

*Issue No. 5 of Reporting Year 2006/2007
(22 March 2007)*

Office of The Ombudsman, Hong Kong



EXECUTIVE SUMMARY

**Direct Investigation
on Monitoring of Cases with Statutory Time Limit for Prosecution
by Food and Environmental Hygiene Department**

Background

The Food and Environmental Hygiene Department (“FEHD”) is responsible for enforcing a number of ordinances and regulations concerning food safety and environmental hygiene. Prosecution of these offences must be brought within a statutory time limit of six months.

2. We noted that FEHD had been debarred from prosecuting offenders in certain cases because the statutory time limit had expired. Our preliminary examination revealed systemic deficiencies. The Ombudsman, therefore, declared this direct investigation under section 7(1)(a)(ii) of The Ombudsman Ordinance, Cap. 397 on 14 September 2006, to examine:

- (a) procedures and practices for processing cases with statutory time limit for prosecution (but not the decisions to prosecute or not); and
- (b) system, if any, for monitoring progress of cases for prosecution to ensure timely action.

Prosecution Procedures

3. Prosecution procedures are set out in the Operational Manual for Hygiene Services. An Assistant Director (Operations) is in overall command of environmental hygiene matters in each of Hong Kong Island, Kowloon and the New Territories regions, covering 19 district offices. Separately, the Food Surveillance and Control Division under another Assistant Director is responsible for handling food-related cases.

District Operations

4. District Offices are responsible for such operations as market management, street cleansing, hawker control, inspection of licensed food premises and law enforcement. When a district action officer (“AO”) finds that an offence has been committed, he prepares a summons file for reporting to the section head at the rank of Senior Health Inspector (“SHI(District)”). SHI(District)¹ vets the summons file to ensure that there is sufficient *prima facie* evidence for prosecution and forwards it to the Prosecution Section in Headquarters.

Prosecution Section

5. Upon receiving a summons file, the Prosecution Section will action as follows:

¹ For simplicity, SHI(District) in this report also denotes SHI of the Food Surveillance and Complaint Section in case the complaint was handled by that Section.

- (a) A clerical staff records receipt of the case and staples on the file jacket a reminder of the date on which the time limit expires (“the time-bar date”).
- (b) A Senior Health Inspector (“SHI(Prosecution)”) double checks the evidence and, if not satisfied, returns the file to the district for further evidence or clarification.
- (c) If the case is in order, SHI(Prosecution) passes the file to a clerical staff to allot a departmental reference number.
- (d) A clerical staff then inputs data into the Judiciary’s Case and Summons Management System (“CASEMAN”) for issue of summons. Cases past the time-bar date are automatically rejected by the system.

Withdrawal

6. When a case has to be dropped because of expiry of the statutory time limit or other reasons, approval from a Chief Health Inspector (District) is required. For cases arising from complaints, SHI(District) informs the complainants of the outcome.

Observations and Opinions

7. Over the past three years, 33 summonses were time-barred. We have summarised their reasons for failure to proceed to prosecution:

Reasons	No. of summonses
Mistake	3
Ignorance of legal requirement	3
Misplacement of file	2
Delay	12
Report issued by Government Laboratory after time limit	11
Advice issued by Department of Justice on or after time-bar date	2

8. Whether or not to prosecute is a matter of departmental policy, which is outside the scope of this study. However, the points we raise here are:

- (a) once it has been decided to prosecute, offenders should not be allowed to get away scot-free because of carelessness or dilatoriness of enforcement staff;
- (b) the arrangements with the Government Laboratory should be better coordinated;

- (c) monitoring mechanism is not evident; and
- (d) the authority for dropping a case for prosecution is at too low a level.

9. Some cases are summarised below to illustrate the various reasons for their being time-barred.

10. **Irresponsible vetting.** **Case I** reveals a lax and, therefore, worrying attitude among some FEHD staff. SHI(Prosecution) missed two summons forms in the file. If she had gone through the file thoroughly to check if there was sufficient evidence to proceed, she should have spotted that there were three offences on three different dates.

11. **Protracted processing.** In **Case II**, the Prosecution Section took almost three months to allot a departmental reference number and apply for summons.

12. **Mistaken calculation of time limit.** According to legal advice, in case of unauthorised alteration to premises for licensing, the time limit should normally count from the date the approved plan was last checked, not the date the breach was detected. **Case III** was time-barred because of unawareness of this, resulting in wrongful calculation of the time limit. In three years, three cases were time-barred for this reason. FEHD should consider amending the law to enable FEHD staff to initiate prosecution within six months from the unauthorised alteration being discovered or coming to their notice.

13. **Failure to follow through.** In **Case IV**, the Prosecution Section staff had misplaced the file, which re-surfaced only after the time-bar date had expired. In **Case V**, the summons file never reached the Prosecution Section but the district staff who had despatched the file was not even aware. In addition to possible deficiencies in the despatch procedures, a communication gap exists between the Prosecution Section and district staff.

14. **Poor case management.** In **Case VI** where the time-bar had become imminent, SHI(District) had repeatedly reminded AO of the urgency of the case. The latter remained lethargic and the time limit expired. SHI(District), as the section head, should have taken more proactive steps to pursue the case by pressing and coaching AO.

Classification of Cases

15. In **Case VII**, Government Laboratory reported to FEHD, after the time limit had expired, that there was insufficient evidence. We consider that FEHD should have come clean and classified such cases as having to be dropped not just on insufficient evidence, but also due to expiry of the time-bar date.

16. FEHD and the Government Laboratory had taken the initiative to close the time gap. Nevertheless, FEHD should alert the Government Laboratory to the urgency of the matter and check the progress to keep abreast of the time-bar date.

