THE GOVERNMENT MINUTE

IN RESPONSE TO

THE ANNUAL REPORT OF
THE OMBUDSMAN 2016

Government Secretariat
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Introduction

The Chief Secretary for Administration presented the Annual Report of The Ombudsman 2016 (the Annual Report) to the Legislative Council at its sitting on 6 July 2016. This Government Minute sets out the Government's response to the Annual Report. It 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 the recommendations made by The Ombudsman in respect of the full investigation and direct investigation cases in the Annual Report.

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 made by The Ombudsman for raising the efficiency and quality of public services.

2. The Ombudsman summarised eight direct investigation and 226 full investigation cases in the Annual Report. This Minute responds to the eight direct investigation and 91 full investigation cases in which recommendations were made by The Ombudsman. The vast majority of the 277 recommendations made by The Ombudsman were accepted by the government departments and public bodies concerned and they have taken or are 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. The Ombudsman mentioned in *The Ombudsman's Review* of the Annual Report that her Office (the Office) continues to actively promote the use of mediation to efficiently resolve cases involving no or only minor maladministration. The number of cases resolved by the Office this reporting year is on a par with that of the previous reporting year, with the satisfaction levels of both complainants and complainee organisations reaching almost 100%. The Government will continue to support the Office in promoting the use of mediation in addressing differences. All government departments will give the Office full cooperation in this regard.

Part II
– Responses to recommendations in full investigation cases

Buildings Department

Case No. 2014/4516A – Failing to take follow-up actions against unauthorised building works

Background

4. In January 2013, the complainant made the first complaint against Buildings Department (BD) to the Office of The Ombudsman (the Office). The complainant alleged that certain unauthorised structure (subject structure) on a private lot (subject lot) was used as a columbarium, causing nuisance to residents of the nearby housing estate. Although BD had taken enforcement actions by issuing a statutory removal order and a superseding order (subject order) to the owner of the subject lot in November and December 2006 respectively, and had instituted prosecution action thereafter, the subject structure still remained. As such, the complainant alleged that BD had failed to take follow-up actions to remove the subject structure.

5. Having completed the investigation of the case, the Office issued an investigation report on 16 August 2013.

6. On 27 October 2014, the Office received another complaint (new complaint) lodged by the complainant against BD. In the new complaint, the complainant alleged that BD had failed to take follow-up actions such that the subject structure still remained.

The Ombudsman's observations

7. BD did take follow-up actions on the subject order after the Office completed the investigation in August 2013.

8. BD had clarified to the Office that the subject order concerned a concrete platform, a retaining wall and associated site formation works. They were not used as columbarium.

9. According to the records of BD, the Department inspected the subject lot in August and December 2012 and found two unauthorised building works (UBWs) with columbarium inside (UBWs I and II). Yet those UBWs did not constitute obvious hazard or imminent danger to life or property. According to aerial photos provided by the Lands Department, UBWs I and II had been in existence since 2003 and were not newly built.

10. Since UBWs I and II did not constitute obvious hazard or imminent danger to life or property, nor were they newly built, according to BD's enforcement policy, UBWs I and II were not actionable UBWs warranting priority enforcement action. Thus BD at this stage would not take any enforcement action against UBWs I and II, nor issue statutory removal order against the owner.

11. The enforcement policy adopted by BD was formulated after extensive public consultation and had a certain degree of public acceptance. It was not unreasonable for BD not to issue removal order against UBWs I and II under the enforcement policy. The Office understood that the complainant did not want a columbarium to exist in the concerned district. However, such matter was beyond the scope of BD's enforcement policy.

12. The Ombudsman considered the complaint unsubstantiated, but recommended BD to keep monitoring the conditions of UBWs I and II. If the two UBWs became dangerous, immediate enforcement action should be taken to ensure public safety.

Government's response

13. BD noted The Ombudsman's recommendation.

14. Ensuring public safety is BD's priority. Should it come to BD's attention that the two UBWs concerned become dangerous, BD will take prompt action.

15. However, it would be hard for BD to monitor the conditions of those UBWs as recommended by The Ombudsman. Section 37(1) of the Buildings Ordinance provides that it is not obligatory for the Building Authority to inspect any building or building works to ascertain that the provisions of the Buildings Ordinance are complied with. The responsibility for monitoring the conditions of a building or building works, and for removing UBWs, should therefore rest with the owners.

16. Should BD assume the responsibility of monitoring the UBWs, it would raise expectation for BD to continuously monitor the conditions of all buildings or building works in the territory. Not only would it be impractical given limited resources, it might also risk sending a wrong message to the public, leading to building owners shirking their responsibility and undermining building safety in Hong Kong.

17. BD conveyed its position to the Office on 2 November 2016.

Buildings Department

Case No. 2014/5636 – Delay in taking enforcement action against illegal structure

Background

18. The complainant reported to the Buildings Department (BD) in 2013 that there were unauthorised building works (UBW) items on the podium flat roof of a building. Subsequently, BD issued removal orders and later instituted prosecutions against the owners concerned. However, the UBW items remained. The complainant was dissatisfied that BD had delayed causing the removal of those UBW items.

19. It was as early as in 2006 that BD found the two UBW items, then newly built, attached to two adjoining flats (Flat 1 and Flat 2) on the podium flat roof of the building. Under BD's established enforcement policy, those UBW items fell into the category of actionable UBW items subject to higher priority for enforcement actions.

20. Between 2007 and 2010, BD issued removal orders to the owners of the two flats, but the owners did not comply with the orders. Consequently, BD issued warning letters to them and later decided to institute prosecution. Meanwhile, the ownership of Flat 1 changed, with the details of the new owner not yet registered. BD, therefore, withheld prosecution against the owner of Flat 1, and instead issued an advisory letter to the former owner, urging prompt removal of the UBW item attached to Flat 1 on the flat roof. Later, BD succeeded in prosecuting the owner of Flat 2 for non-compliance with the removal order. Afterwards, having confirmed the identity of the new owner of Flat 1, BD issued a superseding order, demanding removal of the UBW item attached to the flat. On receiving the complainant's complaint in 2013, BD asked its consultants to conduct another inspection. Based on the inspection findings, BD issued warning letters to the owners of the two flats and later instituted prosecution against them.

21. In 2014, the court fined the owners of Flat 1 and Flat 2 for their failure to comply with the superseding order and the removal order. However, the UBW items continued to exist. Hence, BD issued warning letters to the owners again in January 2015, making it clear that it would institute prosecution again, appoint a contractor to remove the UBW items and recover from them the costs incurred. In March 2015, BD issued a Notice of Intention to Apply for a Closure Order (the Notice) to the owners, and they had the UBW items removed shortly afterwards.

The Ombudsman's observations

22. As early as in 2006, BD had categorised the UBW items as actionable items subject to higher priority for enforcement actions. However, the owners concerned did not remove those UBW items until after BD had issued the Notice in March 2015, making it clear that it would appoint a contractor to remove them. Prior to that, even though BD had initiated prosecution twice against the owners for non-compliance of removal orders and issued three warning letters, the owners simply ignored BD's actions. As a result, those UBW items had existed for nine years. It was indeed ironic that BD's enforcement actions which were supposed to have been given "higher priority" had dragged on for so long.

23. Had BD been more decisive and issued the Notice earlier, the UBW items would have been removed long ago.

24. In fact, similar cases of delay were quite common and BD often attributed such delays to heavy backlog of cases and inadequate manpower. The Office of The Ombudsman considered that BD should be more determined in taking enforcement actions, thus making better use of its resources and enhancing its efficiency, in resolving problems.

25. The Ombudsman considered the complaint substantiated, and urged BD to conduct a comprehensive review of its enforcement strategy in order to prevent recurrence of similar unacceptable delays.

Government's response

26. BD accepted The Ombudsman's recommendation.

27. In response to the recommendations made in the Public Accounts Committee Report No. 64 and the Director of Audit's Report No. 64, and taking into account the views of The Ombudsman as well as other parties, BD assigned its Deputy Director to head the Task Force and conduct an overall review on its enforcement actions against UBW. The Task Force put in place a series of measures to expedite enforcement actions, including the redeployment of more resources to deal with non-compliant removal orders, updating internal guidelines, exploring other measures to facilitate voluntary removal of UBW by owners, etc. BD will monitor the implementation of the measures and introduce further measures as necessary to enhance the effectiveness of its enforcement actions.

Buildings Department

Case No. 2015/1232 – Delay in enforcing a repair order

Background

28. In August 2007, the complainant lodged a complaint via 1823 on water seepage through the walls and ceiling of his premises, which was suspected to be caused by the seepage of water from a flushing water tank on the roof of the building. The Buildings Department (BD) inspected the premises and later referred the case to the "Joint Office for Investigation of Water Seepage Complaints" (JO) set up by the Food and Environmental Hygiene Department and BD for follow up. After investigation, JO issued a letter to the Owners' Corporation (OC) of the building requesting the OC to carry out repair works. The OC subsequently applied to BD for erection of a new flushing water tank on top of the existing flushing water tank and the works were completed in 2009. However, the water seepage problem at the complainant's premises not only did not improve but had worsened after the completion of the new water tank as concrete spalling was noted in the ceiling. In March 2010, the complainant lodged another complaint of the said problem via 1823, requesting BD to follow up.

29. On 10 February 2012, pursuant to the Buildings Ordinance, BD served an investigation order on the OC requiring the OC to submit an investigation report on the condition of the common structural walls and beams inside the complainant's premises and to carry out the necessary repair by 10 May the same year. However, the OC and its consultant failed to comply with the order before the specified deadline.

30. In February 2015, the complainant asked BD about the progress of his case and noted that BD was still liaising with the consultant on the repair proposal. The complainant accused BD of delay in following up the investigation order, and as a result, the defective condition in his premises had not been rectified.

The Ombudsman's observations

31. The Office of The Ombudsman (the Office) considered that while BD had the duty to closely monitor the compliance of the investigation order, BD should also carefully scrutinise the investigation report to ensure that the information and recommendations in the report complied with the requirements under the Buildings Ordinance.

32. The Office's investigation revealed that BD had been continuously following up the compliance of the investigation order, including urging the OC and its consultant to submit and revise the reports, and meeting with the consultant to understand the progress. The consultant had indeed submitted investigation reports, but the reports were found to be not meeting the requirements. In fact, other factors were involved in the failure of the OC in complying with the order, including the complexity of the works and the dispute between the owner and the OC. The problems concerned could not be resolved by BD unilaterally.

33. The Office understood that BD had as far as possible coordinated and undertaken appropriate follow-up actions. As no structural danger was noted at the complainant's premises during the inspection made by BD in September 2015, BD did not take enforcement action.

34. The Ombudsman considered the complaint unsubstantiated, but urged BD to closely monitor the compliance of the investigation order and to keep the complainant informed of progress as appropriate. In case the situation becomes dangerous, BD should take decisive enforcement action.

Government's response

35. BD accepted The Ombudsman's recommendation.

36. The consultant engaged by the OC re-submitted a revised investigation report to BD in December 2015, but BD replied in January 2016 that the report was not acceptable as it still failed to fully comply with the requirements. Subsequently, BD held a meeting with the OC's representative in April the same year to explain the reasons of not accepting the report and the requirements. In July 2016, BD issued reminders to the OC and the consultant, urging them to re-submit the revised report as soon as possible, or the Department would consider instigating prosecution action. BD had informed the complainant of the case progress.

Buildings Department and Lands Department

Case No. 2014/4657A&B – Delay in taking enforcement action against some illegal structures

Background

37. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD) and the Buildings Department (BD) on 4 November 2014.

38. The complainant first lodged her complaint with the Office in August 2013. According to the complainant, she made a report to a local District Lands Office (DLO) of LandsD in December 2012 that there were four structures (known respectively as Structure A, Structure B, Structure C and Structure D, and collectively known as "the concerned structures") in a lane (the concerned location) occupying government land and obstructing access (the problem of the concerned structures). However, DLO had delayed taking enforcement action against the concerned structures and did not give her any reply. After the completion of the investigation, the Office informed the complainant of its findings in writing on 10 March 2014. Subsequently, the complainant raised comments/questions regarding LandsD's response. The Office responded to the complainant on 25 August 2014, covering the following main points –

(a) There were originally four structures at the concerned location which had been given survey numbers under the 1986 Environmental Improvement and Clearance Programme (the Programme);

(b) Having sought advice from relevant departments, DLO learned that the concerned structures had given rise to adverse effects on the environment, safety and hygiene. DLO requested the Clearance Unit of LandsD to demolish the concerned structures;

(c) If it were to demolish any structures surveyed under the Programme, the Government would have to determine the affected persons' eligibility for ex-gratia allowances and rehousing. Therefore, DLO had to carefully verify whether the concerned structures had been surveyed (the survey problem);

(d) The Clearance Unit responsible for the Programme, which was formerly part of the Housing Department, was only subsumed under LandsD in 2006. Therefore, it took time for DLO to verify the relevant information with the Clearance Unit; and

(e) DLO noted that BD had assisted in the demolition of some structures at the concerned location in around 1990, and hence the concerned structures might not be the ones originally surveyed under the Programme. DLO requested BD on 12 March 2014 to confirm whether the demolition action was conducted in 1990 (the demolition action) and issued a reminder for BD's reply on 23 July 2014.

39. The complainant said in her new complaint on 4 November 2014 that the concerned structures had not yet been demolished. She considered that BD and LandsD had delayed following up the problem of the structures.

The Ombudsman's observations

40. DLO had referred the problem of Structure A to BD. The owner of Structure A had completed the demolition works. BD had processed the removal order issued in 2011 and instituted prosecution against the owner concerned, in accordance with its performance pledge.

41. LandsD had explained why Structures B, C and D, which were situated on government land, had not yet been demolished. As the demolition of Structures B, C and D might involve the granting of ex-gratia allowances and District Survey Office (DSO) had yet to give DLO its reply and advice on the survey problem, DLO could not reach a decision on how to deal with Structures B, C and D. DLO undertook to take appropriate actions, including demolishing the concerned structures, after clarifying the survey problem.

42. The Programme was implemented as early as in 1986, and it was not until 2006 that the Clearance Unit was subsumed under LandsD. It was thus understandable that it would take time for LandsD to search for and verify the relevant information. DLO had indeed followed up on the survey problem. LandsD had also given instructions on the demolition of the concerned structures. As the demolition might entail compensation, DLO needed time to handle the matter prudently.

43. Overall speaking, The Ombudsman considered the complaint against BD and LandsD unsubstantiated.

44. As the concerned structures had adverse effects on the environment, safety and hygiene, The Ombudsman urged LandsD to clarify the survey problem as soon as possible and to take early actions to demolish Structures B, C and D.

Government's response

45. LandsD accepted The Ombudsman's recommendation. After clarifying the survey problem, LandsD and BD had conducted a joint operation against Structures B, C and D. BD served a statutory order on the unauthorised building works under the Buildings Ordinance while LandsD took land control action by posting notice under Land (Miscellaneous Provisions) Ordinance on the concerned platform requiring the occupiers to cease the unlawful occupation of government land before 18 August 2015. Upon expiry of the notice, staff of LandsD carried out follow-up inspection and found that the unlawful occupation had not ceased. Although LandsD had intended to prosecute the occupiers, LandsD could not pursue such action due to insufficient evidence.

46. Afterwards, LandsD considered the latest advice by DSO and found that Structures B, C and D had extended from a private lot and encroached onto government land. This situation was similar to that of Structure A and should fall within the purview of BD. LandsD then discussed with BD, which subsequently agreed that all portions of the concerned structures could be treated as the same structure, and that it should fall under BD's enforcement ambit. Therefore, LandsD referred Structures B, C and D to BD for follow-up actions on 5 February 2016. BD had also served a statutory order on Structures B, C and D under the Buildings Ordinance.

Buildings Department and Lands Department

Case No. 2015/1679A&B – (1) Failing to take enforcement action against unauthorised building works; and (2) Failing to issue a formal reply to the complainant

Background

47. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Buildings Department (BD) and Lands Department (LandsD) on 28 April 2015.

48. According to the complainant, there were unauthorised building works (UBWs) on the roof and the external wall of a village house (village house A) in the New Territories, posing danger to residents nearby (UBW problem). The complainant made a complaint about the UBW problem to BD in 2013. The Department indicated in its reply that the UBWs posed no risk of collapse and the case had been referred to LandsD. LandsD advised that it had to look into the relevant land lease. Subsequently, the UBWs not only continued to exist but also expanded in area.

49. The complainant criticised BD and LandsD for their delayed action against the UBWs and failing to make a formal reply.

The Ombudsman's observations

50. BD had indeed followed up the UBW problem in accordance with its responsibilities and established enforcement policy. It had also informed the complainant of the situation in a timely manner. Thus, The Ombudsman considered the complaint against BD unsubstantiated.

51. The Office considered that District Lands Office concerned (DLO) did inform the complainant of its follow-up actions. However, as the government department responsible for regulating village houses, DLO should have taken prompt and effective action to deter the breach of lease of the village houses.

52. In this case, DLO received BD's referral on 26 September 2013. More than six months had lapsed before DLO began to review the case in the order of priority. From the time DLO received legal advice in June 2014 until its issuance of warning letter, there was a further interval of 13 months. Despite the need to follow up the new initiative, DLO should not have set the case aside and delayed taking enforcement action against the UBW problem. Not only did the delay fail to meet the reasonable expectations of the public, it also encouraged the relevant owners to continue their irregularities.

53. All in all, The Ombudsman considered the complaint against LandsD partially substantiated.

54. The Ombudsman urged LandsD to learn from this case and instruct its staff to enhance the efficiency of enforcement actions.

Government's response

55. LandsD accepted The Ombudsman's recommendation and DLO has instructed its staff to enhance the efficiency of enforcement actions. Moreover, DLO took lease enforcement action by issuing warning letters to the registered owners of village house A and the nearby village house B. The owners subsequently demolished the structure extended from the village house A and its external wall. However, as there were still other unauthorised structures on the roofs of the village house A and village house B, DLO copied the warning letters to the Land Registry for registration against the lots concerned (commonly known as "imposing an encumbrance"). If the breach of lease conditions persists, DLO will re-enter the lots concerned according to the priority and established mechanism.

Buildings Department and Lands Department

Case No. 2015/3061A – Ineffective enforcement action against the unauthorised building works of a village house

Case No. 2015/3061B – Ineffective enforcement action against the unauthorised building works of a village house which illegally occupied Government land

Background

56. On 29 July 2015, the complainant lodged a complaint to the Office of The Ombudsman (the Office) against the Buildings Department (BD) and Lands Department (LandsD). According to the complainant, the complainant complained to BD and LandsD in January 2010, that the front area and the side lane of a New Territories Exempted House (commonly known as "Village House") were occupied for private garden use and vehicular parking and that there were unauthorised building works (UBWs) affecting the building structures. The two departments confirmed that there was illegal occupation of Government land and UBWs were found on the concerned lot. The District Lands Office (DLO) of LandsD had issued a warning letter demanding the occupant to remove the UBWs and cease the illegal occupation of Government land. The irregularities had nonetheless persisted. The complainant criticised BD and LandsD for not taking effective enforcement actions.

The Ombudsman's observations

57. BD and DLO had duly handled the case in accordance with the relevant enforcement policy/departmental guidelines. Enforcement actions had not been taken against the concerned structures as they did not pose obvious structural dangers, and the illegal occupation of Government land was considered minor in nature, thus not falling within the category for priority enforcement action. Therefore, the enforcement actions of both departments should not be viewed as ineffective.

58. Nevertheless, the Office considered that in following up on the complaint made in 2010 by the complainant, both departments had deficiencies in their communication with the complainant. As a result, the complainant had all along been unaware of BD's follow-up work and thus had to make an enquiry with BD about the progress of the case in 2013.

59. In its interim reply on 14 January 2010, BD indicated that it would give the complainant an account of the investigation findings. However, after informing DLO of the investigation findings in writing on 24 May the same year, BD only asked DLO to reply to the complainant while overlooking the need to explain to the complainant direct. Further, upon receipt of BD's memo, DLO neither gave a reply to the complainant as requested by BD, nor did it inform BD that it had no intention to take any follow-up actions.

60. The Ombudsman considered the complaint unsubstantiated but other inadequacies found, and urged BD and LandsD to learn from this case and remind staff to improve communication with other departments and members of the public.

Government's response

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

62. BD had reminded its staff to pay particular attention and adhere to the established procedures in giving timely response to members of the public in respect of reports on UBWs as well as improve communications with other departments and members of the public.

63. The DLO concerned issued a written reminder on 5 February 2016 to all staff, urging them to learn from this case and improve communications with other departments and members of the public.

Buildings Department and Lands Department

Case No. 2015/3995A&B – Delay in taking enforcement actions against a large-scale signboard mounted on the external wall of a building, causing nuisance to the residents of a neighbouring building at night

Background

64. The complainant complained to the Office of The Ombudsman (the Office) against the Buildings Department (BD) and Lands Department (LandsD) on 24 September 2015.

65. According to the complainant, a report was made on 6 January 2015 via 1823 to BD that a large advertising lightbox was under construction on the external wall of a building (Building B) near the building being managed by the complainant (Building A) (the complaint). BD indicated in its written reply to the complainant via 1823 on 26 March that there was an unauthorised signboard (the signboard) on the external wall, and that it would issue a removal order to the parties concerned. BD indicated in another reply to the complainant via 1823 on 9 April that the external wall had been vested in the Government as bona vacantia under the purview of LandsD, and hence the case would be followed up by LandsD. Since then, the signboard had remained in existence and had been emitting strong light, causing persistent nuisance to the residents of Building A (the light nuisance problem).

66. The complainant criticised BD and LandsD for delayed action against the signboard.

The Ombudsman's observations

67. The Office considered that there was legal basis for BD not to take enforcement action against the signboard. The Ombudsman considered the complaint against BD unsubstantiated.

68. The Office was also of the view that LandsD had taken appropriate steps to follow up on the occupation of government property by the signboard, and hence The Ombudsman considered the complaint against LandsD unsubstantiated.

69. Nevertheless, the Office noted that BD had advised LandsD in March 2015 that, given the constraints of the Buildings Ordinance (the Ordinance), it would not take any enforcement action against the signboard. However, in April and July, LandsD continued to request BD to take enforcement action against the signboard. The Office considered that it was unnecessary for LandsD to request BD again after March to take enforcement action. As such, although The Ombudsman considered the complaint unsubstantiated, there were other inadequacies found on the part of LandsD.

70. The Ombudsman urged LandsD to learn from this case and not to make similar unnecessary moves in future.

Government's response

71. LandsD accepted The Ombudsman's recommendation.

72. LandsD requested BD to consider taking enforcement action again after March 2015. It was due to the literal interpretation of sections 24(2)(c)(i) and 24(2)(c)(ii) of the Ordinance which stated that the person who erected the unauthorised signboard or received money from it might have contravened the Ordinance. LandsD therefore requested BD to reconsider if enforcement action could be taken. LandsD had actively handled the case and replied to the complainant regarding the progress of the case. The case progress was not affected by LandsD's suggestion to BD regarding enforcement action. LandsD had learnt from this case the correct interpretation of sections 24(2)(c)(i) and 24(2)(c)(ii) of the Ordinance and had informed its staff responsible for handling bona vacantia properties of the constraints of the Ordinance.

Correctional Services Department

Case No. 2015/3646 – (1) Improper categorisation of the level of security accorded to the complainant; and (2) inappropriate use of force

Background

73. On 28 August 2015, the complainant complained to the Office of The Ombudsman (the Office) against a facility (the Centre) of the Correctional Services Department (CSD).

74. On 10 June 2015, the complainant complained to the Office against the Centre, in which he was then on remand, for having applied a handcuff transport belt (HTB) to him when he was being escorted to attend medical appointments outside the Centre. The complainant had requested CSD officers not to treat him that way as it reminded him of his war-time trauma. However, his repeated requests were ignored. On 26 August 2015, the Office wrote to inform the complainant of its findings, including –

(a) the complainant was classified as a Security Category B inmate. HTB was applied to him in accordance with the relevant rule and procedures; and

(b) according to CSD, when he was escorted to a medical appointment outside the Centre on 8 June 2015, he reacted strongly when HTB was about to be applied to him. In view of his strong reaction against the application of HTB, the Centre management looked further into his case and considered that handcuffs, instead of HTB, could be used in future escorts outside the Centre, to be determined on a case-by-case basis.

75. In his letter of 28 August 2015, the complainant expressed dissatisfaction with the Centre's classification of him as a Security Category B inmate, thus subjecting him to application of HTB (allegation (a)). He also alleged that four Centre staff members had inappropriately used force when trying to apply HTB to him on 8 June 2015 (allegation (b)).

The Ombudsman's observations

Allegation (a)

76. Given that the complainant was charged with a serious offence, it was not unreasonable of CSD to classify him as a Security Category B inmate. As regards the issue of CSD's application of HTB to him, CSD had clarified that in fact, HTB is applied to all male inmates, on remand or convicted, when they attend medical appointments at outside hospitals. Hence, CSD's classification of him as a Security Category B inmate was irrelevant to the issue. The Ombudsman considered allegation (a) unsubstantiated.

77. In any event, since the complainant was charged with a serious offence, the Office did not find it unreasonable of CSD to apply HTB to him when he attended medical appointments at outside hospitals. The Office also noted that, in view of the complainant's strong reaction to the Centre's application of HTB, the Centre had made special arrangement for him. The complainant's grievance had, therefore, been duly addressed.

Allegation (b)

78. In the absence of independent corroborative evidence, the Office could not adjudge if there was any impropriety on the part of the Centre officers. The Ombudsman, therefore, found allegation (b) inconclusive.

79. Overall speaking, The Ombudsman considered the complaint unsubstantiated and made the following recommendations –

(a) the Office was not fully convinced that CSD had good reasons to apply HTB to all male inmates (on remand or convicted), irrespective of their security category and other conditions. The Ombudsman urged CSD to review this aspect of its procedures; and

(b) there was no mention in CSD's procedures that Security Categories B to D covered inmates on remand. The Ombudsman, therefore, urged CSD to also review this part of its procedures for clearer guidelines on the security classification of inmates on remand.

Government's response

80. CSD accepted The Ombudsman's recommendations.

81. CSD had clarified to the Office as regards recommendation (a). The Office notified CSD on 7 June 2016 and 6 October 2016 of its understanding that HTB was not applied across the board to all categories of convicted inmates and each case would be considered by the head of institution according to need. The application of a HTB by CSD to male inmates on remand was on par with that to convicted male inmates.

82. CSD is reviewing the operational guidelines on the application of HTB to male inmates on remand and the security classification of inmates on remand accordingly.

Department of Health,
Government Secretariat–Food and Health Bureau,
Planning Department, Government Secretariat–Development Bureau,
Lands Department
and Food and Environmental Hygiene Department

Case No. 2014/2060A (Department of Health) – Extended reservation of a piece of Government land without a construction schedule, resulting in a serious waste of Government resources and public money

Case No. 2014/2060B (Government Secretariat–Food and Health Bureau) – Failure to handle properly the complainant's request and being biased towards the Department of Health

Case No. 2014/2060C (Planning Department) –Shirking of responsibility and failure to revise its plan for a piece of Government land

Case No. 2014/2060D (Government Secretariat–Development Bureau) – Failure to handle properly the complainant's request and being biased towards the Planning Department

Case No. 2014/2060E (Lands Department) –Failure to manage properly a piece of Government land, resulting in a waste of Government resources and public money

Case No. 2014/2060G (Food and Environmental Hygiene Department) – Impropriety in its application for land allocation

Background

83. The complainant alleged that, in view of the development and population growth in an area, the Food and Environmental Hygiene Department (FEHD) planned to relocate a refuse collection point and upgrade it to a large and enclosed one. However, the Government land that FEHD applied for (the Site) in May 2012 had already been reserved for the Department of Health (DH) to build a Government clinic.

84. According to the complainant, the Food and Health Bureau (FHB), Development Bureau (DEVB), Department of Health (DH), Planning Department (PlanD) and Lands Department (LandsD) had failed to properly utilise the Site in that: LandsD had allowed DH to reserve the Site for an extended period without a schedule for building the clinic. FHB had failed to explain why it was not feasible to build both a clinic and a refuse collection point on the Site. PlanD had shirked its responsibility and failed to revise its plan for the Site to build a refuse collection point. DEVB had failed to coordinate the sharing of the Site between DH and FEHD, and there was impropriety on the part of those Government departments in the consultation on reserving the Site for building a clinic or a refuse collection point, namely ignoring local objections to building on the Site a clinic that would provide methadone treatment services and not building the refuse collection point there only because of one objection.

85. The investigation of the Office of The Ombudsman (the Office) into this complaint also covered whether FEHD had properly handled the application regarding the Site.

The Ombudsman's observations

86. Land is a very precious resource in Hong Kong. Site searching, therefore, has always been a difficult and time-consuming task. Since both the clinic and refuse collection point are essential community facilities in the new development area (the Area), it was not unreasonable for FHB to support the land allocation applications for both uses. FHB had already explained why sharing of the Site by DH and FEHD was not feasible. Moreover, as there was still a long time before new population would move into the Area, DH's reluctance to give up the Site even though it had no fixed schedule for the clinic was understandable. As a matter of fact, when PlanD proposed another suitable site for the clinic, DH immediately agreed to relinquish the Site.

87. The Office considered that Lands D had in general handled this application properly and there was no impropriety involved.

88. To ensure proper utilisation of the precious land resources, DEVB and PlanD had to balance the demands for land from various departments when working out the land planning. Despite the past deadlock over the use of the Site between DH and FEHD, the problem was eventually resolved in mid-2015. There was no significant maladministration or delay.

89. The Office considered that inadequate communication among the bureaux and departments had caused the issue to drag on for years. Both bureaux attributed the problem to each other's unclear stance, and questioned whether the other party had followed the work procedures or given proper replies. It reflected their compartmental mentality and lack of cooperation, which resulted in their failure to promote better communication and coordination to resolve the problem.

90. Since PlanD has the latest information about reservations of Government land and the overall planning of an area, if FEHD had maintained sufficient communication with PlanD, the latter could have provided the necessary assistance and suggestion during the former's land search process. FEHD, however, had tried to find a suitable site for the refuse collection point on its own instead of seeking assistance from PlanD. As a result, FEHD had to go through many unfruitful attempts before success.

91. According to the prevailing formal procedures for site selection, Government departments should obtain policy support from their bureaux before making a request for land allocation. Yet, FEHD normally would not consult FHB before planning to move a refuse collection point. Such practice was not in line with the formal procedures. FHB and FEHD should, therefore, review the internal guidelines. DEVB and PlanD also seemed to be aware of or tacitly agree to FEHD's practice. The Office considered that if DEVB considered such practice acceptable, it should include it in the formal procedures/guidelines so that other departments could have clear instructions to follow when processing similar applications.

92. Based on the above, The Ombudsman considered all the allegations unsubstantiated but other inadequacies found on the parts of FHB, FEHD, DEVB and PlanD. The Ombudsman recommended that –

(a) DEVB, PlanD and LandsD should examine whether it is appropriate for FEHD to adopt the existing practice which is different from the formal procedures for land allocation application followed by other Government departments. If such practice is regarded as appropriate, it should be included in the formal procedures/guidelines; and

(b) FHB and FEHD review their existing internal guidelines on site selection for refuse collection points to ensure that they are in line with the requirements in the formal procedures for land allocation.

Government's response

93. DEVB, PlanD and LandsD accepted The Ombudsman's recommendation. As part of the regular review, a revised set of guidelines setting out the responsibilities and procedures for site search and site reservation was promulgated on 26 August 2016.

94. FHB and FEHD accepted The Ombudsman's recommendation, and have reviewed the existing site search procedures of FEHD. To complement the requirements in the Housing, Planning and Lands Bureau General Circular No. 1/2004, FEHD headquarters is now finalising an internal circular relating to site search for the reference of all District Environmental Hygiene Offices.

Drainage Services Department and Home Affairs Department

Case No. 2015/0112A&B – Failing to carry out drainage works in a village to resolve the flooding problem

Background

95. On 5 February 2015, a complainant lodged a complaint with the Office of the Ombudsman (the Office) against the Drainage Services Department (DSD) and Home Affairs Department (HAD).

96. According to the complainant, flooding occurred frequently in a village (the villlage) after heavy rain and the situation had been worsening (flooding problem). In June and August 2014, staff of HAD, after on-site inspection, proposed to carry out widening works of drainage channels at three locations in the village (improvement works). Subsequent to the site visit on 26 November, staff of DSD remarked that there was a need to carry out the improvement works. As the department did not have the required funding to implement such works, it had to refer the case to HAD for follow-up actions. However, HAD could only arrange the clearance of drainage pipes in the village without confirming the schedule for implementing the improvement works.

97. The complainant was dissatisfied with DSD and HAD for delaying in carrying out the improvement works, which kept the flooding problem unsolved.

The Ombudsman's observations

98. According to HAD, proposals of the improvement works (i.e. installation of two drains at the junction of the village channel located on private land at the village (drainage channel) and the drainage pipe beside a road for directing the rainwater into the drainage nullah of DSD (Proposal I); and widening of the drainage channel (Proposal II)) were suggested by the complainant and the relevant village representatives (VRs), not by HAD or the local District Office (DO).

99. During the period from June to August 2014, DO had followed up on the flooding problem, while taking measures within its purview to improve the flooding problem.

100. HAD had explained that Proposal I should be followed up by DSD with other relevant departments. Apart from that, as DO had not yet received information from the VRs about the concerned land owners, DO could not proceed with the Proposal II. The Office accepted its explanation. The Ombudsman considered the complaint against HAD unsubstantiated.

101. DSD had explained the reasons for not following up on the Proposals I and II. The Office accepted its explanation. In fact, DSD did not ignore the flooding problem. The Office was pleased to note that DSD had pledged to arrange temporary measures when the rainstorm warning signal was in force for alleviating the flooding situation in the village. The Ombudsman considered that the complaint against DSD was also unsubstantiated.

102. Overall speaking, The Ombudsman considered the complaint unsubstantiated. Notwithstanding this, the flooding problem had indeed been causing inconvenience and disturbance to the residents. Therefore, The Ombudsman urged HAD to continuously keep contact with the local residents and proactively explore possible solutions to the flooding problem.

Government's response

103. HAD accepted The Ombudsman's recommendation and has taken the follow-up actions below.

104. Both the complainant and the VR of the Village proposed two improvement works in order to improve the drainage system inside the Village. As part of the proposal from the VR was objected by the complainant, DO requested the local District Lands Office (DLO) to post notice to seek public views on the proposal from the complainant and part of the proposal from the VR of the village. During the consultation period, no objection was received by DLO.

105. The locations of the proposed improvement works requested by the VR which did not receive objection after posting notice fall within 57 private land lots. On 11 April 2016, DO issued a total of 55 letters to the affected land owners with a copy to the VR in a bid to obtain their consent to implement the relevant works. As of 12 August 2016, DO received nine signed owners' consent and DO is waiting for the remaining ones. DO is only authorised to carry out the proposed improvement works requested by the VR upon the receipt of all necessary owners' consent.

106. As regards the proposed improvement works requested by the complainant, DO commenced the works in December 2015 and completed in January 2016. After completion of the works, DO engaged the complainant and sought her feedback on its effect. In response, the complainant opined that local flooding had been alleviated after its completion. However, during heavy rain, flooding at particular locations remained. DO assessed that such situation might be further improved upon implementation of the proposed improvement works requested by the VR. While DO will endeavour to liaise with the relevant owners to obtain their consent, whether the relevant improvement works can be implemented will depend on the willingness of the relevant private land owners.

107. During the period from December 2015 to July 2016, DO carried out five regular desilting works at the existing drainage channels in December 2015, March, April, May and June 2016 in the concerned area to keep them clear.

Electrical and Mechanical Services Department

Case No. 2015/2167 –Failing to properly monitor the maintenance workshops for liquefied petroleum gas vehicles

Background

108. The complainant alleged that the Electrical and Mechanical Services Department (EMSD) had failed to properly monitor the maintenance workshops for liquefied petroleum gas (LPG) vehicles, causing the earlier Wong Tai Sin garage explosion incident.

109. The complainant pointed out that in promoting the use of LPG taxis, the Government had specified that the repair of their fuel system had to be carried out at "LPG vehicle maintenance workshops" approved by EMSD. EMSD, however, subsequently relaxed such requirement and only required that replacement of fuel tanks and repair of associated components of the vehicle fuel system be carried out by "Competent Persons (Class 6)".

110. The complainant considered it inadequate for EMSD to issue only four guidelines with no legal effect, including the "Guideline for Revalidation of LPG Fuel Tanks for LPG Vehicles", "Code of Practice for Servicing and Maintenance of LPG Vehicle Fuel System", "Guideline for LPG Vehicle Fuel System Maintenance Workshop", and "Guideline for Disposal of LPG Vehicle Fuel Tanks", without issuing any guidelines or codes of practice with legal effect to the gas vehicle repair trade. Moreover, EMSD revised the content of these guidelines in the absence of legal grounds and public consultation.

111. In respect of monitoring of LPG vehicle maintenance workshops, EMSD did not inspect workshops other than "vehicle maintenance workshops with approved notifiable gas installation", and failed to update and announce the list of "Competent Persons (Class 6)" and their work locations, etc.

The Ombudsman's observations

112. Equipped with an LPG fuel tank, LPG taxis are under the regulatory control of the Gas Safety Ordinance (the Ordinance). EMSD has an undeniable responsibility to enforce the Ordinance by monitoring the environment of LPG vehicle maintenance workshops to ensure proper storage of LPG, and monitoring whether the repair/maintenance of LPG fuel system and fuel tank of LPG taxis is carried out by a Competent Person.

113. In this connection, there was a legal basis for EMSD to regularly inspect "vehicle maintenance workshops with approved notifiable gas installation". As for other vehicle maintenance workshops, in view of their relatively lower risk level and EMSD's limited resources, it was understandable that EMSD would only carry out inspections to them in the event of suspected contraventions. The Office of The Ombudsman (the Office) observed that EMSD had bid to strengthen manpower for inspection of general vehicle maintenance workshops. The Office considered EMSD should conduct regular review and assessment on the compliance with the related guidelines by the trade so as to decide whether corresponding deployment or application for additional resources to cope with the monitoring work was required.

114. With regard to the issue on mandatory registration of vehicle maintenance workshops and vehicle mechanics, the Office considered that enacting legislation would facilitate further regulatory control by EMSD, and that EMSD should closely follow up the associated legislative work.

115. In fact, in addition to inspections by EMSD, it is equally important for the trade and vehicle owners to exercise self-discipline by complying with related legislation. Hence, EMSD should step up publicity and education on the related laws and regulations so as to facilitate the trade and vehicle owners to understand the statutory requirements and the aspects to comply with.

116. As regards the cause of the Wong Tai Sin garage explosion incident, the Office would not comment at this stage as the interdepartmental taskforce was still investigating.

117. The Office took the view that there was already legislation in place to regulate gas safety. Since the guidelines were not legislation, they were not legally binding. The guidelines aimed to spell out the related statutory requirements and offer recommendations on professional and good practices, which the leaders in the industry should hence follow. For those not following the guidelines, it would depend on whether the non-compliant act was a requirement under the law or a good practice to determine if there was a contravention.

118. With regard to some of the wordings in the earlier guidelines that were prone to misunderstanding, EMSD had made revisions accordingly. The revisions involved the proper selection of words that would enable the statutory requirements in the guidelines being presented in a clearer manner, over which there was little controversy. Hence from the administrative point of view, there was nothing improper for not conducting a consultation.

119. In respect of the release of information, from 2008 onwards, EMSD has uploaded the List of Competent Persons (Class 6) onto its website and updated it annually. In mid-2015, the names and addresses of the vehicle maintenance workshops where these competent persons worked were also included in the list, and updates of the list have been made on a quarterly basis instead of a yearly basis since then. Besides, information on "vehicle maintenance workshops with approved notifiable gas installation", "LPG fuel tank workshops" and "Competent Persons (Class 1)" is also available on the website. Moreover, since mid-2015 and August 2015, EMSD has issued certificates and identification signage to Competent Persons (Class 6) and vehicle maintenance workshops providing services to LPG fuel system respectively, in an effort to encourage them to display the certificates and signage at their workshops for easy identification. The Office had visited EMSD's website and confirmed that it featured the relevant information.

120. Taking into account the above, the Office considered that EMSD's mode of inspections and monitoring of LPG vehicle maintenance workshops was in line with the spirit of the relevant legislation. Therefore, The Ombudsman considered the complaint unsubstantiated.

121. As for whether legislative amendment should be made in order to tighten the regulatory control over LPG vehicles, it should be left for the society to discuss and come to a consensus upon completion of the investigation by the interdepartmental taskforce.

122. The Ombudsman recommended that EMSD should–

(a) conduct regular review and assessment on the compliance with the related guidelines by the trade so as to decide whether corresponding deployment or application for additional resources to cope with the monitoring work is required;

(b) closely follow up the legislative work on mandatory registration of vehicle maintenance workshops and vehicle mechanics; and

(c) step up publicity and education on the related laws and regulations so as to facilitate the trade and vehicle owners to understand the legislative requirements and the aspects to be observed.

Government's response

123. EMSD accepted The Ombudsman's recommendations and has taken the following actions.

124. As regards recommendations (a) and (c), EMSD will continue to adopt a multi-pronged approach which includes developing codes of practice and guidelines based on the legislation, publicising them by stepping up publicity and education, enforcement and prosecution to tackle breaches of the Ordinance, as well as to facilitate the trade and vehicle owners to understand and comply with the legislative requirements and the guidelines.

125. After the Wong Tai Sin garage incident in late April 2015, EMSD immediately redeployed resources to strengthen inspection of vehicle maintenance workshops. Since April 2016, EMSD has also sought additional manpower to carry out the associated regulatory work. Inspections are focused on workshops providing maintenance services for LPG vehicles. From late April 2015 till end July 2016, EMSD carried out over 6,200 inspections to about 2,700 vehicle maintenance workshops throughout Hong Kong. Should suspected contravention of the Ordinance be found during inspections, resolute enforcement actions will be taken. Suspected breaches of other ordinances will be referred to he relevant departments for follow-up. EMSD has also implemented the "Identification Signage Scheme for LPG Vehicle Fuel System Maintenance Workshop" since August 2015, which is an administrative measure to encourage vehicle owners and drivers to maintain and repair the LPG fuel systems of their vehicles at maintenance workshops with the identification signage.

126. Besides, EMSD has long been publicising and educating the LPG vehicle owners/drivers and the relevant trades on the safe repair and maintenance of LPG vehicles through various channels, including talks, seminars, letters, and dedicated webpage, etc. EMSD will regularly review the guidelines to see if any update is required.

127. As regards recommendation (b), EMSD is reviewing the operation and effectiveness of the voluntary registration scheme for vehicle mechanics and the voluntary registration scheme for vehicle maintenance workshops. EMSD will also review the survey results on the general acceptance by the public and the trade towards the mandatory registration schemes for the vehicle maintenance industry, the regulatory assessment report and other related factors, so as to examine the feasibility of implementing the mandatory registration schemes.

Environmental Protection Department

Case No. 2015/0217 – Delay in identifying the source of seepage of some pollutants

Background

128. On 18 January 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Environmental Protection Department (EPD). According to the complainant, waste oil pollution at the drainage channel and slope at a location in a village (the subject area) had lasted for more than three years. However, EPD was unable to identify the source and resolve the problem once and for all.

129. The complainant considered that situation of the accumulated waste oil would easily cause fire at any time. This would pose safety concern to villagers and cyclists in the surroundings of the subject area. The nearby well water would also be polluted.

130. In regard the said problem, the complainant lodged a complaint with the Legislative Council on 31 March 2014 and urged EPD to invite overseas expert to investigate on the source of the waste oil. The Legislative Council Secretariat made a reply to the complainant on 3 June and relayed EPD's response that the Department would continue closely monitor the situation and try to locate the source. However, the Department did not commit regarding the invitation of overseas experts.

131. The complainant alleged that EPD did not properly follow up and resolve the waste oil pollution problem at the subject area.

The Ombudsman's observations

132. It was not unreasonable for the complainant to worry about the long-lasting and unresolved problem. However, after scrutinising EPD's relevant documents, the Office was satisfied with EPD's response in handling the seepage pollution incident. The Office considered that EPD had tried hard and appropriately followed up by tracing the source of seepage pollutant. It was not essential to employ overseas experts to assist in the investigation. In view of the complexity of the issue, it was understandable that EPD would need more time to look into the case.

133. The Ombudsman considered this complaint unsubstantiated. Nonetheless, the issue had lasted for more than three years. The Ombudsman urged EPD to continue with its investigation and prosecution work, and take decisive enforcement action if there was sufficient evidence.

Government's response

134. EPD accepted The Ombudsman's recommendation and has completed the investigation as well as initiated prosecution action on the case.

Environmental Protection Department and Lands Department

Case No. 2014/5509A&B – Failing to follow up properly a complaint about leakage of foul water from a septic tank

Background

135. The complainant complained to the Office of The Ombudsman (the Office) that the Environmental Protection Department (EPD) and Lands Department (LandsD) had not properly handled her complaint about sewage leakage from a septic tank.

136. It transpired that the complainant had noticed sewage leakage from the septic tank of a village house (Village House A) near her residence, with foul water accumulating on a footpath behind the village house. She called 1823 to lodge a complaint and the case was referred to EPD and LandsD for action.

137. Having identified the septic tank as the source of sewage leakage after some dye-tracing tests, EPD asked the occupants of the village house to clear the septic tank. However, the leakage persisted. EPD indicated that giving verbal advice to the owners of the house was all that the department could do. The local District Lands Office (DLO) under LandsD initially told the complainant that it could not provide any assistance regarding environmental nuisance or pollution problem. It was not until it had received a written complaint from the complainant that DLO wrote to the owners of the house, requiring repairs to the septic tank. The sewage leakage nevertheless persisted.

The Ombudsman's observations

138. The Office considered EPD to have performed its duty in pursuing the case and tried to resolve the problem by actively liaising with the occupants of the house and DLO.

139. As regards LandsD, while being the department responsible for regulation of village houses, it had failed to follow up the case promptly or take effective actions to stop as soon as possible the serious environmental nuisance caused by the breach of the lease conditions by the village house concerned. LandsD did not seek legal advice until a month or so after its issuance of advisory letters. Clearly, LandsD had not taken the complaint seriously, making people wonder whether it had actively attempted to resolve the problem.

140. In view of the above, The Ombudsman considered the complaint against EPD unsubstantiated, but the complaint against LandsD substantiated. The Ombudsman urged LandsD to direct the DLO concerned to follow up the case closely to ensure that the owners of Village House A comply with the requirements stated in the warning letters and rectify the irregularity before the prescribed deadline.

Government's response

141. LandsD accepted The Ombudsman's recommendation and has taken further lease enforcement action. The owners concerned had subsequently repaired the septic tank and submitted a report from a registered professional engineer certifying that the septic tank functioned properly without leakage.

Food and Environmental Hygiene Department

Case No. 2014/4438 – Delay in taking follow-up action against water dripping from an air-conditioner

Background

142. On 18 May 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD). The complainant said water was often found dripping on the canopy of the kitchen (water dripping problem) of her home in a village house (the Second Floor), which might be caused by leakage from the newly built soil pipe of the flat above (the Third Floor) or by water dripping from the flat's spilt type air-conditioner. In September 2014, the complainant wrote to 1823 and FEHD to complain about the water dripping problem. Photos were later provided as evidence.

