to solve the problem of lost trips where appropriate;

(l) follow up closely the media coverage about "phantom buses" and inform public of findings where appropriate;

(m) consider drawing up internal guidelines to assist its officers to determine in what circumstances verification of information and site investigations should be arranged; and

(n) endeavour to provide sufficient and specific information and data, as well as a detailed explanation of its follow-up actions in its replies to complainants with a view to clearing their doubts.

Administration's response

1336. TD accepted all recommendations put forward by The Ombudsman and has implemented/will implement the following actions as per items (a) to (n) above –

(a) TD has put in place a mechanism to verify bus companies' operational records regularly since July 2014. The staff of TD would collect on-site operational data of a certain number of bus routes each month and compare against the operational records submitted by the franchised bus companies. If there is any inconsistency between the two sets of data, TD will follow up with the bus companies;

(b) the Government has critically reviewed the existing sanction regime in respect of bus lost trips with reference to past experiences, the statutory and administrative arrangements of other public transport services in Hong Kong, and the practice in other cities. At present, there are already a rigorous and fair statutory mechanism (i.e. in accordance with the Ordinance) and administrative arrangements in place for the close monitoring of franchised bus service. Meanwhile, the operating environment of franchised bus service in Hong Kong is different from other local franchised public transport services or public bus service being provided elsewhere. Past experience also showed that the existing mechanism has been effective. As such, the Government is of the view that the existing sanction system in respect of bus lost trips should remain unchanged. Nevertheless, there is room for improvement in the monitoring and follow-up mechanism in handling bus lost trips. The following measures will be put on trial in early 2015 –

(i) TD will enhance the internal guidelines on handling bus lost trips. The guidelines would set out objective criteria in determining the actions required under various lost trip situations. There will also be a more systematic workflow on the issuance of advisory and warning letters, as well as the initiation of submission to the Executive Council to impose financial penalty under the Ordinance; and

(ii) to ensure that bus companies are taking mitigation measures and improving services more promptly, a written notice will be served to its board of directors when TD issues warning letters to a franchised bus company. Besides, the Government will take into account whether warning letters have been issued as well as the number of such letters when processing a fare increase application submitted by a bus company.

(c) TD has examined the average journey time and average speed of each bus route between 2008 and 2013 as provided by franchised bus companies to better understand the change in journey time and speed in overall terms and by individual routes, as well as the reasons for such changes. Besides, TD would review from time to time the change in bus journey time of individual bus routes in collaboration with franchised bus companies. If the actual journey time of a particular bus route always exceeds the scheduled one, TD and the franchised bus company will examine and revise the operational arrangements of the bus route concerned having regard to the passenger demand and service frequencies. To further monitor the change in bus journey time in Hong Kong, TD will conduct journey time surveys on all daytime franchised bus routes in the fourth quarter in 2014. Depending on availability of resources, TD will consider conducting such surveys regularly. In the meantime, TD will continue to encourage franchised bus companies to provide more bus information to passengers, such as by installing real-time arrival information system at appropriate locations, to help passengers better plan their trips;

(d) TD has all along been proactively monitoring and handling traffic congestion situation in Hong Kong. TD, having regard to the constraints with respect to development density and road construction, will continue to closely monitor the traffic flow

and traffic situation, as well as devise and implement traffic management measures. As franchised buses are road users with a higher carrying capacity, TD will accord priority to them if the circumstances so warrant and permit. This can help enhance the reliability of bus service. In addition, in March 2014, the Transport and Housing Bureau has invited the Transport Advisory Committee to conduct a study on road traffic congestion in Hong Kong. The Committee will submit a report to the Government by end 2014;

(e) TD has set up a working group with the franchised bus companies for regular liaison and meetings to discuss operational issues at specific congestion spots, so as to examine and work out feasible traffic management and improvement measures. From May 2003 to end June 2014, TD has adjusted the signal of 11 sets of traffic light, and implemented/is preparing to implement 19 traffic and other improvement measures. The feasibility of another 17 such measures are being considered. TD has also solicited assistance from the Police in stepping up enforcement actions against illegal parking/stopping and loading/unloading activities at about 40 locations;