17. **Delay in sending food samples for analyses.** In **Case VIII**, a milk product sample was sent for chemical analysis after a few hours lapse by the complainant and a four-day lapse by FEHD staff. Legal advice received on the time-bar date indicated that because of the lapses, there was no reasonable prospect of securing a conviction and the case had to be dropped.

Withdrawal of Prosecutions

18. For consistency in approving withdrawal, involvement of senior officials at directorate level is warranted. The approving officer should also vet replies to complainants to guard against errors as outlined below and damage to the credibility of enforcement.

19. In Case VIII, the complainant was first told that prosecution would be initiated and then advised otherwise three weeks later. This can only breed puzzlement and disappointment to the complainant, also discredit for the department. Care must be exercised in communicating with complainants to ensure accuracy as well as transparency.

20. Two of the cases we studied were time-barred because FEHD had misplaced the summons file. This was, however, not what the complainants were told. In Case IV, the time limit had expired on 3 July 2005. However, in explaining to the complainant why no prosecution was to result, FEHD fudged the issue by telling the partial truth about the unlicensed restaurant ceasing operation on 31 July 2005 but not that prosecution was time-barred.

21. In Case V, nowhere in the file had FEHD staff ever indicated concern over the lack of evidence. However, the complainant was told that the case had been dropped due to insufficient evidence. This was simply not true.

22. Such action is tantamount to giving knowingly false information or bluntly put, covering up their mistake by lying to members of the public. This is even more serious than the mistake itself.

Concluding Comments

23. Timely and proper management of cases, particular over significant issues such as withdrawal of prosecution, is crucial to effective and efficient discharge of duty for the administration of justice. In this connection, FEHD has recently introduced monitoring of on-going cases by headquarters and other improvement measures since we initiated this investigation. We consider that the directorate staff should have an overview of the whole situation. Prosecution cases which did not proceed further (for whatever reason) and cases which had been completed should both be monitored. Regular returns on cases prosecuted (with time spent) and dropped (with reasons) should be submitted to headquarters for examination and random inspection of files by directorate members.

24. We appreciate the remedial efforts of FEHD to improve the procedures in handling cases for prosecution and in monitoring developments. However, those supplementary instructions and guidelines have been issued through email messages. They should be consolidated and incorporated into the Operational Manual, and be reviewed from time to time for updating as necessary.

25. By enforcing the Public Health and Municipal Services Ordinance and various regulations, FEHD safeguards our food hygiene and public health. In this connection, the public has high expectations. Even a few slips may cause untold damage to food safety and affect public confidence in the law and its enforcement authority. Rigorous vigilance is critical.

26. On the basis of our observations, The Ombudsman has made the following recommendations to the Director of Food and Environmental Hygiene:

District² Operations

- (1) to review the coordination between the District operations and the Prosecution Section to ensure close and direct liaison: para. 13;
- (2) to review despatch procedures: para. 13;
- (3) to instil among SHIs(District) the concept of good case management: para. 14; and
- (4) to review the procedures for handling food samples, particularly those subject to easy deterioration to ensure timely analysis: para. 17.

Prosecution Section

- (5) to review the procedures for checking evidence and handling cases for prosecution in the case mentioned in para. 10;
- (6) to impress upon staff that reliance on the clerical staff should not absolve the SHIs(Prosecution) from their responsibility: para. 10;
- (7) to remind staff of the importance to be conscious of the time limit: para. 11;
- (8) to remind staff to take prompt action: para. 11; and
- (9) to assess regularly the Judiciary's quota for different prosecution units and to review its adequacy where appropriate: para. 11.

Extension of Time Limit

- (10) to consider amending the law for prosecuting offences in relation to unauthorised alteration: para. 12.

Withdrawal of Prosecution

- (11) to devise a system for involving directorate staff for approval to withdraw cases for prosecution: para. 18;
- (12) to involve directorate staff for scrutinising replies to complainants on withdrawal of prosecution: para. 18; and
- (13) to submit regular returns on prosecution cases which did not proceed (for whatever reason) for scrutiny by the directorate staff: para. 23.

² For simplicity, District in this report denotes the Food Surveillance and Complaint Section as well.

Communication with the Public

- (14) to remind staff to attend to accuracy as well as transparency in communicating with the public: para. 19;
- (15) to disclose full and frank information to the public, wherever appropriate: para. 20; and
- (16) to warn staff against covering up mistakes by giving knowingly false information: paras. 21 to 22 .

Classification of Cases

- (17) to set up guidelines on classifying cases dropped: para. 15.

Co-ordination with Government Laboratory

- (18) alert the Government Laboratory to urgent cases and check progress to keep abreast of the time-bar date: para. 16.

Monitoring by Headquarters

- (19) to submit regular returns on completed cases to headquarters for scrutiny: para. 22.

Legal Advice

- (20) to review the current arrangement for disseminating important information (e.g. legal advice) to staff concerned: para. 12; and
- (21) to review the procedures for seeking timely legal advice: para. 17.

Operational Manual

- (22) to consolidate and incorporate the supplementary instructions into the Operational Manual: para. 23.

Comments from FEHD

27. FEHD has accepted all our recommendations and has in fact already started to implement some of them.

Final Remarks from The Ombudsman

28. The Ombudsman is grateful to FEHD for close cooperation throughout the investigation, prompt and positive response to our findings and proactive implementation of our recommendations. We particularly appreciate the improvement measures introduced on its own

initiative shortly after we initiated this direct investigation. We also commend the earnest service attitude of FEHD directorate in taking this exercise as an opportunity to revamp its monitoring mechanism.

Office of The Ombudsman
March 2007