143. It was not until 13 October 2014 that the Environmental Hygiene Section (EHS) of the concerned District Environmental Hygiene Office (DEHO) under FEHD sent Officer A to conduct a site inspection.

144. Officer A phoned the complainant on the same day to tell her that he had entered the Third Floor for inspection. The inspection result showed that there was no water seepage problem in relation to the pipes of the flat in question. As no one knew how to operate the said split type air-conditioner and the water dripping problem might be caused by other air-conditioners, he had not switched on the air-conditioner in question to test if there was any water dripping problem. Moreover, he had not received the complaint letter dated 30 September from the complainant. As FEHD would not accept photos as evidence, the complainant could confirm the seepage location on her own by visual inspection. Lastly, Officer A said that as no further water dripping was found, investigation by FEHD would be temporarily discontinued. If the water dripping problem resurfaced next year, the complainant could contact FEHD again.

145. The complainant alleged that FEHD delayed following up the water dripping problem and that its staff refused to conduct further investigation by giving excuses.

The Ombudsman's observations

146. Overall speaking, FEHD's follow up of the water dripping problem was not very prompt but there were no undue delays. As for whether Officer A had invented excuses to shirk his responsibilities, FEHD had given an explanation. The Office did not rule out the possibility that there might be some misunderstanding in the communication between the complainant and Officer A. The Office found it questionable that the EHS staff did not conduct any test to ascertain whether the air-conditioner was the source of water dripping. There was no evidence, however, to show that the officer concerned was inventing excuses not to follow up the water dripping problem.

147. That said, the Office did not accept FEHD's arguments for its EHS staff not conducting any test on the air-conditioner on the following grounds –

(a) The Public Health and Municipal Services Ordinance (the Ordinance) empowered the authorised FEHD staff to enter the flat alleged to have a dripping air-conditioner and conduct the relevant test. In other words, the officer concerned had the right to carry out the test upon entry into the suspected flat without seeking further approval from anyone;

(b) It was impossible that the DEHO staff who was responsible for the dripping air-conditioner investigation did not know how to switch on an ordinary air-conditioner. After entering the flat alleged to have a dripping air-conditioner, the DEHO staff should switch on the air-conditioner in question to conduct the test without seeking assistance, unless there were obvious dangers or special difficulties in doing so; and

(c) According to FEHD, an EHS officer had managed to enter the Third Floor twice for investigation but the aged person(s) and kid(s) inside the flat said that they did not know how to operate the air-conditioner in question. There was no information indicating that the officer concerned would be unable to switch on the air-conditioner without the assistance of the aged person(s) and kid(s). Empowered by the law, he should have endeavoured to conduct the test. Alternative arrangements should be considered only when he had tried but to no avail. After all, the occupants concerned might not necessarily offer full cooperation and assistance even if alternative arrangements were made.

148. In view of the above, The Ombudsman considered this complaint unsubstantiated but other inadequacies found. The Ombudsman recommended that FEHD should revise its operational guidelines to advise its staff that necessary tests should be conducted to ascertain the source of environmental hygiene nuisance unless there are insurmountable difficulties.

Government's response

149. FEHD accepted The Ombudsman's recommendation. The Department issued guidelines in July 2015 to remind EHS officers of all districts that with the powers conferred by section 126(1)(d) of the Ordinance, they should fairly and reasonably follow up complaints about dripping air-conditioners and conduct the required tests. This should include switching on the air-conditioner in question to identify the source of environmental hygiene nuisance when it is reasonable to believe that the alleged water dripping nuisance is caused by the air-conditioner concerned, that the owner or occupant does not accede to the request for switching on the air-conditioner to conduct the test, and that there are no obvious dangers or difficulties in doing so.

Food and Environmental Hygiene Department

Case No. 2014/4775, 2014/4897, 2014/4907, 2014/5543, 2014/5546 – Failing to take effective enforcement action, thereby condoning street traders' illegal hawking activity and tolerating the street obstruction they caused

Background

150. Five complainants lodged their complaints separately with the Office of The Ombudsman (the Office), alleging that since September 2014, a large number of people (street traders) had been buying in and selling mobile phones of new models on the pavements along two streets in Causeway Bay and Mong Kok. Some of them even hoisted sun umbrellas, causing serious obstruction to pedestrians. Some of the complainants had reported the problem immediately to the Food and Environmental Hygiene Department (FEHD) officers on duty nearby, but the officers did not take any enforcement action.

151. The complainants were dissatisfied that FEHD had failed to take rigorous enforcement action, thereby condoning the street traders' illegal hawking activity and tolerating the street obstruction they caused.

The Ombudsman's observations

152. The investigator of the Office conducted several site inspections in Causeway Bay and Mong Kok and found that –

(a) on most occasions, street traders stationed themselves and placed articles on the pavements, causing serious obstruction to pedestrians;

(b) quite a few street traders opened their backpacks or suitcases to display mobile phones of various models to passers-by, at the same time holding placards to introduce the different models;

(c) some street traders approached the Office's investigator to tout their mobile phones, or quoted the prices of the mobile phones when asked, and indicated the availability of stocks; and

(d) some street traders placed suitcases filled with mobile phones beside them, though claiming that they were just buying in mobile phones.

153. The Office considered that the activities of the street traders had caused serious street obstruction. Yet, FEHD just repeatedly issued verbal advice/warning or affixed Notices to Remove Obstruction, which did not help to curb the street traders' unlawful activities.

154. Furthermore, during the Office's site inspections, street traders were easily found to be touting mobile phones, telling passers-by the prices and arrangements for collection of goods. They were clearly hawking. FEHD's argument of lack of concrete evidence was indeed a lame excuse for not taking enforcement action.

155. Although FEHD pointed out that street management problems straddled across a number of government departments, it has an undeniable responsibility to combat illegal on-street hawking activities and street obstruction. It was believed that the problem of street obstruction by street traders as mentioned above would recur in the future when new models of mobile phones were released in the market.

156. The Ombudsman considered this complaint substantiated, and urged FEHD to closely monitor the street traders' activities and take strict enforcement action against the illegal hawking and street obstruction involved, so as to prevent causing obstruction to road users.

Government's response

157. FEHD accepted The Ombudsman's recommendation and has urged the district environmental hygiene offices concerned to step up inspections, including strengthening enforcement actions with the relevant departments when the issue in question recurs. If it is found that the act of any persons (including those who buy in mobile phones in the street) involves illegal hawking and constitutes an offence relating to street obstruction, FEHD officers will take enforcement action. Under normal circumstances, if street traders only carry out buy-in activities which do not involve illegal hawking or environmental hygiene problems, FEHD will not accord priority to handling such cases. However, FEHD will take action in accordance with the enforcement guidelines if complaints from the public are received and/or serious obstruction is detected.

Food and Environmental Hygiene Department

Case No. 2015/0656 – Delay in collecting food samples for testing, resulting in mishandling a relevant complaint

Background

158. In January 2015, the complainant purchased a powdered health food product (the product) from a shop operated by a health food company (the shop). He later suspected that he suffered food poisoning from the consumption of the product. Subsequently, he lodged a complaint with the Food and Environmental Hygiene Department (FEHD) on 27th of the same month. A staff member of FEHD (Officer A) collected one product sample from the complainant on the same day for laboratory tests.

159. On 3 February 2015, a staff member (Officer B) from the Centre for Food Safety (CFS) under FEHD informed the complainant over the phone that CFS would deal with his complaint soonest, and he would be informed of the result afterwards.

160. On 12 February 2015, Officer B called the complainant again, informing him that the quantity of the previously-collected sample was too small, and a long time had elapsed after the product was opened. To ensure accurate testing, CFS needed to collect product samples again for laboratory tests. The complainant responded that he had already returned all of the product to the shop. Officer B said that CFS would visit the shop and buy the product to pursue the complaint.

161. The complainant opined that FEHD failed to handle his food safety complaint properly because of the delay in collection of product samples.

162. On 13 February 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against FEHD.

The Ombudsman's observations

163. The Office accepted in principle the explanations given by FEHD. The most direct and efficient way to pursue the complainant's case was to collect information and evidence from the complainant, including obtaining sufficient samples from him for testing. However, when the complainant indicated he was his unwilling to provide adequate samples for testing, the officer concerned should resort to other means to follow up on the product safety issue, including visiting the shop to collect sufficient samples from the same batch of products for testing as soon as possible. The Office saw no strong justification for the officer concerned to await the reply of the Chemist of CFS on the testing arrangements before making a decision to conduct sampling at the shop. On the premise of safeguarding public health, the Office considered it a responsible approach to collect sufficient quantity of samples before the testing parameters were determined in order to avoid undue delay in sampling. Unless the product was extraordinarily expensive, it would still be worthwhile to incur additional public expenses in the purchase.

164. By 12 February (seven days before the first day of the Lunar New Year), the officer concerned had received the Chemist's reply, and the complainant had made it clear that he had returned all of the product to the shop. However, the officer concerned waited until 25th of the same month (the seventh day of the Lunar New Year, almost half a month from 12 February) before visiting the shop to purchase the product for testing. As a result, he was unable to obtain items from the same batch of product. FEHD explained that there was only five working days from the receipt of the expert's reply to the purchase of the product. However, with the imminent arrival of the Lunar New Year holiday, the officer concerned should have bought the product earlier instead of taking follow-up action after the holiday.

165. The Office opined that as food safety was at stake, this case should not be dealt in a lax manner, lest more people consuming the product might be exposed to health hazards. In this case, the complainant had clearly stated at the outset that he was unwilling to provide more of the product to CFS. FEHD should have collected samples from the shop for testing as early as possible to ascertain whether the product was safe and fit for consumption. As such, The Ombudsman considered there was delay on the part of FEHD in handling the case. The complaint was substantiated.

166. The Office noted that the operational guidelines of FEHD did not specify the time frame for collecting food samples from vendors upon the receipt of food complaints. This might lead to delay in following up by some members of FEHD staff. The Ombudsman recommended FEHD to review its operational guidelines to ensure that its staff would pursue food complaints lodged by the public in a timely manner.

Government's response

167. FEHD accepted The Ombudsman's recommendation. In April 2016, the Department completed its review of and made various amendments to the operational guidelines on handling food complaints, including stipulating a time frame for officers to collect food samples from vendors upon receipt of food complaints from the public.

Food and Environmental Hygiene Department

Case No. 2015/0773 – Failing to properly follow through a complaint

Background

168. Allegedly, the swimming pool (the Pool) of the housing estate where the complainant lived had, inter alia, the following problems (the Safety Issue) –

(a) time and again there were less than two lifesaving attendants on duty when the Pool was open; and

(b) the lifesaving attendants had been found sleeping, eating breakfast and playing games with their mobile phones while on duty.

169. Since July 2013, the complainant had complained many times to the Food and Environmental Hygiene Department (FEHD) about the Safety Issues, but the problems persisted. On 14 January 2015, FEHD replied to the complainant that it had inspected the Pool but no breach of the conditions of the licence issued for the Pool or any hygienic problem was found.

170. The complainant considered that FEHD had failed to properly investigate his complaints about the Safety Issues.

The Ombudsman's observations

171. The Office of The Ombudsman (the Office) considered that FEHD had followed up on the complaint with due care and diligence. The Office agreed that in the absence of sufficient evidence and in light of the advice of the Department of Justice (DoJ), it was not unreasonable for FEHD not to take prosecution action against the licensee of the pool for the time being. The Ombudsman, therefore, considered the complaint unsubstantiated.

172. The Ombudsman recommended that FEHD should continue to closely monitor the problem and, when new evidence was to hand, seek DoJ's advice again on whether prosecution should be instituted.

Government's response

173. FEHD accepted The Ombudsman's recommendation and has further sought DoJ's advice with new evidence provided by the complainant. DoJ advised FEHD against prosecuting the licensee of the Pool.

Food and Environmental Hygiene Department

Case No. 2015/1093 – Failing to tackle the problem of feeding feral pigeons in a private building

Background

174. Allegedly, the complainant had seen time and again that an occupier of a flat (Flat A) on the second floor of a building (the Building) opposite to the building where he lived fed feral pigeons by placing bird feed on top of an air-conditioner of Flat A and the canopy of the flat immediately below (Flat B). As a result of the bird feeding, pigeon droppings were found on the Building and even on the complainant's own building, causing a nuisance and hygiene problem (the Problem). In February 2015, the complainant complained to the Food and Environmental Hygiene Department (FEHD) about the Problem. However, the FEHD officer concerned replied that feeding feral pigeons from within a private residence was outside the Department's jurisdiction. The Department merely issued an advisory letter to the occupier of Flat A, and the Problem persisted.

The Ombudsman's observations

175. The complainant's complaint to FEHD was clearly about somebody's pigeon-feeding activity resulting in droppings on the buildings concerned, which might amount to contravention of section 4 of the Public Cleansing and Prevention of Nuisances Regulation and section 12 of the Public Health and Municipal Services Ordinance. The Office of The Ombudsman (the Office) considered that the Department as the enforcement agency should have as soon as possible –

(a) tried its best to visit the location concerned to examine the alleged pigeon-feeding activity, and where the situation warranted it, applied for a warrant to enter Flat A for investigation; and

(b) consulted Department of Justice (DoJ) on the sufficiency of the evidence available (i.e. the video clips provided by the complainant).

176. However, FEHD did neither of these until after the complainant had complained to the Office. In this light, The Ombudsman considered the complainant's complaint substantiated.

177. The Ombudsman urged FEHD to follow up the case closely.

Government's response

178. FEHD accepted The Ombudsman's recommendation. The department had kept the case under close monitoring. At the time of inspection at Flat A, no pigeon-feeding activity was witnessed, and no bird feed and bird's droppings were found on the top of the air conditioner of Flat A and the vicinity. The locality was kept hygienic at the time of inspection. This notwithstanding, health education was given to the occupiers of Flat A on the spot and they were warned to refrain from pigeon-feeding. On the other hand, in accordance with DoJ's advice, the complainant was invited to give a witness statement for the Department to follow up on the alleged offence. However, he did not turn up eventually. FEHD had followed up the case closely according to The Ombudsman's recommendation.

Food and Environmental Hygiene Department

Case No. 2015/1475 – (1)Wrong decision in issuing a provisional licence to a restaurant; (2)Failing to take enforcement action against the restaurant which operated as food factory without the relevant licence; and (3)Failing to take enforcement action against the restaurant which continued to operate after its provisional licence had expired

Background

179. As alleged by the complainant, a roasted meat restaurant (the restaurant) had been operating on the ground floor of the building where he was living since July 2014. He was greatly disturbed by the problems caused by the restaurant, which included emission of oily fumes, rodent infestation, environmental hygiene and fire safety issues, etc. He had lodged complaints with various government departments (including the Food and Environmental Hygiene Department (FEHD)), but the problems persisted.

180. The complainant was dissatisfied with FEHD with regard to the following aspects –

(a) the air duct of the restaurant was extended to the exterior of the windows of his residence. As a result, when the restaurant was grilling meat, the floor slab of his home would be partially affected with a rise in temperature, and thick smoke and exhaust gas would often spread into his flat. FEHD was accused of neglecting the impacts of the barbecue operation on nearby residents and the resultant health effects when issuing a "provisional restaurant licence" (provisional licence) to the restaurant;

(b) the restaurant delivered its roasted products to another shop (a restaurant with the same name on the concerned street) for sale, which was beyond the mode of operation allowed by the "provisional licence". The restaurant should have applied for a "food factory licence", but FEHD failed to take enforcement against it for operating an unlicensed food factory;

(c) the restaurant continued to operate without a "full general restaurant licence" (full licence) when its provisional licence expired in February 2015. FEHD was accused of failing to take vigorous enforcement action to crack down on the unlicensed restaurant in a timely manner; and

(d) the complainant lodged a complaint against the licensing and hygienic problems of the restaurant with the concerned District Environmental Hygiene Office (DEHO) of FEHD. However, an officer there (Officer A) made defensive remarks for the restaurant and admitted that the provisional licence was "wrongly issued". The DEHO simply referred such problems as improper emission of oily fumes and obstruction of fire escapes to the Environmental Protection Department, the Fire Services Department and other relevant government departments for replies. It took no steps to crack down on the restaurant. FEHD was suspected of showing favouritism to the restaurant.

The Ombudsman's observations

Allegation (a)

181. The existing policy does not prohibit the use of street-level shops in residential buildings for restaurant operations. According to records, FEHD adhered to the established policy and procedures in processing the provisional licence application of the restaurant. The provisional licence was issued only when the restaurant was found to have satisfied all the essential health, building and fire safety requirements. The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b)

182. The allegation of the complainant and FEHD's explanation differed. There was also no sufficient evidence showing that the restaurant habitually supplied roasted products to another restaurant bearing the same name. Therefore, The Ombudsman considered allegation (b) unsubstantiated. Besides, whether the restaurant was in breach of licensing conditions in this aspect would have no actual impact on the complainant.

Allegation (c)

183. The complainant filed a complaint with the Office of The Ombudsman (the Office) between April and May 2015. The provisional licence of the restaurant had already expired at that time. However, according to the established policy and procedures of FEHD, the licence application of the restaurant was still considered valid. Therefore, instead of cracking down on the restaurant immediately, FEHD followed the standing practice to conduct regular inspections and institute prosecution against the restaurant afterwards. FEHD was only acting in accordance with the established procedures. It could not deviate from these procedures at will. As such, The Ombudsman considered allegation (c) unsubstantiated.

184. Nevertheless, subsequent developments reflected that the existing licensing system and procedures could possibly be abused. A restaurant operator might have no intent to improve facilities for compliance with the requirements for a full licence. Instead, by repeatedly changing operators and submitting fresh licence applications, a restaurant could remain in operation under the more lenient provisional licence conditions, possibly with health and safety implications on the public. The Office urged FEHD to conduct an in-depth review of this issue.

Allegation (d)

185. As to whether Officer A had remarked to the complainant that the licence was "wrongly issued", the complainant and Officer A had different assertions. In the absence of objective corroborative evidence, the Office was unable to ascertain the facts of the case. FEHD had explained its procedures for issuance of provisional licence and full licence, its enforcement policy against unlicensed restaurants and its rationale for not cracking down on the restaurant in the first instance. Records indicated that FEHD followed the relevant policy and guidelines in dealing with the case of the restaurant. There was no favouritism involved. FEHD referred the problems arising from the restaurant to different departments for action having regard to their scope of duties. It was its duty to do so. The Ombudsman considered allegation (d) unsubstantiated.

186. Overall speaking, this complaint was unsubstantiated. The Ombudsman considered that FEHD must conduct an in-depth review on the possible loopholes created by the existing mode of changing the operator for making new licence applications.

Government's response

187. FEHD accepted The Ombudsman's recommendation.

188. Under the existing policy, in order to prevent applicants from abusing the provisional licensing system, FEHD would not process any application for a licence of the same nature at the same premises within three years from the date of expiry of the relevant provisional licence. Moreover, for restaurant operators who have no intent to improve facilities to comply with the requirements for a full licence but continue to operate under a provisional licence, the provisional licence will be cancelled when the premises are found not in compliance with any of the health, building safety and fire safety requirements for issuance of provisional licence.

189. After reviewing the relevant measures, FEHD has further strengthened regulatory control on repeated applications from unlawful food business operators for a fresh licence under another applicant. In addition to the existing measures, FEHD will not process applications for new provisional food business licences if the application is submitted by the former licensee or his/her business partner/proprietor where the last provisional licence has lapsed and a full licence has not been issued to the former licensee within the past 12 months preceding the date of new licence application for the same nature of business in respect of the same premises.

190. When processing new provisional licence applications received within 12 months after the lapse of the provisional licence, FEHD will request the applicant to submit documentary proof (e.g. tenancy agreement for the premises where the licence is under application, business registration certificate, company documents, etc.) to demonstrate that he/she has no business connection with the former licensee or his/her business partner/business proprietor. In parallel, a non-standard licensing requirement will be imposed on the provisional licence to require the applicant to make a statutory declaration under the Oaths and Declarations Ordinance that he/she has no business connection with the former licensee or his/her business partner/business proprietor of the premises where a licence is under application. By virtue of Section 36(a) of the Crimes Ordinance, an applicant who knowingly and wilfully makes in a statutory declaration a statement which is false in a material particular shall be guilty of an offence, and shall be liable on conviction upon indictment to imprisonment for two years and to a fine. Moreover, FEHD will consider refusing the issue of a new provisional licence or cancelling any such provisional licence issued.

191. The Office has been informed of the arrangements under the enhanced provisional licence issuance control mechanism. FEHD will review the effectiveness of the related measures as appropriate.

Food and Environmental Hygiene Department

Case No. 2015/1489 – Ineffective control of hawkers in Scheduled Streets

Background

192. On 15 April 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD). According to the complainant, the following problems existed in the subject location –

(a) on the pavement, the goods of some stalls were hung at a height that caused sightline obstruction to drivers at the subject location, thus affecting driving safety (Problem I); and

(b) at the subject location, some stall operators caused obstruction to traffic flow by placing their goods or seating themselves on part of the left lane of the carriageway (Problem II).

193. Between September 2014 and March 2015, the complainant lodged a number of complaints about the problems concerned via 1823. After following up these complaints, the Transport Department (TD) confirmed the existence of Problem I. Although FEHD also followed up the matters, the problems persisted.

194. The complainant alleged that FEHD had failed to effectively follow up the problems concerned and ignored the nuisance thus caused to drivers.

The Ombudsman's observations

195. Upon receipt of the complaints concerned, FEHD deployed staff to the subject location for inspection on 37 occasions between September 2014 and May 2015, during which goods were occasionally found hanging high or being placed on the pavements. Those items were removed by the stall operators concerned upon FEHD's advice.

196. FEHD explained the subject location was within a "Scheduled Street" and the hawkers operating there were not issued any hawker licence. Hawkers within the "Scheduled Streets" are managed by the Police. In the light of the unique historical background of the subject location which has long become a tourist attraction and the fact that the stalls concerned are not posing any serious obstruction to pedestrians or vehicles, FEHD normally would not take any enforcement action against the stalls.

197. The Office was of the view that FEHD did follow up the complaints concerned but failed to completely resolve the problems due to the unique historical background of the subject location and the fact that the problems concerned also fell within the purview of other departments.

198. In view of this, The Ombudsman considered the complaint unsubstantiated and recommended FEHD to –

(a) follow up on its meeting with representatives of the Office and TD on 5 August 2015, during which FEHD undertook to request the Police to assist in tackling Problem II (goods obstructing traffic flow);

(b) advise the stall operators concerned to hang their goods at a lower height (Problem I), with a view to improving the situation eventually; and

(c) review its outdated approach to managing the subject location.

Government's response

199. FEHD accepted the recommendations (a) and (b) of The Ombudsman, but had reservations on recommendation (c).

200. Regarding recommendation (a), FEHD held a meeting with the Police on 17 August 2015 where it requested the Police to help tackle the problem at the subject location, where some stall operators had caused obstruction to traffic flow by placing their goods or seating themselves on part of the left lane of the carriageway concerned. The Police said it would instruct frontline staff to monitor the situation of the subject location and take follow-up actions accordingly.

201. As regards recommendation (b), FEHD sent staff to advise the stall operators concerned to hang their goods at a lower height to avoid sightline obstruction to drivers. Subsequently, FEHD conducted a number of inspections between September 2015 and February 2016, and found that the stall operators concerned had taken FEHD's advice and hung their goods at a lower height. There was no obstruction to the traffic lane of the carriageway at the subject location.

202. As for recommendation (c), FEHD visited the subject location with TD staff on 27 August 2015. The traffic condition at the subject location was deemed acceptable by TD staff. FEHD sought advice from TD about the traffic condition at the subject location on two subsequent occasions. After site inspections, TD replied on 24 November 2015 and 22 February 2016 respectively that the traffic condition at the subject location was normal. Upon receipt of The Ombudsman's recommendation, FEHD contacted the relevant government departments and called for joint efforts to solve the problems concerned. During inspections over the past six months, no stalls at the subject location were found to have caused sightline obstruction to drivers or obstruction to carriageway. Taking into account the operation mode of the stalls at the subject location, including their operating hours, major types of goods on sale, impact on environmental hygiene, unique historical background of the subject location, as well as the priorities of FEHD in the allocation and deployment of its existing resources, FEHD has no plan at the present stage to change the approach adopted regarding the regulation of stalls at the subject location. FEHD will closely monitor the operation of the stalls concerned and take appropriate follow-up actions when necessary.

203. FEHD informed the Office of the above follow-up action and stance on 23 March 2016. The Office replied on 31 March 2016 acknowledging receipt of the reply, and noted that the recommendations in the investigation report were implemented. The Office indicated that its follow-up action on this case had come to an end.

Food and Environmental Hygiene Department

Case No. 2015/1628 – Failing to properly handle a food complaint about pesticide residues found on some Indian lettuce

Background

204. The complainant found suspected pesticide residues on the Indian lettuce he bought from a vendor. He then complained to the Food and Environmental Hygiene Department (FEHD).

205. Subsequently, FEHD informed the complainant that the result of laboratory tests confirmed that the residue level of metaldehyde, a pesticide, in the Indian lettuce in question exceeded the maximum residue limit (MRL) specified by law. Nevertheless, FEHD decided to only issue a warning letter to the vendor, but not to institute any prosecution. The complainant considered FEHD's handling of his case improper.

The Ombudsman's observations

206. The Office of The Ombudsman agreed with the decision of the Food Surveillance and Complaint Section (FSCS) under the Centre for Food Safety (CFS) to conduct a risk assessment rather than instituting prosecution based on Part 1 of Schedule 1 to the Pesticide Residues in Food Regulation (the Regulation) under the Public Health and Municipal Services Ordinance. Nevertheless, the report of CFS's Risk Assessment Section (RAS) already clearly indicated that the pesticide residues on the Indian lettuce in question had exceeded the safety reference values. Based on this conclusion from RAS, FSCS should have sought advice from FEHD's senior management and the Department of Justice (DoJ) for a decision on whether to prosecute the vendor.

207. Moreover, after FSCS decided not to institute prosecution, it simply issued a so-called "warning letter", which was devoid of any substance or deterrent effect. Such a letter had in no way removed the health risk involved. This decision was too rash and perfunctory. Tasked with ensuring food safety, FEHD should take strict enforcement actions so that people's health could be safeguarded against unsafe food.

208. The Ombudsman considered the complaint substantiated and urged FEHD to –

(a) take effective measures to ensure that FSCS would handle similar cases more proactively and carefully in future such that correct and responsible enforcement decisions will be made; and

(b) review its enforcement system for handling cases that involve excessive levels of pesticide residues in food to achieve better protection for the health of the public. It should also issue clearer guidelines for the trade to follow.

Government's response

209. FEHD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

210. In July 2015, CFS under FEHD set up the "Food Complaint Risk Analysis Panel" (the Panel) led by a doctor at directorate level to provide expert advice on food complaints with difficulties encountered (including potentially prosecutable cases). When the Panel cannot come to a conclusion, the case would be reported to more senior officers for advice. Where necessary, DoJ will be consulted.

211. In support of the implementation of the Regulation, CFS has compiled the "Guidelines on Food Classification for the Pesticide Residues in Food Regulation" (the Guidelines) to facilitate the trade in identifying the appropriate pesticide residue limits that are relevant to the food commodities concerned by making reference to the Codex Classification of Foods. The Guidelines are subject to review by CFS from time to time and will be amended or supplemented as necessary.

212. As regards the enforcement aspect, CFS would handle complaints concerning food containing pesticide residues with no MRLs/extraneous MRLs specified in Schedule 1 to the Regulation by conducting risk assessments in accordance with section 7 of the Regulation. Moreover, FSCS would submit risk assessment reports prepared by RAS and laboratory test results on the food in question to the Panel to seek its views and decisions on follow-up actions.

213. CFS would conduct full investigation when there are solid grounds in pursuing a food complaint and seek DoJ's advice if necessary. When sufficient evidence is available, prosecution would be instituted for the protection of food safety and public health.

Food and Environmental Hygiene Department

Case No. 2015/1897 – Failing to take enforcement action against some advertising light boxes which caused pavement obstruction

Background

214. On 13 May 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD). The complainant alleged that in July and December 2014, he lodged complaints with FEHD about pedestrian obstruction caused by advertising light boxes (the light boxes) on the pavements in a certain district (Location 1 and Location 2). FEHD indicated that the issue involving the light boxes was not a street obstruction problem to be handled with priority and hence did not take action. The complainant alleged that FEHD had shirked its responsibility.

The Ombudsman's observations

215. The complainant was dissatisfied with FEHD because he considered that the light boxes had caused obstruction to pedestrians but FEHD did not take any action. The crux of the matter in this case, therefore, was whether the light boxes had indeed caused street obstruction, and, if yes, whether FEHD had handled the case according to the law. FEHD was authorised to take enforcement action against street obstruction, but the light boxes had not caused any actual obstruction to pedestrians. The Office considered it not unreasonable for FEHD not to take enforcement action by invoking the "street obstruction provision" under section 4A of the Summary Offences Ordinance. Furthermore, officers of the District Environmental Hygiene Office (DEHO) had successfully advised the relevant party to remove one of the light boxes, and also managed to remove the other light box after expiry of the deadline indicated on the notice issued according to the "provision on obstructions to scavenging operations" under section 22 of the Public Health and Municipal Services Ordinance (the Ordinance).

216. Notwithstanding the above, placing the light boxes at the locations was indeed a breach of the "provision on illegal affixing of bills" under Section 104A(1) of the Ordinance, which should have been invoked for enforcement by FEHD. FEHD is responsible for regulating the affixing of bills, which is different from tackling street obstruction problem. It was not reasonable for FEHD to determine its enforcement priority against advertising light boxes in accordance with the seriousness of obstruction caused. Moreover, it was not convincing that FEHD did not take action on the light boxes by invoking the "provision on illegal affixing of bills" on the grounds that ordinary advertising light boxes would not affect the streetscape. After all, people's aesthetic tastes differ and FEHD should not try to be the aesthetic judge for the whole city.

217. As such, The Ombudsman considered the complaint against FEHD unsubstantiated but other inadequacies found. Given the increasing number of advertising light boxes in certain districts and the resultant aggravation of the problem, The Ombudsman urged FEHD to conduct a comprehensive review of its enforcement against advertising light boxes, so as to prevent the situation from deteriorating and becoming unmanageable.

Government's response

218. FEHD accepted The Ombudsman's recommendation and has taken the actions below.

219. The definition of "bill" and "poster" under section 104E of the Ordinance covers advertising light boxes in a broad sense. As explained in FEHD's reply to the Office on 21 August 2015, the core duty of FEHD is to maintain environmental hygiene. In enforcing sections 104A and 104C of the Ordinance, FEHD will take into account the impacts of the irregularities on environmental hygiene and the public, other relevant factors which include the legislative intent of the Ordinance to combat environmental nuisances caused by illegal affixing of bills and posters, and the enforcement priority determined in the light of available departmental resources. Generally speaking, advertising light boxes do not cause problems that affect environmental hygiene and the streetscape. The obstruction they cause is also relatively less serious than the street obstruction caused by goods placed in front of shops.

220. Judging from the number of complaint cases about advertising light boxes on the pavements received by FEHD each year and the department's follow-up findings, the problem of placing light boxes on the pavements is not serious at present and FEHD's previous follow-up actions have proven to be effective. Therefore, FEHD is of the view that its current practice of determining enforcement priorities with due regard to the impacts of the irregularities on environmental hygiene and the public, as well as to the availability of departmental resources, is appropriate.

221. Nevertheless, FEHD would consider The Ombudsman's recommendation and closely monitor the environmental hygiene nuisances and obstructions to the public caused by advertising light boxes on the pavements in various districts. It would also step up enforcement actions against serious cases of street obstruction by invoking sections 104A and 104C of the Ordinance as appropriate.

222. The Office noted FEHD's stance and considered that the Office's recommendation had been implemented. The Office indicated that it had concluded its follow-up action on this case.

Food and Environmental Hygiene Department

Case No. 2015/1975 – Mishandling a food complaint

Background

223. The complainant and several friends bought some yogurt ice-cream (the yogurt) at a restaurant (Restaurant A). Two of them felt sick after eating the yogurt and had to seek emergency treatment at a hospital. The complainant lodged a complaint with the Food and Environmental Hygiene Department (FEHD) that night.

224. Later on, he checked FEHD's website and found that Restaurant A was not among the licensed restaurants in the commercial building where it was located (the Building). Nevertheless, FEHD stated in its written reply to him that Restaurant A was a licensed general restaurant with permission to sell frozen confectionery. FEHD also indicated that its officer had conducted an investigation at Restaurant A and found its hygiene condition and storage of frozen confectionery satisfactory.

225. The complainant then complained to the Office of The Ombudsman (the Office) against FEHD for –

(a) failing to follow up on his food complaint properly, including the failure to collect a food sample from Restaurant A promptly for laboratory tests; and

(b) providing inaccurate and incomplete information on its website regarding Restaurant A's licensing status and conniving at the operation of an unlicensed restaurant in the Building.

The Ombudsman's observations

226. According to the investigation result of the Office, the FEHD officers made a number of blunders in handling the complainant's food complaint, including delay in referral and failure to collect samples of the yogurt immediately.

227. It is the Office's view that FEHD should be rigorous and prompt in handling complaints concerning food safety. To protect public health, it should collect evidence in a timely manner for instituting prosecution against restaurants selling unsafe food. In this case, if the FEHD officer concerned had collected a "formal sample" when he first went to Restaurant A, there would have been sufficient evidence for FEHD to institute prosecution. The Ombudsman therefore considered allegation (a) substantiated.

228. As regards allegation (b), FEHD explained to the Office that there were five licensed restaurants in the Building, including Restaurant A. It was only because Restaurant A had not specified the name of the Building in its registered address that the complainant could not find Restaurant A on the list of licensed restaurants on FEHD's website just by entering the name of the Building. FEHD pointed out that there was in fact no unlicensed restaurant in the Building. With FEHD's clarification, The Ombudsman considered allegation (b) unsubstantiated.

229. Overall speaking, The Ombudsman considered the complaint partially substantiated. The Ombudsman urged FEHD to learn from this incident and remind its staff to be rigorous and prompt in pursuing food complaints. In particular, they should collect evidence in a timely manner for instituting prosecution against restaurants selling unsafe food.

Government's response

230. FEHD accepted The Ombudsman's recommendation and has informed the officers concerned about the findings and recommendation of the Office's report. They had been reminded to be rigorous and prompt in investigating and pursuing food complaints in accordance with the relevant departmental guidelines.

Food and Environmental Hygiene Department

Case No. 2015/2064 & 2015/2068 – Failing to take effective enforcement action against the street obstruction problem caused by illegal extension of business areas by shops

Background

231. In May 2015, a member of the public and a company (the complainants) lodged complaints with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD) about the same problem. The complainants said the shops along several streets in a certain district (the location) had placed goods on the pavements for sale for long periods and deposited many polystyrene foam boxes on the pavements, causing serious street obstruction and environmental hygiene problems. Although some of the complainants had lodged complaints with FEHD repeatedly, FEHD staff merely gave advice to but did not institute prosecutions against the non-compliant shop operators.

232. The complainants were dissatisfied that FEHD had failed to take effective enforcement action and allowed the street obstruction and environmental hygiene problems at the location to persist.

The Ombudsman's observations

233. FEHD had all along been taking enforcement actions against the shops at the location. Since September 2014, the Department had adopted the enforcement strategy of "instituting immediate prosecutions". It had also invoked more frequently the "illegal hawking provision" under section 83B of the Public Health and Municipal Services Ordinance which imposes a heavier penalty. Nevertheless, according to the photographs provided by the complainants and the findings of the inspections conducted by the Office during the earlier stage of the investigation, the problem persisted and the occupation of pavements by individual shops for sale of goods could even be described as rampant. This showed that enforcement actions by FEHD failed to produce sufficient deterrent effect. Fortunately, after the Office had started investigation into the case, FEHD began to take more stringent and proactive enforcement actions, and recent inspections conducted by the

Office found that the situation seemed to be improving.

234. As for the problem of polystyrene foam boxes being placed on the pavements by the shops, it was only after the Office had looked into the case that FEHD did step up inspections and take prosecution actions. This indicated that FEHD had previously failed to take a proactive approach to tackling the problem.

235. The Ombudsman considered the complaint lodged by the complainants against FEHD partially substantiated, and recommended that FEHD should continue to closely monitor the situation at the location and take rigorous enforcement actions, including instituting prosecutions by invoking the "illegal hawking provision" more frequently, so as to achieve a stronger deterrent effect for significant and continuous improvement of the situation.

Government's response

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

(a) FEHD had closely monitored the situation of street obstruction by the shops at the location and will take stringent enforcement actions as necessary. The district staff have also been reminded to stay vigilant and institute prosecutions by invoking the "illegal hawking provision" without prior warning whenever sufficient evidence on illegal hawking can be established; and

(b) between December 2015 and June 2016, FEHD instituted 213 and 34 prosecutions against the non-compliant shop operators at the location for "street obstruction" and "illegal hawking" respectively.

Food and Environmental Hygiene Department

Case No. 2015/2486 – Failing to take effective enforcement action against the obstruction problem caused by a recycling shop

Background

237. The complainant lodged a complaint with the Office of The Ombudsman (the Office) on 25 November 2014 against the Food and Environmental Hygiene Department (FEHD) about, among other things, the Department's failure to take any actions to tackle the street obstruction problem caused by the daily operations of a recycling company (the shop) on the pavement and the carriageway outside its premises in a certain district. The Office concluded the investigation on 24 March 2015.

238. The complainant lodged a new complaint with the Office on 19 and 22 June 2015, alleging that the street obstruction problem caused by the shop had persisted with no improvement. He alleged that FEHD had failed to take effective enforcement actions**.**

The Ombudsman's observations

239. Comparing the situation described in the Office's investigation report in March 2015 and the findings of the Office's inspection in October 2015, the Office considered that there had been slight improvement in the situation of pavement occupation and obstruction caused by the shop. That said, the litter and debris left by the shop on the road had affected environmental hygiene and the situation was in dire need of rectification.

240. As reiterated by the Office, the "street obstruction provision" does not require that the obstruction caused be related to illegal hawking activities. It was indeed unreasonable for FEHD not to invoke the "street obstruction provision" to prosecute the person-in-charge of the shop just because no illegal hawking was involved. It would be impractical to expect the Police, which should concentrate their resources on maintaining law and order in the community, to enforce the "street obstruction provision" on FEHD's behalf and handle the street obstruction problem caused by the shop. This would only result in

departments shirking responsibilities to one another, leaving the problem to the care of no one.

241. Moreover, having referred to the photographs previously provided by FEHD in respect of street cleansing by FEHD staff outside the shop, the Office was of the view that the objects placed on the road by the shop had undoubtedly caused obstruction to street cleansing operations.

242. Given that the operator of the shop was a recalcitrant offender, FEHD should take rigorous enforcement actions with a view to achieving a deterrent effect on the shop and hence continuous improvement of the situation. Although the occupation of pavement by the shop had slightly receded upon inspections and joint operations arranged by FEHD, information indicated that the strength of FEHD's enforcement actions was still inadequate. Inspection by FEHD staff had thus failed to deter the shop from illegally placing articles of various sizes on the road.

243. The Ombudsman considered the complaint partially substantiated and recommended FEHD to –

(a) continue monitoring the situation closely. If the shop is found to have caused street obstruction, decisive enforcement actions should be taken, including instituting prosecutions by invoking the "street obstruction provision"; and

(b) where necessary, FEHD should discuss with the local District Office (DO) and consider launching joint operations more frequently with a view to working out a concrete solution to the problem.

Government's response

244. FEHD accepted the part of The Ombudsman's recommendation (a) about enhancing enforcement but not the part on invoking the "provision on obstruction of public places" for the reasons given below.

245. FEHD's core duty is to maintain food and environmental hygiene. For street obstructions caused by recycling activities, FEHD will step up inspections of the locations concerned subject to the availability of resources. If obstructions to scavenging operations persist or become serious, law enforcement officers will, having considered the actual circumstances at the locations concerned, prosecute the offenders without prior warning or issue the "Notice to Remove Obstruction" by invoking section 22 of the Public Health and Municipal Services Ordinance (Section 22).

246. FEHD has reservations about The Ombudsman's recommendation that FEHD should consider prosecuting the recyclables collector in question by invoking the "provision on obstruction of public places", i.e. section 4A of the Summary Offences Ordinance (Section 4A). For obstructions caused by on-street illegal hawking, FEHD staff will, under normal circumstances, institute prosecution for unlicensed hawking by invoking section 83B of the Public Health and Municipal Services Ordinance, and will, subject to the evidence available on the spot, also take enforcement actions by invoking Section 4A. As the recycling activities had only caused obstructions to FEHD's scavenging operations without involving any unlicensed hawking activities, the case was followed up mainly by the Foreman grade staff (the Foremen) of FEHD's Cleansing Section as warranted by circumstances. FEHD is of the view that if the recycling activities are found to have caused serious obstructions, the Foremen should institute prosecution by invoking Section 22 immediately to achieve a deterrent effect. FEHD does not agree that the Foremen should invoke Section 4A to institute prosecution. Under normal circumstances, if street traders only carry out buy-in activities which do not involve illegal hawking or environmental hygiene problems, FEHD will not accord priority to handling such cases. However, FEHD will take action in accordance with the enforcement guidelines if complaints from the public are received and/or serious obstruction is detected.

247. FEHD has closely monitored the situation of street obstruction caused by the shop, conducted inspections from time to time, made arrangements for washing the street in question and taken rigorous enforcement actions as necessary. District staff has also been reminded to maintain vigilance and to institute prosecution without prior warning whenever there is sufficient evidence to establish that an offence has been committed. During the period from January to June 2016, FEHD conducted 58 inspections of the street in question and instituted one prosecution against the person-in-charge of the shop for causing obstructions to street scavenging operations by invoking Section 22.

248. FEHD accepted The Ombudsman's recommendation (b) and has taken the initiative to liaise with relevant departments (including the Highways Department, Environmental Protection Department and Lands Department) and launched joint operations to enhance the effectiveness of enforcement. Two joint operations were launched during the period from January to June 2016. In the joint operations, the hygiene condition of the street was satisfactory in general, and no miscellaneous articles were found placed on the pavement. Although the present situation has improved, FEHD will keep on monitoring the shop closely and take proactive and appropriate actions to tackle the problem. FEHD will also work jointly with other departments to maintain environmental hygiene by taking actions within their respective purview and according to the law. Where necessary, FEHD will request the local DO to co-ordinate joint operations.

249. FEHD informed the Office of the above position on 1 December 2015.

Food and Environmental Hygiene Department

Case No. 2015/2525 – Failure to control unlawful use of stalls in a market

Background

250. The complainant had found that quite a few frozen meat stalls in an Food and Environmental Hygiene Department (FEHD) market (the Market) were, in breach of the tenancy agreements, being used as an office, a cold storage for food and a workshop for cutting frozen meat, and a siu mei (roast meat) stall had nothing but baskets in it. She complained to the Office of The Ombudsman (the Office) that FEHD failed to take proper actions to rectify such breaches which had led to inadequate market service for the residents in the neighbourhood.

The Ombudsman's observations

251. This case involved a total of seven market stalls, two of which (Stalls I and IV) could be used for selling frozen meat only, and the remaining five (Stalls II, III, V, VI and VII) for siu mei. The officer from the Office visited the Market in July and October 2015. In addition to seeing what is shown in the complainant's photographs, the officer witnessed some workers handling goods around the huge walk-in metal cabinet in Stall II, and someone was cutting meat with a meat-cutting machine at Stall IV. None of the stalls was displaying or selling food.

252. Furthermore, the officer noticed that Stalls I and IV shared the same company name (Company A) in their stall signs. Although Stalls II, III, VI and V did not have the name of Company A on their signs, the tenant of the first three stalls was a shareholder of Company A, while the registered assistant of Stall V was another shareholder.

253. There was evidence that Stall I had been used as an office since 2013. FEHD had issued a warning letter to the tenant, but when the breach was once more found, FEHD merely issued verbal warnings again and again. Such enforcement actions were feeble, thus allowing the breach to continue, and that was utterly unacceptable.

254. The Office wondered why the problem could have gone unnoticed despite daily inspections by the contractor and officers from the concerned District Environmental Hygiene Office (DEHO). If not for the complaints received, DEHO would not have even started to take action against Stall I. The Office considered that a serious dereliction of duty.

255. The other stalls involved were being used for purposes other than displaying and selling the types of food specified in their tenancy agreements. And yet FEHD maintained that the problem had been rectified or that no breach of the tenancy agreements had been found. The Office considered that FEHD should conduct an in-depth investigation into the irregularities.

256. This case also exposed loopholes in FEHD's mechanism of leasing market stalls. FEHD treated that merely as a commercial activity. Vacant stalls were leased to the highest bidders through open tender and FEHD did not set a limit on the number of market stalls that each person could rent.

257. The Office believed that the intent of FEHD's leasing of market stalls was to have different types of shops in the market so that an array of choices in terms of types and prices of goods would be available to consumers. It, however, turned out that quite a number of stalls in the Market were rented by the same person or someone associated with that person. Some of the stalls had even been converted into an office or storages for goods, making up in effect a single big shop. Should the situation be allowed to continue, both the competition among stalls and the choices available to consumers would be seriously reduced. It was really amiss of FEHD to have turned a blind eye to this problem and not to have ever reviewed its mechanism of leasing market stalls to identify ways to plug the loopholes.

258. The Ombudsman considered this complaint substantiated, and urged FEHD to seriously review its mechanism of leasing market stalls, the terms and conditions of its tenancy agreement and its methods of control and enforcement so as to prevent further abuse of market stalls.

Government's response

259. FEHD accepted The Ombudsman's recommendation and reported to the Office on the progress of implementing the recommendation by way of a letter on 13 July 2016.

260. Public market stalls are generally let out by open auctions and the tenancy agreement is for a term of three years. Upon expiry of tenancy, stall tenants can normally continue to rent their stalls at a rate adjusted in accordance with the prevailing rental adjustment policy, unless their tenancies have been terminated due to breach of tenancy conditions or relevant legislation. Renting of market stalls has been regarded by FEHD as a commercial activity, and therefore, no limit is imposed on the number of market stalls that a tenant can bid for. Nevertheless, FEHD is now actively considering limiting the number of market stalls that a tenant can rent, but has yet to come to a decision.

261. The current terms and conditions of the FEHD market stall tenancy agreement restrict the tenant from using the stall for any purpose other than the Permitted Use. Restrictions include not using the stall for storage purposes or operation of non-specified businesses. Under the prevailing "Warning Letters" system, a stall tenant who has been found breaching any of the tenancy clauses will first be given a verbal warning. If the tenant concerned fails to heed the verbal warning, FEHD will issue a warning letter requiring the tenant to rectify the irregularity/irregularities concerned within a specified period of time. If a tenant who has received three warning letters within six months breaches any tenancy clauses again, FEHD will consider terminating the tenancy of the stall in question. In addition, to prevent the subletting of market stalls, the tenancy agreement stipulates that the tenant shall carry on business as a sole proprietor at the stall and shall not assign, mortgage, charge, demise, sublet or part with the possession of the stall or transfer any of his/her rights or obligations under the agreement or enter into any agreement so to do. If there is evidence that the above clause is breached, FEHD will immediately terminate the tenancy of the tenant concerned. In the past four years, there were a total of eight cases in which subletting or assignment of market stall was ascertained by FEHD and the tenancies concerned were terminated as a result. In another two cases, the tenants concerned voluntarily terminated their tenancies in the course of FEHD's investigation of the alleged subletting or assignment of their market stalls. FEHD reviews the relevant monitoring system and the terms and conditions of the tenancy agreement from time to time. The management staff of markets is instructed to strictly enforce the terms and conditions of tenancy agreements in order to enhance the vibrancy of markets and prevent the abuse of public market resources.