(f) to enhance publicity on the needs and benefits of bus rationalisation, a new Announcement in Public Interest for TV and radio has been produced for broadcasting since January 2014. New leaflets and posters are being distributed from the third quarter of 2014. For more major rationalisation proposals, TD will arrange press briefings and distribute brochures to help the affected passengers to better understand the details of the plans and adjust their journeys;

(g) at present, lost trip rate is calculated on a daily basis and that can reflect both the overall level and trend of bus service delivery and reliability. This enables targeted measures to be taken to address any problematic trends or situations. To enhance the public's understanding of service performance of the franchised buses during peak and off-peak periods, TD and the franchised bus companies will provide lost trip rates for the following four different periods –

(i) Morning peak period: from the first departure to 9:59 am;

(ii) evening peak period: from 4:00 pm to 7:59 pm;

(i) inter-peak period: from 10:00 am to 3:59 pm; and

(ii) after evening peak period: from 8:00 pm to the last departure.

The four periods were drawn up with reference to the travelling pattern to/from work/school of the general public.

In addition to taking into account the overall bus service level, this arrangement enables TD and franchised bus companies to devise targeted improvement measures for the individual periods. The franchised bus companies are now revising their internal procedures and computer systems in accordance with the new calculation method of lost trips. The new arrangement is expected to take effect in early 2015;

(h) TD has analysed the operational records of franchised bus companies in respect of the problem of delays. TD has required the franchised bus companies to include the scheduled and actual departure time of each bus trip in their regular submission of operational records, so that TD can monitor the difference more effectively. TD will review the operational arrangements for those routes with frequent or serious delays in further detail and follow up with the bus company concerned. The franchised bus companies are revising their internal procedures and computer systems. The new arrangement is expected to take effect in early 2015;

(i) with effect from early 2015, the franchised bus companies will submit monthly reports on bus driver manpower situation using a standardised form to TD. Should there be any sign of a manpower shortage, the franchised bus company will be urged to implement improvement measures as soon as possible;

(j) TD has conducted a review in collaboration with the franchised bus companies on the main causes of vehicle breakdown. With reference to such causes, the franchised bus companies have implemented a package of precautionary measures since April 2014. This is to reduce the chance of vehicle breaking down whilst they are on the road, and thereby causing bus shortage. TD will continue to monitor the lost trip situation

arising from shortage of buses and mechanical failure;

(k) at present, the causes for lost trips are grouped under six categories, namely "Vehicle Breakdown", "Vehicle Shortage", "Driver Shortage", "Traffic Congestion", "Accidents" and "Other Reasons". After careful analysis of the cases falling under "Other Reasons", TD and the franchised bus companies will refine the category of "Other Reasons" by further breaking it down to "Inclement Weather", "Planned Public Events", "Redeployment of Buses" and "Others Reasons". The franchised bus companies are revising their internal procedures and computer systems. The new arrangement is expected to take effect in early 2015;

(l) TD had taken immediate follow-up action in response to the newspaper reports about "phantom buses" in mid-2012. There was no evidence to substantiate the allegation. TD will closely monitor the situation. Investigation will take place at once if TD has any suspicion or receives any complaints. The public would be kept informed as appropriate;

(m) TD will incorporate appropriate guidelines in its departmental instruction to give clear directions to staff on the circumstances under which on-site surveys should be arranged. Factors such as the number of complaints received, as well as the dates, nature and follow-up actions with respect to the previous on-site surveys will be taken into consideration. The revised departmental instruction is expected to be ready for implementation in the fourth quarter of 2014; and

(n) TD and the franchised bus companies have agreed to provide additional information and data to the complainants as far as possible.