Food and Environmental Hygiene Department and Buildings Department

Case No. 2015/1490A&B – Delay and impropriety in handling a seepage complaint

Background

262. The complainant said she complained to the Joint Office for Investigation of Water Seepage Complaints ("JO") staffed by the Food and Environmental Hygiene Department (FEHD) and Buildings Department (BD) in early 2011 about water seepage in the kitchen ceiling of her flat (Flat A). In November 2012, JO issued a written reply to inform her that the source of water seepage could not be confirmed.

263. As water seepage persisted, the complainant complained to JO again. In January 2013, JO replied in writing that a consultant would be appointed to carry out investigation. From January 2013 to December 2104 (i.e. 24 months), the complainant made enquiries to JO repeatedly about the investigation progress but was told each time that as the owner of the flat above Flat A (Flat B) was uncooperative, tests could not be conducted. In March 2015, JO wrote to inform her that the consultant still could not enter Flat B for investigation.

264. The complainant was dissatisfied that JO had not actively followed up her case, leading to it being unresolved for a protracted period of over three years.

The Ombudsman's observations

265. JO had admitted its own inadequacies and those of its consultant in handling the case.

266. Regarding the inadequacies of the consultant, JO had repeatedly urged and issued warning letters requesting the consultant to make improvement. However, the result was insignificant. Under the premise of outsourcing the work but not the responsibility, JO should have been more proactive in its intervention or should have even taken over to follow up the case. JO is responsible for the delay in resolving this case owing to its consultant's inadequacies.

267. Moreover, JO was indecisive and failed to apply for a warrant to enter Flat B for investigation as early as possible in accordance with the relevant procedures. As a result, "Notices of Intention to Apply for Warrant of Entry" were repeatedly issued to the owner of Flat B. The consequent delay resulted in the case remaining unresolved for over three years.

268. The Ombudsman found the complaint against JO substantiated and urged JO to –

(a) strictly monitor the work of the consultants to ensure timely follow up of all water seepage cases; consider terminating the contract of or taking other punitive measures against consultants with unsatisfactory performance. Where necessary, JO should take over to follow up cases of undue delays;

(b) remind its staff to ensure timely follow up of matters concerning the application for a Warrant to Effect Entry into Premises in accordance with the relevant guidelines; and

(c) continue to closely follow up on the complainant's case and inform the complainant of the investigation progress and relevant findings in a timely manner.

Government's response

269. JO accepted The Ombudsman's recommendations and has taken the following follow-up actions.

270. JO would monitor the progress of the work of the consultant through bi-weekly progress meetings to ensure that every water seepage case is followed up in a timely manner. If the performance of the consultant is unsatisfactory, JO would issue verbal or written warnings to urge for improvement. JO would compile reports regularly to assess the performance of the consultant. If the performance of the consultant was persistently poor, JO would reflect it in the assessment reports which would lower the chance of the contractor being awarded new contracts or even disqualify it from future bidding. Apart from this, JO would consider terminating the contract with the consultant according to the contract terms.

271. JO had reminded its staff to adhere to the guidelines in handling matters concerning the application for a Warrant to Effect Entry into Premises in a timely manner.

272. JO had continued to follow up on this case in accordance with internal guidelines. The results of the laboratory testing of samples collected from the location of seepage on 22 July 2015 did not reveal any colour dyes used in the tests at Flat B. Therefore, the source of seepage could not be identified. After examining the investigation reports submitted by the consultant, JO issued a written reply to the complainant on 22 September 2015 that the source of the seepage could not be identified after performing various "non-destructive" tests, and hence JO had to cease its follow-up action on this case.

Food and Environmental Hygiene Department, Home Affairs Department and Lands Department

Case No. 2015/3077A,B&C – Ineffective enforcement action against street obstruction problem caused by furniture and objects

Background

273. As alleged by the complainant, the pavement at a certain location (the location) had long been occupied and placed with a large quantity of furniture and objects for years, obstructing the passageway and forcing pedestrians to walk on the carriageway instead of the pavement. Moreover, various people always lingered and gathered at the location. They went there for having meals (including uniformed officers of the Food and Environmental Hygiene Department (FEHD)), smoking and drinking, seriously affecting the environmental hygiene conditions there. The complainant had repeatedly lodged a complaint with FEHD but the situation did not improve.

274. The complainant was dissatisfied that the Lands Department (LandsD), Home Affairs Department (HAD) and FEHD had shirked their responsibilities and failed to properly follow up the street obstruction and environmental hygiene problems at the location.

The Ombudsman's observations

275. As shown by the photos provided by the departments concerned and the inspection of the Office of The Ombudsman (the Office), the furniture and miscellaneous objects at the location were small items such as stools and wooden boxes. The site was not heavily patronised. Despite that there were people constantly occupying government land, it would be difficult for LandsD to take enforcement action by invoking the "land occupation provision" and adopting the mode of posting statutory notice as the items involved were small and movable. It was not unreasonable for the Department to suggest referring the complaint to the District Office (DO) for follow-up actions. The Ombudsman, therefore, considered the complaint against LandsD unsubstantiated.

276. After receiving the complaint, the DO under HAD immediately coordinated with the relevant departments including (the District Lands Office and FEHD) to follow up the case. It had coordinated four joint operations. The Office considered that DO had indeed followed up the case appropriately under its purview. Furthermore, the handling method of its staff was not unreasonable. Hence, The Ombudsman considered the complaint against HAD unsubstantiated.

277. As for the question whether FEHD had received a complaint from the complainant in the past, the complainant and FEHD gave different versions of what happened. In the absence of any independent corroborating evidence, it was difficult for the Office to ascertain the truth. Whatever the truth might be, FEHD did follow up the street obstruction and environmental hygiene problems at the location immediately after receiving the referral from HAD. In view of the this, The Ombudsman considered the complaint against FEHD unsubstantiated.

278. The Ombudsman recommended that if further complaints about the problem were received and its inspection at the location revealed serious pavement obstructions caused by the placement of furniture and objects, FEHD should take strict enforcement actions including invoking the "street obstruction provision" with a view to enhancing the enforcement effect.

Government's response

279. FEHD accepted The Ombudsman's recommendation. Inspections conducted by FEHD revealed that the street obstruction problem no longer persisted, and no related complaint had been received by FEHD afterwards. Nevertheless, if future inspection at the location reveals that the placing of furniture and objects causes serious pavement obstruction, FEHD will take strict enforcement actions, including invoking the "causing obstructions to scavenging operations provision" or the "street obstruction provision" in the light of the actual circumstances, to ensure environmental hygiene and keep the passageway clear of obstruction.

Food and Environmental Hygiene Department, Home Affairs Department and Lands Department

Case No. 2014/4350A,B&C – Failing to properly handle the problems arising from a recycling stall

Background

280. On 10 October 2014, an Owners' Corporation (OC) lodged a complaint with the Office of The Ombudsman (the Office) against the Home Affairs Department (HAD), Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

281. According to the OC, a stall recycling miscellaneous articles (the stall) had been operating on the government land near the roundabout of the housing estate for a prolonged period of time. The stall did not only cause obstruction to the road and the pavement, but also had an adverse impact on environmental hygiene. The OC wrote to the District Office (DO) of HAD, District Environmental Hygiene Office (DEHO) of FEHD and District Lands Office (DLO) of LandsD respectively on 7 August 2014, requesting the departments to address the problems caused by the stall and fallen under their respective purview.

282. DEHO indicated in its reply on 3 September that the problems of the stall involved the work of several government departments and that, in mid-August, DEHO had participated in an inter-departmental joint operation coordinated by DO in which cleansing contractors were arranged to step up their efforts in clearing and cleansing the site. DLO indicated in its reply on 4 the same month that the stall "is situated on the pavement of a public road, and the matter is beyond our purview". No reply had been made by DO.

283. The OC criticised HAD, FEHD and LandsD for insufficient communication, shifting responsibilities onto one another and failing to duly address the problems of the stall.

The Ombudsman's observations

HAD

284. The DO of HAD had coordinated three joint operations from August to October 2014. The Office considered that HAD had already followed up, within its purview, the non-compliance problems of the stall in an appropriate manner. The Ombudsman considered the OC's complaint against HAD unsubstantiated. Nevertheless, it was indeed a shortcoming for HAD not to provide a written reply to the OC's letter. The Ombudsman, therefore, considered there were inadequacies on the part of HAD.

FEHD

285. Early in March 2014, DEHO of FEHD was aware that the stall had repeatedly and illegally placed articles on the pavement but all along no enforcement had been taken. In September 2014, even though DEHO found on many occasions that heaps of articles had been placed on the public road by the stall, enforcement actions were taken only by the standard of handling "minor cases", i.e. only verbal warnings and "notices" were issued to the stall in a repeated manner without instituting any prosecutions. It was not until he Office looked into the case that FEHD instituted prosecutions against the recyclables collector concerned by invoking the "provision on prevention of obstructions to scavenging operations". In this case, FEHD had not invoked the "provision on obstruction of public places" when instituting prosecutions.

286. FEHD provided an explanation for not invoking the "provision on obstruction of public places". While understanding that there were limitations for the foremen of FEHD's "Cleansing Section" to enforce the "provision on obstruction of public places", the Office considered that FEHD should make every endeavour to overcome the limitations and invoke the most effective provision when taking enforcement.

287. Furthermore, although street management straddled across a few government departments, FEHD indeed played an important role in tackling the problems. As such, when the problems persisted, FEHD should have exercised the powers conferred by law as far as possible in order to enhance the effectiveness of its enforcement actions.

288. The Office considered that FEHD should have taken rigorous enforcement actions against recalcitrant offenders just like the stall, and invoked the "provision on obstruction of public places" when necessary to achieve a stronger deterrent effect.

289. Based on the above analysis, The Ombudsman considered that although FEHD had taken actions against the street obstruction problem caused by the stall, it had not done its utmost, which rendered the actions ineffective and caused the problems to persist. The complaint lodged by the OC against FEHD was considered partially substantiated.

LandsD

290. LandsD is exploring ways to step up its enforcement actions against repeated unlawful occupation of government land. Under the circumstances, it was understandable that DLO did not take any enforcement action against the stall under the "provision on occupation of land". The Ombudsman considered the OC's complaint against LandsD unsubstantiated.

291. However, in its letter to the OC on 4 September 2014, DLO indicated that the stall "is situated on the pavement of a public road, and the matter is beyond our purview". This statement did not tally with the facts. In fact, DLO had the authority to take enforcement actions against the stall. The Ombudsman thus considered that LandsD had other inadequacies.

292. The Ombudsman urged FEHD to keep a close monitoring over the stall. If serious street obstruction is found, enforcement actions should be taken decisively and strictly, including invoking the "provision on prevention of obstructions to scavenging operations" by the standard of handling "serious cases", and immediately instituting prosecutions without giving prior warning or issuing "notices". Consideration should also be given to invoking the "provision on obstruction of public places" as appropriate to arrest and prosecute the recyclables collector in question, thereby enhancing the effectiveness of enforcement and achieving a stronger deterrent effect to resolve the problems. The Ombudsman also urged LandsD to learn from this case and to remind its staff of the need to accurately reflect the actual situation when communicating with the public.

Government's response

293. As regards The Ombudsman's recommendation, FEHD accepted the part on enhancing enforcement but had reservations about the part on invoking the "provision on obstruction of public places". FEHD explained to the Office by way of a letter on 27 March 2015.

294. FEHD's core duty is to maintain food and environmental hygiene. For street obstructions caused by recycling activities, FEHD will step up inspections of the locations concerned subject to the availability of resources. If obstructions to scavenging operations persist or become serious, law enforcement officers will, having taken the actual circumstances at the locations concerned into account, prosecute the offenders without prior warning or issue the "Notice to Remove Obstruction" by invoking section 22 of the Public Health and Municipal Services Ordinance (the Ordinance).

295. Regarding The Ombudsman's recommendation that FEHD should consider arresting and prosecuting the recyclables collector in question by invoking the "provision on obstruction of public places", i.e. section 4A of the Summary Offences Ordinance (section 4A) as appropriate, FEHD has reservations about the recommendation. For obstructions caused by on-street illegal hawking, FEHD staff will, under normal circumstances, institute prosecution for unlicensed hawking by invoking section 83B of the Ordinance, and subject to the evidence available on the spot, also take enforcement actions by invoking section 4A. As the recycling activities had only caused obstructions to FEHD's scavenging operations without involving any unlicensed hawking activities, the case was followed up mainly by the Foreman grade staff (the Foremen) of FEHD's Cleansing Section as appropriate. Due to the heavy workload and lack of manpower, the Foremen usually work alone. In addition, without designated vehicle provided, it is difficult for the Foremen to initiate arrest action. Besides, procedures for making arrest are very time consuming and seriously affect his/her daily work.

296. In view of the above, FEHD opines that if the recycling activities are found causing serious obstructions to scavenging operations, the Foreman should immediately institute prosecution by invoking section 22 as a deterrent. FEHD does not agree that the Foremen should invoke section 4A for arrest action.

297. During the period from April 2015 to June 2016, FEHD participated in 15 joint operations co-ordinated by DO and instituted two prosecutions against the recyclables collector concerned for causing obstructions to scavenging operations under section 22. At present, the situation has improved.

298. Moreover, the District Council concerned has included the item "On-street illegal recycling activities" in its District-led Actions Scheme. The DO plays the role as the co-ordinator for the discussion of action details with FEHD and other relevant government departments (including LandsD and the Police). FEHD will, having taken into account the actual circumstances at the locations concerned, enhance enforcement actions, and actively participate in the joint operations co-ordinated by DO to ensure the tidiness and cleanliness of the location concerned.

299. LandsD accepted The Ombudsman's recommendation. DLO issued a written reminder on 5 May 2015 to all concerned officers reminding them of the need to accurately reflect the actual situation when communicating with the public.

Food and Environmental Hygiene Department and Housing Department

Case No. 2014/5276A&B – Shirking responsibility in tackling the problem of illegal hawking in a public housing estate

Background

300. On 8 December 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD) and Housing Department (HD).

301. According to the complainant, he lodged a complaint with 1823 on 3 November 2014, stating that there were quite a number of illegal cooked food hawkers (hawking problem) on a covered walkway by the side of a road near a particular housing estate. Thereafter, 1823 replied by quoting HD as saying that the above problem fell within the purview of FEHD. 1823 then referred the case to FEHD for follow-up actions. Nonetheless, FEHD replied that the location of hawking did not fall within its jurisdiction.

302. The complainant criticised both FEHD and HD for shirking the responsibility, resulting in the persistent hawking problem.

The Ombudsman's observations

303. Having examined the inspection records, the Office was satisfied that both FEHD and HD had taken appropriate actions within their respective purviews upon receipt of the complainant's complaint. In fact, both departments, after giving their replies to the complainant, had continued to follow up on the issue of hawking on the covered walkway, areas outside the pavement as well as public places near the convenience store. They had also kept each other informed of the inspection results. It was evident that the two Departments had not tried to shift the responsibility onto the other party.

304. In view of the above, The Ombudsman considered the complainant's complaint against both FEHD and HD unsubstantiated.

305. That being said, the initial reply given by the housing estate property services agent (PSA) responsible for the management of the covered walkway concerned to the complainant through 1823 could indeed be easily mistaken as HD's refusal to take further action against the problem of hawking or its attempt to shift the responsibility onto another department. Had the PSA been more proactive in making contact with the complainant to clarify the location of hawking activities and explain the subsequent follow-up actions before giving him a reply, this complaint could have been avoided. In the light of the above, The Ombudsman recommended that HD should step up its supervision of the PSA in handling public complaints.

Government's response

306. HD accepted The Ombudsman's recommendation and would step up its supervision of the PSA in handling public complaints.

Food and Environmental Hygiene Department and Housing Department

Case No. 2015/0372A&B – Failing to take lease enforcement action against two food premises which occupied a back alley in a public housing estate

Background

307. In December 2013, the complainant made a complaint (the first complaint) to Food and Environmental Hygiene Department (FEHD) and Housing Department (HD), alleging that some restaurants occupied a back alley (the alley) in a housing estate for storing and handling food and cleansing eating utensils, which was in breach of the legislation governing restaurant operations. FEHD officers verbally replied that the case should be followed up by HD, as the alley was within HD's jurisdiction. HD referred the case to the property management company (the management company) of the housing estate, but the latter failed to take any action.

308. On 20 January 2015, the complainant further complained (the second complaint) about the issue in writing to FEHD and HD. On 29 the same month, HD officers verbally replied that the alley was cleaned up. However, the complainant found out later the same day that there were still plenty of miscellaneous articles, foodstuffs, eating utensils and even large refuse collection bins in the alley. No enforcement action had been taken by FEHD.

309. The complainant accused FEHD and HD of failing to handle his complaints properly and take enforcement action against the restaurants concerned.

The Ombudsman's observations

310. The District Environmental Hygiene Office of FEHD had in fact followed up the two complaints, but the officers failed to issue warnings against the restaurants in accordance with FEHD's departmental operational guidelines (the operational guidelines). The action was therefore ineffective.

311. Moreover, after checking the work records of FEHD, the Office of The Ombudsman (the Office) found that although FEHD conducted monthly inspections at the two restaurants, it failed to detect breaches of the Food Business Regulation under the Public Health and Municipal Services Ordinance or licensing conditions in the alley. FEHD explained to the Office that the persons in charge of the restaurants might have removed the objects or taken them into the shops before the inspections. However, the photos provided by the complainant showed that many miscellaneous articles, including large commercial refrigerators and big sinks, were placed in the alley. Supposedly, these things could not be removed promptly and completely. The Office believed that had FEHD officers paid closer attention during their routine inspections, it would have been easy for them to notice illegal placement of miscellaneous items in the alley at an early stage.

312. Based on the above analysis, The Ombudsman considered the complaint lodged against FEHD partially substantiated.

313. As for HD, the management company had indeed followed up the complaint of the complainant and explained the situation to him. The enforcement action of HD and the management company had been appropriate. The Ombudsman, therefore, considered the complaint against HD unsubstantiated.

314. The Ombudsman urged FEHD to remind its staff to follow the operational guidelines in issuing binding warnings against restaurants in breach of licensing conditions and to check records properly. It should also be more stringent in conducting inspections of restaurants and decisive in taking enforcement action when irregularities were identified.

Government's response

315. FEHD accepted The Ombudsman's recommendations and has reminded its staff to follow the operational guidelines in issuing binding warnings against restaurants in breach of licensing conditions and to check records properly. It would also be more stringent in conducting inspections of restaurants and decisive in taking enforcement action when irregularities were identified.

316. On the other hand, HD and the management company engaged by it had taken follow-up and enforcement actions in response to the complaints.

Food and Environmental Hygiene Department and Housing Department

Case No. 2015/1715A&B – Ineffective control over illegal hawking problem

Background

317. On 1 May 2015, the complainant filed a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD) and the Housing Department (HD).

318. According to the complainant, she had sent complaints to FEHD and HD through 1823 on numerous occasions since January 2014. She alleged that unlicensed cooked-food hawkers had been operating in an estate (Area A) and on the pavement opposite an MTR station (Area B) from evenings through early mornings for a long time, affecting the residents. Yet, the above problem remained unresolved.

319. The complainant accused that FEHD and HD had not actively tackled the said hawker issue.

The Ombudsman's observations

320. Upon examining the enforcement records of HD and FEHD, the Office believed that both departments had taken enforcement actions within their purview against the unlicensed hawkers in Area A and Area B. Therefore, The Ombudsman considered the complainant's complaint against FEHD and HD unsubstantiated.

321. However, according to the two departments' inspection records, there were still a considerable number of unlicensed hawkers operating in Area A and some occasional hawking activities in Area B. In view of this, The Ombudsman urged FEHD and HD to monitor the situation in both locations. More decisive enforcement actions should be taken against unlicensed hawkers who are repeat offenders. If necessary, HD should increase enforcement operations by its Mobile Operations Unit (MOU) so as to generate greater deterrent effect on unlicensed hawkers.

Government's response

322. FEHD and HD accepted The Ombudsman's recommendations and have taken the following follow-up actions.

323. FEHD had closely monitored the situation of Area B and taken rigorous enforcement actions.

324. For the black spots of unlicensed hawkers in the estate concerned, HD had strengthened the guard duties and patrol by security guards who also took enforcement actions to disperse unlicensed hawkers. In addition, HD's MOU has stepped up routine patrols and raiding actions in the estate concerned. The Unit has also carried out joint operations with FEHD from time to time to raid and combat illegal hawking by unlicensed hawkers.

Food and Environmental Hygiene Department, Housing Department and Buildings Department

Case No. 2015/3042A,B&C – Mishandling a seepage complaint and shirking of responsibility

Background

325. On 25 July 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Joint Offices for Investigation of Water Seepage Complaints (JO) jointly staffed by the Food and Environmental Hygiene Department and the Buildings Department as well as against the Housing Department (HD).

326. The complainant resided in a flat purchased (Flat A) under the Tenants Purchase Scheme of the Hong Kong Housing Authority (HA). According to the complainant, she lodged a complaint about water seepage in Flat A to JO via the estate management office (EMO) in August 2012. In September, JO replied that since the flat above Flat A (Flat B) was a public rental housing unit, the case would be referred to HD. In October, the property services agent (PSA) appointed by HA replied that the sold flat (Flat C) above Flat B was identified as the source of seepage in Flat A upon inspection, the case was thus referred to the EMO for follow-up action. Since then, the complainant had made several enquiries to JO, PSA and EMO about the progress of the case, only to be told that the case was still being processed. In November 2013, JO stated that since the source of seepage could not be ascertained after investigation, the follow-up action would be discontinued.

327. In mid-August 2014, the complainant filed another complaint to JO via the EMO about the recurrence of water seepage in Flat A. In response, JO stated later that month that the case was still being processed. In September, JO further explained that the case would be referred to HD for follow up.

328. In a reply to yet another complaint made by the complainant to JO and HD in July 2015 about the seepage problem in Flat A, JO reiterated that the case should be handled by HD, whereas the PSA stated that since the seepage source had to do with Flat C, the case was referred to the EMO for follow-up.

329. The complainant criticised JO and HD for passing the buck between themselves and not taking appropriate action to follow up on her seepage complaint, leaving the problem unsettled for three years.

The Ombudsman's observations

330. After examining relevant documents and records, the Office was satisfied with the statements provided by JO and HD about the handling of the complainant's case. The Office found that both JO and HD had in fact followed up on the case and taken actions appropriate to their respective scope of work.

331. With so many complex factors at play, the cause of seepage was difficult to identify. To protect private properties from damage, JO could only resort to non-destructive methods (such as moisture content measurement, dye water testing and water ponding test for floor slabs). These methods often take a long time and yet fail to detect seepage source. The Office considered these methods arduous but fruitless on the one hand, and were almost certain to invite criticism on the other given the length of time required.

332. The Office had, when handling similar complaints, advised JO to review their work procedures and explore new technology to enhance efficiency in the detection of seepage source. JO was urged again on this occasion to expedite their work in this respect.

333. In view of the above, The Ombudsman considered the complaint against JO and HD unsubstantiated.

334. That said, the Office noticed that upon receipt of the seepage complaint, both JO and HD indicated that the complaint would be referred to the other party for handling, giving rise to the perception that the two were passing the buck between themselves. It might help to clear misunderstanding if both parties would clarify their division of labour and explain their respective follow-up actions when they reply to the complainant.

335. The Ombudsman urged –

(a) JO and HD to make an effort to facilitate communications with the complainant when handling similar cases in the future; and

(b) JO to closely follow up on the complainant's case of water seepage and to take enforcement actions once the source of seepage was confirmed.

Government's response

336. JO accepted The Ombudsman's recommendations and has taken the following follow-up actions.

337. JO had issued internal guidelines on handling water seepage reports involving public housing estates to remind investigation staff that they should explain clearly to the complainant that if the source of water seepage is suspected to be from a public rental housing flat, the case will be handled by HD. If the source of water seepage is a flat sold by HD, the case will be followed up by JO.

338. JO had continued to follow up this case in accordance with internal guidelines. Based on the confirmatory test and moisture monitoring carried out between August to November 2015, the consultant submitted the report and supplementary information on 18 November and 9 December 2015 respectively. Based on the relevant investigation and test results, water seepage persisted in Flat A and Flat B, but the colour dye used in the confirmatory test did not appear in the seepage location. Hence, the source of seepage could not be confirmed to be related to the waterproofing of the floor slab of the bathroom of Flat C. As the source of the seepage could not be identified after performing various "non-destructive" tests, JO ceased its follow-up actions and issued a written reply to the complainant on 24 February 2016. The Office accepted the reasons for ceasing the follow-up action on this case.

339. HD accepted the recommendation of The Ombudsman, and would strengthen communication with the complainant and other government departments when handling similar cases in the future.

Food and Environmental Hygiene Department and Lands Department

Case No. 2014/3972A – Failing to properly follow up with other relevant departments on the complainant's application for outdoor seating accommodation for food premises

Case No. 2014/3972A – Failing to properly check the responsibility for maintenance and repairs of a piece of land

Background

340. In mid-2014, the complainant applied to the Food and Environmental Hygiene Department (FEHD) (the application) for outdoor seating accommodation (OSA) at an open area (the land) outside a shop at a shopping centre. According to the standing procedures, FEHD consulted the relevant government departments (including the LandsD Department (LandsD)) on the application and requested them to reply within a specified period of 20 working days. After the specified period, the complainant asked FEHD about the progress of the application, but was informed that the departments concerned had not yet responded. The officer who was answering the complainant suggested that the latter contact each of those departments to learn about the situation.

341. Later, the complainant asked LandsD about the application. The officer answering the complainant said that LandsD did not have a timeframe for dealing with OSA applications, and the Department needed not respond within the time frame as specified by FEHD. The officer further said that although the land was government land, LandsD was not certain which department was responsible for its maintenance. For this reason, LandsD could not pursue the application further.

342. In its reply letter to the complainant on 22 September 2014, FEHD conveyed that LandsD had reservations about the application as it was unclear which department would assume the responsibility for maintenance of the land. Thereafter, no further action was taken by LandsD.

343. The complainant accused FEHD of failing to properly follow up with other relevant government departments in providing input on the application within a specified period of time. LandsD was accused of acting perfunctorily without making efforts to find out which department was responsible for maintenance of the land. As a result, the application was held in abeyance.

The Ombudsman's observations

344. The Licensing Section of FEHD generally followed the departmental guidelines in processing the application, including conducting preliminary screening and seeking the views of relevant departments on the application twice. However, in the second round of consultation, it mistakenly specified a longer period of time for other departments to respond. Hence, some departments took a longer time than originally specified to reply to FEHD. Though the mistake did not substantially affect the progress of the application by the Licensing Section, it was still a shortfall.

345. As to why the Licensing Section did not follow up with Lands D and the Highways Department (HyD) on the responsibility of maintenance of the land immediately after the "first round of consultation", the Office considered that FEHD's explanation was not unreasonable.

346. The Ombudsman considered the complaint against FEHD partially substantiated.

347. As regards LandsD, the follow-up work of the District Lands Office under it was appropriate after being informed that HyD would not take up the maintenance and repair responsibility. Nevertheless, it was not satisfactory in terms of efficiency for the work to take more than three months. The Ombudsman, therefore, considered the complaint to LandsD partially substantiated.

348. The Ombudsman recommended FEHD –

(a) to remind its staff to strictly follow the departmental guidelines in processing licence applications, including requesting the departments consulted to respond within the specified period of time; and

(b) to vet the complainant's proposal soonest and after receiving proof of the short term tenancy (STT), process the application promptly without further delay.

Government's response

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

(a) reminded the relevant officers to adhere to the departmental guidelines and exercise due care in processing OSA applications, including requesting the departments consulted to provide their inputs within a specified period of time; and

(b) concerning the application, FEHD received the complainant's remedial proposal to address the residents' objections in the first half of March 2015. The proposal included pledging to clean up the OSA regularly to maintain its cleanliness and tidiness, and to provide a green open space for customers to enjoy coffee without affecting the outlook of the building and the environment. FEHD vetted the remedial measures proposed by the complainant according to the established procedures and issued a Letter of Requirement to the complainant on 20 May 2015. The complainant was required to comply with all the licensing requirements within six months from the date of the letter, if not, the application would be deemed withdrawn. During that period of time, FEHD conducted on-site inspections and kept in touch with the representative of the complainant. As the complainant failed to observe all the licensing requirements (including the provision of proof of STT) within the specified time, FEHD wrote to the complainant on 2 December 2015 to ascertain whether the complainant would continue to proceed with the application. The complainant did not reply within the specified time. FEHD then informed the complainant in writing on 16 December 2015 that the application was deemed withdrawn.

Food and Environmental Hygiene Department and Lands Department

Case No. 2015/2992A&B – Failing to properly follow up a complaint about seepage of foul water from the wall of a village house

Background

350. On 27 July and 5 August 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD) and the Lands Department (LandsD).

351. According to the complainant, she owned a cottage in a village. Adjacent to the cottage, there was a private housing estate (the housing estate), which was made up of some village houses. Barrier walls had been erected in the housing estate, and the lot owners were responsible for the maintenance and repairs of the walls in their respective lots. The ground level of the housing estate was higher than the complainant's cottage. In November 2014, the complainant complained to 1823 about the persistent seepage of sewage from the cracks on the barrier walls (the barrier walls) of two village houses (the village houses) in the housing estate near her cottage. Stagnation of sewage and sullage on the path to her cottage (the path) led to environmental nuisance, including mosquito breeding and stench. The case was followed up by FEHD and LandsD.

352. However, FEHD concluded that the sewage was not faecal sewage without conducting any test, and subsequently refused to issue a letter to the owners of the village houses requiring them to solve the problem of seepage from the barrier walls on the grounds that the source of sewage was uncertain. In addition, around April or May 2015, FEHD staff promised to give the complainant a written reply on the follow-up actions taken and the results, but the complainant had not received any reply since then.

353. As for LandsD, in a telephone conversation with the complainant in November 2014, the staff of LandsD indicated that the case would be referred to FEHD for follow-up action. The staff also asked the complainant to identify the village house from which the sewage had originated before LandsD would assign staff to follow up on the issue.

354. During that period, the seepage from the barrier walls persisted and the cracks became wider. In July 2015, the complainant found drain pipes installed outside the barrier walls of the village houses, which were suspected to be used for discharge of sewage onto the path, exacerbating the problem of stagnant sewage.

355. The complainant alleged that FEHD and LandsD had failed to properly follow up her complaint, resulting in persistence and even worsening of the problem.

The Ombudsman's observations

356. Having perused the relevant statutory provisions, documents and records, the Office considered the follow-up actions taken by FEHD and LandsD with regard to the seepage from the wall generally appropriate. FEHD conducted colour water tests at the village houses and arranged for the seepage samples to be examined, in order to identify the source of the seepage through objective and scientific methods. Yet, before the source of the seepage could be ascertained, FEHD and LandsD indeed had no justifications to take enforcement/lease enforcement actions against the owners of the village houses by invoking the Public Health and Municipal Services Ordinance or the relevant building licence condition(s). Nevertheless, the concerned District Lands Office (DLO) had already issued advisory letters to the owners concerned.

357. As for the complainant's allegations that FEHD had failed to fulfil its promise by sending her a written reply and the staff of LandsD had asked her to identify the source of the seepage herself, both departments disputed the allegations. The Office considered that there was no evidence in support of the alleged maladministration of FEHD and LandsD.

358. Based on the above analysis, The Ombudsman considered the complaint lodged by the complainant against both FEHD and Lands D unsubstantiated. Nonetheless, The Ombudsman urged the two departments to keep a close watch over the situation of water seepage from the wall and continue to look for the source of water seepage. For instance, FEHD should conduct colour water tests at other suspected locations and urged the persons concerned to resolve the problem of water seepage from the wall as soon as possible.

359. Although the source of seepage has not yet been ascertained and the authorities cannot take enforcement actions against the parties involved, there are indications (including photographic records) that the area of the barrier walls is rather large, stretching all the way to the other end of the housing estate. A number of cracks have appeared on the concerned walls and seepage from some of the cracks has persisted for more than two years. The Office is thus very concerned about the overall structural safety of the barrier walls. To safeguard public safety, The Ombudsman recommended that DLO (as the regulatory authority over village houses) should refer the case to the Buildings Department (BD) and Civil Engineering and Development Department (CEDD) (if the barrier walls involve retaining wall structures) without delay, so as to examine whether there are any structural safety concerns, and such that follow-up action could be taken accordingly.

Government's response

360. FEHD and LandsD accepted The Ombudsman's recommendations and have taken the following follow-up actions.

361. Apart from conducting colour water tests at the soil drain outlets of the village houses earlier on, colour water tests were also conducted by FEHD at the storm water drain outlets of the village houses concerned. However, the test results were negative, indicating that the source of water seepage was still uncertain. As the source of water seepage could not be confirmed despite completion of various colour water tests, FEHD decided to suspend the follow-up action on this case. FEHD had notified the local DLO of the test results to facilitate its consideration of whether the case could be handled separately according to the lease condition(s). FEHD would continue to carry out mosquito prevention and control work regularly in the vicinity of the location.

362. The DLO concerned of LandsD noted that the repair of septic tank at a village house had been completed. Besides, water colour tests conducted by FEHD at other drain outlets still could not help to identify the source of seepage. Further inspections conducted by DLO have revealed that the condition of seepage from the barrier walls has remained roughly the same and there has been no deterioration. DLO noted that the complainant intended to construct a channel at the side of the barrier walls for collection of the seepage, so as to improve the hygiene conditions. In this regard, she hoped to have the advice of government departments. DLO liaised with the District Office (DO) concerned, and arranged a joint site inspection with the Works Section of DO and the complainant. Advice has been given to the complainant for her reference. The complainant said she would have to discuss with the owner of the path next to the barrier walls as to whether such works could be carried out.

363. As for the concern on structural safety of the barrier walls, DLO has referred the case to BD and CEDD. CEDD had replied that no significant signs of irregularities were identified at the barrier walls/ retaining structure concerned that would cause imminent and obvious danger from the geotechnical point of view. BD responded that no action could be taken under section 27A of the Buildings Ordinance (i.e. concerning formed or man-made land, or any earth-retaining structure). While noting that both BD and CEDD considered that the barrier walls would not pose any structural safety concern, DLO had issued advisory letters to the owners concerned, requiring them to pay attention to the cracks on the barrier walls and to prevent their deterioration lest the safety of the barrier walls may be compromised.

Food and Environmental Hygiene Department and Lands Department

Case No. 2015/3375A – Failing to take proper enforcement action against illegal fish-selling activities

Case No. 2015/3375B – Failing to take proper enforcement action against unlawful occupation of Government land

Background

364. On 19 August 2015, the complainant complained to the Office of The Ombudsman (the Office) against the Lands Department (LandsD) and Food and Environmental Hygiene Department (FEHD).

365. In October 2013, the complainant complained to the Office against LandsD and FEHD for, among others, failing to take enforcement actions against an illegal fish stall (the Stall) at the rear of a house (the Site) in a certain village (the Village). According to the complainant, the Stall occupied some government land (GL) and caused hygiene problems. On 9 April 2014, the Office wrote to inform the complainant of the findings, including the following points –

(a) LandsD had identified some objects that obstructed scavenging operations as the targeted items for removal during the multi-departmental joint operations at the Village. The Office considered that LandsD could have taken enforcement actions against all objects at the Site occupying GL, whether or not such objects obstructed scavenging operations; and

(b) FEHD had, in 2013, instituted one prosecution against the Stall for illegal fish-selling activities and one prosecution against an offender for littering. While the Office did not expect FEHD to spend disproportionate resources on a single spot, the Office considered it necessary for FEHD to accord higher priority to the case, given the perennial hygiene problems that the Stall had caused. The Office urged FEHD to adopt a more rigorous enforcement strategy.

366. In the complaint of 19 August 2015, the complainant alleged that the following problems at the Site persisted –

(a) unlawful occupation of GL at the Site with the equipment of the Stall (including three large commercial refrigerators), blocking the passageway at the rear of its neighbouring houses; and

(b) hygiene problems caused by the Stall (including the continued littering of the gutter with fish parts, causing a strong stench and attracting flies and other insects).

367. The complainant considered that LandsD and FEHD had not taken proper actions in the past two years to curb the problems.

The Ombudsman's observations

368. LandsD had been trying to tackle the problem of unlawful occupation of GL in the Village (including the Site) by way of joint operations with other government departments in line with the agreed enforcement strategy. From this angle, The Ombudsman considered the complaint against LandsD unsubstantiated.

369. Given the perennial nature of the problem, The Ombudsman recommended that LandsD should consider conducting surprise inspections on top of the scheduled joint operations to enhance the effectiveness of its enforcement actions. Moreover, the Office appreciated that LandsD might have concern about the possible dissent of the local community when taking enforcement actions in the Village. If necessary, LandsD could consider liaising with the District Office (DO) with a view to taking the matter to the District Council (DC), which would be well positioned to advise the Government on what would strike a proper balance between the conflicting interests of different stakeholders.

370. As for FEHD, it could be seen from FEHD's responses that the Department had indeed stepped up its enforcement actions against the Stall. In this light, The Ombudsman considered the complaint against FEHD unsubstantiated.

371. Nevertheless, the Office's site visit indicated that the Stall might be discreetly engaged in illegal fish-selling activity. The Ombudsman urged FEHD to continue to closely monitor the situation at the Site, including the conduct of more undercover blitz operations, so as to deter offences.

Government's response

372. FEHD accepted The Ombudsman's recommendations. FEHD had continued to closely monitor the situation of the Site and taken stringent enforcement actions as follows –

(a) carrying out weekly inspections to the Site. The inspections were conducted in the early morning when illegal food business would be more likely to occur;

(b) conducting additional inspection on Saturdays or Sundays; and

(c) arranging undercover blitz operations to the Site.

373. LandsD accepted The Ombudsman's recommendations and had taken the following actions –

(a) the District Lands Office (DLO) concerned had conducted a surprise inspection. No sale of fish was observed at the Site but sale of vegetables was detected. Miscellaneous articles such as cabinets were found in the vicinity. DO had been approached to coordinate the next phase of joint operation according to the agreed schedule; and

(b) DLO would continue to liaise with DO to discuss whether it would appropriate to put up the case to DC or the District Management Committee for consideration of the way forward.

Food and Environmental Hygiene Department and Lands Department

Case No. 2015/3803A&B – Ineffective enforcement action against street obstruction problem caused by a recycling shop

Background

374. On 14 September 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

375. According to the complainant, a recycling shop (the shop) had frequently been occupying a pavement for placing tools and miscellaneous objects and for cutting objects since 2013, blocking access and endangering passers-by. The complainant had repeatedly complained to FEHD and LandsD via 1823, but the situation had not improved.

The Ombudsman's observations

376. While FEHD received multiple complaints from different complainants against the recycling shop in August 2015, LandsD received similar complaints at about the same time. As shown in the photos provided by one of the complainants, various kinds of articles were heaped up on the whole pavement and one whole traffic lane at the location day and night. The situation of illegal occupation was extremely serious. During its inspection, the Office had also found many articles placed on the pavement and the carriageway at the location. Moreover, taking into account the complainant's observations in March 2016, the Office had reasons to believe that the recycling shop had habitually placed articles on the pavement and the carriageway for a prolonged period of time.

377. Photos taken during the "inspections" between August and September 2015 were provided by FEHD, which showed that articles were placed in vertical position by the pavement railings and that the pavement was indeed clear of obstruction. However, the Office suspected that there was no obstruction because FEHD's contractor was carrying out street washing and the recycling shop had to take away the articles or stack them up for the time being.

378. Based on the above analysis, The Ombudsman considered that FEHD had followed up on the problem but with inadequate enforcement, thus allowing the obstruction problem of the recycling shop to persist. As such, the complaint lodged by the complainants against FEHD was partially substantiated.

379. As regards LandsD, the reasons why it had not taken any enforcement action against the occupation of government land by the shop were due to the existing division of responsibilities among departments and the practical difficulties in enforcement. Therefore, The Ombudsman considered the complaint against LandsD unsubstantiated.

380. Notwithstanding that the articles placed by the shop were "movable", the prolonged occupation of the pavement was in essence occupation of government land. As the administrator of government land, LandsD should have made active attempts to solve the problem rather than accept the situation as it was. In particular, LandsD should step up to its responsibility when other departments could not tackle the problem alone.

381. In light of the above, The Ombudsman urged that –

(a) FEHD and LandsD should conduct inspections more frequently and monitor the location closely. If the shop is found to have continued with its illegal activities, stringent enforcement actions should be taken in exercise of their respective authority so as to curb the problem as far as possible; and

(b) LandsD should endeavour to resolve the problem posed by the prolonged occupation of government land by "movable" articles.

Government's response

382. FEHD and LandsD accepted The Ombudsman's recommendations and have taken the following follow-up actions.

383. Upon receipt of the complaint referred by the Office, FEHD had closely monitored the situation of street obstruction caused by the recycling shop, stepped up inspections, made arrangements for washing the street and taken strict enforcement actions as necessary. District staff had also been reminded to maintain vigilance and institute prosecutions without prior warning whenever there is sufficient evidence to establish that an offence has been committed. During the period from January to June 2016, FEHD conducted 29 inspections of the street in question, issued seven verbal warnings to the person-in-charge of the recycling shop and instituted two prosecutions by invoking Section 22 of the Public Health and Municipal Services Ordinance.

384. Under normal circumstances, if street traders only carry out buy-in activities which do not involve illegal hawking or environmental hygiene problems, FEHD will not accord priority to handling such cases. However, FEHD will take action in accordance with the enforcement guidelines if complaints from the public are received and/or serious obstruction is detected.

385. The District Lands Office of LandsD will continue to conduct inspections in respect of the complaint under LandsD's purview and will take appropriate land control actions where necessary.

386. Regarding the problem of "movable" objects occupying government land, LandsD will continue to gather cases of continual occupation of the same plot of unleased government land by platforms of the same kind at the same location and initiate prosecution. The court's ruling will be sought if the party concerned raises a defence in relation to the definition of "cessation of occupation" in the proceedings.

Food and Environmental Hygiene Department and Lands Department

Case No. 2015/4180A&B – Failing to take enforcement action in respect of obstruction caused by shop-front platforms

Background

387. On 9 October 2015, the complainant lodged a complaint with the Office of The Ombudsman against the Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD).

388. According to the complainant, he had repeatedly complained to FEHD and LandsD since 2012 about the erection of shopfront platforms by several shops selling telephone accessories on the ground floor of a building (the site). The platforms occupied more than half of the pavement for goods display, and caused serious obstruction to passers-by, some of whom (including wheelchair users) were forced to make use of the carriageway nearby instead.

389. FEHD subsequently indicated in its reply to the complainant that it could only take actions against movable items, and thus referred the case to LandsD given that the platforms at the site were immovable.

390. However, LandsD indicated in its reply that due to insufficient manpower, no follow-up action could be taken and that FEHD should be responsible for the matter.

391. The complainant alleged FEHD and LandsD for shirking responsibility, thus delaying enforcement action against the shops.

The Ombudsman's observations

392. Information indicated that FEHD staff found no irregularities that fell within the department's purview during an inspection conducted after receiving a complaint from the complainant in late September 2015. As a result, no enforcement action was taken. Nevertheless, FEHD did refer the case involving "immovable" platforms placed at the location to LandsD according to the established division of duties. The Ombudsman considered that the follow-up actions taken by FEHD with respect to the complainant's complaint were appropriate in general. The complaint lodged by the complainant against FEHD was unsubstantiated.

393. The Office considered that it was understandable for the District Lands Office (DLO) concerned of LandsD to address the issue in the order of priority after receipt of the complaints in 2013 and confirming the existence of unauthorised immovable platforms on the pavement at the site, because such an issue did not fall under the category of priority cases. Further, LandsD, in response to repeated complaints from the public, subsequently suggested to the District Council concerned that the issue be handled under an action plan. As a result of the suggestion, the platforms unlawfully occupying government land were removed. In view of the above, The Ombudsman considered the complaint against LandsD unsubstantiated.

394. Notwithstanding the above, recent inspections by FEHD and the Office of The Ombudsman revealed that the shops at the site often put the platforms (immovable and movable) back onto the pavement following the enforcement actions taken by the departments concerned. This showed the disregard of the shops for the laws. The Ombudsman urged FEHD and LandsD to continue to keep a close watch on the shops at the site, and to actively collect evidence and take stringent law enforcement actions (for example, FEHD should, as far as possible, institute prosecutions by invoking the "illegal hawking provision" which carried a heavier penalty, in addition to the "street obstruction provision" and the "provision on obstructions to scavenging operations") in order to achieve a stronger deterrent effect.

Government's response

395. FEHD and LandsD accepted The Ombudsman's recommendations and have taken the following follow-up actions.

396. FEHD had kept a close watch over the shops. Stringent enforcement actions would be taken whenever necessary. Moreover, the district staff had been reminded to engage in active collection of evidence with a view to charging the offenders with the offence of "illegal hawking" under section 83B of the Public Health and Municipal Services Ordinance so as to deter the shops from illegally extending their business areas.

397. LandsD had also continued to keep a close watch on the shops at the site. DLO concerned conducted a joint operation with FEHD in April 2016. Illegal immovable and movable platforms were found on the pavement in front of the shops at the site. Staff of DLO and FEHD took prompt enforcement actions pursuant to the relevant ordinances. DLO posted notices under the Land (Miscellaneous Provisions) Ordinance on the illegal immovable platforms to require the occupiers to cease unlawful occupation on government land within the specified time period. The occupiers complied. Subsequently, another joint operation in June 2016 revealed that no illegal platform occupying the pavement was found in front of the shops at the site.

398. DLO will continue to keep a close watch on the shops at the site, and where necessary, will coordinate with FEHD to take enforcement actions by way of joint operation to achieve a stronger deterrent effect.

Government Property Agency

Case No. 2015/0613 – Delay in refunding the deposit to an ex-operator of a canteen at the Hong Kong Police College

Background

399. The complainant complained against the Government Property Agency (GPA) for delay in following up his request for refund of deposit.

400. The complainant was appointed as the liquidator of an ex-operator of a canteen at the Hong Kong Police College which was ordered to be wound up by the court in February 2011. As the tenancy between GPA and the ex-operator would only expire in May 2011, the complainant obtained GPA's permission to carry on the business until the expiry date on 15 May 2011. According to the tenancy agreement, a deposit of HK$366,000 should be refunded without interest to the tenant upon expiry of the tenancy after deducting the outstanding rents and payments.

401. On 16 May 2011, the canteen was handed over to the Hong Kong Police College and the incoming operator. On 16 October 2013, the complainant requested GPA to refund the deposit but was advised that legal advice had to be sought in respect of his request. In November and December 2013, July and October 2014, the complainant chased GPA for the refund but to no avail. On 16 January 2015, GPA advised the complainant that it was still seeking legal advice on the matter. The complainant was dissatisfied that the refund request was outstanding for more than one and a half years without any progress.

The Ombudsman's observations

402. GPA admitted delay in this case because the subject officer had not taken any action for 14 months. The inaction of the case officer (Officer A) could not simply be explained by oversight or heavy workload. The complainant had chased Officer A many times during the process, and the officer had told the complainant himself that legal advice would be sought. Hence, Officer A should be well aware that the case was outstanding and he was required to seek legal advice. Yet no action had ever been taken till a new case officer (Officer B) assumed duty.

This was clearly unacceptable. The Office of The Ombudsman (the Office) urged GPA to take serious follow-up actions regarding the misconduct of Officer A.

403. This case had also demonstrated a clear loophole in the internal supervision and monitoring system of GPA, resulting in Officer A's misconduct and procrastination going unnoticed for years (i.e. since 2012). Nevertheless, the Office noted that GPA had put in place a series of measures to improve its monitoring mechanism.

404. In view of the above, The Ombudsman considered the complaint substantiated and recommended GPA to –

(a) enhance the existing computer systems to automatically issue periodic reminders in respect of expired tenancies with un-refunded deposits to the case officer as well as the supervisor concerned;

(b) issue monthly outstanding case reports to the senior management;

(c) enhance the computer record system to automatically generate reminder letters in accordance with the Guidelines in Handling Unclaimed Deposits;

(d) consider to extend the new monitoring system to cover all categories of cases or business areas where GPA has a duty to act within defined or pledged timeframe;

(e) examine all expired or terminated tenancies to confirm that deposit refund action has been duly taken and followed up;

(f) draw up a list of tenancies that will expire or be terminated in the coming six months and update the list centrally and regularly for case monitoring;

(g) take serious follow-up actions regarding the misconduct of Officer A; and

(h) conduct staff briefings to enhance supervisory accountability and understanding of relevant work procedures after implementation of the new monitoring system.

Government's response

405. GPA accepted The Ombudsman's recommendations and has taken the following actions –

(a) GPA's computer system was enhanced in August 2015 to issue periodic reminders in respect of expired tenancies with un-refunded deposits to the case officer and the supervisor concerned;

(b) monthly outstanding case reports on applications for refund of deposit are generated by GPA's enhanced computer system. Overdue cases would be brought to the attention of officers at division head level;

(c) reminder letters to ex-tenants on unclaimed deposits would be automatically generated at suitable intervals by GPA's enhanced computer system;

(d) similar reports mentioned in (b) above would also be generated by GPA's enhanced computer system in some other categories of cases/business areas which would require GPA's action within defined or pledged timeframe;

(e) all expired or terminated tenancies had been examined to ensure that deposit refund action had been duly taken and followed up;

(f) lists on leased out tenancies that would expire or be terminated in six months' time would be regularly compiled for monitoring purpose;

(g) as Officer A had been transferred out of GPA, GPA had conveyed The Ombudsman's recommendation (g) to the serving department of Officer A to consider taking appropriate action in accordance with the civil service disciplinary procedures; and

(h) several briefings were conducted for GPA staff to introduce the enhanced computer system, and to enhance awareness of supervisory accountability and understanding on complaints handling procedures, etc.

Government Secretariat –
Constitutional and Mainland Affairs Bureau

Case No. 015/2857(I) – Refusing to provide the complainant with the records of Government's meetings with political bodies and Legislative Council Members on political reform

Background

406. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Constitutional and Mainland Affairs Bureau (CMAB) on 18 July 2015.

407. According to the complainant, he made a request to CMAB on 6 June 2015 under the Code on Access to Information (the Code) to obtain records and details concerning the meetings between the Government and various political bodies and Legislative Council (LegCo) Members on the 2015 constitutional reform package. In a written reply dated 16 July 2015, CMAB informed him that disclosure of the information requested would inhibit political bodies, LegCo Members and other stakeholders from expressing their views and opinions to the Government on various issues in a frank and candid manner in the future, and this would affect the consultation and policy formulation processes of the Government. The request for the provision of the said information was therefore refused by CMAB on the grounds provided in para. 2.10(b) of the Code.

408. The complainant was not satisfied with CMAB's refusal to provide to him the above-mentioned information and queried whether the decision was in line with the provisions of the Code.

The Ombudsman's observations

409. Based on the clarification made by the complainant to the Office regarding the scope of information he requested, the Office confirmed that the information he requested should only encompass the discussion contents of the Government's meetings with some political parties, political groups as well as individuals (including LegCo members) on the basis of confidentiality during the consultation period.

410. If CMAB violated the confidentiality agreement with the individuals concerned and disclosed to the public the discussion contents of those meetings, it is indeed probable that LegCo members, political groups and other individuals would be inhibited from expressing their views and opinions to the Government in a frank and candid manner in future. Therefore, CMAB could invoke para. 2.10(b) of the Code to refuse the disclosure of the relevant information. The Ombudsman considered that CMAB's refusal to provide the complainant with the information requested was not unreasonable. The complaint concerned was thus unsubstantiated.

411. Nevertheless, the initial request put forward by the complainant should have been treated as inclusive of some other open information (the discussion contents of government officials' meetings with individual groups on other occasions). However, CMAB had not properly handled the request for such information in compliance with the requirements of the Code. In view of this, The Ombudsman considered that the complaint unsubstantiated, but other inadequacies were found on the part of CMAB.

412. CMAB is the policy bureau responsible for supervising the compliance of all government departments with the requirements of the Code. It should be the role model for handling every request for access to information from members of the public in a proper manner. The Ombudsman urged CMAB to remind its staff that when handling request for information from the public in the future –

(a) they should confirm with the person requesting information the scope of information being asked for. If the request is refused, justifications for refusal in respect of each item of the requested information should be provided; and

(b) they should direct the person requesting information as to where to look for the information which is already in the public domain.

Government's response

413. CMAB accepted The Ombudsman's recommendations, and has already updated the internal guidelines on handling requests for information under the Code from the public, which would be circulated to its staff on a regular basis.

Government Secretariat – Development Bureau

Case No. 2015/3186(I) – Failing to provide the complainant with the list of 85 Cooperative Building Society sites estimated to have redevelopment potential

Background

414. In a discussion paper submitted by the Development Bureau (DEVB) to the Legislative Council Panel on Development in May 2015, it was mentioned that 85 Civil Servants' Cooperative Building Society (CBS) sites out of a total of 178 were estimated to have redevelopment potential. The complainant was dissatisfied with DEVB's refusal to provide her with the list of those CBS sites (the List).

The Ombudsman's observations

415. The Office of The Ombudsman (the Office) is of the view that both the letter and the spirit of paragraph 2.13(a) of the Code on Access to Information (the Code) are clearly just to protect information relating to "incomplete analysis, research or statistics" and to avoid public misunderstanding potentially caused by disclosure of such kinds of information. Since the research through which the 85 CBS sites were identified had already been completed, there was no basis for DEVB to cite that paragraph of the Code to refuse the complainant's information request. DEVB's concern about potential misunderstanding was unnecessary, because it had already explained to the complainant the context in which those 85 CBS sites were identified.

416. Neither did the Office accept paragraph 1.14 of the Code as a valid reason for refusing the complainant's information request. The List itself was clearly not"information which is already published". Even if the complainant could eventually arrive at the List by checking the development restrictions of all CBS sites in Hong Kong as suggested by DEVB, that would be undue hardship put on her. This goes against the letter and spirit of the Code that departments should provide the public with information they hold unless there is valid reason under the Code to withhold it.

417. The Ombudsman considered this complaint substantiated and urged DEVB to disclose the List to the complainant as soon as possible.

Government's response

418. DEVB accepted the recommendation of The Ombudsman. On 26 February 2016, DEVB provided the complainant with a list of the sites of all dissolved CBSs as at 30 November 2015 and all necessary information to enable her to readily identify the aforesaid 85 sites by comparing the current area of each site with the estimated floor area of the same site after redevelopment.

Government Secretariat – Education Bureau

Case No. 2014/3889 – (1)Refusing the complainant's request for recording his telephone conversation with an officer; and (2)Unreasonably requesting him to enquire about progress of his complaint only by writing or in person

Background

419. During a telephone conversation with an Education Bureau (EDB) officer (Officer A) about the progress of his complaint case, the complainant asked whether he could record the conversation (the Request). Officer A refused the request, and then remained silent. The complainant thus complained to EDB about the incident. EDB replied to him that Officer A had decided to stop talking to him because he was recording the conversation without Officer A's consent. The complainant complained to the Office of The Ombudsman (the Office) that Officer A had unreasonably refused the Request and that EDB should not have approved of Officer A's decision.

420. According to EDB, Officer A refused the Request in order to protect her own personal data and privacy. It is true that Officer A had, out of such concern, stopped talking, but she did continue listening attentively to the complainant until he hung up. Moreover, Officer A issued an email to the complainant afterwards, explaining that if a member of the public wants to record his/her telephone conversation with an EDB officer, he/she should first obtain the officer's consent. He/she may also consider making a complaint or enquiry in writing or in person.

421. EDB had sought legal advice on handling the public's requests to make audio recordings. The Bureau was given to understand that its officers may consider accepting such requests on a case by case basis. EDB also has established procedures and guidelines that its officers should only make an audio recording with the caller's consent. If the caller refuses to give consent, the officer should advise the caller to consider lodging his/her complaint or making his/her enquiry in writing or in person. In the light of the above, Officer A told the complainant that she did not consent to the Request.

The Ombudsman's observations

422. The Office noted that before refusing the Request, Officer A had not enquired of the complainant about his purpose so as to assess whether the Request was justified. The Office would consider it unreasonable of Officer A to refuse the Request if the complainant had merely intended to keep a record of the conversation. After all, Officer A was talking with him in the course of discharging her duty and the content of their conversation was only about official matters. The Office could not see how acceding to the Request would infringe on her privacy.

423. Moreover, after refusing the Request, Officer A did not give the complainant an explanation immediately. She abruptly stopped talking and became a mute listener. The way she handled the matter was clearly improper.

424. EDB's guidelines only stipulate that its staff should seek consent from the caller before making an audio recording. Indeed, there is no similar requirement imposed on the caller to obtain consent from the staff. The Office considered that Officer A should not have relied on those guidelines to refuse the Request, and neither should EDB have approved of the way she handled the telephone conversation.

425. The Ombudsman considered the complaint partially substantiated, and recommended that EDB should –

(a) review its officers' practice for handling audio recording requests from members of the public and formulate proper guidelines to avoid occurrence of similar complaints; and

(b) remind its officers to express clearly when communicating with members of the public so as to avoid misunderstanding.

Government's response

426. EDB accepted The Ombudsman's recommendations, and has taken the following follow-up actions –

(a) reviewed the current practices and guidelines as well as shared the experience gained from the concerned case with frontline officers with a view to providing them with the proper approach to handling members of the public's requests for audio recording; and

(b) provided training to enhance the communication skills of frontline staff and to instil in them positive attitude in handling requests for audio recording.

Government Secretariat – Education Bureau

Case No. 2014/4939 – (1)Wrongly allowing a kindergarten to refuse to help a student to use an inhaler in case of an asthma attack; and (2)failing to inform the complainants of the investigation results of one of their complaints

Background

427. On 18 November 2014, the complainants lodged a complaint to the Office of The Ombudsman (the Office) against the Education Bureau (EDB). According to the complainants, their son has been suffering from asthma. In early September 2013, their son was admitted to K2 class of a kindergarten (Kindergarten A). The complainants requested teachers of Kindergarten A to help their son inhale bronchodilator with an inhaler when he began to display symptoms of asthma attack (request for assistance in using an inhaler) but their request was rejected by Kindergarten A. They then lodged a complaint (Complaint I) to EDB against the rejection. Upon EDB's intervention, Kindergarten A still upheld its decision. EDB pointed out that it was consistent with the relevant requirements of the School Administration Guide (SAG) for Kindergarten A to do so.

428. Besides, the complainants claimed that they had seen a teacher of Kindergarten A administering basic first aid to an injured student on 13 February 2014. However, teachers of Kindergarten A refused to give first aid treatment to their son when he was injured on 4 June the same year. The complainants thus lodged another complaint (Complaint II) to EDB. After completing the investigation of Complaint I, EDB sent a letter to inform the complainants of the relevant investigation results, but the investigation results of Complaint II were not mentioned therein.

429. The complainants accused EDB of –

(a) allowing Kindergarten A to violate the requirements of SAG by rejecting unreasonably the request for assistance in using an inhaler; and

(b) failing to inform them of the investigation results of Complaint II.

The Ombudsman's observations

Allegation (a)

430. EDB had actually followed up Complaint I and striven to solve the dispute between the complainants and Kindergarten A over the request for assistance in using an inhaler but to no avail.

431. While SAG is only a reference for kindergartens, it serves the purpose of providing guidance to a certain extent. In any case, it was confirmed by EDB that Kindergarten A had not violated the requirements of SAG in the incident, and there was no reason for EDB to interfere with Kindergarten A's decision to reject the request for assistance in using an inhaler.

432. Based on the above analysis, The Ombudsman considers that allegation (a) is unsubstantiated.

Allegation (b)

433. EDB opined that Complaint II was not a new allegation but an enquiry extended from the investigation of Complaint I. The Office could not rule out the possibility that the EDB officer, who received the telephone call of the complainant that day, misinterpreted the intent of the complainant. As such, it was not unreasonable for EDB not to mention in the letter the investigation of Complaint II.

434. Based on the analysis in the preceding paragraph, The Ombudsman considered allegation (b) unsubstantiated.

435. Overall speaking, this case was unsubstantiated. However, The Ombudsman recommended that EDB should learn from the experience and remind its staff to pay more attention when having a dialogue with members of the public in order to avoid any misunderstanding.

Government's response

436. EDB accepted The Ombudsman's recommendation and has reminded the staff of the division concerned to pay more attention when having dialogues with members of the public in order to avoid any misunderstanding.

Government Secretariat –Transport and Housing Bureau and Transport Department

Case No. 2015/2325A&B – Failure to combat illegal carriage of passengers for hire or reward by unlicensed private cars booked through mobile phone apps

Background

437. The complainant complained against the Transport and Housing Bureau (THB) and the Transport Department (TD) for insufficient monitoring of a mobile apps company which allegedly arranged for the use of private limousines without hire car permits (HCPs) for carriage of passengers for hire.

438. The complainant alleged that the mobile apps company had sought to monopolise the market by engaging in unfair trade practices. Such practices included recruiting private car owners and drivers to operate passenger service through misleading publicity (by alleging that the service was not illegal because the service was for exclusive use of its members/no cash transaction would be involved), illegally arranging for passengers to hire private cars without HCPs (the so-called "pak pai"), and adopting charging mechanism on distance basis similar to that of taxis and yet escaping statutory regulation, thereby creating unfair and unreasonable competition which threatened the survival of the taxi trade. In the absence of legislation governing the use of mobile apps in arranging for the service of hire cars, the grey area in law had been exploited in running business of arranging for illegal carriage of passengers for reward, thus disrupting the order of the public transport market.

439. The complainant was not satisfied with the fact that THB and TD had turned a blind eye to the problem and failed to take any action to curb the illegal behaviour. The complainant suggested that the Government should amend the legislation to plug the loophole created by the emergence of mobile apps platform, and at the same time, step up enforcement and impose heavier penalties.

The Ombudsman's observations

Enforcement against Use of Private Cars for Carriage of Passengers for Reward

440. THB and TD had, in accordance with legislative provisions, put in place a licensing system for regulating the use of private cars for carriage of passengers for hire and reward. Vehicles authorised for use as hire cars were subject to a set of HCP conditions. It was not illegal for carriage of passengers by private cars with HCPs booked through mobile apps.

441. Under the existing law, the use of private cars without HCPs for carriage of passengers for hire and reward was illegal and the third-party insurance of the private cars would be rendered ineffective. This would not only result in loss of protection to drivers and passengers, but would also jeopardise the interests and protection of other road users. The Hong Kong Police Force (the Police) was responsible for taking enforcement action against "pak pai" service. TD had already referred reported "pak pai" cases to the Police for follow-up action. The Office of The Ombudsman (the Office) considered that from the administrative perspective, THB and TD were both acting in accordance with the law and there was no maladministration.

442. Noting that the number of prosecutions against "pak pai" service had remained low, the Office urged TD to closely monitor the figures of such prosecution cases and enhance its communication with the Police in their continued efforts to combat "pak pai" service. The cases in which staff members of a mobile apps company were arrested on suspicion of "aiding and abetting the illegal use of motor vehicle for carriage of passengers for hire and reward purpose" and "aiding and abetting the driving of motor vehicle without third party insurance" were still under investigation. How these cases would be handled and their outcomes would provide more insight on the matter and reflect whether the existing law or regulatory regime could achieve their intended purposes. The Office thus urged that TD should closely monitor the progress of the cases and, where necessary, the Government should review relevant legislation and seek to plug the loophole.

Review of Policies and Regulatory Regime

443. On policy level, the popularity of the mobile apps in question and positive public opinions as well as feedbacks on its use spoke volumes about the need for high-quality transport service. Besides, the innovative service mode of hailing taxi service via mobile apps not only provided convenience to passengers in calling taxis, but, more importantly, also enabled passengers to evaluate and monitor such services direct, thereby ensuring their service quality. There were definite indications that conventional taxi service could no longer satisfy the demands of passengers. Many passengers would opt for better service by paying more. Against this background, the Office considered that enforcement action could only be a palliative solution to curbing the illegal behaviour. To tackle the root of the problem, the Government should adjust the existing policies to cater for the new trend and bring in new transport service mode and regulatory regime to meet passengers' demands for transport service. It was noted that THB and TD would give priority to the review of taxi service under the Public Transport Strategy Study (PTSS) and, in parallel, would conduct a study on ways to enhance the approval mechanism and monitoring system relating to hire cars. The Office considered that such decisions and suggested measures, such as the promotion of hire-as-a-whole taxi service as well as the introduction of a new operating and management model through the introduction of premium taxis, could help address the problem.

444. In terms of regulation, TD was only empowered by law to issue HCPs to the registered owners of private cars. The Office noted that the regulation over traditional hire car trade had all along been effective. This was because hire car operators would normally apply for HCPs for the vehicles under their ownership, and TD could thus regulate such operators through the issue of HCPs to registered car owners. However, mobile apps companies were not running hire car business in its traditional sense. They adopted new operation mode and did not apply for HCPs themselves. They operated in collaboration with private car drivers and shared part of the returns from the fares collected via credit card transactions. TD also admitted that neither did the development of such mobile apps require prior approval of TD, nor were the mobile apps companies required to submit any operating data to TD.

445. The Office did not agree with TD that there was no need to impose regulation on such mobile apps which were regarded as merely a booking tool providing platform for car-hailing. A mobile apps company, though it was not issued with HCPs, was in effect operating as a business operator, performing functions such as recruiting drivers, setting fares, promoting business, or even collecting and sharing fare payment by customers. They were of considerable scale of operation and the profits they reaped were substantial. If the Government failed to effectively regulate such operators, more followers would be attracted to join the practice, and the problem would only get worse. The Office considered that enforcement action alone could not deter drivers from breaking the law for reaping attractive returns. The current regulatory regime on point-to-point personalised transport service was designed to target individuals (including registered owners of private cars who were issued with HCPs and taxi licence holders) and was not effective in regulating relevant business operators (like mobile apps companies). The Office urged THB and TD to adopt a new mindset to review and, where necessary, revamp the relevant regulatory regime. For example, bringing this emerging transport service model under regulatory control by putting in place a regulatory regime similar to that applicable to franchised bus/green minibus operators, under which operators were required to submit operating data to TD for scrutiny through the granting of franchises and licence conditions.

446. It was noted that the number of HCPs (Private Limousine) issued by TD during the period from 2012 to 2015 remained at a low level, ranging from 235 to 247, while the total number of HCPs issued to different types of private cars (622 nos.) took up only about 41% of the maximum number (1,500) permitted under the law. Judging from this, there was scope for TD to issue more HCPs as appropriate without exceeding the statutory limits in order to cater for market demand.

447. With technological advancement, the Office believed that it would be an irresistible trend for mobile apps or other technologies to be employed to satisfy the transport needs of the travelling public. Apart from introducing new operation models under the conventional public transport framework, the Government should also conduct an in-depth review on the existing policies and regulatory regime. Admittedly, such kind of innovative mobile apps had its own merits. It not only brought convenience to passengers, but also allowed passengers to evaluate and monitor the performance of drivers direct, thereby ensuring the quality of their service. The Office considered that any new transport service introduced by the Government should aim at satisfying passengers' transport needs and allow for effective monitoring of its quality.

Service Quality of Taxis

448. Public dissatisfaction with the service quality of ordinary taxis also indirectly encouraged the provision of "pak pai" service. Field surveys conducted by the Office found that quite a number of taxi drivers were engaged in suspected malpractices such as selecting passengers or refusing hire. Recent enforcement action taken by the Police also revealed that many drivers were overcharging taxi fares. The Office was of the view that TD should consider taking more proactive steps to improve the service quality of taxis (for example by reviewing the deterrent effect of current complaint mechanism on errant drivers). It should not solely rely on self-regulation in the taxi trade. Nor should it try to play down the problem by blaming it on the "black sheep" of the trade.

449. In view of the above, The Ombudsman considered this complaint unsubstantiated. However, the relevant authority should conduct a in-depth study and review into the relevant issues.

450. The Ombudsman recommended that –

(a) TD should closely monitor the prosecution figures provided by the Police and liaise with the Police in a timely manner in its continued effort to combat illegal carriage of passengers for reward by unlicensed private cars;

(b) TD should closely monitor the progress of the cases involving a mobile apps company allegedly arranging for illegal carriage of passengers for reward by unlicensed private cars, and where necessary, the Government should consider reviewing the relevant legislation;

(c) THB and TD should adopt a new mindset to review the existing policies and related regulatory regime with a view to catering for passengers' demand for transport service. Options would include introducing new operation models and employing new technologies to ensure service quality;

(d) THB and TD should review the number of HCPs (Private Limousine) to be issued in order to meet the market demand for such service; and

(e) TD should consider taking more proactive steps to improve the service quality of taxis.

Government's response

451. THB and TD accepted The Ombudsman's recommendations and have taken the following actions.

Recommendation (a)

452. To combat illegal carriage of passengers for reward by private cars, TD had been keeping close contact with the Police, including proactively referring suspected cases to the Police for follow-up action and providing information on the vehicles concerned to the Police upon request to support their investigation. In 2015 and 2016 (January to August), TD had referred 47 and 11 suspected cases respectively to the Police for follow-up action. According to the statistics provided by the Police, there were 17 and three prosecution cases involving alleged illegal carriage of passengers for reward by private cars in 2015 (July to December) and 2016 (January to June) respectively. TD would continue to work closely with the Police and render all possible assistance in combating illegal carriage of passengers for reward by private cars.

Recommendation (b)

453. The legal proceedings of the case involving a mobile apps company allegedly arranging for illegal carriage of passengers for reward by private cars were in progress. The seven drivers involved had been charged with the offences of "driving a motor vehicle for the carriage of passengers for hire or reward" and "driving a vehicle without third party insurance". Two of them pleaded guilty and were each fined $7,000 and had their respective driving licences suspended for 12 months. TD would keep in close view the progress of the trials of the remaining five drivers. The Government is open-minded in respect of the application of different types of technologies, including the use of Internet or mobile applications for calling hire cars. However, all hire car services, regardless of the use of which type of technology or platform, must be lawful and most importantly, have regard to the interest and safety of passengers. Under the current law, if car owners (whether individuals or companies) are interested in using their private cars for carriage of passengers for hire or reward, they must apply to the Commissioner for Transport (the Commissioner) for Permits for operating hire car services. To better respond to the demands for hire car service, THB and TD would continue to keep under review relevant statutory provisions and the assessment criteria adopted by the Commissioner for the issue of HCPs, having regard to the latest social development, the need for diversification, enforcement actions taken by the Police and the outcomes of relevant court cases.

Recommendation (c)

454. The Government was studying the introduction of premium taxis under the Role and Positioning Review of the PTSS. The objectives are to provide passengers with an additional choice other than ordinary taxis and address the needs of passenger groups with higher disposable income. The Government has preliminarily proposed to grant time-limited franchises to a few companies to operate premium taxis. The Government will be able to monitor the operators' performance through franchise terms. The operators will be responsible for ensuring that their services (including the performance of the drivers) will be proper and efficient as prescribed in the franchise. This will help address the difficulty in managing centrally the service quality due to scattered ownership of ordinary taxis. Meanwhile, through franchise terms, the Government will be able to clearly prescribe the service level and set service standards in respect of vehicle types, compartment facilities, limit on vehicle age, arrangement of mobile hailing applications, service quality of drivers, etc. If the operators fail to meet the service level or standards prescribed under the franchise, the Government will be able to impose penalties through franchise terms or even revoke the franchise. Moreover, the Government proposes to require the operators to maintain an employer-employee relationship with their drivers. Drivers will be the employees of the operators and protected by the Employment Ordinance and other Ordinances relating to employees' rights. Compared with those of the ordinary drivers, their job and income will be more stable. It will help attract more new blood to the trade. Moreover, under the employer-employee relationship, part of drivers' income will be related to their service quality. This will help encourage the drivers to maintain good service quality. The Government reported to the Panel on Transport (the Panel) of the Legislative Council on the preliminary proposals on premium taxis in June 2016. For details, please see Legislative Council paper No. CB(4)1124/15-16(01). After canvassing the Panel members' views, the Government has continued to liaise with the taxi trade. The target is to determine the policy framework and the details of some key implementation arrangements by around the end of this year. If members of the Panel's support can be obtained by then, the Government will take forward the necessary legal amendment exercise.

Recommendation (d)

455. Under Regulation 14 of the Road Traffic (Public Service Vehicles) Regulations on issue or refusal of hire car permits, subregulation (3)(b) provides that the Commissioner may issue to the applicant a hire car permit if the Commissioner is satisfied that the type of hire car service specified in the application is "reasonably required". Given the capital and resources required in running a hire car business, operators who are unable to secure enough business volume from operating hire car service might be tempted to engage in unauthorised business under the HCP (such as touting) or make use of hire cars to operate other unauthorised businesses, affecting the operation of other public transport service and worsening road congestion. For this reason, applications for HCPs would only be approved if the applicants submitted sufficient proof to justify the proposed service needs and reasonable usage of hire cars. This arrangement is not related to the proportion the HCPs issued against with the numbers as gazetted under the law. To better respond to public demand for hire car services, the Government has studied ways to enhance the assessment mechanism for hire cars (including ways to facilitate new market entrants) without affecting hire car's current position in the transport hierarchy and the current regulatory regime.

456. After the study, the Government is preparing the launch of a series of enhancement measures. Currently, TD considers a host of factors when assessing HCP applications, including the hiring records and future service contracts provided by an applicant, to evaluate if the application satisfies the legal requirement (i.e. the service under application is reasonably required). Some applicants (e.g. new market entrants) may not be able to submit these types of proof. If an applicant is unable to submit the abovementioned documents but can provide other information to support that it has a valid business case and the service under application is reasonably required, TD will assess the application flexibly on the basis of individual merits. Besides, since the law requires an HCP to be applied for by a registered owner of private car, an applicant must purchase a vehicle before submitting an application. TD will launch a pre-application assessment. Persons who are interested in applying for HCPs will be informed, on a non-prejudicial basis, of the likelihood of having their applications approved before purchasing vehicles. They may then decide whether to further invest and formally submit applications based on the information. This could reduce possible investment loss.

Recommendation (e)

457. Both the Government and taxi trade shared the view that the quality of taxis service needed to be improved. TD had been assisting the trade to explore how the service quality of ordinary taxis could be improved to better respond to community's demand under the existing legal framework. In this regard, 17 taxi associations formed the Hong Kong Taxi Council (the Council) in November 2015 with an objective to improve service quality through self-regulation by the trade. The Council launched a mobile application for hailing taxi service in May 2016 and put in place reward and penalty mechanisms to follow up on passengers' comments received. The Council was also discussing with the Employees Retraining Board the provision of retraining programme for taxi drivers. Moreover, TD was discussing with the Council whether complaint cases could be followed up through trade organisations. Meanwhile, some operators were already providing pre-booked ordinary taxi service of higher quality in the form of hire-as-a-whole service by using vehicles with larger compartments and better facilities. The fare would be agreed between the parties providing and receiving the service. This type of service could meet the needs of different passengers more flexibly. Besides, the Government would continue its efforts to combat malpractices of the taxi trade. The Police had stepped up enforcement action. TD would continue to remind the trade to obey the law and disseminate to passengers information related to the hiring of taxis through different channels. Since end-2015, TD had been providing the trade with information on law enforcement and court judgments relating to taxi malpractices at its regular meeting with the taxi trade to remind drivers to abide by the law.

Government Secretariat – Transport and Housing Bureau and Transport Department

Case No. 2015/2438A&B – Failure to combat illegal carriage of passengers for hire or reward by vans

Background

458. The complainant complained against the Transport and Housing Bureau (THB) and the Transport Department (TD) for failing to tackle the problem about illegal carriage of passengers for hire or reward by light goods vehicle (LGV) (the problem). The complainant alleged that the problem of the van-type LGVs had evolved from picking up passengers at the airport or carriage of long-distance passengers several years ago to using mobile phone applications for hiring LGVs over the territory recently. Without Government's proper regulation and control, the number of LGVs increased to over 50,000 in recent years. Some luxury models of LGVs were altered illegally for carriage of passengers, which had misled passengers and made enforcement by the Hong Kong Police Force (the Police) more difficult. Given the third party insurance of the LGVs involving "illegal carriage of passenger" might become invalid, the public might not have the necessary protection. The complainant considered that the Government should combat such illegal operation but THB and TD had not taken appropriate measures to resolve the problem.

The Ombudsman's observations

459. Under existing legislation, LGV was only allowed to carry goods for hire or reward. It is an offence for a person to use LGV for carriage of passengers for hire or reward. As the third party insurance covering the LGV concerned might become invalid, the driver and passenger of the LGV might not have necessary protection and it would also affect the rights and protection of other road users. The Office of The Ombudsman (the Office) concurred with views of some members of the Legislative Council (LegCo) made in the LegCo Panel on Transport that members of the public were confused over the use of LGVs. While the Government reiterated that the gist of the problem was not the type and quantity of goods but the relationship between the driver and the passenger, i.e. whether the passenger being carried was "a passenger" or

"an escort", the Government did not give a clear definition of "passenger" and "escort", but only stressed that each case would be subject to individual circumstances and evidence. In other words, for situations that were frequently encountered by the general public, such as using an LVG to carry bicycle, luggage, funiture and pet whilst their owners were on board, the authority could not provide a clear stance and explanation whether they are legal or not.

Publicity

460. At present, TD publicised through different channels that it was illegal for an LGV to carry passengers for hire or reward, and reminded the public that in case they were carrying things, they should not hire LGVs as if they were able to carry such things and travel by public transport. In the event of an accident involving an LGV that carried passengers for hire or reward, the third party insurance of the vehicle concerned might become invalid and the passengers might have no protection. Despite the message that "LGV should not be used to carry passengers for reward" was clearly conveyed, the public might not have a clear understanding under what cirumstances would it be classified as "carriage of passenger for hire or reward"; and the exact definition of "carriage of passenger" and "carriage of goods". A driver had once opined that "a key should be regarded as goods". The Office understood that it was illegal for an LGV to carry passengers (who did not carry any goods) for reward. However, the public might have an impression that it was legal as long as there was "goods" in the LGV.

461. Furthermore, the Office considered that the publicity made by TD currently only emphasises that it was illegal to carry passengers for hire or reward and the passengers would lose the protection of the insurance. However, it did not help resolve the problem if members of the public did not understand under what circumstances that it was illegal to hire an LGV. TD should provide concrete information or cases (such as successful prosecution cases) so that members of the public would not contravene the law mistakenly.

462. As regards the pubicity channel, broadcasting the message through radio Announcement in Public Interest (API) might not be sufficient. TD should extend the publicity through television (TV) and internet so that the public could clearly understand how to use an LGV legally.

Other measures

463. Apart from publicity, the trades and LegCo members had made many recommendations such as revising the definition of goods, reducing the maximum passenger seating capacity of LGVs and mandatory labeling of all LGVs for easy identification. However, after thorough considerations, the Government did not adopt them as these recommendations would affect the normal operation of LGVs. In fact, LegCo did not recommend any legislative amendments after detailed discussions of the issue twice.

Enforcement

464. The Office concurred with the complainant that the popular use of mobile phone applications might aggravate the problem. Given THB and TD considered enforcement and publicity were the most effective means in tackling the problem, they should strengthen the enforcement and publicity work accordingly. In 2005, the Police had 15 and three successful prosecutions against illegal touting at airport and carriage of passenger for hire or reward respectively but there was no prosecution in 2012 and 2013. In the first half of 2015, the prosecution figures had substantially increased to 29. As the figures fluctuated, the Office urged TD to closely monitor the figures and enhance the liaison with with the Police with a view to stepping up enforcement.

465. Besides, some mobile phone application software companies post on their websites the situations that LGVs could be used, such as shopping (with a publicity photo showing two persons carrying shopping bags), walking a pet (with a publicity photo showing two persons and a dog in an LGV). The legality of such uses was in doubt. The Office considered that TD should strenghten its monitoring on the content of such publicity and see whether there is any misleading information conveyed to the public and if so, take necessary follow-up action.

466. With regard to the complaint against the increase in the number of LGVs, TD stated that it was untrue. In fact, the number of van-type LGVs and its respective percentage in the overall number of vehicles reduced substantially in the past 20 years. Moreover, the Office concurred that as there was no side window in the goods compartment of any van (including the luxury models as indicated by the complinant), the Police should have no difficulty to identify an LGV when taking enforcement action.

467. In conclusion, The Ombudsman considered that there was no impropriety on the part of THB and TD in the policy regarding illegal carriage of passengers for rewards by LGV. The Ombudsman therefore considered this complaint unsubstantiated.

468. The Ombudsman recommended TD to –

(a) closely monitor the prosecution figures and timely liaise with the Police in stepping up enforcement actions against LGVs illegally used for carriage of passengers for hire or reward;

(b) publicise the legal requirement more clearly and substantially to members of the public and the transport trades;

(c) increase the publicity channels to ensure that the public would receive clear messages on how to use van-type LGV legally; and

(d) monitor the publicity made by the mobile phone application software companies and the LGV operators to see if the content of the publicity is proper.

Government's response

469. TD accepted the recommendations and has taken the following actions.

Recommendation (a)

470. TD has all along maintained close liaison with the Police. There were 15 and 38 prosecution cases in 2014 and 2015 respectively. In the first half of 2016, there were 2 cases. The Police noted that there was a decrease in the number of prosecution. According to their latest operations and intelligence collected, the situation regarding use of vehicles, especially LGVs, for illegal carriage of passengers for hire or reward has improved. The Police would continue to closely monitor the above trend and development, and depending on different circumstances, deploy uniformed police officers to patrol black spots or deploy plain cloth officers to undertake decoy operation to combat the illegal operations.

Recommendation (b)

471. Since radio API was an effective publicity means to disseminate information to members of the public and the trade, TD produced a new radio API, which had been broadcast since 11 April 2016 with concrete examples to explain the legal requirement to the public and the trade.

Recommendation (c)

472. TD has produced a new set of publicity leaflet to remind members of the public not to use LGV as a mode of public transport. In July 2016, TD also launched a dedicated webpage on "Proper use of LGV" on its website. The webpage contains relevant publicity leaflets, radio APIs and TV APIs for educating the public the role and proper use of LGV. To faciliate public viewing, the webpage is also linked to GovHK. Moreover, TD also reminded the goods vehicle trade not to carry passengers for hire or reward in the regular conference held in April 2016.

Recommendation (d)

473. TD monitors the mobile phone applications related to hiring of LGVs and relevant websites from time to time. In December 2015, TD found that an operator posted on its website a message that was suspected of promoting the use of LGVs for carriage of passengers for hire or reward. TD immediately followed up with the operator, and at the request of TD, the operator deleted the message from the website. Apart from that, in February 2016, TD found an LGV operator posted a message on Facebook to promote a "car pooling" scheme by soliciting and grouping passengers living in nearby locations to travel to common destinations by LGVs. TD reminded the LGV operator at once that an LGV could only carry goods for hire or reward and requested the operator to revise the relevant publicity. TD also referred the case to the Police for follow-up action. TD would continue to keep close monitoring of the content of publicity in relevant mobile phone applications and the publicity made by LGV operators through different media, and would join hands with the Police to take appropriate follow-up actions.

Highways Department

Case No. 2015/3805(I) – Refusing to provide the complainant with the tree inspection report prepared by the Department's contractor

Background

474. On 16 September 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Highways Department (HyD). According to the complainant, he requested in accordance with the Code on Access to Information (the Code) on 31 August 2015 from HyD the tree risk assessment report (the Report) as contained in "Form 1" and "Form 2" prepared for several trees at a road before their removal in July of the same year. On 11 September 2015, HyD replied to the complainant in writing, invoking paragraph 2.9(a) of the Code to refuse the release of the Report.

475. The complainant considered HyD's justifications for refusing his request for access to the Report weak.

The Ombudsman's observations

476. The Office agreed that the Reports were completed by the Contractor of HyD and the disclosure of the Report was not for the purpose of the road management and maintenance contract between HyD and its Contractor (the Contract) or relevant engineering work. It was in fact not necessary for the public to review the Report of the tree inspections carried out by the Contractor. Therefore, pursuant to Clause 8(2) of the General Conditions of Contract in the Contract, HyD could not disclose the Report. Otherwise the Contractor had the right to initiate litigation against HyD for breach of contract.

477. The Office considered that the Report was information produced as a result of the contractual relationship between HyD and its Contractor, and could be regarded as information associated with contractual activity. Although the Report ostensibly did not contain any commercially confidential information, the possibility that commercial confidentiality of the Contractor could be damaged in case of disclosure of the Report could not be ruled out. Therefore, HyD's refusal to release the Report by citing the reason in paragraph 2.9(a) of the Code was in line with the

situation referred to in paragraph 2.9.2 of the Guidelines on Interpretation and Application of the Code.

478. Moreover, HyD had explained that since the Contractor did not anticipate that his information provided would be released (as stipulated in Clause 8(2) of the General Conditions of Contract), future tendering might be affected if HyD released the Report.

479. Therefore, the Office considered that it was not unreasonable for HyD to refuse the complainant's request for information as provided by paragraph 2.9(a) of the Code. In fact, having regard to public concerns on HyD's removal of the trees, HyD had uploaded a detailed tree removal report onto its website to explain the grounds for the removal of the trees. The uploaded report has also basically met the purpose of the complainant's request for the Report.

480. The Ombudsman considered this complaint unsubstantiated. Nonetheless, as a government department, HyD would have to be accountable to the public in addition to honouring the contracts signed. This should include following the requirements of the Code and provide information to the public as far as practicable. The current Clause 8(2) of the General Conditions of Contract requires that all information provided by the Contractor (regardless of whether the disclosure would harm the interests of the Government or the Contractor) could not be disclosed to the public, which hinders HyD's accountability to the public to a certain extent.

481. The Ombudsman recommended that HyD should follow up with the relevant department(s) responsible for formulation of the clause of the General Conditions of Contract and explore the viability of revising and relaxing the limitation of the clause, so as to allow HyD to release to the public information that is not sensitive or will not affect the interest of any party under the contract.

Government's response

482. HyD accepted The Ombudsman's recommendation and has followed up with the Development Bureau (DEVB) to explore the viability of revising and relaxing the limitation of Clause 8(2) of the General Conditions of Contract. DEVB considered that Clause 8(2) upholds the interest of the Contractor in respect of any information it may produce and own, albeit submitted to the Government or the Engineer. Under the current arrangement, works departments might still seek the Contractor's consent for releasing the information concerned to a third party or the public when it is necessary or desirable. DEVB did not see any room to amend Clause 8(2) to enable the divulging of information provided by the Contractor where it is not for the purpose related to the Contract or future repairs, etc. and without the consent of the Contractor.

483. HyD will continue to strictly follow the principles of the Code and relevant guidelines to process the requests for information from the public proactively, in accordance with the established practice.

Home Affairs Department

Case No. 2015/2327 – (1)Delay in answering the complainant's enquiries about a local consultation conducted in 2006; (2)Delay in providing the complainant with the details of the consultation; and (3)Providing false consultation results to another department

Background

484. On 2 June 2015, the owners' corporation (OC) of an estate lodged a complaint with the Office of The Ombudsman (the Office) against the Home Affairs Department (HAD) through a solicitors firm (Solicitors).

485. The estate is a Home Ownership Scheme estate built by the Hong Kong Housing Authority (HA). According to the Solicitors, HA applied to the Lands Department in 2007 for a waiver of parking restrictions on the estate's car park (the subject car park) so as to let some of the parking spaces to non-residents. The local District Office (DO) under HAD therefore carried out a local consultation (the subject consultation).

486. On 22 August 2014, the Solicitors wrote on behalf of OC to DO requesting the details and documentary records on the subject consultation (the requested information). DO replied to the Solicitors on 28 May 2015 indicating that the requested information could not be found. The Solicitors alleged that HAD –

(a) delayed the reply;

(b) failed to provide the requested information; and

(c) provided false consultation results to the relevant departments, resulting in the opening of the subject car park to non-residents for years, which was unfair to the residents of the estate.

The Ombudsman's observations

Allegation (a)

487. The Office noticed that it took about three and six months for the HAD to reply to the Solicitors' enquiries made in August and December 2014 respectively. Besides, in response to the Solicitors' enquiry made in December 2014, DO had submitted a draft reply to HAD on 29 January 2015 for its comments. However, it was only after repeated requests from DO that HAD replied on 20 May 2015 (i.e. about 5 months later) that it had no comment on the draft reply. As a result, DO was unable to give a written reply to the Solicitors until 28 May 2015. It could be seen from the above that there was delay on the part of HAD. Therefore, The Ombudsman considered allegation (a) substantiated.

Allegation (b)

488. The Office found out that DO had actually found the details and documentary records on the subject consultation on 21 October 2014. However, in both of its replies to the Solicitors in November the same year and May 2015, DO did not provide the requested copies of these documents. The Office was of the view that DO should have provided copies of these documents to the Solicitors. Allegation (b) was thus substantiated.

489. Furthermore, even though DO had verbally consulted the relevant stakeholders, the records were deficient in a way that made it impossible to investigate the details of the subject consultation later on. This was an improper practice.

Allegation (c)

490. Due to the deficiency of the records kept by DO, the Office was unable to verify whether the consultation results were false or not. As such, The Ombudsman considered allegation (c) inconclusive.

491. Overall speaking, The Ombudsman considered the complaint partially substantiated. The Office learnt that District Offices still carry out verbal consultations at present. Given that the community is very concerned about whether stakeholders' views are duly collected and considered by the Government during public consultations, HAD, as a department constantly required to conduct local consultations, should keep proper records of all consultation results for future reference. The

Ombudsman urged HAD to remind all staff of District Offices to maintain proper records of views collected from stakeholders, especially for verbal views which should be recorded in writing for future reference.

Government's response

492. HAD accepted The Ombudsman's recommendations. HAD has implemented since January 2010 the rationalisation of local consultation exercise whereby the relevant subject bureaux or departments (the leading departments) should take the lead in initiating local consultations and decide, according to their own established mechanisms, whether and how to conduct local consultations on their respective policies. If they so wish, they can enlist assistance from the HAD or its District Offices and specify the targets, scope and approaches for consultation. They are required to submit to the District Offices the proposals and the reply slips for consultation. The targets would have to express their views by way of the reply slips. The District Offices will forward the reply slips collected to the lead departments for follow up and put the copies on file properly.

493. HAD on record issued a memo on 28 July 2010 to all District Offices reminding staff to take proper records of verbal views collected during local consultations. Nevertheless, upon receipt of The Ombudsman's recommendation, HAD issued another memo on 11 March 2016 to all District Offices and remind their staff to maintain proper records of views collected in local consultations from stakeholders, including keeping written records of verbal views from stakeholders for future reference.

Home Affairs Department

Case No. 2015/2753 – (1)Unreasonably refusing to provide the complainant with the service of administration of declaration; (2)Allowing members of the public to make statutory declarations not in accordance with the statue; and (3)Misleading the public by using the terms "declaration" and "swear" interchangeably

Background

494. On 9 July 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Home Affairs Department (HAD).

495. According to the complainant, he visited the Enquiry Centre (the Centre) of a District Office of HAD on 8 July 2015 where he asked the staff of the Centre to administer an oath with two self-prepared affidavits in English. The staff advised him that only the declaration forms prescribed by HAD would be accepted for the purpose.

496. The complainant pointed out that –

(a) section 13 of the Oaths and Declarations Ordinance (the Ordinance) stipulated that "if by law a person is authorised or required to make a declaration or a statutory declaration, that declaration shall be made and signed in the manner provided by section 14". However, he noticed on that day that some members of the public making the declaration in the Centre were neither authorised nor required by law to do so. For example, a member of the public made a declaration in the Centre for proof of kinship; and

(b) the Chinese version of HAD's website stated that "市民可到各區民政事務處辦理宣誓" (English translation: members of the public can make declarations at the District Offices). The term of "Declarations" was used in the English version of the website. Yet the English translation of "宣誓" should be "swear" instead of "declaration", which should mean "聲明").

497. The complainant was of the view that –

(a) the Centre unreasonably refused to provide him with the service of administration of oath;

(b) the Centre should not allow members of the public to make statutory declarations not in accordance with section 13 of the Ordinance; and

(c) HAD misled the public by using the terms "swear" and "declaration" interchangeably.

The Ombudsman's observations

Allegation (a)

498. HAD had explained why the Centre did not accept the complainant to take an oath with the self-prepared affidavits. The Office considered that the explanation of HAD was fair and reasonable. Allegation (a) was therefore unsubstantiated.

Allegation (b)

499. The Office agreed that it would indeed be difficult for Centre staff to ascertain that each and every person using the service of administration of declaration had been authorised or required by law to make a declaration. The Ombudsman, therefore, considered that allegation (b) was unsubstantiated.

Allegation (c)

500. While the Commissioners for Oaths at the Centres may take and receive the declaration (聲明) of any member of the public in front of them in the manner provided by section 14 of the Ordinance, i.e. a statutory declaration (法定聲明), it was stated on the HAD's website that the service of "Administration of Declaration (宣誓聲明) for Private Use" was available at the District Offices to members of the public. As different wording had been used for the service of administration of declaration on the HAD's website, the Office could not rule out that some members of the public might consider that a "法定聲明" was different from a "宣誓聲明". Yet, the Office agreed that the general public might

not understand the legal definitions of oath, affirmation/affidavit and declaration, and they only sought the service of administration of statutory declaration provided by the Centres. Therefore, the information provided on the HAD's website that "the service of Administration of Declaration for Private Use is available at the District Offices to members of the public" had neither misled the public nor deprived them of the service for which they were entitled. As such, The Ombudsman considered allegation (c) unsubstantiated.

501. The Ombudsman considered this complaint unsubstantiated and recommended that HAD should review the wording in relation to the service of administration of declaration featured on its website as soon as possible so as to avoid further misunderstanding from the public.

Government's response

502. HAD accepted The Ombudsman's recommendation. After consulting the Department of Justice, HAD completed the review of its webpage on the service of administration of declaration. This could ensure that the wording used would be in compliance with the relevant provisions in the Ordinance to avoid misunderstanding. The revised webpage was uploaded onto the HAD's website in early June 2016.

Home Affairs Department, Environmental Protection Department and Lands Department

Case No. 2014/4544A,B&C – Failing to resolve the odour problem of a village drainage

Background

503. The complainant lodged a complaint with the Office of The Ombudsman (the Office) on 29 October 2014. According to the complainant, there was a surface channel (subject channel) inside a village accumulated with dirt for a long period of time and had malodour affecting the environmental hygiene ("malodour problem"). In April 2014, the complainant lodged a complaint about the "malodour problem" to 1823, and the case was followed-up by the Home Affairs Department (HAD).

504. As suggested by HAD, 1823 referred the case to the Environmental Protection Department (EPD) and Lands Department (LandsD). However, the "malodour problem" persisted.

505. The complainant alleged that HAD, EPD and LandsD did not follow-up properly on the "malodour problem".

The Ombudsman's observations

HAD

506. HAD had followed up with the "malodour problem" proactively within its purview. That included referring the "malodour problem" to the relevant departments, increasing the frequency of cleaning the subject channel, and planning to undertake improvement works to fasten the water movement in the subject channel with a view to improving the "malodour problem". As such, The Ombudsman considered the complainant's complaint against HAD unsubstantiated.

EPD

507. EPD is responsible for control of water pollution. After receiving referral of the "malodour problem" from 1823 on 20 June 2014, EPD should have conducted on-site inspection to ascertain if there was any discharge of household wastewater to the subject channel. However, EPD did not take any action with the reason that the District Office concerned of HAD had already agreed to carry out cleansing work at the subject channel.

508. Inspection results of EPD on 30 July and 8 August 2014 revealed the subject channel was already polluted. However, EPD did not conduct immediate testing to ascertain if there was any situation of illegal wastewater discharge.

509. Only upon the complainant's complaint to the Office, EPD conducted testing on 5 February 2015. There clearly existed a delay. Fortunately, the testing result revealed that there was no illegal wastewater discharge which should be handled under the purview of EPD. The Ombudsman considered the complainant's complaint against EPD substantiated.

LandsD

510. As clarified by LandsD, the District Lands Office (DLO) received the referral of the "malodour problem" from 1823 on 20 June 2014, and was informed on the same day that there was no need to follow up with the case as it had been assigned to other departments. Besides, before the Office initiated the investigation, LandsD had not received any further complaints about the "malodour problem". Thus no further action was taken by LandsD.

511. In response to EPD's inspection report dated 5 February 2015 which confirmed the leakage of sewage from the septic tank into the channel, DLO would seek legal advice on whether any breach of land lease was involved.

512. LandsD provided a reasonable explanation as to why DLO had not followed up on the foul smell. The Ombudsman considered the complainant's complaint against LandsD unsubstantiated.

513. The Ombudsman recommended that –

(a) EPD to remind staff to conduct timely tests on suspected cases of illegal discharge of sewage in future; and

(b) LandsD to closely follow up with the leakage of the septic tank.

Government's response

514. EPD and LandsD accepted The Ombudsman's recommendations.

515. EPD had instructed staff to conduct tests in a timely manner to ascertain any illegal wastewater discharge when handling similar pollution complaints in future.

516. After seeking legal advice, the DLO concerned of LandsD confirmed that the leakage of the septic tank was in breach of the lease conditions of the village house concerned. Therefore, DLO took lease enforcement action by issuing a warning letter to the owner concerned. Subsequently, the owner concerned had repaired the septic tank and submitted a report from a registered professional engineer certifying that the septic tank could function properly without leakage.

Home Affairs Department, Food and Environmental Hygiene Department and Lands Department

Case No. 2015/2163A,B&C – Failing to take effective measures to tackle the problem of illegal parking of bicycles

Background

517. The complainant lodged a complaint in April 2013 with the Office of The Ombudsman (the Office) against the Home Affairs Department (HAD), Food and Environmental Hygiene Department (FEHD) and Lands Department (LandsD) that they failed to take effective measures to tackle the problem of illegal bicycle parking in the vicinity of Sheung Shui Mass Transit Railway station (the concerned location). The Office concluded the investigation in September the same year.

518. The complainant later lodged a new complaint on 30 May 2015 about the persistence of the problem of illegal bicycle parking at the concerned location. He believed that the "occupation of Government land provisions" invoked by the relevant departments was ineffective in resolving the problem. He also pointed out that an effective operation was conducted by the relevant departments on 28 January 2015 by invoking Section 4A of the Summary Offences Ordinance ("public obstruction provisions"). The problem reinstated immediately after the operation, but the relevant departments resorted back to the "occupation of Government land provisions".

519. The complainant alleged that the relevant departments failed to take effective measures in resolving the problem of illegal bicycle parking at the concerned location.

The Ombudsman's observations

520. After the Office's conclusion of the complainant's complaint in 2013, HAD and LandsD had indeed endeavoured to tackle the problem of illegal bicycle parking at the concerned location. Since then, both departments and FEHD continued to conduct regular "joint clearance operations" under their respective purviews. As such, The Ombudsman considered the complainant's complaints against the above three departments unsubstantiated.

521. Besides, HAD had explained why only one trial scheme under which the Hong Kong Police Force (the Police) invoked Section 32 of the Summary Offences Ordinance and the "public obstruction provisions" (hereinafter collectively known as the "relevant provisions") was conducted at the concerned location.

522. According to The Ombudsman Ordinance, except for matters relating to the non-compliance with the Government's Code of Access to Information, the Office has no authority to investigate the Police's actions. Therefore, the Office was not in a position to comment on the Police's decision of not invoking the "relevant provisions" due to its human resources considerations.

523. The Ombudsman urged HAD to –

(a) monitor the concerned location closely with LandsD, and step up efforts against the problem of illegal bicycle parking there; and

(b) explore with the Police actively on the feasibility in invoking the "relevant provisions" for enforcement, and explore with the Transport Department (TD) on the provision of more legal parking facilities in the district.

Government's response

524. HAD accepted The Ombudsman's recommendations.

525. Between July 2015 and April 2016, HAD, FEHD, the District Lands Office concerned (DLO) and the Police conducted monthly joint operations at the concerned location which had taken possession of a total of 50 illegally parked bicycles under the Land (Miscellaneous Provisions) Ordinance.

526. Besides, the Chief Executive suggested in his Policy Address on 13 January 2016 the implementation of the District-led Actions Scheme (DAS) in all 18 districts. The North District Office (NDO) has proposed to make use of the resources under DAS for strengthening the effectiveness and deterrence of the existing joint operations through increasing the number of monthly joint clearance operations and the number of black spots to be covered in each operation. The North District Council (NDC) was consulted on the proposal on 14 April 2016. The relevant departments would further collect views from NDC and the North District Management Committee (DMC), and implement the proposal shortly. NDO would continue to monitor the concerned location closely with relevant departments and conduct joint clearance operations to clear illegally parked bicycles, as appropriate.

527. After reviewing the operation model of invoking the "relevant provisions" and its subsequent implication on human resources allocation, the Police do not have plans to clear illegally parked bicycles by adopting the same model at this stage. A meeting among NDO, TD, FEHD, DLO and the Police was held in October 2015 to evaluate the model of joint clearance operations. The relevant departments would continue to study the issue, as appropriate.

528. As regards the increase of bicycle parking areas, during meetings of DMC and NDC Traffic and Transport Committee, NDO and NDC members have expressed views on bicycle parking and bicycle parking facilities. HAD will continue to work closely with TD and other relevant departments to actively explore feasible ways to provide additional bicycle parking facilities in the district.

Hong Kong Examinations and Assessment Authority

Case No. 2015/1851(R) – Failing to properly handle the complainant's request for information

Background

529. On 12 May 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Hong Kong Examinations and Assessment Authority (HKEAA). The complainant stated that he wrote to HKEAA on 13 April 2015 to request the following information (Request for Information) –

(a) the cut scores for each level of all 24 Category A subjects (senior secondary subjects) and six Category C subjects (other language subjects) for the Hong Kong Diploma of Secondary Education Examination (HKDSE) in 2012, 2013 and 2014 (concerned years) (Information A);

(b) the group ability index of 20 Category A elective subjects and Category B subjects for HKDSE of the concerned years (Information B);

(c) regarding the rechecking and remarking for subject levels and component levels (if applicable) of the 24 Category A subjects for HKDSE of the concerned years, the number of marks above the cut scores ("specified margin") required for upgrading subjects/component levels (Information C);

(d) the methodology adopted by HKEAA for determining the "specified margin" (Information D); and

(e) the definition of "technical errors" involved in rechecking and remarking for Category C subjects of HKDSE (Information E).

530. In response to the Request for Information, HKEAA replied to the complainant on 23 April and 11 May 2015 respectively (hereinafter known as Reply 1 and Reply 2), but the complainant did not accept the contents of Reply 1 and Reply 2.

531. The complainant criticised the HKEAA for –

(a) unreasonably refusing to disclose Information A, Information B, Information C and Information D;

(b) failing to act in accordance with paragraph 2.1 of the HKEAA Code on Access to Information (the HKEAA Code) to provide reasons for refusing to disclose Information C and D but just "generally" quoting paragraph 2.4 of the HKEAA Code as a justification for the refusal;

(c) failing to approach the Cambridge International Examinations (CIE) before refusing to disclose information pertaining to Category C subjects under Information A (Information A-1) and Information E, which was in contravention of paragraphs 1.17 and 2.12 of the HKEAA Code; and

(d) failing to lay down in the HKEAA Code the requirement of considering "whether the public interest in disclosure of the information outweighs any harm or prejudice that could result".

The Ombudsman's observations

Allegation (a)

532. The Office agreed that since the cut scores are complicated and variable by nature, members of the public may find it difficult to understand and misunderstandings may even arise. Therefore, the Office considered that HKEAA could by virtue of paragraph 2.4 of the HKEAA Code refuse to disclose Information A.

533. As the group ability index is mainly used by HKEAA to determine the cut scores, disclosure of such information may lead to misunderstandings. Therefore, the Office considered that HKEAA could by virtue of paragraph 2.11(a) of the HKEAA Code refuse to disclose Information B.

534. The Office also agreed that since the "specified margin" may vary across different examination years, subjects and levels, and the determination of the "specified margin" is not based on the raw marks of candidates, disclosure of such information may be misleading. Therefore, the Office considered HKEAA could by virtue of paragraph 2.4 of the HKEAA Code refuse to disclose Information C.

535. HKEAA argued that the disclosure of Information D might be misleading or hinder its internal discussion. However, as Information D involves an established procedure, which is clear and specific and is applicable to different examination years and subjects, the Office was hardly convinced that disclosure of such information would be misleading. Therefore, the Office considered that HKEAA could not by virtue of any reason set out in the HKEAA Code refuse to disclose Information D.

536. Based on the analysis above, The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

537. In Reply 1, HKEAA quoted paragraph 2.4 of the HKEAA Code as a justification for refusing to disclose Information C and D. The complainant then sent an email to the HKEAA on 27 April 2015 to demand a detailed explanation. In response, HKEAA issued to the complainant Rely 2, which only reiterated its previous stance without providing supplementary information on the grounds for its refusal.

538. The Office considered that in Reply 1, HKEAA already stated its views about the complainant's Request for Information at that time as well as reasons as set out in Part 2 of the HKEAA Code for refusing to disclose the requested information. Such a reply was in compliance with the basic requirements in paragraph 2.1 of the HKEAA Code, and therefore there was no maladministration on the part of the HKEAA (whether the reasons given were appropriate or not would be a separate issue).

539. From this perspective, The Ombudsman considered allegation (b) unsubstantiated. However, in hindsight, it would have been more appropriate if HKEAA had elaborated further in Reply 2 to make its views better understood.

Allegation (c)

540. According to HKEAA's clarification, it did not realise that it possessed Information A-1 when it replied to the complainant. It was at a later time that HKEAA became aware of the possession of such information. Regarding Information E, after reviewing Reply 1 and Reply 2, the Office confirmed that HKEAA had not informed the complainant that it did not possess Information E.

541. Since the HKEAA was not in possession of Information E when it replied to the complainant and it thought that it did not have Information A-1 either, it is understandable that no attempt was made by the HKEAA to check with the CIE whether CIE would consent to its disclosure of Information A-1 and Information E to the complainant. In this light, The Ombudsman considered allegation (c) unsubstantiated. That said, The Ombudsman opined that other inadequacies were found on the part of HKEAA because it mistakenly mentioned in Reply 1 that it did not possess Information A-1 and it did not state in Reply 1 and Reply 2 that it did not possess Information E.

Allegation (d)

542. Upon completion of the direct investigation on the Access to Information Regime in Hong Kong in March 2014, the Office recommended that the Government should devise and implement a phased programme of subjecting all public organisations to its Code on Access to Information (the Government Code). The Government subsequently replied to the Office that given their unique operations, certain public organisations are unable to fully adopt the Government Code. However, these public organisations (including HKEAA) have incorporated the major provisions of the Government Code into their own Codes on Access to Information.

543. As the Government did not require HKEAA to fully adopt the Government Code, no maladministration was perceived on the part of HKEAA even though the HKEAA Code did not comprise the requirement that the HKEAA should consider "whether the public interest in disclosure of the information outweighs any harm or prejudice that could result". In this light, The Ombudsman considered allegation (d) unsubstantiated.

544. Nonetheless, the Office recommended that HKEAA should consider including the above provision in the HKEAA Code. After all, HKEAA could not insistently refuse to disclose information to the public merely on the grounds of "third party information" when there are matters involving the overriding public interest.

545. The Ombudsman considered this complaint partially substantiated and urged HKEAA to –

(a) provide Information D to the complainant as soon as possible; and

(b) consider incorporating the provision of "considering whether the public interest in disclosure of the information outweighs any harm that results" into the HKEAA Code.

Government's response

546. HKEAA accepted the Ombudsman's recommendations and has taken the following actions –

(a) to promote public understanding of the assessment of public examinations, in addition to providing the complainant with information about the methodology for determining the "specified margin" required for upgrading levels upon remarking (Information D), HKEAA also uploaded such information to its website for stakeholders' reference. Considering the confidentiality and technicality of such information, HKEAA had to, before the release of information, seek the consent of the Public Examinations Board and come up with a way of presentation that facilitates public reading. The Public Examinations Board approved the release of information about the methodology for determining the "specified margin" at the meeting on 25 February 2016, and HKEAA provided such information to the complainant by email on 31 March the same year. Information about the methodology for determining the "specified margin" had also been uploaded to the HKEAA website for the stakeholders' reference; and

(b) upon deliberation, HKEAA included the provision of "considering whether the public interest in disclosure of the information outweighs any harm that results" into the HKEAA Code. In December 2015, HKEAA submitted a progress report to the HKEAA Council on the revisions to the Code. The revised Code had been uploaded to the HKEAA website.

Hong Kong Housing Society

Case No. 2014/4538 – Failing to properly handle the complainant's application for taking over the tenancy of a public rental housing unit

Background

547. The complainant lived with her family members in a public housing unit under the Hong Kong Housing Society (HKHS) and her father was the principal tenant. In 2011, her parents passed away one after another and HKHS learned about this in 2012. HKHS then terminated the tenancy agreement and notified the complainant that she could apply for taking over the tenancy if she had housing needs but then she must be relocated as stipulated to a smaller unit. Subsequently, she submitted an application for taking over the tenancy.

548. In 2014, HKHS required the complainant to sign a licence for temporary stay (Licence) on a one-year fixed term. She considered HKHS to have failed to handle properly her application for taking over the tenancy and, by requiring her to sign the Licence, attempted to evict her from the present unit.

549. The HKHS public housing tenancy agreement stipulates that tenants should inform HKHS promptly of any changes to the family composition such as marriage, moving out and decease of family members included in the tenancy. In case of under-occupation due to reduction in the number of occupants, the household has to be relocated to a smaller unit. However, the household is allowed to stay in the existing unit while awaiting suitable relocation. Upon the death of the principal tenant, his/her spouse can apply for taking over the tenancy. Where no spouse is listed on the tenancy, any enlisted family member aged 18 or above can submit an application.

550. In May 2014, HKHS revised its working guidelines on transfer of tenancy, stipulating that applicants for taking over the tenancy should submit necessary documents within two months from the date of notification by HKHS and that under-occupation households, while waiting for relocation, are required to sign a Licence for temporary stay

to establish a landlord-tenant relation with HKHS. When suitable units are available, HKHS will make relocation arrangements for those households in order of priority. HKHS will issue a Notice-To-Quit to a household that has refused three relocation offers.

551. In 2012, on learning that the complainant's parents had passed away, HKHS immediately explained to the complainant the procedures for taking over the tenancy and relocation arrangements. However, the complainant tried to delay the submission of her application for taking over the tenancy and indicated repeatedly her unwillingness to move to a smaller unit. Though she did submit the necessary documents in the end, she rejected all three relocation offers by HKHS. The fact that HKHS required her to sign the Licence for temporary stay was to allow her to stay in the present unit while awaiting relocation.

552. Considering the complainant's grief of loss of both parents and busy work life, HKHS tried to be understanding and did not want to be too harsh in dealing with her case. Unfortunately, as the complainant had not been cooperative, HKHS subsequently had to take a stricter approach. It issued three warning letters urging her to sign the Licence before a prescribed date and making it clear that a Notice to Quit would be issued without further notice if she failed to do so.

The Ombudsman's observations

553. HKHS's understanding of the tenant's situation was commendable. Nevertheless, as an organisation managing valuable public housing resources, HKHS must ensure that it would not be unfair to those public housing applicants and overcrowded households with pressing housing needs.

554. The complainant had failed to comply with the tenancy agreement and notify HKHS of the death of her parents. She was also not cooperative on the relocation arrangements. Her attitude was certainly one reason why the problem had dragged on for several years. Yet, HKHS's failure to actively follow up her case after learning the changes in her family composition also played a part. In the view of the Office of The Ombudsman (the Office), while HKHS did not want to be too harsh, it should not be unduly lenient because that would encourage

under-occupation households to continue occupying their present units.

555. The Office considered it reasonable that HKHS required the complainant to sign the Licence if she wanted to stay in the present unit. Moreover, the Office did not see any grounds for the complainant's allegation that HKHS had failed to handle properly her application for transfer of tenancy. In fact, it was her uncooperativeness which delayed the transfer. Nevertheless, this complaint revealed HKHS's laxation in handling such cases, which resulted in underutilisation of public housing resources.

556. The Ombudsman considered this complaint unsubstantiated but other inadequacies found.

557. The Ombudsman recommended that it is necessary for HKHS to strengthen its supervision to ensure implementation of the new guidelines by its staff, and take decisive actions (such as to issue Notices-to-Quit) against tenants who have repeatedly ignored its advice in order to ensure proper use of public resources.

Government's response

558. HKHS accepted The Ombudsman's recommendation, and has taken the following follow-up actions –

(a) relevant working guidelines had been updated with effect from 1 May 2014, stipulating that tenants applying for taking over the tenancy should submit relevant documents to respective estate offices within two months from the date of notification by HKHS. If tenants refuse to submit any documents or fail to respond, HKHS would issue Notices-to-Quit to tenants concerned upon expiry of the two-month period to recover the units; and

(b) Estate Managers have to report on a monthly basis to HKHS management the progress in processing applications for taking over the tenancy of units arising from the death of principal tenants until the completion of the relevant follow-up work. This allows the management to monitor the progress made by the frontline staff in processing these applications.

Hospital Authority

Case No. 2015/2399 – Delay in responding to a complaint

Background

559. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against Queen Elizabeth Hospital (QEH) of the Hospital Authority (HA). In July 2013, the complainant lodged a complaint against QEH about a medical incident relating to his new-born daughter. However, he did not receive any reply from the hospital in two years.

The Ombudsman's observations

560. QEH admitted that there were a series of oversights when the complaint was handled by the Patient Services Office. First, the case officers mistook the case as a concluded one, leading to a delay of two years before giving a formal reply to the complainant. Besides, the Patient Relation Assistants (PRAs), in ignorance of the case progress, continued to issue interim replies as a routine. This had been caused by a lack of communication between the PRAs and case officers. The Office considered that the PRAs, having repeatedly issued interim replies, should have noticed that the case had remained unresolved for a long time. It was their obligation to take appropriate follow-up actions to make a report to the case officers. The PRAs obviously failed to comply with the guidelines.

561. In view of the above, The Ombudsman considered the complaint substantiated. The Ombudsman believed that the series of oversights in this case were related to the resignation of a number of staff and persistent manpower shortage in QEH's Patient Services Office. Apart from urging the hospital to acknowledge the situation and take appropriate measures to tackle the manpower problem of the Patient Services Office, The Ombudsman also requested QEH to expedite the implementation of the preliminary improvement measures and launch the "Complaint and Feedback Management System" as soon as possible to help the Patient Services Office monitor and follow up the progress of complaint cases. This should ensure timely and proper handling of all complaint cases.

Government's response

562. HA accepted The Ombudsman's recommendation and QEH has fully implemented all the preliminary improvement measures. The measures include requiring case officers to review and issue interim replies by themselves, formulating guidelines on "case handover prior to leave or resignation" and launching a newly developed "Complaints and Feedback Management System" in January 2016. These measures ensure that all complaint cases would be handled in a timely and proper manner.

Hospital Authority and Transport Department

Case No. 2014/5176A – (1)Failure to take into account the physical, medical and social aspects of the complainant's case in considering his application for disabled person's parking permit; (2)Failure to consider the complainant's application on compassionate grounds; and (3)Failure to inform the complainant of the outcome of its meeting with the Transport Department

Case No. 2014/5176B – (1)Failure to take into account the physical, medical and social aspects of the complainant's case in considering his application for disabled person's parking permit; (2)Failure to consider the complainant's application on compassionate grounds; and (3)Failure to inform the complainant of the outcome of its meeting with the Hospital Authority

Background

563. In December 2014, the complainant lodged a complaint against the Hospital Authority (HA) and Transport Department (TD) for –

(a) failure to take into account the physical, medical and social aspects of his case in considering his application for disabled person's parking permit (DPPP);

(b) failure to consider his application on compassionate grounds; and

(c) failure to inform the complainant of the outcome of their meeting and the reasons for not approving his application.

The Ombudsman's observations

Allegation (a)

564. The assessment on whether the complainant meets the criteria for obtaining DPPP is a professional medical judgment which the Office of The Ombudsman (the Office) is not in a position to comment. The investigation would therefore focus on the administrative aspect of the matter.

565. From the replies given by TD and HA, they have processed the complainant's application in accordance with the established procedures. In particular, HA emphasised that the rehabilitation doctor had taken into account the medical opinions of two specialists, as well as the complainant's updated medical condition retrieved from HA's electronic patient record, in making the assessment.

566. After the complainant expressed dissatisfaction with the assessment result, the RehabAid Centre (RC) had arranged to conduct another assessment for the complainant, and explained to him why he was considered to be not meeting the eligibility criteria. If the complainant was still dissatisfied with RC's handling of the matter, he could lodge an appeal to the Public Complaints Committee of HA (PCC), whose members include medical professionals. The Office considered that HA already had an established mechanism for applicants of DPPP to seek a review of RC's assessment by the same doctor and by other parties (i.e. PCC). From the administrative point of view, the Office did not consider there to be any maladministration in this respect.

567. As regards the complainant's dissatisfaction with how PCC handled his case, according to the sequence of events, PCC took up the complainant's appeal in August 2014. By the time when the Office completed the draft investigation report (i.e. May 2015), PCC was still following up the case. In particular, PCC still issued reminder to RC in January 2015 for submission of materials. It seemed that the PCC Secretariat had failed to secure the cooperation of RC to facilitate its processing of complaints in a timely manner. This is highly undesirable.

Allegation (b)

568. Both HA and TD had explained that, under the law, they had no power to grant DPPP to applicants who fail to meet the eligibility criteria on compassionate grounds.

Allegation (c)

569. The Office agreed that RC's letter of 22 July 2014 would give the complainant a reasonable expectation that the meeting would discuss the issues of his concern and he would be informed of the result of the meeting. The Office urged HA to exercise more care in replying to complainants in future to avoid misunderstanding.

570. The Ombudsman considered the complaint against TD unsubstantiated and against HA partially substantiated.

571. The Ombudsman urged HA to expedite its processing of the complainant's appeal to PCC and reply to the complainant as soon as possible.

Government's response

572. HA accepted The Ombudsman's recommendation and PCC has already sent a reply to the complainant prior to the issue of the Office's Investigation Report on this case.

Housing Department

Case No. 2014/2264 – Unreasonably take back the complainant's public rental housing flat when the complainant was studying abroad

Background

573. In July 2012, the Housing Department (HD) allocated a flat to the complainant. In August 2012, the complainant went to study in the United States of America (USA) for two years. On 28 February 2014, due to non-occupation of the complainant's flat for over three months, HD issued a Notice-to-quit which was delivered to her flat. The complainant was in USA at the time and did not learn about the said decision. On 5 May 2014, HD recovered the flat and seized the complainant's personal properties therein. On 13 May, HD notified the complainant's parents to take back her properties before 19 May.

574. In respect of the above incident, the complainant filed a complaint with the Office of The Ombudsman (the Office) against HD on 21 May 2014. On 13 August 2014, HD replied to both the complainant and the Office. Subsequently, the complainant wrote a letter to the Office on 20 September, stating her views about HD's reply and raised new points of complaint.

The Ombudsman's observations

575. Public housing was a precious resource of society. HD, therefore, had to adopt appropriate measures to ensure rationalising and optimising the use of the resource. HD should also be stringent in combatting the abuse of public housing resources.

576. As there was objective and actual evidence to prove that the complainant had not been residing in the flat for a long time, it was reasonable for HD to recover the flat according to regulations. In fact, under the existing system, even if HD had known that the complainant was going to USA for study, it would also recover the flat immediately. The Office considered unacceptable for a public rental housing (PRH) flat to be left vacant for a long period of time given the acute shortage of PRH supply and the long queue on the waiting list.

577. HD denied the complainant's allegation that she had told HD staff on many occasions that she was going to study in USA. HD and the complainant had different versions of the matter. But even if the complainant had really informed HD of her plan of studying abroad before signing the tenancy agreement, HD would have ceased to allocate the flat to the complainant in the first place, let alone arranging to sign the tenancy agreement. The Office considered that it was highly unlikely that several HD staff members and the warden could all ignore the complainant's declaration of studying abroad.

578. Furthermore, while the complainant went abroad to study on 23 July 2012, she still declared that she was unemployed instead of being a student when she met with a staff member of HD on 4 June. On the declaration she made when signing the tenancy agreement on 16 July (i.e. a week before going abroad), she did not state her "student" status in the field of "occupation". Besides, the complainant signed the declaration undertaking to move into the allocated flat within one month from the commencement of the tenancy and reside therein continuously while she knew very well that she would go abroad for study in a week's time. This was tantamount to making a false declaration. If HD staff, as claimed by the complainant, indeed had known that she would go abroad for study, it would be impossible for them to turn a blind eye to it. Therefore, the Office had doubts about the complainant's allegation.

579. In addition, the Office also studied the admission letter that the complainant claimed to have submitted to HD. It was mentioned therein the college concerned only made a provisional offer for admission to the complainant. There were no details of the admission (such as the commencement date of study and the duration of the course). If HD indeed had received the said document, it would have asked the complainant to provide further details (e.g. the time for reporting to the college, duration of study, whether she would return to Hong Kong in the interim, etc.). However, the complainant did not indicate that she had provided such details to HD.

580. It was stated clearly in the complainant's tenancy agreement that any notice to the tenant shall be sufficiently served if left addressed to the tenant at the said premises. Therefore, HD's practice complied with the clauses and provisions of the tenancy agreement.

581. The Office considered that when HD had to recover a vacant PRH flat, it was crucial to make sure the flat concerned was truly left vacant. It might not be necessary for HD to have contacted the tenant before commencing the flat recovering action. Otherwise, if the tenant could not be found, it might take HD a long time to recover the flat for allocation to other people in need.

582. As regards the complainant's claim that HD did not contact her parents, The Ombudsman considered that since the complainant was the tenant of a one-person PRH flat and her parents were not included in the tenancy, HD should notify the complainant instead of her parents when it demanded vacation of the flat or termination of the tenancy. In spite of the complainant's claim that she had given full authorisation to her parents to handle tenancy matters of the flat, HD's documentary record revealed that the complainant had just named her father as the contact person in case of emergency. The Office also deemed that since tenancy matters concerning HD and the tenant (including the principal tenant and other members in the tenancy) involved the tenant's privacy, it was appropriate for HD not to disclose matters pertaining to the tenant's privacy to persons other than the members listed in the tenancy.

583. According to the declaration and the tenancy agreement signed by the complainant, she had to move into the allocated flat within one month from the commencement of the tenancy and reside continuously in the flat. Therefore, it was quite reasonable for HD to regard the said PRH flat as the complainant's only place of residence in Hong Kong. Even when it was confirmed that the complainant did not reside in the flat, there was no valid reason for HD to deliver the said notice to other address (say, her previous home address before moving in).

584. As mentioned above, the complainant signed a declaration agreeing to move into the allocated flat within one month from the commencement of the tenancy and reside continuously in the flat. Thus, the complainant should clearly understand that if she did not move into the flat after signing the tenancy agreement, she would not only breach the tenancy agreement but also be suspected of making a false declaration. Clause IV(2) of the Tenancy Agreement explicitly stipulates that if a tenant does not observe any clauses in the tenancy agreement, the Landlord has the right to recover the flat. Therefore, the Office considered that the complainant could not shift the blame onto HD, alleging that she did not know HD would recover a flat if its tenant left Hong Kong for over three months and did not move into the flat within one month from the commencement of the tenancy and reside therein continuously.

585. As regards whether HD staff provided false information to the complainant's mother thereby misleading her, since the explanations provided by the complainant and HD were different, in the absence of independent corroborative evidence, the Office was unable to ascertain what really happened and therefore would not give any comments.

586. The Office agreed that without authorisation of the tenant, HD should not disclose information pertaining to the tenant's privacy to anyone not listed in the tenancy. If the complainant's mother had to make a decision or take an action (e.g. lodge an appeal) on behalf of the complainant, it was all the more important for her mother to have an authorisation letter to prove that she had the right to represent the complainant to handle matters relating to the flat so as to avoid future dispute.

587. HD had clarified that according to relevant legislation, personal data is exempt from the provisions of the data protection principle concerned if it is held for the prevention of unlawful or seriously improper conduct. Therefore, in carrying out investigation, HD has the right to check the movement records of tenants suspected of tenancy abuse.

588. The Ombudsman considered all the allegations made by the complainant against HD unsubstantiated but other inadequacies found. The Ombudsman recommended that HD –

(a) should strengthen staff understanding of the arrangements for tenants to collect their tenancy agreements, as well as adopt effective measures to ensure that the relevant requirements are strictly observed in a timely manner; and

(b) should strictly implement the requirement for ex-tenants to collect their properties.

Government's response

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

(a) in the email to Heads of the Estate Management staff dated 14 May 2015, HD reiterated the relevant guidelines that records should be kept for all the tenancy agreements to be distributed, and follow-up actions should be taken in respect of suspected cases when the agreements are not collected after sending repeated reminders. All Assistant Housing Managers will conduct checking on the records concerned every two months and forward the suspected cases to the Public Housing Resources Management Sub-section as soon as practicable for follow-up actions; and

(b) after HD had sent out numerous letters, the complainant arranged for her family members to collect her properties on 13 April 2015.

Housing Department

Case No. 2014/3303 – Misleading the complainant into believing that the alterations she made to her public rental housing unit were permitted and unreasonably refusing to provide her with the details of the charges on the reinstatement works

Background

590. In January 2013, the complainant was allocated a public rental housing (PRH) unit and started renovating it after taking up residence. In March, she informed the Housing Department (HD) of the completion of the renovation works. After an HD officer conducted a site inspection and took some photographs for record purposes, HD formally issued the tenancy agreement to her.

591. However, in November 2013, HD received a report alleging that the complainant and her husband had appeared on a television programme to introduce the interior decoration of their PRH unit, and suspecting that those were unauthorised alterations. HD followed up on the case and subsequently told the complainant that a number of unauthorised alterations were found in her unit, which had caused minor seepage at the unit below. HD then demanded a reinstatement of the fixtures in her unit and the complainant was required to pay the costs of $60,000.

592. The complainant alleged that HD had misled her, such that she had all along believed that her renovation works were not in breach of any requirements. It was unreasonable for HD to enforce reinstatement after eight months.

The Ombudsman's observations

593. The Office of The Ombudsman (the Office) considered HD to have in place established procedures to remind PRH tenants of the requirements on alteration of fixtures. Since the complainant had signed to acknowledge acceptance of the undertaking and relevant guidelines, she should be responsible for any unauthorised alterations and could hardly claim that she was unaware of the requirements.

594. Nonetheless, the Office did not accept that the estate office had properly handled this case. From the records of the first inspection by a housing officer from the estate office (Officer A) in January 2013, the Office noted that apart from knocking down an original partition wall, the complainant had also removed the cooking bench in the kitchen and the water closet pan in the toilet, both listed as Category A fixtures not allowed to be altered. There were also a few items of Category B fixtures which had been altered without prior approval. At that time, Officer A simply advised the complainant to reinstate the partition wall and took no notice of the other unauthorised items. As such, he missed the opportunity to reverse the complainant's course of action at an early stage.

595. Even if Officer A only found the unauthorized alterations in March 2013 and intended to follow up on the case eight months later, he should at least have given the complainant forewarning about the enforcement action to be taken, so as to avoid creating a false impression that HD had acquiesced in her retention of the unauthorised alterations.

596. The serious breach in this case showed that the tenant was in total disregard of her undertaking to HD, and yet HD still did not see the need to deal with this case speedily. It even tried to justify its lack of positive action on the grounds of environment protection. The Office agreed that, where appropriate, tenants might be allowed to keep their renovations and fittings to reduce construction wastes. However, some of the alterations in this case involved fixtures not allowed to be altered under HD's categorisation and so must be reinstated. In such circumstances, HD should not use environment protection as an excuse for its delay or non-action.

597. The Ombudsman considered the complaint unsubstantiated but found other inadequacies on the part of HD. The Ombudsman recommended that HD should –

(a) review outstanding cases concerning unauthorised alterations of PRH units and enhance scrutiny of the handling progress to ensure timely completion;

(b) draw up specific guidelines, give clear instructions to frontline staff on the procedures and timeframe for following up cases of unauthorised alterations, reminding them that environment protection should not be an excuse for not taking prompt action, and step up staff training;

(c) strengthen management, implement an effective monitoring system and keep clear records on follow-up actions (with submission of real-time reports) for supervising officers to monitor case progress and to ensure proper and timely follow-up of cases;

(d) review existing workflow and resources with a view to shortening the time required for handling similar cases; and

(e) review regularly the effectiveness in handling cases of unauthorised alterations.

Government's response

598. HD accepted The Ombudsman's recommendations, and it will take the following follow-up actions.

599. HD will review outstanding cases concerning unauthorised alterations and enhance its scrutiny of the handling progress to ensure prompt completion. The existing guidelines on handling unauthorised alterations will also be reviewed and revised with a view to enhancing the implementation process. This includes strengthening management, implementing an effective monitoring system and reviewing existing workflow, resources as well as the effectiveness in handling cases of unauthorised alterations. In addition, HD will step up staff training to ensure that each case is handled in a proper and timely manner.

Housing Department

Case No. 2014/3798&4946 – (1)Failure to properly vet the applications for using certain public venues of a public housing estate; (2)Unreasonably suspending all applications before the dispute was resolved; (3)Providing false information when replying to the complainant; and (4)Inappropriately accepting applications for using public venues of a public housing estate from certain "community organizations"

Background

600. The complainant lodged two complaints with the Office of The Ombudsman (the Office) against the Housing Department (HD), alleging HD and its property services agent (PSA) of improper handling of the applications for use of public venues from organizations in a public rental housing estate (the Estate).

601. According to the complainant, several parties including the complainant, the offices of Councillors and community organizations (the applicants) had applied for the use of public venues of the Estate in September 2014. A ballot was arranged in late August by the PSA to decide on the use of venues. On the ballot day, due to the chaotic arrangements of the PSA and disagreement among the applicants, the ballot was forced to be suspended.

602. Taking into account the two complaints, the complainant made the following allegations against HD –

(a) Before holding the ballot, PSA did not comply with the guidelines to confirm the eligibility of the applicants and request them to submit relevant documents to prove their status as registered charitable organizations in advance. As a result, a dispute arose over the application criteria/documentary proof on the ballot day. To evade responsibilities, HD and the PSA stopped the ballot on the grounds of the chaotic situation;

(b) After suspending the ballot, the PSA informed the applicants that it had decided to withhold approval for application to use the venues of the Estate for the whole month of September, as it would take time to clarify the guidelines in handling applications for use of venues. The complainant said the decision of the PSA was unreasonable as it made it impossible for any of the applicants to use the venues for provision of services to residents in September; and

(c) In its reply on 13 November 2014, HD stated that the PSA arranged another ballot on 5 September. Yet the representatives of the applicants did not show up, resulting in further delay in the approval process for the use of venues in September. The complainant accused HD of lying about the situation. The fact was that the complainant's representative did show up at the PSA's office in the afternoon on 5 September intending to take part in the ballot, but the staff of the PSA asked the complainant's representative to agree not to hold the ballot.

(d) HD inappropriate accepted applications for use of public venues of the Estate from societies that can be registered with only three members (not charitable organizations according to the law), in contradiction to HD's guidelines on use of venues of public housing estates. This practice affected the chances of qualified organizations in winning a ballot.

The Ombudsman's observations

Allegation (a)

603. HD admitted that the PSA and its estate management office (EMO) had failed to strictly follow HD's guidelines in handling applications for use of venues in the following ways –

(a) failure to request the applicants to submit application forms;

(b) failure to confirm the eligibility of the applicants before making arrangement for the ballot;

(c) the EMO continued to process the applications even though all the applicants requested to use the two venues concerned for the whole month of September 2014, in obvious contravention of HD's rules on the use of venues; and

(d) the EMO did not follow the rules to handle the applications on a first-come-first-served basis.

604. The above showed that the PSA had made quite a number of mistakes when handling applications, indicating a deficiency in its knowledge of HD's application guidelines. Nevertheless, when the incident was brought to its notice, HD had made timely intervention, taken steps to remedy the situation and imposed penalty on the PSA concerned. The remedial measures were appropriate and did not come too late. The Office urged HD to make sure that its outsourced PSAs fully understood and strictly followed HD's guidelines to prevent the recurrence of similar incidents.

605. In view of the above, the Office considered allegation (a) partially substantiated.

Allegation (b)

606. This allegation largely stemmed from the improper handling of applications at the very beginning by the PSA which resulted in disputes during the first ballot. The EMO had subsequently followed up on the applications and arranged another ballot, and the applicants concerned were eventually able to use the venues from 22 September 2014. Therefore, the Office considered allegation (b) unsubstantiated.

Allegation (c)

607. The complainant and the EMO staff concerned had different versions of the incident leading to the abortion of the ballot on 5 September 2014. Lacking independent corroborative evidence, the Office was unable to make a judgment. Therefore, the Office considered allegation (c) inconclusive.

608. On the other hand, according to HD's existing guidelines, a ballot should be held in the presence of all applicants concerned to avoid questions about the fairness of the result. The Office agreed with the good intention of the above arrangement, but considered that it was open to potential abuse. For instance, other applicants might be denied the

use of venues for a prolonged period of time if one of the applicants kept refusing to attend the ballot. Therefore, the Office suggested that HD should appropriately review the relevant guidelines and consider for example inviting an independent party to witness the ballot to ensure its impartiality and prevent abuse of the mechanism.

Allegation (d)

609. The Office understood the desire of the complainant for HD to tighten the criterion for applying to use venues of public housing estates with regard to the qualification of the applicants. However, HD is of the view that as long as the activities are charitable in nature and do not involve commercial elements, residents of public housing estates could benefit from activities organized by community organizations in general. The Department does not agree with the complainant's demand to restrict the use of venues to only those charitable organizations exempted under section 88 of the Inland Revenue Ordinance. The Office considered HD's position not unreasonable and the EMO's action in observance of HD's guidelines not inappropriate. Therefore, the Office considered allegation (d) unsubstantiated.

610. On the other hand, the Office reckons that HD should consider appropriate measures to strengthen its monitoring over the quality of applicants. In cases where an applicant (including charitable organizations exempted under section 88 of the Inland Revenue Ordinance) does not organize the activity stated in its application after being granted use of the venue and does not provide a reasonable justification, or where the organizer of the activity concerned is not the applicant itself, HD should consider adding an appropriate penalty to its guidelines. The Office noticed that a declaration has been added to the application form for the use of venues that says if the applicant does not follow HD's rules, the Department may disapprove future applications to organize similar or other activities by the same applicant. However, HD's guidelines do not require the PSA to check the past records of applicants. Nor do the guidelines set out under what circumstances, the PSA should reject an application of the applicant concerned.

611. Overall speaking, The Ombudsman considered this complaint partially substantiated and recommended HD to –

(a) strengthen the knowledge and understanding of its PSAs and their staff on the guidelines and procedures on the use of venues, and provide suitable training to ensure that the guidelines are faithfully implemented by the staff of PSAs;

(b) review the existing procedures on ballot drawing and consider practicable mechanism to prevent delay due to the refusal of applicants to attend a ballot;

(c) review the existing application guidelines to require the PSAs to check the records of applicants on use of venues before granting permission to participate in the ballot; and

(d) consider imposing appropriate penalty to prevent applicants who have violated the rules from using the venues again.

Government's response

612. HD accepted The Ombudsman's recommendations and has taken the following follow-up actions –

(a) HD had repeatedly reminded its PSAs of the guidelines and procedures in handling applications for use of venues and requested their strict compliance during its monthly meetings with the PSAs. When paying monthly visits to public housing estates for inspection of its PSAs' work, HD would also examine the relevant documents to ensure strict implementation of the guidelines. In addition, at the 24th PSA Monitoring Meeting held at HD Headquarters on 22 June 2015, the Chairman urged the Senior Property Service Managers of all districts to remind their PSAs to observe HD's guideline EMDI-M15/2006 in handling applications for use of venues. HD's Training and Development Centre has also conducted two training and experience sharing sessions for PSA staff on 30 November and 1 December 2015 respectively to strengthen their knowledge and understanding on the guidelines and procedures in handling applications for use of venues.

(b) Regarding the existing balloting procedures concerning the applications of community organizations for the use of venues in estates to organize activities, HD has reviewed the relevant procedures and decided to invite an independent party to witness the ballot if an applicant is unable to attend. This would ensure the impartiality of the ballot and prevent delay due to applicant's refusal to attend.

(c) HD will revise the guidelines to require its PSAs to check the past records of applicants on use of venues to ensure that all conditions in the application form are implemented properly.

(d) Regarding the imposition of appropriate penalty to prevent applicants who have violated the rules from using the venues again, relevant regulations have been drawn up and implemented by HD.

Housing Department

Case No. 2014/4562 – (1)Allowing a District Council member to apply for lease of a new ward office in a public housing estate before surrendering his original ward office; and (2)Allowing another DC member who shared the original ward office with the above DC member to take up the lease of office all by himself, instead of conducting an open allocation

Background

613. In 2008, the complainant, a District Council (DC) member, submitted an application to the Housing Department (HD) for lease of a ward office in a public housing estate (Office 1). Office 1 was eventually leased to another DC member (Councillor A) by lot. In 2014, the complainant applied for leasing a ward office in another public housing estate (Office 2). HD again leased the space to Councillor A because he belonged to the "first priority category for allocation". Regarding his two applications for ward offices, the complainant was dissatisfied that HD had –

(a) allowed Councillor A to surrender Office 1 only after he had been allocated Office 2; and

(b) failed to arrange for open application after Councillor A had surrendered Office 1. Instead, HD allowed Councillor B, who had earlier been invited by Councillor A to share use of Office 1, to take over the tenancy and continue to occupy the premises. The complainant considered such arrangement unfair to other DC members and smacking of an illicit transfer of benefits.

The Ombudsman's observations

Allegation (a)

614. That HD stipulated a notice period of two months for termination of tenancies was not unreasonable. After all, preparations for relocation to a new office took time. Two months should be a reasonable period.

Allegation (b)

615. The Office of The Ombudsman (the Office) shared the complainant's view that HD's existing practice might result in unfairness and it smacked of an illicit transfer of benefits.

616. The Office considered it reasonable for HD to have permitted Councillors A and B to share use of Office 1 for proper use of resources. However, when Councillor A terminated his tenancy, HD should have handled the lease arrangement in accordance with the established mechanism and arranged Office 1 for open application, rather than allowing Councillor B to stay in the name of a joint tenant, or even renewing the tenancy with him if he got re-elected. Otherwise, it would mean allowing DC members to circumvent the existing allocation mechanism and transfer the tenancy to another DC member whom they invited to share use of the premises, resulting in de facto "inheritance of tenancy". That was obviously a loophole in HD's allocation mechanism.

617. The Office understood that HD staff were just following the Instructions. They, therefore, committed no maladministration in this regard. However, the guidelines in the Instructions for handling cases which involved premature termination of tenancy by a joint tenant would indeed give rise to the problem of "inheritance of tenancy".

618. The Ombudsman considered the complaint partially substantiated, and recommended HD –

(a) to review the guidelines and instructions in handling the letting of ward offices under joint tenancies, in particular the leasing right and allocation arrangement after the tenant concerned terminates the tenancy, and to draw up appropriate measures for ensuring the relevant policies and measures are in compliance with the principles of rational use of resources and fairness;

(b) to add a suitable clause to the tenancy agreement to ensure that in case of termination of tenancy by the original tenant, the tenant who is added later to the tenancy agreement has to vacate the office within an appropriate period of time; and

(c) owing to the unfairness arising from HD allowing Councillor B to "inherit" the tenancy of Office 1, HD should handle the letting arrangements of Office 1 upon expiry of the current tenancy properly. Open application should be arranged in accordance with established policies and mechanism, as well as the order of priority.

Government's response

619. HD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

620. HD has formulated proposals for enhancing its current policy and arrangement, and submitted them to the Commercial Properties Committee of the Hong Kong Housing Authority (HA) in May 2016 for preliminary discussion.

621. Furthermore, HD has sought comments from the Home Affairs Department (HAD) in June, and planned to commence consultation and collect the views of stakeholders through HAD in due course. Meanwhile, HD will review the need to add a relevant clause to the current tenancy agreement in order to implement the proposed enhanced arrangements.

622. Before the proposed enhancements are approved and implemented, HD would continue with the current policy and arrangements for letting ward offices. Under the current policy, if a DC member who has leased a ward office from HA is re-elected, the member is allowed to continue leasing the existing ward office for providing service to the public. Since Councillor B was re-elected after the tenancy had expired, existing tenancy terms were used by HD in renewing the lease of Office 1 with Councillor B. After the new recommendations are approved and implemented, HD will revise the relevant operational details and tenancy terms in a timely manner.

Housing Department

Case No. 2014/5008 – Mishandling the complainant's enquiries and complaints

Background

623. The complainant, a public housing resident, alleged that in the past three years he had repeatedly complained about the nuisance caused by his neighbours burning joss paper in front of their unit. However, the Housing Department (HD) had failed to take any concrete action to resolve the problem, and had even wrongly sent a reply letter intended for him to the neighbours under complaint. Furthermore, HD staff responded to his enquiries in an evasive and poor manner. Misusing the performance pledge of replying public enquiries within 21 days, they would delay answering simple questions.

The Ombudsman's observations

624. Having considered HD's response, the Office of The Ombudsman (the Office) considered HD to have properly handled the complaint about joss paper burning in the common areas. Besides, it had not wrongly sent the letter addressed to the complainant to a third party.

625. The complainant had bombarded HD with extremely frequent enquiries and complaints. After examining HD's procedural guidelines on handling public complaints and the many reply letters issued to the complainant, the Office considered HD to have responded to the various issues raised by the complainant in an appropriate manner.

626. The numerous telephone calls and frivolous enquiries made by the complainant to different HD offices, together with his hostile attitude, had not only strained the Department's resources, but also caused unnecessary stress and anxiety to the staff and ultimately affected the operations of HD. The complainant's behaviour was indeed unreasonable.

627. The Ombudsman considered the complaint unsubstantiated and recommended HD to –

(a) enhance its frontline staff's ability in effectively responding to different forms of unreasonable complainant behaviour, including by strengthening staff training (such as organising workshops from time to time); and

(b) draw up proper guidelines and instructions for the staff, and provide them with the necessary support.

Government's response

628. HD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

629. HD's Training and Development Centre had organised a series of training courses to strengthen the frontline staff's ability in effectively responding to different forms of unreasonable complainant behaviour. These courses included "Complaint Handling Skills Workshop", "How to Handle Difficult Callers Training Course", "One-day Seminar on Handling Abusive/Violent Customers", "Housing Management Seminar – Tips on Avoiding Harassment and Confrontation with Tenants" and "Seminar on Excellent Customer Service in Property Management", etc.

630. Furthermore, HD would re-circulate the internal circular on "Procedures in Handling Public Complaints" at half-yearly intervals. The circular sets out appropriate guidelines and reminders for staff reference.

631. As regards difficult and unreasonable complaint/enquiry cases, the Sub-divisions of Estate Management Division of HD would hold meetings to discuss and review the cases according to the nature of individual complaints and enquiries. If necessary, the Sub-divisions would liaise and collaborate with other sections of the Department to formulate appropriate guidelines and provide suitable guidance and support to the frontline staff.

Housing Department

Case No. 2015/0427 – Misleading the complainant into believing that the alterations he made to his public rental housing unit were permitted and delay in responding to his concern about reinstatement works

Background

632. The complainant complained against the Housing Department (HD) for improperly handling his request for renovating his public rental housing flat.

633. The complainant alleged that he had asked HD in early November 2013 about his renovation plan and was told by Officer A, then Senior Property Officer of the estate management company to go ahead. However, shortly after the renovation was completed in December 2013, HD told him that the renovation was unauthorised and in-house fixtures had to be reinstated.

634. The complainant wrote to HD on 12 December 2013, undertaking to reinstate the in-house fixtures upon vacating his flat in the future. Allegedly, HD did not reply until 30 October 2014. HD reiterated in the reply the need for reinstatement and also the problems caused to the lower flat (plaster peeling off from ceiling) by the renovation. The complainant wrote to HD again, indicating financial hardship and again undertaking to carry out reinstatement works upon vacating his flat in the future. HD replied to the complainant on 2 February 2015, basically repeating its reply of 30 October 2014.

635. In February 2015, the complainant complained to the Office of The Ombudsman (the Office) against HD for –

(a) Officer A's failure to make it clear that his renovation plan was not acceptable; and

(b) HD's delay in replying to his letter of 12 December 2013.

The Ombudsman's observations

Allegation (a)

636. In the absence of independent corroborative evidence, the Office is unable to ascertain the exact conversation between the complainant and Officer A. The need for HD's prior approval is, however, clear. It is laid down in the tenancy agreement and different categories of alterations detailed in the notice on display in all public housing estates.

Allegation (b)

637. HD's letter to the complainant dated 16 December 2013 indicated clearly that there had been a breach of the tenancy agreement and that the unauthorised alterations had to be rectified. However, the letter did not refer to the complainant's letter of 12 December 2013 and did not expressly deny the complainant's request to rectify upon vacation of the flat in future. The Office therefore considers that while there was no delay on the part of HD in replying to the complainant's letter, its reply was certainly not direct enough to deliver its message.

Other observation

638. The Office considers the follow-up action on the unauthorised alterations in the complainant's flat lax. For one, no action had been taken for ten months after the first warning letter in December 2013, not to mention that the actions taken have so far been futile.

639. Besides, HD had merely been asking and reminding, to no effect, the complainant to reinstate the fixtures. It seems to have ignored until March 2015 when HD carried out cost evaluation that certain reinstatement should be carried out by HD.

640. In conclusion, the unauthorised alterations have not been rectified and the Office does not see any promisingly efficacious pending action. The Office considers HD's control over alterations to public housing rental units grossly ineffective in the present case.

641. Overall speaking, The Ombudsman considered the complaint unsubstantiated but found other inadequacies on the part of HD. The Ombudsman recommended HD to –

(a) draw up specific guidelines for frontline staff on the procedures and timeframe for following up cases of unauthorised alterations;

(b) provide training to staff on follow-up action on such cases in accordance with the guidelines drawn up under (a) above and on clarity of replies sent to tenants on matters relating to unauthorised alterations;

(c) review existing workflow and resources with a view to shortening the time required for handling similar cases; and

(d) review regularly the efficiency of handling cases of unauthorised alterations.

Government's response

642. HD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

643. HD is reviewing and revising the internal instruction for handling unauthorised alterations in public rental flats with a view to drawing up more concise and clearer guidelines. Training to frontline staff will be provided after finalising the said instruction.

Housing Department

Case No. 2015/0786A – Failing to monitor the repair works carried out by its contractor and to reply to the complainant in writing

Background

644. The complainant complained against the Housing Department (HD) –

(a) for failing to follow up and monitor properly the repair works carried out by its contractor as regards the seepage in his flat; and

(b) for failing to give a written reply to his complaint.

645. The complainant resided in a public rental housing unit where there had long been seepage on the wall(s) of its toilet. After the problem was reported to HD, the maintenance contractor had carried out repairs in the flat numerous times but the seepage problem remained unresolved. While carrying out repair work on 25 June 2014, the contractor committed a major blunder. The drain pipe in the toilet, which was dismantled temporarily, was not sealed up properly. As a result, the flat was permeated with the noxious odour exuding from the drain pipe. The complainant considered that the contractor had done a sloppy job and HD did not follow up or monitor the contractor's work properly.

646. With respect to the contractor's aforementioned blunder, the complainant made a complaint by calling the contractor, the Property Management Agent (PMA) of the housing estate concerned and the Housing Authority Hotline on 26 June 2014. He also lodged a written complaint with a Deputy Director of HD by post and email on 22 July. Given no written reply from HD, the complainant wrote another email to the Deputy Director on 6 October to request a written reply. However, there was still no reply from HD.

647. The complainant felt aggrieved and therefore filed a complaint with the Office of The Ombudsman (the Office) in late February 2015.

The Ombudsman's observations

648. Regarding the seepage problem, the Office considered that even though HD and its contractor had taken timely follow-up actions in response to the situation, the contractor's workers indeed were negligent for not sealing up properly the opening of the pipe after dismantling the trap of the pipe. Besides, it was improper that the staff members of the HD's maintenance office or the PMA, who were responsible for monitoring the works, failed to notice the omission by the workers.

649. In the letter to the Deputy Director of HD on 22 July 2014, in addition to expressing his discontent about the repair works, the complainant also questioned how HD monitored the performance of its contractors and the PMAs. In the last paragraph of the letter, the complainant "strongly requests the Deputy Director to answer each question raised in this letter". The Office considered that besides passing on the complaint to the PMA for follow-up actions, HD itself should have replied to the complainant in response to the questions on monitoring. HD at least had to make sure that the PMA would provide a written reply to the complainant if it was not going to do so itself, and indicate clearly that it had given consent to the PMA to reply in its stead.

650. There were only three lines in the complainant's email dated 6 October to the Deputy Director of HD, which explicitly stated that he "has not received any reply for more than two months ……strongly requests again the Deputy Director to provide a written reply within 14 days….." However, upon receiving the complainant's email dated 6 October, HD continued to pass on the complaint to the PMA for follow-up, showing no awareness of the need to either provide a written reply to the complainant or monitor if the PMA had given a timely reply to the complainant. The Office was of the view that the staff member who handled the complaint was undeniably not vigilant enough.

651. Overall speaking, The Ombudsman considered the complaint substantiated, and recommended HD to take effective measures to remind its staff members concerned to handle public complaints diligently. HD staff should ensure that the issues of complaints are handled properly and timely replies are provided to ease the concerns of complainants.

Government's response

652. HD accepted The Ombudsman's recommendation and has taken the following follow-up actions.

653. In handling in-flat repairs involving sanitary facilities, HD will require contractors to carry out all the necessary remedial works properly. They will also be required to take photos upon finishing the works at the end of the day for record purpose and to hand them to staff members of HD's relevant maintenance office to enable effective monitoring of the work of the contractors.

654. Apart from examining the cases in the computer system before passing them on to the PMAs, staff members of HD's Property Service Administration Unit who are responsible for handling complaints will pay additional attention to identify cases of repeated complaints, and report complex or contentious cases to their supervisors so as to ensure the cases are handled properly.

Housing Department

Case No. 2015/0942(I) – Unreasonably refusing the complainant's request for records/operational guidelines/CCTV footage, etc. concerning the management of the public housing shopping centre where the complainant had an accident

Background

655. On 10 March 2015, the Office of The Ombudsman (the Office) received a written complaint from the complainant against the Housing Department (HD). He allegedly sustained an injury and suffered bone fractures from a slip when walking past the public housing estate shopping centre (the centre) on 8 March 2014. He then lodged a claim for compensation with HD. He was dissatisfied that HD refused his request for the following information on the grounds of "internal documents" –

(a) management records of the shopping centre from 1 to 15 March 2014 (including management log of the centre, storage locations of carpets and anti-slip equipment as well as their access and use records, duty rosters of staff and cleaners' reports, etc.);

(b) operation manual (precautionary measures and arrangements for inclement weather, process of handling complaints and compensation claims, daily operation and maintenance of CCTV system, etc.);

(c) CCTV footage, CCTV maintenance records, name of maintenance company and date of commencement of service, areas affected due to the CCTV hard drive failure, etc.;

(d) maintenance records relating to the tactile guide paths and leakage from the top of the wooden entrance door of the centre; and

(e) information on accident handling, tender requirements for services, regular/spot checks and service assessment results regarding the management company.

The Ombudsman's observations

656. The Office considered that HD displayed the following inadequacies in handling this case –

(a) the Department did not have sufficient justification to refuse the information request of the complainant, neither did it explain to the complainant the reasons for the refusal in accordance with the Code on Access to Information (the Code) and the Guidelines on Interpretation and Application (the Guidelines);

(b) its refusal to disclose information on the grounds of "internal documents" was not in line with the provisions under Part 2 of the Code, which indicated its staff was not familiar with the rules and requirements of the Code;

(c) HD failed to meet the target response time under the Code or provide the complainant with channels of review and complaint;

(d) HD had a duty to consider the complainant's requests one by one in detail, and should not blindly follow the advice/recommendation of the insurer/loss adjuster; and

(e) HD and the management company had not properly maintained the CCTV system of the centre. They should learn from this experience and explore ways to improve the alert function of the CCTV system to avoid recurrence of similar problems in the future.

657. The Ombudsman considered the complaint substantiated and recommended HD to –

(a) consider reviewing the complainant's requests one by one and provide the complainant with the information requested, unless it has a justifiable reason not to do so as provided in Part 2 of the Code;

(b) strengthen staff training and make sure that its officers adhere strictly to the Code and the Guidelines; and

(c) explore ways to improve the alert function of the CCTV system of the centre so as to avoid future failure in video recording.

Government's response

658. HD accepted The Ombudsman's recommendations and has taken the following follow-up actions –

(a) HD had reviewed the complainant's requests for information and given a reply to the complainant;

(b) HD regularly circulated the Code and the Guidelines to its staff. Training courses and workshops on the Code were also organised from time to time. To raise staff awareness of the Code, HD has arranged training courses to share this case with frontline staff; and

(c) a fault alert function was added to the hard drive of the CCTV system to ensure that duty officers and maintenance contractor were promptly alerted to take follow-up actions. Meanwhile, the maintenance contractor has arranged training sessions to help relevant staff to review the operating procedures of the CCTV system.

Housing Department

Case No. 2015/1633 – (1) Providing a form with unclear instructions; and (2) Unreasonably refusing to meet the complainant to handle his complaint promptly

Background

659. The complainant visited the Customer Service Centre of the Housing Department (HD) to hand in an Amendment Form for his friend who was applying for public rental housing (PRH). To his dismay, the receptionist told him that the applicant was also required to provide a written statement regarding addition or deletion of family members. The complainant was dissatisfied that such a requirement was never mentioned in the Amendment Form, and the statement was not available for download from HD's website either. He reckoned that such an omission would inevitably prolong the PRH application process.

660. The complainant alleged that he immediately requested an interview with HD's duty officer to lodge a complaint. After waiting for one hour, he was told that he should first obtain a tag and wait for his turn. He then called the police for assistance. However, the duty officer still refused to meet him straight away, and insisted that he should get a tag first.

The Ombudsman's observations

Allegation (a)

661. The Office of The Ombudsman (the Office) considered the Amendment Form indeed lacking in clarity. While it noted under the section "Deletion of Family Member" that a written statement should be attached to the form, no similar instructions were found under "Addition of Family Member". This could create a wrong impression that no statement would be required in the latter situation.

Allegation (b)

662. Since the Customer Service Centre receives a large number of visitors every day, for efficient use of resources and fairness to all waiting visitors, it is reasonable for HD officers to require the complainant to follow established procedures in obtaining a tag and waiting to be interviewed. As regards the complainant's allegation that he had been kept waiting for an hour without being told to get a tag first, the Office could not ascertain what actually happened when the complainant's account of the incident was different from that given by HD officers.

663. The Ombudsman considered this complaint partially substantiated, and recommended HD to review the form concerned and revise it as soon as possible so as to provide clearer instructions to applicants.

Government's response

664. HD accepted The Ombudsman's recommendation and has already reviewed the "Amendment Form" (HD10) that was in use. To provide forms with clearer instructions to applicants, HD split Form HD10 into three sets (i.e. HD10, HD10-1 and HD10-2) for different kinds of amendments. Form HD10 is intended for straightforward amendments (e.g. concerning address, telephone number or choice of district, etc.) that generally do not require any supporting document. Forms HD10-1 and HD10-2 are designed for handling application for addition and deletion of family members respectively. These cases are generally more complicated and the supporting documents required to be submitted by applicants will differ depending on circumstances. Nevertheless, HD has listed on the forms the supporting documents generally required under various situations for the reference of applicants. Furthermore, a remark was specifically added on the forms to remind applicants that they may be required to submit other relevant supporting documents and undertakings to HD for the processing of their applications. For the convenience of the applicants, the three forms mentioned above had been uploaded to the HD website (www.housingauthority.gov.hk) on 15 December 2015.

665. In its letter dated 31 March 2016 to HD, the Office said it was satisfied that HD had accepted and implemented The Ombudsman's recommendation, and had therefore concluded the follow-up action on this case.

Housing Department

Case No. 2015/1810 – Failing to tackle the problems of water dripping from and unauthorised installations of air-conditioners in a public housing estate

Background

666. The complainant complained to the Office of The Ombudsman (the Office) against the Housing Department (HD) for failing to tackle the problems of water dripping and unauthorised installation of air-conditioners in a public housing estate.

667. The complainant alleged that the problem of water dripping from air-conditioners in a public housing estate had remained unresolved for a long period of time. The dripping problem, which had become rampant since March 2015, underlined the incompetence of HD and the outsourced service provider as they failed to discharge their duties in a conscientious manner to follow up the situation.

668. The complainant produced several photographs to explain that the split-type air-conditioner above the outsourced management company's office in a certain block in the estate had projected more than 75 mm beyond the external wall, a irregularity to which the complainant alleged that HD and the outsourced management company had turned a blind eye. Also, he pointed out that the installation of split-type air-conditioners to external walls without prior application to HD and submission of plans by registered persons to the Buildings Department was illegal. Looking from the outside, the complainant found that the air-conditioners in the estate differed in positions and dimensions of their supporting structures/ frames and in alignment of pipes. He doubted whether HD had properly monitored the specifications and safety of the installation of split-type air-conditioners by public housing estate tenants.

The Ombudsman's observations

669. As regards the problem of water dripping from air-conditioners, after studying documents provided by HD on the Marking Scheme, relevant inspection records and follow-up records on dripping problems, and having conducted a joint observation with HD and the outsourced service provider, the Office considered that both the Department and the service provider had taken appropriate follow-up actions.

670. In respect of the installation of air-conditioners, HD requires tenants to submit prior applications. It has also formulated a set of guidelines for reference by tenants and minor works contractors engaged to carry out the works, stipulating that installation works must meet legal and safety requirements. As for the suspected case of unauthorised works, HD had deployed staff to carry out inspection, and confirmed that the installation were safe and did not violate any requirement.

671. HD had established policies and mechanisms to handle the problem of water dripping from air-conditioners. There were also appropriate guidelines for the installation of air-conditioners for public housing tenants to follow. As far as this case was concerned, HD had also taken appropriate actions to follow up on the allegedly unauthorised installation of split-type air-conditioners. In conclusion, The Ombudsman considered that there was no evidence of maladministration on the part of HD and thus this complaint was unsubstantiated. The Ombudsman recommended HD to –

(a) continue to strengthen inspection and require tenants to rectify problems of dripping and unauthorised installation promptly if they are found; and

(b) enhance publicity and education initiatives by, for example, distributing leaflets to remind tenants to inspect their air-conditioners before summer to prevent dripping and to ensure that the air-conditioners are safe to use.

Government's response

672. HD accepted The Ombudsman's recommendations and has taken the following follow-up actions below.

673. The Estate Office (EO) conducts daily inspection in each and every block of the estate. Whenever an air-conditioner is found to show signs of dripping, investigation will immediately follow to trace its source. On unauthorised installation of air-conditioners, new tenants are reminded of the installation requirements and are given an installation guide for reference during intake. EO has also deployed security guards to regularly inspect air-conditioners already installed. If irregularities are found, swift rectification on the part of tenants is required. During monthly review of contractors' performance, staff of Property Service Administration Units of HD will check the inspection records of EO to ensure that cases in relation to dripping and unauthorised installation of air-conditioners are followed up properly.

674. To enhance publicity and education initiatives, EO will, in addition to posting notices at the lobby of each block alerting tenants to the risk of point allotting due to air-conditioner dripping under the Marking Scheme, send a letter to each household before summer highlighting the importance of proper maintenance of air-conditioners to avoid dripping. EO also plans to promote the message of proper maintenance and installation of air-conditioners at New Year Carnival to be held in the estate.

Housing Department

Case No. 2015/2091 – Unreasonably requesting the complainant to vacate his public housing unit after he got a divorce

Background

675. The complainant alleged that the Housing Department (HD) unreasonably recovered his public housing unit.

676. The complainant originally lived in a public housing unit (Unit A) with his ex-wife and son. Following the conclusion of the divorce proceedings in November 2014, he applied to HD to delete his ex-wife and son from the tenancy in January 2015. On 22 January, HD notified the complainant in writing that his household was a "prioritised under-occupation" case because he lived by himself in a unit that was 33.07 square metres in size. As such, he would have to transfer to a smaller unit.

677. However, HD informed him in another letter on 7 May of the policy on housing arrangements for divorced couples. He was also advised to vacate and return the unit according to the policy, because his ex-wife had the custody of their son.

678. The complainant found HD negligent in handling the matter. Firstly, HD staff did not explain to him that the tenancy would be granted to the party having the custody of children when processing his application for deletion of occupants from the tenancy. Secondly, after the approval of his application, a letter was sent to him to inform him that he would be transferred to a unit of an appropriate size, giving him a reasonable expectation that he could continue to rent a public housing unit.

679. The complainant was of the view that it was unreasonable for HD to recover his unit in breach of procedural justice.

680. Feeling aggrieved, the complainant made a complaint to the Office of The Ombudsman (the Office) in late May 2015.

The Ombudsman's observations

681. The Office did not consider it inappropriate for HD to recover Unit A in accordance with the policy on housing arrangements for divorced couples. In fact, the complainant had already lodged an appeal against HD's decision following the established procedures. It was believed that the Appeal Panel would have a fair ruling.

682. However, the fact that the staff of both the Estate Office and District Tenancy Management Office (DTMO) failed to explain to the complainant the above policy upon receipt of his application for deletion of occupants showed their negligence in the matter. By regarding the household as "under-occupied", DTMO committed yet another mistake. Despite having noticed that the tenancy of the complainant's ex-wife in another public housing unit (Unit B) was converted to a normal tenancy on 20 March, DTMO still failed to contact the complainant to inform him of the policy. Sending a letter to the complainant as late as 7 May to inform him that his unit had to be recovered as yet another delay in follow-up action.

683. In May 2014, HD had already arranged for the complainant's ex-wife and son to move into Unit B under a conditional tenancy. Under these circumstances, the complainant and his ex-wife occupied two separate public housing units during the course of their divorce. To ensure the rational allocation of public housing resources, HD should have closely monitored the progress of the divorce proceedings to ensure that one of the units would be recovered once the proceedings were concluded. However, there was no information to suggest that HD had monitored the situation as such. Furthermore, with the deletion of the complainant's ex-wife from the tenancy in January 2015, HD became aware of the conclusion of the divorce proceedings and granted a normal tenancy for Unit B occupied by the complainant's ex-wife. Even then, HD had not taken any action to recover Unit A.

684. The Ombudsman considered the complaint unsubstantiated but other inadequacies found, and recommended HD to –

(a) establish a monitoring mechanism to keep a close watch on similar cases where divorcing couples are occupying two public housing units, with a view to ensuring rational allocation of public housing resources; and

(b) provide more training for staff to ensure that they are well-versed in the policy on housing arrangements for divorced couples.

Government's response

685. HD accepted The Ombudsman's recommendations and has taken the following follow-up actions –

(a) HD has established a mechanism to enhance monitoring of the progress of frontline staff in handling cases which involve simultaneous occupation of two units. The Support Services Section at the headquarters of HD sends emails to Regional Chief Managers and Assistant Directors on a regular basis to list out the cases in each district and the follow-up actions taken. Housing Managers are required to report their actions and progress to Senior Housing Managers, Regional Chief Managers and Assistant Directors, with a view to strengthening monitoring; and

(b) HD has further strengthened training for frontline staff by improving the materials for the Housing Management Training Course and seminars organised regularly, allowing them to have a clearer and deeper understanding of prevailing housing policies, including the policy on the housing arrangements for divorced couples in public housing flats and the relevant procedures and guidelines. It is hoped that their expertise, vigilance and skills for case handling will be enhanced.

Housing Department

Case No. 2015/2216 – Improper handling of the complainant's application for transfer to a bigger public housing unit

Background

686. The complainant complained against the Housing Department (HD) for unreasonably refusing to accept the diagnosis made by her doctor (i.e. her need to use a wheelchair). As a result, she was unable to transfer to a more spacious flat.

687. The complainant, who is over 70 years old, has mobility difficulty and requires the aid of a wheelchair. Having received the diagnosis certificate issued by her doctor, the complainant applied to HD in July 2014 for transferring to a more spacious flat which was more wheelchair-friendly. However, HD queried the doctor's assessment and repeatedly requested explanation from the doctor. Since the doctor maintained that the diagnosis was correct and refused to provide explanation, the complainant's application was rejected by HD.

The Ombudsman's observations

688. Due to the scarcity of housing resources, HD has the responsibility to ensure the optimal use and rational allocation of public housing resources. The Office of The Ombudsman (the Office) considered that HD was responsible to have requested further clarification on the doctor's assessment and observed the activities of the complainant when in doubt. Therefore, in the opinion of the Office, there was nothing improper for HD to initially refuse to accept the diagnosis made by the doctor regarding the complainant's need to use a wheelchair.

689. Nevertheless, there was marked discrepancies between HD's repeated observation on the complainant's activity conditions and the initial assessment made by the doctor concerned. In this connection, the Office was of the opinion that HD had failed to discharge its duty in a prudent manner by neither continuing the observation nor seeking professional advice from another doctor, when waiting for the next reply of the complainant's doctor. The Office considered that HD was somewhat "blinded" to the situation by simply accepting the assessment report by a doctor which was contrary to its observation.

690. This case revealed the working attitude of the HD frontline staff concerned in that they merely followed the procedures to close the case. The Office was of the opinion that HD should provide guidelines on the need for observation when tenants applied for transfer on health reasons (especially on ground of mobility difficulty) and on the handling methods when the results of observation did not tally with doctor's opinions. For example, whether to inform the doctor concerned of the observation of staff, or whether another doctor's professional advice should be sought to facilitate the frontline staff in handling these cases effectively.

691. On the other hand, except for the singleton applicants, normally public housing will be allocated to families in order to help the members of the public with genuine housing needs. Under the existing mechanism, although the complainant and her husband each occupying a flat suitable for one to two persons do not violate the existing rules, they do enjoy more housing resources than a couple in general. The Office opined that, given the scarcity of housing resources and the need to ensure the optimal use and rational allocation of public housing resources, HD should review the related policy and formulate proposals to deal with this situation.

692. The Ombudsman considered the complainant against HD unsubstantiated but other inadequacies found on the part of the Department. The Ombudsman recommended HD to –

(a) review the relevant guidelines with a view to considering the need for observation when tenants apply for transfer on health reasons, and provide more detailed guidelines on the handling methods when the results of observation do not tally with the doctor's opinions; and

(b) review the related housing policy with a view to considering the need to formulate measures to prevent two single tenants from enjoying more housing resources than a couple in general when they insist on living separately after marriage.

Government's response

693. HD accepted The Ombudsman's recommendation (a) and has taken the follow-up actions below.

694. According to the existing arrangement, when a tenant applies for transfer solely on medical grounds with no social factor involved, the estate staff will seek professional assessment/advice from medical institution directly. Under normal circumstances, HD will accept the doctor's assessment and recommendations when handling the cases. HD has general guidelines in place for estate management staff to make reference to when handling special transfer applications. However, if after observation, HD staff consider that clarification of an applicant's health condition is necessary or further information is required regarding the assessment, they will normally make enquiries with the doctor who makes the recommendation in order to vet the case properly to ensure rational allocation of public housing resources. To enable frontline staff to have a better grasp of the above handling direction, HD issued guidelines via email to frontline staff in June 2016 reminding them to follow the relevant procedures when dealing with the above situation. As each transfer case is unique, HD can only give indicative guidelines to avoid affecting the professional judgement of the staff by imposing overly rigid rules.

695. HD did not accept The Ombudsman's recommendation (b).

696. Regarding the issue of two single public rental housing (PRH) tenants choosing to live separately after marriage, this touches upon the policy of the Housing Authority (HA) on whether HA can make it compulsory for the couple to live together and recover one of their flats. When considering whether to formulate a new policy, HD has to take the relevant legislation into account. The legal advice obtained by HD at present is that if HA makes it compulsory for two single PRH tenants to live together after marriage and recover one of their two flats, it may constitute a violation of section 7(1)(a) "Discrimination against married, etc, persons" and section 29(2)(b) "Discrimination in disposal or management of premises" of the Sex Discrimination Ordinance, as well as section 5(a) and section 20(2)(b) "Discrimination in disposal or management of premises" of the Family Status Discrimination Ordinance. HD is still studying the legal aspect and will report to the Office when a final conclusion is made.

697. HD informed the Office of the above position on 28 April 2016.

Independent Commission Against Corruption

Case No. 2015/0238(I) – Unreasonably refusing to provide the complainant with information related to the investigation of her corruption report

Background

698. In October 2012, the complainant reported to the Independent Commission Against Corruption (ICAC) that she was a victim of an alleged corruption case involving a property transaction. Later on 27 November 2014, she wrote to ICAC requesting to obtain information related to the ICAC investigation of the case in question, but her request was refused by ICAC. The complainant then requested the ICAC to review its decision. After review, ICAC still refused to provide her with the information requested. The complainant was not satisfied with the outcome of the ICAC's review.

The Ombudsman's observations

699. The Code on Access to Information (the Code) is applicable to ICAC, which is required to handle requests for information made by members of the public in accordance with the Code. The reasons given by ICAC for refusing to disclose information in this case are based on paragraphs 2.6(e) and 2.14(a) of the Code. The relevant Guidelines on Interpretation and Application (Guidelines) of the Code provide that –

Paragraph 2.6(e) of the Code

(a) the effective investigation of both criminal and regulatory offences will ordinarily require that the investigation and methods of investigation are kept secret from the suspect and from other persons. This means that information relating to both ongoing and completed investigations should ordinarily be kept confidential (Guidelines para. 2.6.17);

(b) this provision does not require that there should be a probability that disclosure would be prejudicial to a law enforcement process or facilitate the commission of an offence. It will be sufficient for these purposes if it is more likely than not that prejudice would result from disclosure of the information sought (Guidelines para. 2.6.19);

Paragraph 2.14(a) of the Code

(c) care must always be taken in cases which involve third party information. Information is given to the Government in many different circumstances by persons, corporations and organisations on the explicit or implicit basis that such information, including its source, will be kept confidential (Guidelines para. 2.14.3); and

(d) the duty to hold information in confidence will often be implied where information is supplied or prepared for a particular purpose or sought by the Government, as opposed to where it is volunteered (Guidelines para. 2.14.7).

700. Based on the above, the Office of The Ombudsman (the Office) considered the reasons invoked by ICAC for refusing the complainant's request acceptable.

701. However, the Office noted that, in refusing the complainant's request, ICAC only stated in its reply that it "is not in possession of any information required to be disclosed to her under the Code". The Office understood that in order to avoid confirming the existence, or otherwise, of certain information relating to the investigation, ICAC did not advise the complainant the specific grounds for refusing to disclose individual pieces of requested information.

702. Although what ICAC did was not unreasonable, its reply to the complainant might be incomprehensible and baffling. The Office considered it appropriate that ICAC should have at least explained to the complainant that as a guiding principle, ICAC would generally not disclose information relating to an investigation.

703. The Ombudsman considered the complaint unsubstantiated, but other inadequacies were found on the part of ICAC. The Ombudsman recommended that ICAC should inform the person making a request for information that as a guiding principle, ICAC would not disclose information relating to an investigation.

Government's response

704. The ICAC accepted The Ombudsman's recommendation. In future, the ICAC would inform the person making a request for information that as a guiding principle, ICAC would not disclose information relating to an investigation.

Lands Department

Case No. 2015/1971(I) – Refusing to disclose the name of the Rural Committee chairman who agreed to a certain decision

Background

705. A property developer had undertaken to build new fisherman houses for resettling residents affected by a development project in the area where the complainant lived (the resettlement scheme). In 2007, Lands Department (LandsD) and the developer entered into a supplemental agreement, under which the number of new fisherman houses to be built was to be reduced. In 2013, the complainant made an application under the Code on Access to Information (the Code), requesting LandsD to disclose the name of the Rural Committee (RC) Chairman who had consented to such reduction.

706. The complainant was dissatisfied that LandsD had merely provided him with a copy of the letters from two RC Chairmen indicating that they had no objection to the resettlement scheme, and in one of the letters the Chairman's personal data had been obliterated.

707. Lands D explained that in 2006, two RC Chairmen (Mr A and Mr B) had separately issued letters (Letter 1 and Letter 2) to LandsD to confirm that they had no objection to the sites and area proposed for the resettlement scheme. LandsD thought that as the two letters involved third party information, LandsD had to seek the consent of the two Chairmen before releasing them to the complainant.

708. After obtaining Mr A's consent, LandsD provided the complainant with a copy of Letter 1. Nevertheless, Mr B had already passed away. LandsD reckoned that Mr B had issued Letter 2 in a non-official capacity after his tenure as RC Chairman. Since Mr B had not authorised LandsD to release the letter, nor did Mr B's relative agree to provide the complainant with Letter 2, disclosure of such information relating to Mr B might infringe upon the privacy of his relative. Accordingly, based on the reasons stated in paragraphs 2.14(a) and 2.15 of the Code (i.e. third party information and privacy of the individual), LandsD decided to give the complainant a copy of Letter 2 but with Mr B's personal data obliterated.

The Ombudsman's observations

709. The Office of The Ombudsman (the Office) noted that Mr A had stated in Letter 1 that during his tenure as Chairman from 1995 to 1999, he had raised no objection to the resettlement scheme. However, the fact was that not before 2002 did Lands D decide on the eligibility criteria for accommodation in the new fisherman houses, and that was what led to the reduction in the number of new fisherman houses afterwards. This showed that the reduction proposal had yet to be made during Mr A's tenure as Chairman, and Letter 1 was actually not the information the complainant wanted.

710. As for Letter 2, while it was issued by Mr B after he had left office, he stated in the letter that during his tenure he and the RC had no objection to the resettlement scheme, and he signed the letter in the capacity of former RC Chairman. In other words, Mr B was giving the opinion of the then RC in his official, not private, capacity. Furthermore, since receiving Letter 2 from Mr B, LandsD had not explicitly or implicitly indicated to Mr B that the RC's opinion would not be disclosed. The Office's view was that Lands D should not have refused to disclose Mr B's name on grounds of "third party information".

711. Moreover, Letter 2 contained no information about Mr B's family status or relatives. The Office found LandsD's argument far-fetched that disclosure of Letter 2 might infringe upon the privacy of his relative. LandsD should really have provided the complainant with a copy of Letter 2 in full without keeping Mr B's name confidential.

712. The Ombudsman considered the complaint substantiated and urged LandsD to –

(a) provide the complainant with a copy of Letter 2 in full; and

(b) provide training for staff to ensure that they clearly understand and comply with the provisions of the Code.

Government's response

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

(a) the District Lands Office concerned provided the complainant with a copy of Letter 2 in its entirety on 21 December 2015; and

(b) LandsD's Training Section has been holding thematic talks on the Code roughly every two years to help officers better understand the Code. The latest thematic talks were held in October and November 2015, and the next round of talks will be held in 2017. After receiving the Office's investigation report, LandsD has circulated the summary of the report to all staff. LandsD will incorporate this case in the training materials for in-class analysis in future talks, with a view to strengthening staff knowledge of the Code and its Guidelines on Interpretation and Application.

Lands Department and Buildings Department

Case No. 2015/3355A – Failing to take enforcement action against the unauthorised structures of some squatter huts

Case No. 2015/3355B – Failing to take enforcement action against unauthorised building works

Background

714. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD) and Buildings Department (BD) on 18 August 2015.

715. According to the complainant, she complained to LandsD via 1823 in May 2007 about the illegal reconstruction of a squatter structure at Lot A. In its written reply to the complainant in June the same year, the concerned District Lands Office (DLO) of LandsD advised that –

(a) its inspection revealed that two squatter huts (collectively referred to as "the structures") were being reconstructed at the site, which was a private lot. DLO did not have any records of the structures and no approval had been given for the reconstruction. DLO was checking with the Squatter Control Office (SCO) concerned, which was also under LandsD, to ascertain whether the structures had been given squatter survey numbers; and

(b) the case had been referred to BD for follow-up action.

716. Since then, the complainant had not heard any further from LandsD or BD, nor had any control action been taken by the government departments against the structures. The structures were eventually converted into a concrete structure.

717. The complainant criticised LandsD and BD for delayed enforcement action against the structures.

The Ombudsman's observations

718. As regards LandsD, if it was not due to SCO's erroneous description in 2007 that there had been no survey records of the lot, SCO could have taken immediate enforcement action against the structures under the squatter control policy, instead of having DLO followed up the case later in August 2013. From this perspective, there was indeed delay in LandsD's enforcement action against the structures.

719. On the other hand, SCO, after issuing a warning letter to the owners, repeatedly allowed them to extend the deadline for rectifying the irregularities for as long as a year. During that time, the owners did not take any concrete action to commence rectification works apart from making vague promises about rectifying the non-compliance with the survey records as soon as possible. Given such a lax approach, SCO's enforcement actions were not only ineffective, but also undermined the credibility of the Government in land management and lease enforcement.

720. In conclusion, The Ombudsman considered the complaint against LandsD substantiated. The Office noted that after commencement of its investigation, DLO and SCO had stepped up their efforts in enforcement by taking decisive actions to cancel the squatter survey numbers and impose an encumbrance. The structures had been extended into an adjoined structure (the adjoined structure). It was eventually demolished by the owners.

721. As regards BD, the Office considered, after perusing the relevant guidelines and records, that the Department had indeed followed up the case of the adjoined structure in a timely manner. BD was compliant in principle with the relevant guidelines for not taking enforcement action against those structures while referring the case to LandsD for follow-up action. As such, The Ombudsman considered the complaint against BD unsubstantiated.

722. The Ombudsman urged DLO and SCO to learn from this case and to take timely and decisive enforcement actions against irregularities.

Government's response

723. LandsD accepted The Ombudsman's recommendation and has reminded DLO and SCO to take timely and decisive enforcement actions against irregularities of surveyed squatter structures.

Lands Department and Leisure and Cultural Services Department

Case No. 2015/3144A&B – Failing to follow up the problem of illegal shelters erected near a beach by some barbecue site operators

Background

724. Back in August 2012, the complainant complained to the local District Office about some illegal structures erected on a beach by some barbecue site operators. The case was referred to the Lands Department (LandsD) and Leisure and Cultural Services Department (LCSD) for action. However, both departments denied responsibility for managing the area in question (the Area). As at November 2014, the two departments were still deliberating the issue. The complainant thus lodged a complaint with the Office of The Ombudsman (the Office) against them for failing to follow up his complaint, as a result of which the structures continued to exist.

The Ombudsman's observations

725. The Office noted that since 2003, LandsD and LCSD had been discussing the question of management responsibility for the Area but no consensus was reached. LandsD insisted that the management responsibility for the Area should rest with LCSD because the records showed that the Area had been allocated to the then Urban Services Department (the predecessor of LCSD) decades ago. However, LCSD argued that the land allocation process was incomplete and so the management responsibility for the Area should rest with LandsD, which is responsible for managing all unallocated government land. The result was that no enforcement action against the illegal structures had been taken by either department.

726. LCSD further explained that even if the Area had been allocated to it, it could not have taken enforcement action as it had no such statutory authority. Subsequently, LandsD indicated that it was prepared to delegate its relevant statutory power to LCSD for tackling the problem.

727. The crux of the matter was that LandsD does not have management responsibility for allocated government land while LCSD all along had no statutory power to take enforcement action against the illegal structures in the Area. Both departments had a valid reason not to take enforcement action.

728. Based on the above, The Ombudsman considered the complaint unsubstantiated. However, the Area had been unlawfully occupied for more than ten years, which was breeding contempt for the Government's enforcement authority. The Ombudsman, therefore, recommended that LandsD and LCSD take the matter to higher authorities in the Government for a pragmatic solution to the problem as soon as possible.

Government's response

729. LandsD and LCSD accepted The Ombudsman's recommendation and have taken the following actions –

(a) LandsD had communicated with LCSD regarding the procedure for the delegation of power under the Land (Miscellaneous Provisions) Ordinance;

(b) LCSD had applied to the Director of Lands (DL) for the delegation of power under the Land (Miscellaneous Provisions) Ordinance to enable it to take enforcement action against the unlawful occupations of the Area;

(c) DL had given a blanket approval for delegation of power to LCSD to deal with all cases of unlawful occupation within areas under LCSD's purview; and

(d) LCSD had served verbal advice to the occupants and asked them to cease occupation of the government land concerned. LCSD would join hands with LandsD to take relevant enforcement action.

Lands Department and Transport Department

Case No. 2015/0324A&B – Failing to follow up properly the problems of illegal occupation or obstruction of metered parking spaces by two garages and vehicles crossing on the pavement in front of the garages

Background

730. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD) and the Transport Department (TD) on 23 January 2015.

731. According to the complainant, he complained to 1823 in mid-2014 that two garages (the garages) on the ground floor of a building (Building A) had, over the years, been illegally occupying or obstructing the metered parking spaces in front of the premises, so that vehicles could drive through the pavement (the pavement) into and out of the garages, and that the garages even carried out repair works on vehicles in the metered parking spaces. 1823 referred the complaint to LandsD for follow-up action. LandsD subsequently informed the complainant that it would refer the case to TD to arrange the installation of metal railings by the pavement, so as to prevent vehicles from driving into and out of the garages through the metered parking spaces and the pavement in front of the premises.

732. In January 2015, 1823 texted a reply to the complainant suggesting it was suspected that the vehicular ingress and egress points of the garages had breached the lease condition and the case was being followed up by the relevant department. Nonetheless, TD's inspections revealed that the pavement and the parking spaces in front of the garages were properly used.

733. LandsD informed the complainant on 9 February that a notice had been posted at the location in question requiring the persons concerned to stop breaching the lease condition whereas TD would follow up the installation of metal railings.

734. As the situation persisted and no metal railing was installed, the complainant accused LandsD and TD of failing to actively follow up his report and hence encouraging the persistent irregularity.

The Ombudsman's observations

735. The Office took the view that the crux of the matter lies in whether vehicles are allowed to access the lot where the garages are located under the lease conditions. If so, it is fundamentally impossible for TD to arbitrarily install metal railings or poles on the pavement in front of the garages in an attempt to impede vehicular access to and from the garages, which will hurt the interests to which the owner is entitled under the lease conditions. Even if vehicular access to and from the garages poses a risk to pedestrians, TD can only consider other safety measures. On the contrary, if vehicular access is not permitted under the lease conditions, the District Lands Office concerned (DLO) of LandsD should consider taking lease enforcement action against the owner. It is thus primarily the responsibility of DLO to examine the relevant conditions of the lease.

736. However, DLO, having conducted inspections in the light of the report made by the complainant, came to the conclusion that the case involved "the misuse of a public pavement and thus should be referred to TD/Highways Department for follow-up action" without any regard to the lease conditions, thereby attempting to pass the problem to other departments for follow-up action. Legal advice was sought only when TD asked DLO whether the use of the pavement as a vehicular access was permitted under the lease conditions. By that time, two months had passed since the report was made.

737. The Office opined that the garages had clearly breached the relevant lease condition, i.e. the grantees of the lot where the garages were located had no rights to allow vehicles to drive into and out of the lot. Given the relevant standard of proof had been set out in the legal advice, DLO should have no difficulty gathering evidence (i.e. vehicles entering/leaving the garages) of the garages' breach of the lease condition if active follow-up action was taken. Yet DLO did not take any immediate and specific follow-up action on the case or on the owner's breach of the lease condition. On the contrary, DLO kept urging TD to consider installing railings along the pavement so that vehicles could not access the garages via the pavement. It was not until more than a month later that DLO issued the warning letter requiring the owner of the garages to purge the suspected breach of the relevant lease condition.

738. DLO had failed to handle the complainant's report in active exercise of its powers within its purview. Therefore, The Ombudsman considered the complaint against LandsD substantiated.

739. As regards TD, the Department had followed up the report of the complainant, including making enquiries to LandsD on key issues of the matter. In view of this, The Ombudsman considered the complainant's complaint against TD unsubstantiated.

740. The Ombudsman urged DLO to actively follow up the gathering of evidence as soon as possible, and take decisive lease enforcement action so that the breach of lease conditions would not be accepted as the norm.

Government's response

741. LandsD accepted The Ombudsman's recommendation. DLO issued a warning letter on 2 February 2015, requesting the owner of the garages to rectify the lease breach within a month of vehicles entering and leaving the garages via the pavement. Otherwise, DLO would register a copy of the warning letter at the Land Registry (commonly known as "imposing an encumbrance").

742. One of the two garages on which DLO had "imposed an encumbrance" had already ceased operation and moved out of Building A. As the breach of lease was rectified, DLO had registered a copy of the cancellation letter at the Land Registry.

743. As for the other garage, the business is still in operation. DLO conducted multiple inspections but was unable to gather sufficient evidence to proceed with further lease enforcement action. DLO would closely monitor the said garage and take lease enforcement action if evidence of any breach of lease conditions is available.

Leisure and Cultural Services Department

Case No. 2015/1410 – Unreasonably prohibiting the complainant from taking photo of reference materials in a public library

Background

744. When reading some reference books in a public library under the Leisure and Cultural Services Department (LCSD), the complainant used his smart phone to photograph a few pages for his academic research. However, the staff stopped him on the grounds that photography is not allowed in the library, and advised him to use the photocopiers in the library or copy the information by hand.

745. The complainant alleged that LCSD's regulation was unreasonable, because he had not caused any nuisance to other readers in photographing the materials, nor was he in breach of the Copyright Ordinance (CO). Moreover, taking photographs was a more efficient and environmentally friendly way of reproduction of materials than photocopying or hand copying.

The Ombudsman's observations

746. The complainant argued that taking photographs of just a few pages would not cause nuisance or violate the CO. The Office of The Ombudsman (the Office) accepted that his argument might stand in isolated cases. Yet it should be noted that LCSD staff cannot possibly ascertain the intent of each and every reader, nor are they empowered to inspect the data stored in readers' smart phones or photographic devices. They have no means to ensure that all readers will only photograph a small portion of materials, and will not transmit the data via their smart phones. Therefore, the Office considered LCSD reasonable in imposing a ban across the board on photography in public libraries for effective control of nuisance or copyright infringement behaviour.

747. The Office noticed that the wording in section 42(d) of the Libraries Regulation (LR) seemed to cover only film photography. As the legislation was enacted years ago, equipment for photographing without films, such as smart phones or digital cameras, was non-existent then. The Office urged LCSD to keep abreast with modern technology and consider amending the relevant provision.

748. The Ombudsman considered the complaint unsubstantiated, but recommended LCSD to review and consider amending LR as soon as possible to provide a more solid legal basis for prohibiting photography in public libraries.

Government's response

749. LCSD accepted The Ombudsman's recommendation and is currently exploring amendment to the LR in consultation with the Home Affairs Bureau. Before completion of the amendment exercise, LCSD will continue to enforce relevant provisions in the LR to request library users to refrain from taking photos in public libraries so as to prevent possible nuisance caused to others or copyright infringement of library materials.

Leisure and Cultural Services Department

Case No. 2015/3502(I) – Refusing to provide the tree inspection report of a fallen tree on grounds of "internal documents", breaching the Code on Access to Information

Background

750. The complainant was dissatisfied with the refusal of the Leisure and Cultural Services Department (LCSD) to provide the tree inspection reports on the dangerous trees in front of a church and a fallen tree on a street on the grounds that the related information was classified as "internal documents", in breach of the Code on Access to Information (the Code).

The Ombudsman's observations

751. The Office of The Ombudsman (the Office) found the following deficiencies on the part of LCSD in handling this case –

(a) its refusal to release information was inappropriate and not well justified;

(b) it failed to meet the target response time specified in the Code or inform the complainant of the channels of review and complaint; and

(c) it failed to take reasonable remedial measures in regard of this case.

752. Overall speaking, the Office considered that LCSD had failed to properly consider the provisions of the Code in handling the complainant's requests for access to the tree inspection reports. The case also revealed that some LCSD staff members were not conversant with the fundamental spirit of the Code or the requirements of the Guidelines on Interpretation and Application for the Code (the Guidelines). The situation was unsatisfactory.

753. The Ombudsman considered the complaint substantiated, and recommended LCSD to –

(a) disclose the information requested by the complainant unless LCSD had reasonable justifications in line with the provisions in Part 2 of the Code to refuse the disclosure of information; and

(b) enhance training of staff to ensure their familiarity and strict compliance with the provisions of the Code and the Guidelines.

Government's response

754. LCSD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

755. As regards recommendation (a), LCSD has revised its arrangement for disclosure of tree inspection reports and put it into implementation since 20 October 2015. Relevant information in the risk assessment reports will be disclosed at the request of the public if such information does not involve confidential matters or concern public security or legal proceedings. Nevertheless, all personal data will be concealed for the protection of privacy. On 16 February 2016, LCSD had provided the complainant with a scanned copy of the "Form 1 - Tree Group Inspection Form" for 2014-15 covering the locations concerned.

756. Concerning recommendation (b), LCSD has since 11 December 2015 started to regularly circulate the Administrative Circular No. 3/2009 on the Code to Division/Section Heads and other relevant staff members to remind them to follow the Code when handling requests for information (including tree inspection reports). If the requested information cannot be provided, the reasons and justifications for the denial of the request and the channels of review and complaint should be stated clearly in the reply. The Department should also give its reply within the target response time specified in the Code. In addition, LCSD has included the relevant content of the Code in some of its training courses since January 2016 to familiarise its staff with the provisions of the Code and relevant guidelines.

Mandatory Provident Fund Schemes Authority

Case No. 2014/4847(R) – (1)Unreasonably insisting on providing only in transcript form the record of a telephone conversation;(2)Failing to handle a data access request in accordance with its established guidelines and code; and (3)Unreasonably refusing to accept verbally made complaint against the staff

Background

757. The complainant had lodged a complaint with the Mandatory Provident Fund Schemes Authority (MPFA) against a Mandatory Provident Fund trustee. Later, invoking MPFA's own Code on Access to Information, he asked for an audio recording of a telephone conversation between him and MPFA staff. MPFA replied that the record of the telephone conversation would have to be provided in the form of transcript, for which a fee of $240 for every six minutes of the conversation would be charged. The complainant considered that MPFA was trying to discourage him from requesting a record of the telephone conversation by charging him such a high fee.

758. MPFA explained that the requested audio recording would reveal the names and posts of two MPFA officers, which are "third party personal data" protected by the Personal Data (Privacy) Ordinance (PDPO). MPFA, therefore, must obtain the consent of the two officers before the requested recording could be released.

759. MPFA added that its offer of providing a record of the telephone conversation in transcript form was for easy redaction of the above-mentioned personal data. MPFA did not rule out the possibility of providing the record in other forms (such as audio recording). Nevertheless, MPFA admitted that it had mistakenly stated to the complainant that the record of the telephone conversation would have to be provided in the form of transcript.

The Ombudsman's observations

760. First and foremost, the Office of The Ombudsman (the Office) considered it unnecessary for MPFA to worry about unlawful disclosure of the aforementioned "third party personal data". The names and posts of the two officers concerned in fact were open information for identifying them as public officers, which should be distinguished from information relating to their private life. It was clear that the purpose of such disclosure was directly related to the purpose for which the information was to be used at the time of its collection. Under the PDPO, such disclosure would not constitute a contravention of the Data Protection Principles.

761. Moreover, what the complainant was asking for was an audio recording, not a transcript that would cost much more. MPFA should have given the complainant all the options, rather than maintaining that the record of the telephone conversation would have to be provided in the form of transcript. It was natural that the complainant thought that he had not been given a choice and MPFA had been trying to discourage him from requesting a record of the telephone conversation by charging him an exorbitant fee. Not until after the Office's intervention did MPFA offer him the option of audio recording, which should have been done right from the outset.

762. The Ombudsman considered this complaint partially substantiated and recommended –

(a) MPFA to instruct its staff to clearly apprise information requestors of all possible forms of provision of information, in order that similar misunderstandings could be avoided in future; and

(b) MPFA to remind its staff to handle verbal complaints flexibly. If the complainant firmly refuses to lodge a complaint in writing, staff should consider recording the complaint in writing on behalf of the complainant to align with MPFA's established practice of accepting verbal complaints.

Government's response

763. MPFA accepted The Ombudsman's recommendations and has taken appropriate follow-up actions.

764. As regards recommendation (a), after reviewing the case internally, MPFA further followed up the complainant's request for information by email on 15 April 2015, setting out the various forms in which the requested telephone recording could be provided and the rate of fees to be charged. As requested by the complainant, MPFA provided on 29 April 2015 the date and duration of various telephone conversations he had with MPFA's staff, and the rate of fees to be charged for providing the recordings.

765. Drawing lessons from this case, MPFA has instructed its staff to explain clearly all possible forms in which the requested information can be provided and the corresponding fees to be charged when responding to enquiries and information requests. When handling requests for information made pursuant to MPFA's Code on Access to Information, the responsible staff members will pay special attention to the need to explain all possible options of providing the requested information.

766. As regards recommendation (b), MPFA has reminded staff members to be flexible in handling verbal complaints from members of the public. Staff members responsible for manning the hotline and receiving the general public have also revisited MPFA's complaint handling policy and procedures during their regular working meetings, including providing appropriate assistance to members of the public who have difficulties in preparing written complaints.

Marine Department

Case No. 2014/4448 – (1)Impropriety in processing the complainant's disciplinary inquiry;(2)Failing to explain the decision of the disciplinary panel;(3)Unreasonably prolonging the complainant's period of suspension;(4)Delay in responding to his appeal; and (5)Improper procedures in amending the application requirements

Case No. 2014/4504(I) – Refusing to reveal the identity of non-official members of the disciplinary panel

Background

767. The complainant lodged a complaint to the Office of The Ombudsman (the Office) against the Marine Department (MD) about its impropriety in processing his disciplinary inquiry and its improper procedures in amending the application requirements of Authorised Surveyors.

768. On 5 July 2010, MD authorised the complainant to be a surveyor for the period until 4 July 2013, during which MD issued a total of 11 warning letters to the complainant in respect of his performance in vessel inspections. On 6 June 2013, MD informed the complainant in writing that it would convene a Disciplinary Panel (Panel) to consider whether any disciplinary action should be taken against him. On 9 June, the complainant requested to attend the meeting of the Panel but MD rejected his request in writing on the next day. On 20 June, the Panel decided in its meeting to suspend the complainant's credentials as Authorised Surveyor for six months and the complainant had to re-apply for authorisation after the suspension. The complainant then pleaded in writing. Nevertheless, the Panel upheld its decision after deliberation on 24 July and determined that the complainant's authorisation would be suspended for six months starting from the date of the decision.

769. The complainant expressed his grievance against the Panel's decision to MD. He lodged an appeal in writing to the Director of Marine (DM) on 25 July 2013 but did not receive any reply until 31 December 2013.

770. MD interviewed the complainant and gave him a written reply on 22 September and 6 October 2014 respectively, only to indicate that there was nothing it could do as the decision was made by the Panel. Also, the reply letter did not give an account of the specific mistakes of the complainant or any solid evidence for his "serious" mistakes.

771. In the interview on 22 September, the complainant indicated his wish to have access to the list of Panel members. However, since the non-official members of the Panel did not consent to disclosing their particulars, MD informed the complainant that members of the Panel did not consent to disclosing their names.

772. The complainant had to re-apply for authorisation as an authorised surveyor upon expiry of the six-month suspension period. However, MD issued a consultation paper on amendments to the "Qualifications of Authorised Surveyors" to the "Sub-committee on Survey Work of Local Vessels" (the Sub-committee) under the "Local Vessels Advisory Committee" (LVAC) on 24 December 2013. MD tabled a paper at the meeting of the Sub-committee on 31 December which stated, inter alia, "as survey works may be delegated by MD to authorised surveyors, they should have qualifications equivalent to those of the Surveyor of Ships of MD … The existing qualification requirements are set according to this principle but do not reflect exactly the philosophy behind. Moreover, the requirements do not include all of the relevant qualifications and training of the Surveyor of Ships of MD." To facilitate the assessment of applications for authorisation as an authorised surveyor, MD proposed amending the existing qualification requirements. The Sub-committee had no other comments on the paper and endorsed the proposal.

773. On 30 January 2014, MD, by way of paper circulation, invited members of LVAC to comment on its consultation paper on or before 12 February, or else it would assume that the paper was endorsed. MD stated in the paper that since the proposal was endorsed by the Sub-committee on 31 December 2013, it would be applicable to all applications received after that date.

774. In the light of the above, the complainant lodged the following complaints against MD –

(a) impropriety in assessing the complainant's professional misconduct – before his credentials as Surveyor was suspended, the complainant was not allowed to attend the Panel meeting to make representation, nor was he given the opportunity to make representation;

(b) the Panel failed to give a clear explanation on why the mistakes made by the complainant were regarded as serious/dereliction of duty;

(c) unreasonably prolonging the complainant's period of suspension - the authorisation of the complainant expired on 5 July 2013 and the suspension period lasted for six months. As the Panel did not complete its consideration of his appeal until 24 July, MD demanded that the complainant could only make another application six months later from that date, thus unreasonably deferring his eligible application date for almost three weeks de facto (from 5 July to 24 July);

(d) no response or delay in responding to his complaint/enquiry and not accounting for the incident;

(e) unreasonably amending the application requirements for surveyors – the admission of "corporate (professional) membership of a maritime institute acceptable to the Director of Marine" as a qualification should not be revoked and the complainant's working experience should not be disregarded;

(f) improper procedures in consulting the industry about amending the application requirements for surveyors – the consultation period was as short as 12 days (from 30 January to 12 February 2014) with a number of public holidays in between. The effective date of the new professional application requirements was unreasonably backdated to 1 January 2014;[1] and

[1] Allegations (e) and (f) were bundled by the Office in its Annual Report as "(5) Improper procedures in amending the application requirements".

(g) The complainant asked for the list of Panel members to check if they were qualified to make a proper determination. MD unreasonably rejected his request.

The Ombudsman's observations

775. Whether or not disciplinary action should be taken against the complainant was a professional judgment of the Panel, and the Office did not intend to comment on that. The Office would focus its investigation on whether there was any impropriety in MD's arrangements for the Panel meetings.

Allegation (a)

776. When responding to the enquiries from the Office, MD repeatedly stressed that the Panel's first (i.e. 20 June 2013) determination was not final. The final determination was only made by the Panel at its second meeting (24 July 2013). As such, the Panel did provide the complainant with ample opportunities to plead before making its final determination. However, MD did not issue a renewal notification to the complainant on 5 July 2013 (i.e. after the complainant's period of authorisation ended) without giving any reasons.

777. The Office considered that, in view of procedural justice, the Panel should provide the subject under deliberation (i.e. the complainant) with the opportunity to plead during the deliberation process and before the Panel formed its opinions on whether or not disciplinary action should be taken against the subject. In this regard, MD stated that the complainant had given written responses to each of the 11 warning letters issued by MD. Nevertheless, not every one of the 11 warning letters requested the complainant to explain or stated that the renewal of his authorisation period would be affected. As such, when the complainant gave his responses, he was not fully aware of the importance of the responses or the consequences. In addition, after receiving the complainant's written responses, MD did not inform him whether or not his explanations were accepted. Neither did MD provide the complainant with its views on the complainant's explanations that were rejected, the grounds for not accepting his explanations and the opportunity for further defence. Therefore, when MD decided to form the Panel, no assumption should be made that the complainant had been

given ample opportunities to respond to the subject matters of the 11 warning letters. When the complainant learnt that the Panel meeting would be held on 20 June 2013, he requested to give further responses and attend the meeting to express his views. His request was unreasonably denied by MD.

778. Furthermore, as shown in the written responses of the complainant submitted before 20 June and his subsequent appeal to DM, he did provide new justifications in his responses which were supported by some shipowners. However, the minutes of meetings of the Panel did not show whether or not or how the Panel had considered the complainant's responses and the information he provided. At the meeting of the Panel on 24 July, the complainant was still not invited to plead in person. Throughout the whole process, there was no information indicating that MD had consulted the Panel about the complainant's request for an interview.

779. According to the notice issued by MD to the complainant after the meeting on 24 July, if the complainant did not provide an explanation or evidence to the Panel for consideration after that meeting, the decision made in that meeting would take effect automatically. The decision was hence de facto a determination (albeit the complainant could rebut). Therefore, MD's denial of the complainant's attendance at that meeting was against procedural justice.

780. MD did not account for its decision on not extending the authorisation period of the complainant. If MD made that decision with reference to the Panel's determination on 20 June, and if the Panel's determination did not comply with procedural justice, it would be unfair to the complainant.

781. The Office considered that MD should notify the subject under disciplinary inquiry that he could request to attend the meetings of the Panel. In general, such request should be granted. Denial of attendance must be backed up with strong justification. In this case, the Panel's decision had far-reaching implications on the complainant as well as on his livelihood. The above showed that MD did not arrange the complainant to attend the Panel meetings without strong justifications nor explicit consultation with the Panel, which was unreasonable.

Allegation (b)

782. There are six categories of deficiency/non-compliance under paragraph 3.2 of the "Instruction to Competent Surveyors No. 1/2010" - Performance Monitoring System for Competent Surveyors" (the Instruction), and they are further classified as major or minor depending on severity. However, in its letter to the complainant dated 20 June 2013, MD only informed the complainant that the decision of the Panel was "substantiated" or "unsubstantiated", without giving any explanation. Regarding the determination on 24 July 2013, MD also did not explain why the Panel rejected the defence of the complainant. It was only after the complainant complained repeatedly afterwards that MD reluctantly provided the reasons for the Panel's "substantiated" decision in its reply on 6 October 2014. However, the reasons were brief and some reasons were merely the Panel's assertions that the explanations of the complainant were unjustifiable. No specific account has ever been given. The Office considered it equivalent to a judge giving his decision on a case without offering any judgment, which was extremely unfair to the complainant.

783. Being a surveyor subject to disciplinary action, the complainant indeed has the right and the need to know the grounds for the determination to facilitate his consideration of his defence and appeal, or to avoid making the same mistakes in future. MD also has the responsibility to inform the complainant of the grounds for the determination for the sake of fairness and justice.

Allegation (c)

784. The disciplinary action against the complainant was theoretically enforced on 24 July 2013, but the actual commencement date of the disciplinary action remained a big question. The complainant was required to provide a defence starting from 20 June. If he did not, the disciplinary action would take effect on 4 July. Between 20 June and 4 July (i.e. the expiry date of the authorisation period), if some of the survey works assigned to the complainant remained uncompleted, how could he be sure that MD would allow him to complete them? The fact that the complainant could no longer be a surveyor after 4 July 2013 showed that the disciplinary period was effectively prolonged for three weeks even though the Panel only came up with the determination on 24 July.

785. In the light of unfairness and doubts about the actual disciplinary period mentioned above, the Office considered that if MD opined that the disciplinary action should be enforced on or after 24 July 2013, it should have extended the authorisation period of the complainant to that date. Alternatively, MD could have backdated the commencement of the six-month disciplinary period to 4 July, which would be more reasonable.

Allegation (d)

786. The complainant appealed to DM on 25 July 2013, and it was not until 31 December that MD gave him a reply. Throughout a period of more than five months, MD neither contacted the complainant nor gave him any interim reply. The Office considered it a serious delay. Worse still, the disciplinary period would expire on 24 January 2014 and MD only gave a reply less than a month before that date. It would be meaningless even if MD had allowed the appeal.

787. The Office understood that the Lamma Incident had significantly increased the workload of MD, but that could not be the excuse for such serious delay in handling the appeal case which affected the livelihood of the complainant.

Allegations (e) and (f)

788. MD had explained why it was necessary to amend the application requirements of Authorised Surveyors and this was a professional judgment of MD.

789. Nevertheless, from an administrative point of view, did MD carry out practical and comprehensive consultation before implementing the amendments? At first sight, the amendments proposed by MD seemed to have the support of the industry, as they were examined by the Sub-committee and LVAC in accordance with the established procedures. Nevertheless, MD only consulted the committees representing the industry, among the members of which there was none who could represent the rights of those surveyors holding the qualifications that met the old requirements. Also, the paper in which MD proposed the amendments stated only the pros of amending the application requirements of Authorised Surveyors but did not mention that certain surveyors would be affected by such changes. As for whether the consultation period was sufficient, it could not be judged only by the number of days in the consultation period, but whether MD had elaborated to the Sub-committee and LVAC clearly the pros and cons and

the grounds of effecting the new application requirements retrospectively from 1 January 2014, as well as whether and how anybody would be affected by the new requirements.

790. In respect of amending the application requirements of Authorised Surveyors, the Office considered that the views of the people who might be affected by this decision could not be fully reflected if only the Sub-committee and LVAC were consulted, and the Sub-committee and LVAC did not seem to have been adequately informed when they gave their views. After all, the Sub-committee and LVAC were only consultative bodies and the final decision rested with MD. As such, MD should definitely be held responsible for making the final decision without undertaking a fair and just procedure.

Allegation (g)

791. According to the Guidelines on Interpretation and Application of the Code on Access to Information (the Code), a department should decide on the release or otherwise of requested information in accordance with the provisions of the Code, even if a complainant does not make specific reference to the Code in his request. MD also admitted that in refusing the request of the complainant, it should have pointed out to him the provision of the Code in the light of which his request was refused, and advise him of the review and complaint channels.

792. MD remarked that the complainant should have known the identities of the official members of the Panel. However, MD should not refuse the complainant's request on the assumption that he had already known such information. Instead, it should disclose the requested information in accordance with the principles of the Code.

793. Regarding the non-official members, the Office considered that since the Panel's decision cast such a significant impact on the complainant, it was reasonable for him to seek to know who made that decision. In fact, most Government-appointed panels or consultative bodies have disclosed their membership (including their non-official members). Moreover, according to paragraph 3.4 of the Instruction, the Panel may need to interview and/or cross-examine relevant persons. Members of the Panel hence should be prepared for the possible disclosure of their identities.

794. Furthermore, the Office found it unacceptable for MD to rely on paragraphs 2.15(a) and (b) of the Code for non-disclosure of information to the complainant. It is explicitly stated in paragraph 2.15(d) of the Code that information should not be withheld if the public interest in disclosure outweighs any harm or prejudice that would result. With regard to the handling of disciplinary matters relating to Authorised Surveyors, disclosing the information would enable people to assess whether those appointed by MD were fit and proper persons to discuss the complainant's case, thus embodying the principles of natural justice. It does not seem any harm or prejudice would result from the disclosure of such information, otherwise the requirement in paragraph 3.4 of the Instruction would not have been included. The Office therefore considered paragraph 2.15(d) of the Code applicable to the case of the complainant.

795. All in all, the Office considered it unjustified for MD to refuse the request of the complainant. MD should, at the time of appointing non-official members, make it clear to them that their identities would be disclosed.

796. The Ombudsman considered the complaint against MD substantiated, and recommended that MD should consider reviewing the operating mechanism of Panels in the following directions –

(a) to uphold the credibility and accountability of Panels, MD should set clearer guidelines on the formation of Panels (e.g. number of members, ratio of official members to non-official members, the principles of selection of non-official members, etc.);

(b) according to the existing disciplinary procedures and mechanism, warning letters are issued by MD and the Chairman of a Panel shall be an officer of MD. If the subjects have any grievance against the determination of a Panel, they can only lodge an appeal to DM. From this point of view, the whole decision-making process is led by MD. MD may need to consider whether the credibility and independence of the procedures need to be enhanced;

(c) the transparency of Panel meetings should be enhanced, such as providing in its notification clear explanations of the process and procedures of the meetings, the names of Panels' members and the rights of the surveyors involved;

(d) when inviting non-official members to join a Panel, MD should inform them that their identities will be disclosed;

(e) MD should ensure that the surveyors involved have ample opportunities to provide a defence before a Panel forms its opinions;

(f) if the Panel is procedurally required to convene a first meeting for decision making and a second meeting for final determination, MD must ensure that the first decision would not cast a material impact on the surveyor concerned;

(g) as the decision of the Panel is of vital importance to the surveyor concerned, it is natural that the surveyor may wish to attend the hearings to defend himself or even request for legal representation. Inviting the surveyor to attend the meetings of the Panel should be made a standing practice;

(h) when notifying the surveyor concerned of the result of the determination, MD should clearly account for the justifications and considerations involved;

(i) when considering the disciplinary action, MD should ensure that the actual disciplinary period does not vary from the determination of the Panel;

(j) as DM has the authority to decide whether or not to extend the authorisation period of surveyors while the Panel has the authority to take disciplinary action against surveyors in terms of the authorisation period (including cancellation or suspension of eligibility for application), MD should consider how to co-ordinate the two mechanisms;

(k) clear guidelines and systems for handling appeals should be established, in particular the time frames for replies. If it takes a rather long time to handle an appeal, consideration should be given to whether there is a need to suspend the disciplinary action;

(l) clear and thorough information should be provided in consultation papers to fully reflect the pros and cons of proposals as well as the possible impacts on different stakeholders;

(m) MD should consider if future consultations would need to expand their scope;

(n) staff understanding of the Code should be enhanced. In particular, decisions should be made in accordance with the provisions and principles of the Code when a request for information is received, even if the applicant does not make specific reference to the Code; and

(o) MD should review the complainant's request for information and handle it in accordance with the principles and provisions of the Code.

Government's response

797. MD accepted The Ombudsman's recommendations and has taken the following follow-up actions –

(a) MD has conducted a comprehensive review of the operating mechanism of the Panel and has made new arrangements for disciplinary procedures. In developing the new arrangements, MD has referred to and taken on board the above recommendations (a) to (k) of the Office. MD will seek legal advice on the new arrangements for disciplinary procedures and plans to conduct a consultation exercise in the fourth quarter of 2016. Subject to the satisfactory completion of consultation, the new mechanism will be implemented in 2017;

(b) pursuant to sections 4 to 6 of the Merchant Shipping (Local Vessels) Ordinance, DM may consult LVAC and its subcommittees on matters regarding the performance of his/her functions or the exercise of his/her powers under the Ordinance, or the regulation or control of local vessels. In future, MD will endeavour to set out relevant information and the principles of analysis in consultation papers, and consider whether the advice of other organisations/parties will need to be sought when handling different issues;

(c) to enhance staff understanding of the Code, MD circulates the departmental circular regarding the Code at regular intervals, and has incorporated a brief account of this complaint case in the circular for reference of its staff. MD will also provide training for its staff to ensure that decisions on requests for information from members of the public are made in accordance with relevant provisions and principles; and

(d) MD will also handle complainants' requests for information in accordance with the provisions of the Personal Data (Privacy) Ordinance and the Code.

Marine Department

Case No. 2015/0433 –Unreasonably requiring the complainant to provide an eyesight certificate for replacement of his Certificate of Competency for Pleasure Vessel

Background

798. The complainant had lost his Pleasure Vessel Operator Certificate of Competency (the licence) issued by the Marine Department (MD). When he applied for a replacement licence, MD required him to provide an eyesight test certificate issued by a registered medical practitioner or optometrist within 12 months preceding the application. The complainant considered MD's requirement unreasonable given that his licence was still valid.

The Ombudsman's observations

799. To ensure maritime safety, MD requires vessel operators to meet certain eyesight standards. In the Examination Rules on licence application, it was stipulated that all applicants for new issue, replacement and extension of licences were required to provide a valid eyesight test certificate. Once issued, the licence would remain valid until the holder reaches the age of 65.

800. MD was just following the Examination Rules in requiring the complainant to provide an eyesight test certificate. However, the Office of The Ombudsman considered the requirement unreasonable and unfair.

801. The Ombudsman considered the complaint substantiated and recommended that –

(a) if MD considered it necessary for licence holders to take the eyesight test at regular intervals, it should impose the same condition on all licence holders, rather than merely requiring those who had lost their licences to be tested;

(b) alternatively, if MD considered it not necessary for licence holders to undergo any further eyesight tests until the age of 65, then it should not especially ask those who applied for a replacement to do the test.

Government's response

802. MD accepted The Ombudsman's recommendations and, having reviewed the relevant requirements under the Examination Rules for Local Certificates of Competency (September 2014 Edition) and the Examination Rules for Pleasure Vessel Operator Certificate of Competency (September 2014 Edition), agreed that it was undesirable to require licence holders to provide an eyesight test certificate when applying for a replacement licence. After consultation with the industry, MD revised the relevant requirements. The revisions to the relevant Examination Rules were gazetted and became effective on 29 May 2015. From then on, licence holders applying for a replacement licence are no longer required to provide an eyesight test certificate.

Planning Department

Case No. 2015/0925 – (1) Failing to take enforcement action against storage of metal wastes and operation of heavy machinery in several land lots; and (2)Failing to inform the complainant of its investigation results

Background

803. On 6 March 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Planning Department (PlanD). According to the complainant, a company (Company A) was suspected to have contravened the Town Planning Ordinance (TPO) (i.e. involving unauthorised developments (UD)) at the following locations –

(a) storage of metal wastes (Use I) at some lots in Yuen Long (collectively referred to as Site 1); and

(b) operation of heavy machinery and storage of metal wastes (Use II) at some other lots in Yuen Long (collectively referred to as Site 2).

804. Between July 2011 and 2014, the complainant repeatedly complained to PlanD about the UDs at the sites of Company A. PlanD issued warning letters and Enforcement Notices (EN) to the land owner concerned in respect of the storage problem, i.e. Use II. However, the UD continued.

805. The complainant alleged that PlanD had –

(a) failed to take effective enforcement action against the UDs; and

(b) failed to inform him of the investigation results of the case.

The Ombudsman's observations

Allegation (a)

806. PlanD explained that according to its records, before the first publication in the Gazette of the notice of Nam Sang Wai Interim Development Permission Area Plan No. IDPA/YL-NSW/1 (the 1990 Notice) on 17 August 1990, developments and storage use had been in existence at some lots including Site 1. Therefore, Use I was an existing use (EU) under TPO, not an UD. As regards Use II, PlanD had taken three rounds of enforcement action and issued ENs to the land owner of Site 2 in respect of the storage use. As for the alleged operation of heavy machinery associated with Use II, PlanD, after conducting repeated inspections, considered that there was no sufficient evidence to show that Company A engaged in workshop use.

807. To address the issue of whether Use I was an EU under TPO, PlanD provided to the Office information including observation findings on 11 October 1989 (before the 1990 Notice), observation findings on 18 August 1990 (the day after the gazettal of the 1990 Notice) and an aerial photo. The Office considered that the information was insufficient to demonstrate whether Use I was an EU under the TPO. As such, the Office was unable to make a substantive comment on this issue.

808. Regarding Use II, the Office generally accepted the explanations given by PlanD. Nevertheless, despite detecting storage use at Site 2 during the follow-up inspection subsequent to "the first EN issued" on 26 April 2012, the staff of PlanD did not take further enforcement action. Instead, they decided to issue a Compliance Notice when no storage use was found during another follow-up inspection of Site 2 on 31 August 2012. It was hard to understand why PlanD did not take timely enforcement action.

809. PlanD should have taken prompt enforcement action against Company A for repeated unauthorised use of Site 2 for storage purpose in accordance with its internal guidelines, instead of tolerating and conniving at the offenders or leaving things to chance that the offenders would rectify the irregularities.

810. In light of the above, the Office considered allegation (a) partially substantiated.

Allegation (b)

811. According to PlanD's explanation, since the complaint was lodged in July 2011, PlanD had replied to more than 40 letters/e-mails/verbal inquiries from the complainant and held three meetings with him, informing him of the progress and findings.

812. The Office considered that the PlanD had, by and large, properly informed the complainant of the case progress. Therefore, allegation (b) was unsubstantiated.

813. Overall speaking, The Ombudsman considered the complaint partially substantiated and recommended PlanD to –

(a) re-examine all its relevant records to ascertain whether Use I was an UD and

(b) remind its staff to take enforcement action when opportunities arise, with a view to imposing sanctions on the offenders.

Government's response

814. PlanD accepted The Ombudsman's recommendations and has taken the following follow-up actions –

(a) PlanD was requested by the Office to re-examine the relevant records to ascertain that storage use had existed at Site 1 in 1990 prior to the gazettal of the relevant statutory plan. In this connection, another PlanD's expert witness specialising in aerial photo interpretation made an analysis of the land use of Site 1 in 1990 and 1991 based on the same set of aerial photos. The analysis showed that in 1990 and 1991 (i.e. around the time of the gazettal of the relevant statutory plan), there were two structures at the western fringe and some objects in the western and central parts of Site 1. In view of the complaint lodged by the complainant in July 2011, the expert witness also analysed the aerial photos taken in 2011 and 2012. The analysis revealed that Site 1 was largely occupied by objects in these two years. Based on the results of re-examining the records and the analysis of the aerial photos, the Planning Authority (PA) considered that Site 1 was used for storage purpose in 1990 (i.e. prior to the gazettal of the relevant statutory plan). Hence, PA maintained

his previous judgment that there was insufficient evidence to prove that the storage use at Site 1 was an UD under TPO. The expert witness analysed the images of the aerial photos with a three-dimensional visual instrument (a device which assisted in the interpretation of aerial photos by enlarging the images and showing them in three dimensions). With his expertise, training and experience, the expert witness made a conclusion on the land use. His qualification as an expert witness to interpret aerial photos was also admitted by the court. PA would, taking into consideration the relevant evidence and information (including the analysis in report of the expert witness), assess whether a use might be an EU or UD under TPO and decide whether to follow up the case. As to the question of whether the use should be confirmed as an EU, it would be the judgment of the court; and

(b) Staff of PlanD had taken several site inspections to obtain sufficient evidence so as to conclude that the UD had been discontinued. However, the Office perceived this serious work attitude as tolerating and conniving at the offenders or leaving things to chance that the offenders would rectify the irregularities. PlanD did not agree to this. Having said that, PlanD had reminded its enforcement officers to follow the internal guidelines, which provided that upon the expiry of an EN, a Compliance Notice should be issued promptly if an UD was confirmed to have discontinued following two site inspections. If a suspected UD was found again at the site, PlanD would collect sufficient evidence and relevant information so as to respond with a new round of enforcement action. As to the latest land use of Site 2, PlanD conducted a site inspection on 22 January 2016 and no UD under the TPO was found.

815. On 21 March 2016, the Central Enforcement and Prosecution Section (CEPS) of PlanD met with the staff of the Office at the latter's request. With the aid of a three-dimensional visual instrument, the CEPS explained to the staff of the Office how the aerial photos were interpreted to reach the conclusion that storage use was found at Site 1.

816. On 23 March 2016, at the request of the Office, the CEPS of PlanD provided to the Office for reference a court case where an aerial photo taken on the day after the gazettal of the statutory plan was accepted for inferring the land use at that time.

817. Later on 31 May 2016, the Office recommended PlanD to –

(a) re-examine all relevant records to ascertain if the subject storage use was an UD; and

(b) consider taking photos before or on the date of gazettal in order to gather stronger evidence.

818. PlanD noted the recommendations made by the Office on 31 May 2016. In its reply to the Office on 22 June 2016, PlanD further explained that –

(a) in this case, based on the concurring professional analyses made by the two independent expert witnesses, it was confirmed that Site 1 had been used for storage purpose before the gazettal of the Development Permission Area (DPA) plan. There was not sufficient evidence to show that the storage use at Site 1 was a UD under TPO. Hence, PA would not and needed not re-examine the relevant information; and

(b) there had been an arrangement of capturing aerial photos as evidence on a date closest to the date of the gazettal of a DPA plan subject to permissible weather and other technical conditions. The PA would assess if a use might be an EU or UD in a professional and prudent manner based on the relevant evidence and information. In this case, there was nothing wrong with the PA determining whether there was an UD based on the aerial photo taken on the date after the gazettal of the DPA plan. The High Court case that PlanD provided to the Office on 23 March for reference showed that the court was satisfied with the PA adopting the aerial photo taken on the date after the gazettal of the statutory plan as the basis of determining the land use then. Any disputes over EU and UD should be determined by the court.

819. On 18 July 2016, the Office requested to meet with the staff of PlanD again to discuss the practice of taking aerial photos as proof of an EU under TPO. PlanD suggested the meeting be held in early August.

820. On 25 July 2016, during a telephone conversation with the staff of PlanD, the staff of the Office noted that –

(a) the Lands Department (LandsD) was responsible for taking aerial photos to be used by PlanD for proving land uses; and

(b) in light of the publication of the Notice in the Government Gazette, PlanD had requested LandsD to take aerial photos on the day of or as soon as possible after the gazettal.

821. In light of the clarification provided by PlanD over the phone on 25 July 2016, the Office stated in its letter of 26 July 2016 to PlanD that the current practice of taking aerial photos generally conformed to the spirit of the recommendations made by the Office. As such, the Office would not meet with PlanD again to discuss the related issues for the time being. Nonetheless, if actions to capture aerial photos were not really taken as soon as possible (same as the situation in this case), it would be difficult to determine if any alleged irregularity was an EU. To ensure that convincing evidence could be obtained, the Office hoped that PlanD would request LandsD to take photos on the date of gazettal so as to prevent creating loopholes for malpractices after the gazettal. The Office concluded its follow-up actions on this complaint at this point.

822. As part of the regular duty related to planning enforcement, PlanD all along follows the general practice of requesting LandsD to capture aerial photos as evidence on a date closest to the date of the gazettal of a statutory plan, subject to permissible weather and other technical conditions. PlanD will continue to adopt this general practice.

Post Office

Case No. 2015/1157; 2015/1245; 2015/1681; 2015/1708 and others – Improper handling of tracing enquiries and claims for compensation on the loss of registered mail items

Background

823. The complainant was the authorised representative of six companies in a total of 27 complaints lodged with the Office of The Ombudsman (the Office) against the Post Office (PO) for mishandling their compensation claims.

824. The complainant claimed that all the six companies had sent packets to overseas destinations by registered mail but some were not delivered to the addressees. After investigation, PO replied that those packets could not be located. The complainant alleged that PO's handling of their compensation claims was unsatisfactory, such as giving him inconsistent replies about what supplementary information was required to support their claims. Moreover, instead of advising him to submit all the necessary documents in one go, PO made separate requests for supporting documents, including invoices, details of the suppliers and the claimants' Business Registration Certificates. Eventually, PO even refused to compensate without giving any reason.

The Ombudsman's observations

825. PO has the duty to assess each compensation claim carefully. Although some of the six companies' claims were made before the amendment of the Post Office Guide, when the then prevailing regulations only required the submission of a Reply Slip and a declaration without the need of any supporting documents, both the old and new versions of the Post Office Guide specified that the compensation paid would not exceed "the value shown in the purchase invoice of the articles lost". The new version merely elaborates on the information that should be shown on the invoice and so should not be regarded as changing the assessment criteria. The Office considered it sensible and reasonable for PO to seek more corroborative information from the claimants as the situation developed in order to ensure the authenticity of the invoices.

826. The complainant alleged that PO staff had given him inconsistent replies, but PO was unable to trace the audio records in question because he could not provide further details such as the dates of the telephone calls. At any rate, PO staff had explained to him the claim procedures time and again, so he should have known what further information was required. PO rejected the compensation claims on the grounds that the information submitted did not meet PO's requirements, and stated the reasons in its written replies. The Office did not find any impropriety on the part of PO from the perspective of administration. As to whether the compensation claims were fully justified and ought to be approved, those were issues subject to PO's judgement and the Office would not intervene.

827. The Office noted that in the past, PO seldom requested claimants to provide supporting documents or rigorously checked their claims. Such practice was indeed too lax and could hardly fulfil the duty entrusted to it by overseas postal administrations. Nevertheless, PO had taken remedial measures to tighten its application procedures for compensation claims and plug any loopholes in the mechanism.

828. The Ombudsman considered the complaints unsubstantiated, but recommended that PO should –

(a) review periodically the effectiveness of its procedures for handling mail enquiries and compensation claims, and further amend those procedures and relevant guidelines where necessary;

(b) remind its frontline staff to be vigilant and make an effort to detect suspected abuse cases as early as possible;

(c) establish a clear reporting mechanism for timely reports by frontline staff of suspected abuse cases to their supervisors;

(d) actively collect evidence on suspected abuse cases, and refer those cases with sufficient evidence to law enforcement agencies for further action; and

(e) strengthen its communication with overseas postal administrations and exchange views with them on how to improve the procedures for handling mail enquiries and compensation claims.

Government's response

829. PO accepted The Ombudsman's recommendations and has taken the following follow-up actions –

(a) PO will keep its enhanced procedures for the processing of mail enquiries and vetting of compensation claims under regular review. The internal monitoring mechanism has been strengthened for early detection of suspected abuse cases. Monthly analyses of the compensation claims received are conducted to review the effectiveness of the control mechanism, which will be reinforced, as necessary, in the light of the prevailing circumstance;

(b) PO organises weekly sessions for case-sharing among frontline staff. Areas of concern are highlighted for their attention. PO also reminded its staff to stay vigilant and report any suspected abuse cases to their supervisors for prompt action;

(c) PO has improved the guidelines for processing compensation claims and established a clear escalation mechanism for timely reporting of suspected abuse cases to supervisors and seniors;

(d) PO staff will stay alert to any suspected abuse cases and report those with sufficient evidence to law enforcement agencies for investigation; and

(e) PO will continue to collaborate and share experience with other postal administrations, with a view to further enhancing the procedures for handling mail enquiries and compensation claims so as to effectively guard against possible abuse cases.

Post Office

Case No. 2015/2363 – Improper handling of an application for renewal of rental of a post office box

Background

830. In December 2013, the complainant sent the Post Office (PO) a cheque to pay the renewal fee for his private PO Box, the rental period of which would expire in March 2014. To his surprise, he subsequently discovered that his PO Box had been closed. PO denied having received his cheque, and also claimed that it had sent him a reminder by recorded delivery before closing his PO Box. The complainant requested PO to show him the mail delivery notification card (notification card) of his PO Box to prove delivery of the reminder, but the staff refused his request on the grounds that the notification card was an "internal document".

831. The complainant, therefore, lodged a complaint with the Office of The Ombudsman against PO for mishandling his cheque, failing to follow proper procedures in giving him notice before closing his PO Box, and unreasonably withholding the relevant records. He also provided a photocopy of his cheque and the bank's transaction records to show that PO had already cashed the cheque in question.

The Ombudsman's observations

Allegation (a)

832. In general, renewal notices are issued to PO Box renters two months before the end date of the current rental period. If a payment cheque is received with the renewal notice attached, PO staff will renew the rental period by scanning the barcode printed on the notice and inputting the cheque number into PO's computer system. However, since the complainant issued the cheque to PO earlier than usual and no renewal notice had yet been issued at that time, he wrote down his PO Box and account numbers on the reverse side of his cheque. Upon receiving the cheque, PO staff wrongly credited the payment to the account of another renter whose PO Box was due to expire very soon. PO did not discover the mistake until after the complainant had provided a photocopy of the cheque for it to check its accounts.

Allegation (b)

833. In February 2014, PO issued a reminder to the complainant in duplicate, which were sent by recorded delivery to his residential address and PO Box respectively. Records showed that the postman had tried but failed to deliver the reminder to his residential address as no one answered the door. For the reminder sent to his PO Box, according to normal procedures, when the registered reminder reached the post office by bulk mail despatch, the staff should inform him to collect the mail item by inserting into his PO Box a notification card stamped with the day's date. PO subsequently retrieved the notification card for his PO Box but found that no such date was stamped on it. After investigation, PO was unable to ascertain whether the staff had not inserted the card into his PO Box, or had done so but failed to stamp on it the date. Eventually, both copies of the reminder remained uncollected after the prescribed period and were returned to the sender.

Allegation (c)

834. The staff of the post office concerned had no recollection about the complainant's request for access to the notification card. At any rate, PO admitted that the complainant should have been allowed to see the notification card of his PO Box, and reminded all staff to comply with the Code on Access to Information and give assistance to customers as far as possible.

835. PO apologised to the complainant for the mistakes committed in this case. PO had cautioned and provided guidance to the staff who mishandled the cheque, and had also enhanced its computer system and handling procedures for better management of the payment records in respect of PO Box renewals. Moreover, PO had ceased the practice of dispatching a bulk mail containing a number of reminders intended for different box renters at the same post office. Instead, the reminders would be sent separately by recorded delivery so that PO can accurately track their individual status.

836. The Ombudsman considered this complaint substantiated and recommended that PO should –

(a) instruct the supervisory officers of all post offices to monitor whether mail items pending collection by PO Box renters have been handled in accordance with relevant guidelines;

(b) review in a timely manner whether its improvement measures are effective in preventing similar problems from recurring; and

(c) remind all frontline staff to consult their supervisors or the Access to Information Officer if they have any doubts in handling the public's requests for information.

Government's response

837. PO accepted The Ombudsman's recommendations and has taken the following follow-up measures. PO –

(a) had instructed all postmasters to remind counter staff to follow the prescribed guidelines for handling mail items pending collection by PO Box renters, and arranged to circulate the guidelines to staff periodically;

(b) would continue to conduct quarterly reviews on the enhanced procedures for processing rental renewal of PO boxes to ensure smooth operation. Further improvement measures would be introduced if necessary; and

(c) reminded all frontline staff to consult their supervisors, if in doubt, in handling public requests for information and seek advice from the departmental Access to Information Officer as necessary. Departmental guidelines on the handling of public enquiries would be circulated to staff periodically.

Privacy Commissioner for Personal Data

Case No. 2014/4454 – (1) Delay in handling the complainant's complaint; and (2) Lack of response to his enquiries

Background

838. The complainant complained to the Office of the Privacy Commissioner for Personal Data (PCPD) twice on 15 November 2011 and 10 April 2012 against an organisation (Organisation A) in respect of three cases (Cases I to III) and another one case (Case IV) respectively of suspected contravention of the Personal Data (Privacy) Ordinance (PDPO). PCPD wrote to inform the complainant on 2 March and 16 April 2012 respectively that Cases I to III and Case IV were accepted as complaints lodged under section 37 of PDPO, and that if PCPD decided not to investigate into Cases I to III and Case IV, the complainant would be informed in writing within 45 days from 29 February and 10 April 2012 respectively.

839. On 22 October 2012, the complainant received a reply from PCPD informing him that, after considering the information obtained, PCPD had decided not to pursue any of his complaints further under sections 39(2)(ca) and (d) of PDPO.

840. On 9 April 2014, the complainant wrote to PCPD to enquire about the interpretation of PDPO. However, apart from an interim reply issued on 10 the same month, he received no further reply from PCPD.

841. On 20 October 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against PCPD. The complainant alleged that PCPD had –

(a) delayed handling his complaints against Organisation A and not taken the initiative to inform him of the reasons or the progress of the cases; and

(b) not responded to his enquiry.

The Ombudsman's observations

Allegation (a)

842. The Office understood that complaint handling did not work like an assembly line. As an enforcement agency, PCPD must assess each and every complaint prudently and should not decide whether to proceed with a 'formal investigation' in the absence of adequate information. Before making the decision, PCPD might need to gather more information, and on the basis of such information, make enquiries with both parties and even other parties for clarifications and/or verifications, and then evaluate all the information. It was inevitable that some time was needed for such a process.

843. In this case, after receiving the complainant's complaints, PCPD's officer had kept seeking clarifications with the complainant and Organisation A on the concerned cases, and requested both parties to provide information, to help decide whether to proceed with 'formal investigations'. During the preliminary inquiry, PCPD had also informed the complainant of the progress of the case and the reasons for not being able to decide on whether to proceed with 'formal investigations' within 45 days.

844. However, it was indisputable that PCPD had not informed the complainant in writing of its decision of not proceeding with 'formal investigations' and the reasons for such decision within 45 days after receiving Cases I to III (i.e. before 14 April 2012) and Case IV (i.e. before 25 May 2012) respectively as required under the existing legislation (section 39(3) of PDPO).

845. Moreover, according to PCPD's then performance target, 88% of complaint cases should be concluded within 180 days of receipt. In this case, PCPD had spent almost eight months with regard to Cases I to III and over six months in regard to Case IV, only to come to the decision of not proceeding with 'formal investigations'. This was indeed unsatisfactory.

846. The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

847. The Office was of the view that in this case, it was unsatisfactory that PCPD neither met its service target of replying to the complainant within 28 working days after 9 April 2014 (i.e. before 23 May), nor gave any response upon receipt of the complainant's email reminders on 7 July and 16 September. Therefore, The Ombudsman considered allegation (b) substantiated.

848. Overall speaking, The Ombudsman considered this complaint partially substantiated. As the existing legislation provided for a time limit for PCPD to decide on whether to proceed with 'formal investigations' into complaint cases, The Ombudsman recommended that before the relevant provision was amended, PCPD should carefully control the time needed for preliminary inquiry and endeavour to make the necessary decisions within the statutory time limit, to avoid giving the public an impression that it did not abide by the law. The Ombudsman also recommended PCPD to act decisively in complicated cases and consider proceeding with 'formal investigations' within the statutory time limit, and then continue with the remaining inquiry work in the course of 'formal investigations'.

Government's response

849. PCPD accepted The Ombudsman's recommendations and has adopted a series of improvement measures such as restructuring the Operations Division, improving the workflow, re-designing the complaint forms etc., to streamline the complaint handling procedures.

850. For all of the complaints received from 1 January 2016 to 15 July 2016, the complainants were informed of PCPD's decision on whether to proceed with a 'formal investigation' within the 45-day statutory time limit.

Privacy Commissioner for Personal Data

Case No. 2015/0922 – (1)Delay in handling a complaint; (2)Not responding to the complainant's calls; and (3)Failing to provide an efficient hotline service

Background

851. In February 2013, the complainant complained to the Privacy Commissioner for Personal Data (PCPD) against her doctor for allegedly refusing her data access request for copies of her medical records. PCPD accepted her complaint as a "complaint" on 1 August and told her that she would be notified before 15 September (i.e. within 45 days) if PCPD decided not to investigate her complaint. However, it was not until late July 2014 that PCPD informed her of such a decision.

852. The complainant subsequently complained to the Office of The Ombudsman (the Office) against PCPD for delay in handling her complaint.

The Ombudsman's observations

853. According to PCPD's Complaint Handling Policy, a complainant should produce sufficient information in support of his allegation(s) in order that his complaint can satisfy the requirements of a "complaint" under the Personal Data (Privacy) Ordinance (PDPO). PCPD will enquire of the complainant in order to understand the complaint details and confirm his allegation(s).

854. PCPD may exercise discretion to refuse to carry out, or to decide to terminate an investigation. Section 39(3) of PDPO stipulates that PCPD shall in no later than 45 days after receiving the complaint inform the complainant in writing of the refusal and the reasons for refusal.

855. While contravention of PDPO is a criminal offence, PCPD found it not possible to achieve absolute compliance with its requirement on response time as set out in section 39(3). Complaints should be handled carefully and the party being complained against given equal opportunity and ample time to clarify and respond to the allegation(s). Besides, PCPD also needs sufficient time to obtain information from different

parties for reaching a fair and objective judgement. It may not work to the benefit of the complainant or the party under complaint if PCPD adheres strictly to a rigid timetable in processing a complaint. As such, PCPD found it necessary to remove the requirement altogether from PDPO. It had made a submission to the Government, which agreed to work on the necessary legislative amendment.

856. The Office accepted that PCPD had in fact been in constant dialogue with the complainant whose continual supply of information might well have protracted PCPD's processing of her case. Nevertheless, taking a year just to inform the complainant of its decision not to pursue her complaint was long by any reasonable standard and a far cry from the statutory time limit of 45 days.

857. The Ombudsman, therefore, considered the complaint partially substantiated and recommended that PCPD should closely follow up the issue of legislative amendment with the Government. Before the proposed amendment was effected, PCPD should use its best endeavours to comply with the 45-day requirement.

Government's response

858. PCPD accepted The Ombudsman's recommendation and has adopted a series of improvement measures, such as restructuring the Operations Division, improving the workflow, re-designing the complaint forms etc., to streamline the complaint handling procedures.

859. For all of the complaints received from 1 January to 15 July 2016, the complainants were informed of PCPD's decision on whether to proceed with a 'formal investigation' within the 45-day statutory time limit. As the statutory requirement is now fully complied with, PCPD has informed the Office that its earlier proposal to amend the 45-day statutory requirement has been put on hold.

Radio Television Hong Kong

Case No. 2015/2670(I) – Refusing to disclose the amount of money used for sponsoring an opinion survey, and improper use of public money to sponsor such a survey

Background

860. The complainant called Radio Television Hong Kong (RTHK) on 15 June 2015 to enquire about the amount of money involved in the rolling survey regarding political reform (Survey A) jointly conducted by three universities and sponsored by RTHK. On 2 July, the complainant called RTHK again to enquire for the result. However, RTHK replied that Survey A was sponsored by the programme "Voices from the Hall", and the amount of money sponsored could not be disclosed pursuant to the agreement made between RTHK and the three universities.

861. The complainant was dissatisfied with RTHK's refusal to disclose the amount of money used for sponsoring Survey A (allegation (a)). The complainant also challenged the appropriateness of RTHK sponsoring Survey A with public money (allegation (b)).

The Ombudsman's observations

862. With regard to allegation (a), RTHK clarified to the Office of The Ombudsman (the Office) that, after completion of procurement procedures and internal verifications of relevant information, the amount of money used for procuring the result of Survey A could be disclosed. The RTHK staff made a misstatement to the complainant that the amount of money used for the procurement could not be disclosed pursuant to a commercial agreement, because the staff had mixed up the two opinion surveys. After the Office commenced the investigation, RTHK had already informed the complainant of the amount of money involved in the procurement of the result of Survey A on 26 August 2015. The Office noticed from the recorded telephone conversation between RTHK and the complainant that although the complainant queried the reply given by the RTHK staff many times, the staff continued to provide the incorrect explanation. While there was no evidence suggesting that the staff deliberately withheld the information about the amount of money RTHK used for sponsoring Survey A, RTHK undoubtedly did not provide the

complainant with the requested information based on a reason which was supported by an incorrect fact at the time. This was in breach of the Government's Code on Access to Information. As such, The Ombudsman considered allegation (s) substantiated.

863. As for allegation (b), RTHK explained to the Office that, RTHK's news section, based on its professional judgement, considered the method of electing the Chief Executive in 2017 a significant social issue. As Survey A conducted by the three universities had certain level of credibility, RTHK decided to procure and employ the result of the survey so that members of the public could be informed about the latest trend of public opinion. With regard to RTHK's need for obtaining the result of Survey A in order to enrich the content of its programme, the Office considered that it was RTHK's professional judgement and was not administrative issues subject to investigation by the Office. As for using public money to obtain the result of Survey A, RTHK had already clarified that it followed normal procurement procedures, which the Office did not consider inappropriate. Therefore, The Ombudsman considered allegation (b) unsubstantiated.

864. Overall speaking, The Ombudsman considered the complaint partially substantiated and recommended that RTHK should learn from this case, and appropriately handle the requests for information from the public in accordance with the Code on Access to Information in future.

Government's response

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

(a) RTHK had on 26 August 2015 provided the complainant with the information on the amount of money spent on procuring the result of Survey A; and

(b) RTHK has reminded staff responsible for answering public enquiries to check the accuracy of information before replying to enquirers.

Social Welfare Department

Case No. 2014/4697 – Delay in referring a case of suspected elder abuse in a nursing home to the relevant section for follow-up action

Background

866. On 7 and 21 November 2014, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Social Welfare Department (SWD). The complainant's mother, Madam A, had poor mobility and was bedridden after suffering a stroke. In September 2014, Madam A was offered by SWD a subsidised place in a private nursing home (the Home) under the Nursing Home Place Purchase Scheme (NHPPS).

867. In late October of the same year, Madam A was sent to hospital twice for treatment for red and swollen private parts and fractured femur. Considering that the fracture was very unlikely caused by Madam A herself, the complainant suspected that the repeated injuries of Madam A had been caused by negligence or abuse at the Home.

868. From late October to early November of that year, the complainant lodged complaints against the Home by calling a number of units and officers of SWD. In early November, a social worker from the medical social service unit of a hospital (Social Worker A) informed the complainant about the accommodation arrangement of Madam A in future. He was told that he could only choose to let Madam A continue to be accommodated at the Home or reapplying on her behalf to SWD for the allocation of another nursing home.

869. In sum, the complainant's complaint against SWD was as follows –

(a) SWD did not properly take up his complaint about Madam A being suspectedly neglected and abused at the Home. Different units/officers of SWD passed the buck to each other without referring his complaint to the relevant unit for follow-up as appropriate; and

(b) SWD refused to make arrangements for Madam A to be admitted to another nursing home.

The Ombudsman's observations

870. Regarding allegation (a), the Office considered that given SWD's division of responsibilities, it was justified for the complainant's complaint to be handled by different units/officers, and that no buck-passing among the units/officers was involved.

871. However during the process, the responsible Social Worker A indeed had some inadequacies, which included failing to clarify the matter or make a suitable referral immediately. As admitted by SWD, when the medical social service unit first received the complaint from the complainant, Social Worker A informed the complainant that he would handle the suspected negligence or abuse of Madam A. Social Worker A should have at the same time clarified that the unsatisfactory service performance of the Home fall within the purview of the Contract Management Section (CMS) of SWD, and referred that part of the complaint directly to CMS for follow-up. He should also have briefed the complainant on the matter to avoid any misunderstanding. SWD undertook to remind its officers concerned so as to avoid recurrence of similar incidents. Therefore, The Ombudsman considered allegation (a) partially substantiated.

872. As for allegation (b), the Office considered that Madam A had in fact already been offered a priority placement at another nursing home. The Office did not rule out the possibility that this allegation had been caused by a misunderstanding between the complainant and Social Worker A during their telephone conversation on 6 November 2014. Therefore, The Ombudsman considered allegation (b) unsubstantiated.

873. Overall speaking, this complaint was partially substantiated. Given the substantial demand for elderly services brought about by the ageing population in Hong Kong, The Ombudsman recommended that in order to ensure no recurrence of similar incidents, SWD should adopt effective measures to remind and train staff about the division of responsibilities between the Licensing Office of Residential Care Homes for the Elderly (LORCHE) and CMS.

Government's response

874. SWD accepted the recommendation and has taken the following follow-up actions –

(a) information on various types of services for the elderly as well as their scope and responsible units had all along been provided on the SWD Elderly Services webpage. SWD had now enhanced the relevant website design whereby the list of nursing homes under NHPPS was included on the webpage of CMS. This would allow SWD staff and the public to have a better understanding of the fact that the monitoring of services under NHPPS is the responsibility of CMS;

(b) CMS of SWD issued an email to all district staff on 3 July 2015 explaining the division of responsibilities between CMS and LORCHE. In the email, it was clearly stated that CMS was responsible for monitoring the services of all contract homes and NHPPS. A hyperlink to the related webpages was also included in the email to facilitate immediate access by colleagues;

(c) the Elderly Branch of SWD conducted a briefing session on home care services for the elderly on 8 July 2015. Participants included officers-in-charge and frontline colleagues of integrated family service centres and medical social service units of SWD. In the briefing session, CMS explained again the division of responsibilities between CMS and LORCHE. In future, SWD would continue to remind frontline colleagues of the said division of responsibilities on suitable occasions; and

(d) at the district level, the relevant District Social Welfare Offices of SWD had clearly explained the said division of responsibilities to the social workers of the medical social service unit concerned as well as the other casework service units. Social worker colleagues were reminded that if views or complaints were received from service users or their family members about residential care services, they should first find out all details of the case, and provide support and counselling as appropriate. Where the management and service monitoring of homes were involved, colleagues would have to first identify the type and nature of the homes so as to ascertain the unit specifically responsible for monitoring the services concerned, before providing the contact information of the relevant unit to the service users or their family members. If agreed by the service users or their family members, social worker colleagues might also directly relay their concerns to the relevant unit.

Transport Department

Case No. 2014/2640 – Failure to properly monitor the service of bus route numbers 299X, 99 and 94

Background

875. The complainant lodged a complaint against the Transport Department (TD) for failing to properly monitor the service of Kowloon Motor Bus (KMB) Route 299X, 99 and 94. These routes did not adhere to their scheduled routeing and there were service delays. Also, the complainant was not satisfied that TD had not handled his complaint properly.

876. KMB Route 299 was split into Route 299X and 99 after service reorganisation. The complainant was dissatisfied that –

(a) service delay of KMB Route 299X had become more serious. Bus regulators and bus captains lacked discipline and did not arrange service according to the scheduled timetable;

(b) some bus captains of Route 99 and 94 altered the routeing without authorisation. They operated from Sai Kung Bus Terminus to Tai Mong Tsai Road via Wai Man Road instead of following the scheduled routeing via Po Tung Road; and

(c) TD was slow in responding to his complaint about service delays of Route 299X and his question about which department was responsible for regulating the behaviour of bus captains under the Public Bus Services Regulations. The Department did not respond until the referral from the Sai Kung District Council (SKDC).

The Ombudsman's observations

Allegation (a)

877. The Office of The Ombudsman (the Office) considered that bus services would inevitably be affected by road conditions, which were beyond the control of the bus company or TD. If there was lost trip or

service delay, the bus regulator should not be criticised for taking the initiative to adjust subsequent bus departure time to even out the frequency after taking into account the factors such as buses available and number of waiting passengers. The bus company admitted that there was room for improvement with respect to the service frequency after service was resumed on the day concerned and had advised the relevant staff accordingly. As regards the query by the complainant about display of bus departure time at the bus terminus and bus stops, TD had clarified that the time of individual bus departures was not displayed at the bus stops of Route 299X. Regarding the departure time of Route 99, it was clearly stated on the timetable that bus departures might be suspended subject to traffic conditions. As mentioned above, buses were share-using road space with other vehicles, it was difficult for the bus company to fully control the arrival time of each and every bus. Hence, the scheduled timetable was for reference only.

Allegation (b)

878. The Office considered that the intent of TD was good for allowing Route 99 to alter its routeing according to traffic conditions to avoid road congestion and improve service reliability. However, it was obvious that TD had not taken into consideration the need for passengers to board/alight at Sha Kok Mei and Muk Min Shan bus stops when such an arrangement was approved. It was clearly improper for TD to request the bus company to inform the affected passengers only after implementation of the arrangement. In addition, TD permitted the bus regulators to decide whether the route should be diverted according to actual situation but did not monitor or regulate the arrangement. If the bus company diverted most of the bus departures via the alternative routeing, the passengers at the two abovementioned bus stops would be greatly affected. The Office was glad to note that TD had already made improvements upon its intervention. Rather than requesting the bus companies to take remedial measures after implementation, the Office urged TD to carry out detailed assessment on the operational feasibility before similar arrangement was rolled out in future.

879. TD indicated that approval had not been given for Route 94 to re-route via Wai Man Road. It would be violating the rules for a bus captain to alter the routeing himself. The Office urged TD to closely monitor the operation of the route and to consider putting in place more deterrent measures if the unauthorised situation recurred. Regarding the complainant's allegation that TD had failed to exercise its statutory power (i.e. regulation 25(3) of the Public Bus Services Regulations) to penalise

a bus captain who had violated the rules and impose on him a penalty of up to a maximum fine of $3,000 and an imprisonment of six months. The Office had studied the relevant legislation and considered that the offences relating to bus captain's conduct covered by the relevant provisions only concerned the requirement to shut off the bus engine if the captain left the bus unattended as well as consumption of alcohol while on duty. Other offences were applicable to passengers (such as passengers who wilfully obstruct the bus captain's view of the road or traffic) and there was no offence applicable to bus captains who failed to adhere to scheduled routeings.

Allegation (c)

880. The Office considered that it was not unreasonable for TD to reply on 9 May 2014 to the complaint which was lodged on 8 April 2014. There was no evidence to show that TD provided a reply only upon the referral of SKDC. In fact, if a complaint was handled by 1823, 1823 would ensure that the department would respond to the complainant in good time. Hence, TD had to make a reply irrespective of whether the complainant lodged a complaint to SKDC or not. On the other hand, the Office had reviewed TD's reply dated 9 May 2014 and found that it was rather simple. It did not address the complainant's enquiry direct or mention that it would take time to conduct bus service surveys and check relevant information such as the bus operation records. Not until the intervention of the Office did TD give a detailed reply. The Office understood that TD had to handle a large number of complaints each day and since the bus company had already replied to the complainant twice, TD might consider a detailed reply from the Department would not be necessary. Taking into account the replies of the bus company dated 23 May and 12 June 2014 in response to the referral from TD, the Office considered that it would be more desirable if TD could give the complainant a more detailed reply.

881. In conclusion, The Ombudsman considered this complaint partially substantiated, and recommended TD to –

(a) closely monitor the operation of Routes 94 and 99 and ensure these two routes were operated according to the scheduled routeing;

(b) closely monitor Route 299X to see if lost trips were often caused by vehicle breakdown. If so, to instruct KMB to improve the quality of vehicles deployed on this route; and

(c) improve the complaint handling skill of staff.

Government's response

882. TD accepted The Ombudsman's recommendations and has taken the following actions.

883. TD had meetings with KMB in March and April 2015 to discuss measures to improve the service of Routes 94, 99 and 299X. KMB undertook to closely monitor the bus regulators and bus captains of Routes 94 and 99 to ensure that these bus routes would be operated according to the scheduled routeing. In addition, KMB undertook to closely monitor the operation of Route 299X, especially during weekends and public holidays when demand was higher and traffic was more congested. Extra buses would be deployed to operate bus routes to and from Sai Kung Town so as to meet the demand and to address the frequency issue caused by traffic congestion. TD also reminded KMB to make its best endeavour to reduce the lost trips caused by factors under its control.

884. To monitor whether the aforementioned routes had adhered to the scheduled routeing, TD conducted on-site monitoring surveys at Sai Kung Bus Terminus on Route 94, 99 and 299X on 17 May 2015 (Sunday). It was observed from the monitoring surveys that Route 94 and 99 were operated via Wai Man Road (southbound), Fuk Man Road and Po Tung Road when leaving Sai Kung Bus Terminus according to the scheduled routeing while Route 299X was operated according to the scheduled timetable.

885. TD also scrutinised the operating records of the relevant routes from April to June 2015 and found that the lost trip rates were at a low level and lost trips were mostly caused by factors beyond KMB's control (such as traffic incidents or adverse weather). Further, TD observed that vehicle breakdown was the main cause for lost trips for Route 299X. TD had thus reminded KMB to ensure proper maintenance of the vehicles concerned, and to flexibly deploy buses having regard to actual circumstances for meeting passenger demand. After analysing the lost trip cases, KMB had also given the duty officers instructions about bus deployment, the rules of seeking assistance and methods of communication during the time of need. This should enable the swift handling of incidents related to vehicle breakdown. It had also committed to deploying buses with more appropriate design for operating the road sections concerned (which was comparatively narrower and winding) and as backup.

886. TD would continue to monitor the operation of the above routes, arrange monitoring surveys and follow up with KMB as needed. Separately, TD had arranged the staff member who handled the complaint to attend a workshop on complaint handling in May 2015 so as to strengthen the staff member's skills in dealing with and preparing replies for complaints, and would continue to monitor his performance.

Transport Department

Case No. 2015/0117 – Prolonged booking time for vehicle examination at designated car testing centres

Background

887. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Transport Department (TD). The complainant indicated that although it had repeatedly expressed its views and made suggestions to TD on ways to enhance the efficiency of annual vehicle examinations for private cars, TD had not implemented them or conducted trial for them. The suggestions included –

(a) increasing the number of designated car testing centres (DCTCs) and vehicle testers;

(b) restoring the provision of vehicle examination services of DCTCs on Sundays and extend their service hours on weekdays;

(c) improving and unifying the booking system;

(d) reviewing the roster arrangement of vehicle testers where one rest day must be allowed after three consecutive working days;

(e) simplifying the procedures of vehicle re-examinations; and

(f) adopting ad hoc measures to cope with the peak period of vehicle examination before Lunar New Year to avoid the situation where a large number of vehicles fail to undergo vehicle examination upon the expiry of their vehicle licences.

The Ombudsman's observations

888. The Office received a number of similar complaints in recent months claiming that due to the substantial increase in booking time for vehicle examination, many vehicle owners failed to have their vehicles examined before the expiry of their vehicle licences. In the light of this, the Office decided to conduct a full investigation to find out the causes behind the problem and whether TD had taken reasonable improvement measures to tackle the problem.

889. TD admitted that since the second half of 2014, the average booking time for vehicle examination had increased substantially from about two weeks to ten weeks, but the situation had been improved in recent months. In fact, there could be great variation in the booking time among different DCTCs. While it took only one week for the fastest DCTC, the slowest one took 12 weeks.

890. According to the information provided by TD, while the overall vehicle examination capacity of the 22 DCTCs reached about 400,000 vehicles a year, the number of vehicles requiring examination each year was only 310,000. Assuming a failing rate of 15%, the existing DCTCs, theoretically speaking, should be able to fully meet the demand for vehicle examination.

891. Based on the information provided by TD, the main causes leading to increasing booking time were –

(a) growing number of vehicle examinations – there had been an increase of over 5% in the overall number of vehicle examinations for each of the past two years, which was partly attributable to the growth in the total vehicle fleet size and partly due to rising failing rate of first inspection in 2013 and 2014;

(b) traditional peak period of vehicle examination – compared to other months, the months straddling across October to December and around Lunar New Year tended to have higher demand for vehicle examination. Therefore, it was normal to have longer booking time towards the year-end; and

(c) multiple and invalid appointments – TD pointed out that multiple and invalid appointments accounted for 20% of all appointments, and most of the time-slots for such appointments would have been wasted.

892. The Office considered that TD's various measures could tackle the root of the problem and help alleviate the problem.

893. To sum up, the Office considered that TD had conducted an in-depth analysis on the problem of increasing booking time for vehicle examination and had implemented a series of targeted improvement measures in the light of the suggestions of the complainant and the trade. The problem had been alleviated in recent months.

894. The Ombudsman considered the complaint unsubstantiated and recommended TD to –

(a) review the trial results of extending the service hours of DCTCs as soon as possible, and encourage more DCTCs to follow suit if these measures proved to be effective;

(b) step up monitoring of all DCTCs to ensure that the verification procedures were stringently implemented to prevent multiple or invalid appointments;

(c) analyse the appointments of DCTCs regularly and strictly handle cases where multiple or invalid appointments were still found at individual DCTCs;

(d) enhance the publicity of the new measure of online checking of appointment status at DCTCs, especially targeting agents who booked appointments on behalf of vehicle owners;

(e) enhance the online platform for checking appointment status at DCTCs (such as extending the one-week period for which appointment status could be checked);

(f) provide more channels for checking appointment status (such as to study the provision of enquiry services through 1823);

(g) expedite the implementation of the measure to allow direct booking of vehicle examination through GovHK;

(h) closely monitor the situation, especially towards the year-end peak period, and, if substantial increase of the booking time was expected towards the year-end, implement contingency measures as soon as practicable, such as requesting DCTCs to extend their service hours, stepping up publicity and encouraging vehicle owners to arrange for early vehicle examination, etc.;

(i) consider increasing the number of approved car testers of DCTCs;

(j) expedite vetting work regarding the application of "Designation of Places as Car Testing Centres" so that new DCTCs could come into operation as soon as possible;

(k) encourage existing DCTCs to expand their service scale (such as enlarging the vehicle examination areas of individual DCTCs to boost the number of vehicles examined);

(l) strengthen communication with the trade in order to enhance services of DCTCs;

(m) consider providing incentives for vehicle owners to avoid having their vehicles examined during the year-end peak period; and

(n) consider whether to unify the existing different arrangements adopted by DCTCs over vehicles with imminent expiry dates.

Government's response

895. TD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

Recommendation (a)

896. The extension of service hours of DCTCs is a temporary measure and will be implemented only during particularly busy periods. Since late 2015, more new DCTCs have gradually come into operation. The booking time for vehicle examination (i.e. the interval between the making of appointment and the conduct of vehicle examination) has been shortened to an average of about one day. For individual DCTCs, vehicle examination could even be conducted on the same day. In view of this, DCTCs have shelved the measure of extending service hours.

While TD notes The Ombudsman's recommendation, it does not see the need to implement this measure at this moment in the light of the currently very short booking time.

Recommendations (b) & (c)

897. TD issued guidelines on procedures in making appointments to all DCTCs in June 2015, requesting operators of all DCTCs to remind their staff to promptly enter into the computer system all relevant booking information (including registration marks of the vehicles under application and contact information of the applicants), to avoid occurrence of multiple or invalid appointments. In order to step up monitoring of all DCTCs, TD conducts random telephone checks on the appointment arrangement of each DCTC. If cases where non-compliance with TD's requirements are identified, TD will issue warning letters to the DCTCs concerned. If DCTCs are found repeatedly violating TD's requirements, TD will consider ceasing designation of the DCTCs concerned upon expiration of their designation. Up to now, TD has not found any cases of non-compliance of TD's requirements. The DCTCs operation and the booking arrangement are considered smooth. These two recommendations have been implemented and completed, with the monitoring measures to be continued.

Recommendation (d)

898. To facilitate the public to search the relevant information, TD has added keywords such as "annual vehicle examination", "vehicle examination" and "designated car testing centre" to the GovHK portal in mid-July 2015. TD will also continue to increase relevant publicity via its website.

Recommendation (e)

899. When designing the website for checking appointment status of the DCTCs, TD has examined different options of checking periods such as one week, two weeks or three weeks. Having taken into account the need to simultaneously display the information of different DCTCs on the webpage, TD has adopted the option of one-week checking period. TD will review the online platform for checking appointment status of DCTCs when necessary.

Recommendation (f)

900. TD has stepped up liaison with 1823 on the new measures relating to online checking of appointment status at DCTCs. Staff of 1823 has been forwarding the appointment enquiries to the Monitoring Unit of TD for follow-up actions. Moreover, TD has put up posters and distributed leaflets to remind vehicle owners that they could schedule vehicle examination within four months before the expiry of vehicle licences. The 1823 hotline was also printed on such posters and leaflets.

Recommendation (g)

901. The Office of the Government Chief Information Officer approved the funding for "Enhancement of Online Vehicle Annual Examination Appointment Booking System" in late 2015. The Electrical and Mechanical Services Department (EMSD) has been working on the project at TD's request. Due to the complexity of the system and the time required to discuss with all DCTCs the implementation details, EMSD expects that the system will come into operation in the second quarter of 2017. Direct booking of vehicle examination will then be available via GovHK.

Recommendations (h), (i), (j) & (k)

902. To increase the number of DCTCs so as to cater for rising public demand for vehicle examination, TD has invited applications for designation of new DCTCs from interested parties in May 2015. Since October 2015, training courses for approved car testers of new DCTCs have also been arranged. The new DCTCs have come into operation in batches since December 2015. TD expects the number of DCTCs to increase from 22 to 45.

903. Regarding the booking situation of DCTCs, according to TD's record the average booking time for vehicle examination in the past four months is around one day. For individual DCTCs, examination service could even be arranged on the same day.

Recommendation (l)

904. TD will strengthen communication with the trade by conducting regular meetings every six months to listen to their views. Such meetings will continue to be held regularly.

Recommendation (m)

905. TD has put up posters and distributed publicity leaflets to remind vehicle owners that they could schedule vehicle examinations within four months prior to the expiry of their vehicle licences to facilitate licence renewal. Since the number of DCTCs has doubled, the demand for vehicle examination in the peak period is expected to be met.

Recommendation (n)

906. TD has unified the arrangements for handling appointments for vehicle examination in all DCTCs. Special arrangement for vehicles with imminent licence expiry dates is no longer provided. In fact, since the gradual opening of new DCTCs and more bookings become available, car owners have more options on vehicle examination and such special arrangement is no longer required.

Transport Department

Case No. 2015/0280 – Prolonged booking time for vehicle examination at designated car testing centres

Background

907. The complainant needed to comply with government requirements and have his private car examined annually by the designated car testing centres (DCTCs) of the Transport Department (TD). He tried to make an appointment with the DCTCs three weeks before expiry of the vehicle licence, but was told that the earliest available time slot would be more than a month later. Consequently, his vehicle licence could not be renewed before the expiry date. He was dissatisfied that TD had failed to ensure that adequate services were provided by the DCTCs, resulting in inconvenience to vehicle owners.

The Ombudsman's observations

908. The Office of The Ombudsman (the Office) found TD to have made detailed analysis on the causes of longer time required for scheduling vehicle examinations and adopted improvement measures to tackle the problem effectively. The Ombudsman, therefore, considered the complaint unsubstantiated. Nevertheless, the Office's investigator called all the 22 DCTCs in June 2015 to make vehicle examination appointments and found that eight centres still accepted duplicate bookings. Apparently, the verification procedures required were not stringently implemented by all DCTCs.

909. The Ombudsman recommended TD to –

(a) review the trial results of extending the service hours of DCTCs as soon as possible, and encourage more DCTCs to follow suit if these measures proved to be effective;

(b) step up monitoring of all DCTCs to ensure that the verification procedures were stringently implemented to prevent multiple or invalid appointments;

(c) analyse the appointments of DCTCs regularly and strictly handle

cases where multiple or invalid appointments were still found at individual DCTCs;

(d) enhance the publicity of the new measure of online checking of appointment status at DCTCs, especially targeting agents who booked appointments on behalf of vehicle owners;

(e) enhance the online platform for checking appointment status at DCTCs (such as extending the one-week period for which appointment status could be checked);

(f) provide more channels for checking appointment status (such as to study the provision of enquiry services through 1823);

(g) expedite the implementation of the measure to allow direct booking of vehicle examination through GovHK;

(h) closely monitor the situation, especially towards the year-end peak period, and, if substantial increase of the booking time was expected towards the year-end, implement contingency measures as soon as practicable, such as requesting DCTCs to extend their service hours, stepping up publicity and encouraging vehicle owners to arrange for early vehicle examination, etc.;

(i) consider increasing the number of approved car testers of DCTCs;

(j) expedite vetting work regarding the application of "Designation of Places as Car Testing Centres" so that new DCTCs could come into operation as soon as possible;

(k) encourage existing DCTCs to expand their service scale (such as enlarging the vehicle examination areas of individual DCTCs to boost the number of vehicles examined);

(l) strengthen communication with the trade in order to enhance services of DCTCs;

(m) consider providing incentives for vehicle owners to avoid having their vehicles examined during the year-end peak period; and

(n) consider whether to unify the existing different arrangements adopted by DCTCs over vehicles with imminent expiry dates.

Government's response

910. TD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

Recommendation (a)

911. The extension of service hours of DCTCs is a temporary measure and will be implemented only during particularly busy periods. Since late 2015, more new DCTCs have gradually come into operation. The booking time for vehicle examination (i.e. the interval between the making of appointment and the conduct of vehicle examination) has been shortened to an average of about one day. For individual DCTCs, vehicle examination could even be conducted on the same day. In view of this, DCTCs have shelved the measure of extending service hours. While TD notes The Ombudsman's recommendation, it does not see the need to implement this measure at this moment in the light of the currently very short booking time.

Recommendations (b) & (c)

912. TD issued guidelines on procedures in making appointments to all DCTCs in June 2015, requesting operators of all DCTCs to remind their staff to promptly enter into the computer system all relevant booking information (including registration marks of the vehicles under application and contact information of the applicants), to avoid occurrence of multiple or invalid appointments. In order to step up monitoring of all DCTCs, TD conducts random telephone checks on the appointment arrangement of each DCTC. If cases where non-compliance with TD's requirements are identified, TD will issue warning letters to the DCTCs concerned. If DCTCs are found repeatedly violating TD's requirements, TD will consider ceasing designation of the DCTCs concerned upon expiration of their designation. Up to now, TD has not found any cases of non-compliance of TD's requirements. The DCTCs operation and the booking arrangement are considered smooth. These two recommendations have been implemented and completed, with the monitoring measures to be continued.

Recommendation (d)

913. To facilitate the public to search the relevant information, TD has added keywords such as "annual vehicle examination", "vehicle examination" and "designated car testing centre" to the GovHK portal in mid-July 2015. TD will also continue to increase relevant publicity via its website.

Recommendation (e)

914. When designing the website for checking appointment status of the DCTCs, TD has examined different options of checking periods such as one week, two weeks or three weeks. Having taken into account the need to simultaneously display the information of different DCTCs on the webpage, TD has adopted the option of one-week checking period. TD will review the online platform for checking appointment status of DCTCs when necessary.

Recommendation (f)

915. TD has stepped up liaison with 1823 on the new measures relating to online checking of appointment status at DCTCs. Staff of 1823 has been forwarding the appointment enquiries to the Monitoring Unit of TD for follow-up actions. Moreover, TD has put up posters and distributed leaflets to remind vehicle owners that they could schedule vehicle examination within four months before the expiry of vehicle licences. The 1823 hotline was also printed on such posters and leaflets.

Recommendation (g)

916. The Office of the Government Chief Information Officer approved the funding for "Enhancement of Online Vehicle Annual Examination Appointment Booking System" in late 2015. The Electrical and Mechanical Services Department (EMSD) has been working on the project at TD's request. Due to the complexity of the system and the time required to discuss with all DCTCs the implementation details, EMSD expects that the system will come into operation in the second quarter of 2017. Direct booking of vehicle examination will then be available via GovHK.

Recommendations (h), (i), (j) & (k)

917. To increase the number of DCTCs so as to cater for rising public demand for vehicle examination, TD has invited applications for designation of new DCTCs from interested parties in May 2015. Since October 2015, training courses for approved car testers of new DCTCs have also been arranged. The new DCTCs have come into operation in batches since December 2015. TD expects the number of DCTCs to increase from 22 to 45.

918. Regarding the booking situation of DCTCs, according to TD's record the average booking time for vehicle examination in the past four months is around one day. For individual DCTCs, examination service could even be arranged on the same day.

Recommendation (l)

919. TD will strengthen communication with the trade by conducting regular meetings every six months to listen to their views. Such meetings will continue to be held regularly.

Recommendation (m)

920. TD has put up posters and distributed publicity leaflets to remind vehicle owners that they could schedule vehicle examinations within four months prior to the expiry of their vehicle licences to facilitate licence renewal. Since the number of DCTCs has doubled, the demand for vehicle examination in the peak period is expected to be met.

Recommendation (n)

921. TD has unified the arrangements for handling appointments for vehicle examination in all DCTCs. Special arrangement for vehicles with imminent licence expiry dates is no longer provided. In fact, since the gradual opening of new DCTCs and more bookings become available, car owners have more options on vehicle examination and such special arrangement is no longer required.

Transport Department

Case No. 2015/1037 – (1) Failing to urge the management company of a private residential estate to rectify the substandard road humps; and (2) Failing to inform the complainant of the case progress

Background

922. On 17 March 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Transport Department (TD).

923. In June 2011, the complainant made a complaint to TD that a private residential estate had been providing substandard road humps for years. TD replied that the management company of the private residential estate had intention to hire a traffic consultant to follow up the issue. Nevertheless, the subject road humps had not been removed still, and TD did not contact him further about the issue. He complained against TD for not supervising the case properly, and as a result, the road hump problem remained unresolved. The complainant was also dissatisfied that after the reply, TD did not proactively contact him to report the progress of the issue.

The Ombudsman's observations

924. The Office concurred that it would be more desirable if the owners of the residential estate would plan and implement the road hump replacement works themselves rather than for TD to carry out the works. Also, the management company had not made an unreasonable claim by saying that it would take two years to plan and three years to complete the road works for the entire estate. In September 2011, the management company indicated that it would hire a consultant to follow up the road hump problem holistically. In the subsequent three years, although TD had liaised with the management company many times, it did not help resolve the problem and there was no progress. Although the management company indicated that during road repaving works, it would replace the substandard road humps at the same time. However, the management company did not implement the works as committed. The Office considered the slow progress of the issue unacceptable and that there was significant delay.

925. The Office considered that during the whole process, TD just followed up with the management company passively, and the consultant only made responses after being repeatedly urged by TD. The management company undertook to say replace the road humps in connection with the road repaving works and to complete the road works in three years' time, but failed to do so. Despite the way that the management company handled the matter might make one suspect that the company was avoiding or delaying the works, TD still did not actively follow up the issue, but just continued to urge the management company by way of letters or telephone calls, hoping that the management company would eventually tackle the problem. TD should be responsible for letting the problem drag on for four years without any concrete progress.

926. In addition, the Office noticed that the management company had indicated that installation of road humps with 3,700 mm wide on some minor roads was not technically feasible. It might increase the road traffic safety risk if all substandard road humps (up to 45% of the existing road humps) were removed. Under this circumstance, the Office considered that TD should consider whether the justification provided by the management company was reasonable based on its professional knowledge instead of repeatedly stating that all road humps should be in compliance with the legal requirements. The Office appreciated that TD should not conduct traffic planning for the private residential estate but TD should take a step forward as the issue had been dragged on for years. If TD considered the justification provided by the management company not reasonable, it should offered comments to the management company from its professional viewpoints. If TD agreed with the views from the management company, it should work together with the management company to find a feasible solution to resolve the issue.

927. With regard to the dissatisfaction of the complainant about TD for not actively approaching him and reporting the progress of the issue, the Office considered that TD had to handle tens of thousands of complaints or enquiries each year and it could not report the latest progress of each complaint or enquiry case to the complainant. However, in the reply made on 16 September 2011, TD only informed the complainant that the management company intended to employ a consultant to follow up the issue. It was not known whether the management company had eventually employed a consultant or not, and if it had, it was not known what were the recommendations made and whether the recommendations were accepted by the management company. It was therefore undesirable for TD to close the complaint case with the above reply. The Office considered that TD should at least close the case when the management company had employed a consultant and committed to closely follow up the case.

928. After detailed consideration of TD's comments, The Ombudsman considered this complaint partially substantiated.

929. The Ombudsman recommended that –

(a) TD should review the existing legislation and the Code of Practice for Private Roads (CoP) to see whether they are still applicable to the road humps on private roads in Hong Kong. If not, TD should consider amending the legislation and/or updating the CoP; and

(b) if TD considers the existing legislation and the CoP are still applicable on private roads in Hong Kong, given most of the road humps are unable to comply with the requirements, TD should consider the need to set up a clear priority and standard for taking enforcement actions;

(c) as regards this case, TD should make a clear stance in respect of the problem of road humps at the private residential estate;

(d) if TD believes the management company's justifications for refusing to reconstruct and remove the road humps reasonable, it should consider how to allow the management company to keep the road humps under the current laws. Otherwise, it should proactively discuss the way to resolve the problem with the management company;

(e) if the management company remains to be uncooperative or adopts a delaying attitude, TD should seriously consider taking stricter enforcement actions; and

(f) TD should follow up closely with the handling of the existing traffic signed in the residential estate as mentioned by the management company.

Government's response

930. TD accepted The Ombudsman's recommendations and has taken the following actions.

931. TD clearly stated to the management company that substandard road humps should be rectified during road repaving works in future and the new road humps should have regard to the legal requirements. TD also advised that if the condition of the road humps deteriorated, it could lead to safety problems. TD would request the management company to handle them. If the management company refused to carry out the repairs (such as repairing or removing the damaged road humps), subject to the actual situation, TD would consider taking appropriate enforcement actions. To ensure the newly built road humps complying with the legal requirements, TD had also requested the management company to provide relevant information and records during the reconstruction or new construction of road humps in the future.

932. TD reviewed the legislation and planning standards of road humps in overseas countries (including Australia, Singapore, the United Kingdom and United States), and is now in discussion with the Transport and Housing Bureau about the result of the review and other relevant issues. TD would report to the Office on the latest progress in a timely manner.

Transport Department

Case No. 2015/1595 – To register an invalid address of a driving licence holder and providing the address to the Police, resulting in a fixed penalty notice wrongly sent to the complainant

Background

933. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Transport Department (TD) for allowing a person (Mr A) to register an address which did not exist but was almost the same as that of the complainant as the correspondence address and providing the incorrect address record to the Hong Kong Police Force (the Police), resulting in the Police sending the Fixed Penalty Notice (the Notice) of Mr A to the complainant's address.

934. On the morning of 23 April 2015, a postman delivered a letter issued by the Police to the mailbox at the complainant's residence. The letter was addressed to Mr A, who did not reside at the address of the complainant. The address printed on the envelope was incorrect (the complainant resided at Flat "96" but the letter was addressed to Flat "96C"). The complainant then made enquiries with the Police and was informed that the address was provided by TD.

935. Given the above, the complainant complained against TD for –

(a) failing to ensure that the address provided by Mr A was correct;

(b) providing incorrect address records of licence holders to other government departments; and

(c) allowing licence holders who use incorrect addresses to use the road which would jeopardise the protection to other road users.

The Ombudsman's observations

936. Currently, a number of government departments would rely on TD to provide the addresses of driving licence holders and registered vehicle owners, especially in performing traffic-related enforcement duties. Therefore, it was of utmost importance to ensure the accuracy of the relevant address records.

937. Under the current practice of TD, applicants were required to produce address proof when submitting licensing applications. If an applicant failed to produce address proof at that time, TD would first process the application but requested the applicant to submit address proof within 14 days. If the applicant failed to submit address proof within 14 days, a remark would be made in the computer system to bring it to the attention of the TD staff. Not until the applicant approached the TD office to submit licensing applications at a later date would TD request the applicant to produce address proof before processing his/her application. The practice was also applicable to cases where the addresses of driving licence holders and registered vehicle owners were found to be incorrect by TD.

938. The Office considered TD's practice too passive. An unverified address record would be in use as long as the applicant did not make any further application with TD. Worse still, even if an address record was proved to be incorrect, the address record would still be kept in the computer system for use by other government departments until the applicant approached TD office again to make further application and had the address record verified. The situation was far from satisfactory.

939. As shown in this case, upon receipt of the complaint from the Office, TD had taken the initiative to contact Mr A, instead of waiting until the applicant submitted further application to TD, and Mr A had promptly submitted an application for changing his address supported by address proof. The Office considered that TD should take the initiative to contact the licence holders concerned as it did in this case if an address was confirmed to be incorrect. In the interim, TD should also stop using the address or make a remark on the address record to avoid other departments unknowingly using the incorrect address to contact the applicant.

940. Apart from applications for changing address record, it had been the practice of TD in processing different applications (including applications for first issue/renewal of vehicle/driving licence) that applicants were required to produce address proof when submitting applications. For cases in which the applicants failed to produce address proof when applying for changing their address records, the Office considered TD's practice to update the address record first and to ask the applicants to produce address proof afterwards understandable. However, for other applications, TD may consider whether a different arrangement can be made, for example, by requiring the applicant to produce address proof before issuing the permits/licences concerned.

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

942. The Ombudsman recommended that TD should consider the following when reviewing its existing practice –

(a) stepping up publicity to remind applicants of the requirement of producing address proof when submitting licensing applications, the relevant legal requirements and penalty, etc.;

(b) conducting in-depth analysis of the statistics of cases involving the updating of TD's address records by driving licence holders/registered vehicle owners in 2013-2015 (up to 24 June) and cases of failure to submit address proof by driving licence holders/registered vehicle owners or where addresses were found to be incorrect during the same period, with a view to identifying the types of applications (e.g. vehicle licence/driving licence/updating address) for which the address proof was not submitted and the circumstances of such cases (e.g. first application/renewal, submission in person/by agent), and, for the types of applications with higher incidence of failure to submit address proof, to consider whether it is necessary to take specific action to rectify the situation;

(c) considering whether different approaches should be adopted for different types of applications, e.g. for some kinds of applications, address proof should be submitted before the processing of such applications. Discretion may be granted by TD if applicants have special reasons;

(d) for applications which must be processed promptly by TD and the address proof thereof can be allowed to be submitted later on, considering whether it is necessary to take the initiative to contact and remind the applicant to submit address proof, e.g. by sending reminder letters or even warning letters generated from the computer system;

(e) adding messages on the application forms or the website of TD to remind the applicants to bring along address proof when submitting licensing applications to TD; and

(f) taking the initiative to contact the driving licence holders/registered vehicle owners concerned for verification if an address is confirmed to be incorrect, and, in the interim, to stop using the address and make a remark in the computer system to avoid other departments using the address.

Government's response

943. TD accepted The Ombudsman's recommendations and has taken the following actions.

Recommendation (a)

944. TD has launched a series of publicity activities starting from 21 September 2015 to inform the public of the need to produce address proof when submitting licensing applications and that failure to do so may render the applications not being processed. The applicants are also reminded of the relevant legal requirement to notify TD within 72 hours of change of address and that the notification should be supported by address proof. The publicity activities include radio broadcasting, TD website, posting of banners and posters and making announcements at the Licensing Offices. Verbal reminders are also given by counter staff of the Licensing Offices.

Recommendations (b) and (c)

945. Starting from 4 January 2016, TD has strictly enforced the requirements imposed on licence applicants with regard to the production of address proof. Except for a few applications (e.g. applications for duplicate copy of licences/permits) where there is no statutory requirement for address proof, applicants are required to produce valid address proof when submitting applications, and failure to do so may render their applications not being processed by TD staff. With the full implementation of the above measures, it is no longer necessary to introduce specific measures for specific types of applications/circumstances for the time being.

946. Moreover, TD has uploaded a list of "acceptable proof of address" and "circumstances under which alternative documents to serve as address proof will be accepted" onto its website for public reference. For applicants who have urgent need for licensing services but are unable to produce address proof when submitting licensing applications for special reasons, the officers-in-charge of the Licensing Offices would consider whether to exercise discretion and allow applicants to submit address proof afterwards having regard to the circumstances of this limited number of cases.

Recommendation (d)

947. For cases where applicants are allowed to submit address proof after processing of the applications on a discretionary basis, reminder letters would be automatically generated by the upgraded computer system and would be sent to these applicants after the completion of licensing procedures in order to remind them to submit address proof later on. If the licence holder does not subsequently submit an address proof within 21 days, TD will make relevant remarks in the computer system to show that the address is doubtful. If the same licence holder subsequently submits any applications to TD, TD will not process his/her applications unless he/she can produce address proof. After the implementation of the new measures, cases in which TD has to contact the applicants regarding submission of address proof will be greatly reduced.

Recommendation (e)

948. Currently, it is stated in different types of licensing application forms that applicants have to bring along address proof when submitting application. Since 21 September 2015, special reminders have been added on the website of TD to remind applicants to bring along address proof when submitting licensing applications. To further disseminate the message, TD has modified the design of its webpage by having such messages popped up automatically when applicants download application forms online. Applicants must confirm that they have read and understood the requirement before they can proceed to downloading the form.

Recommendation (f)

949. TD agrees in principle that further verification should be conducted for address records which are proved to be incorrect. TD would, under the premise of not affecting the processing of licensing applications in accordance with the performance pledge, strike a balance between the resources allocated to processing licensing applications and the resources put into verifying incorrect address records. For address records which are suspected to be incorrect, TD has taken steps to make relevant remarks in the computer system for reference by other government departments. This would enable them to consider whether to use such addresses after taking into account different legal requirements and operational circumstances.

Transport Department

Case No. 2015/2581 – Failing to urge an estate management company to rectify substandard road humps in the estate

Background

950. The complainant lodged complaints with the Office of The Ombudsman (the Office) against the Transport Department (TD) from May to June 2015. The complainant alleged that TD had taken no action for a private housing estate (the housing estate) to install road humps and display signs of road humps at wrong locations outside his residence. This had caused dangers to road users and the noise made by the passing vehicles had caused disturbance to the complainant. The complainant repeatedly complained to TD that substandard road humps were found in the housing estate after the Code of Practice for Private Road (CoP) had been put in force. He considered that due to the improper supervision of TD, the substandard road humps were still not removed or reconstructed.

The Ombudsman's observations

951. The Office considered that whether the road humps and associated traffic signs in the housing estate would have road safety concerns and whether they have to be reconstructed, removed or relocated would be subject to TD's professional judgment. The Office would not comment on it. Besides, whether enforcement actions should be taken against the substandard road humps should also be decided by TD. As restricted by The Ombudsman Ordinance, the Office could not comment.

952. TD had explained that CoP only provides recommendations and guidelines for the installation location of road humps and associated traffic signs. It is not illegal not to follow them. TD had all along been following up the matter for the complainant, including conducting site visits and making recommendations to the management company. The management company had eventually moved the sign to the street lamp which was 60 metres away from the road hump concerned. TD agreed that the position was appropriate. As such, the Office considered that TD had followed up appropriately without any malpractice.

953. The Office concurred that it would be more desirable if the owners of the housing estate would plan and implement the road hump replacement works rather than for TD to carry out such works. The management company initially said it would take two years to plan and three years to complete the works for the entire estate. It was not unreasonable. However, the management company did not carry out the implementation as committed.

954. Before the Office's intervention, TD stated repeatedly that all the road humps should comply with the legal requirements but had not taken other follow-up or enforcement actions. Not only did this fail to resolve the problem, but gave an impression that TD did not enforce the law and delay handling the problem.

955. When the Office requested TD to give a clear stance on the housing estate's problem of road humps, it indicated that the case would not be a priority in terms of law enforcement. From the letters, telephone conversation and meetings between TD and the management company in the past few years, the Office found that TD just requested the management company to rectify/remove the road humps which failed to meet the legal requirements. This was different from TD's views that the road humps had no safety problem; that the road humps needed not be rectified/removed immediately; and that TD would not give priority in taking enforcement against them. The Office believed that the management company might not know about TD's thinking and was mistaken that TD insisted on rectification/removal of the substandard road humps, otherwise the management company would not seek legal advice recently. TD should clearly state its stance to the management company so that the stakeholders would clearly understand TD's views in this matter. This would allay their doubts and worries and avoid further debates about the issue.

956. On the other hand, TD had indicated repeatedly in its replies to the complainant that the non-compliant road humps of the housing estate were only out-of-date but not illegal. Upon the investigation of the Office, TD admitted that it was indeed illegal to install road humps which were not complying with the legal requirements. Therefore, the wording used by the Department in its earlier replies to the complainant was imprecise. The Office considered that "out-of-date" and "illegal" were very different in terms of their meanings. The imprecise use of words by TD demonstrated that the Department had a deviation in the understanding of the problem of road humps and the actual circumstances.

The Department might be far from having a clear stance on the handling of the problem which was different from what it had claimed.

957. With regard to the management company's allegation that most of the road humps in Hong Kong are not in compliance with the legal requirements, and that relevant legislation should be reviewed by TD to meet the actual need, the Office considered that TD should have a comprehensive review on the relevant legislation and consider whether amendments would be required; or TD should make reference to the Government's approach in tackling unauthorised building works and illegal parking by setting priority and standard for taking enforcement actions.

958. After detailed consideration of TD's comments, The Ombudsman considered this complaint partially substantiated. The Ombudsman recommended that –

(a) TD should clearly state its views regarding the road humps of the housing estate to the management company;

(b) if the reconstructed/new road humps do not comply with the legal requirements, TD should immediately request the management company to rectify them and/or consider taking enforcement actions;

(c) if the safety condition of the substandard road humps in the housing estate deteriorates, TD should take follow-up actions in a timely manner;

(d) TD should review the existing legislation and CoP to see whether they are still applicable to the road humps on private roads in Hong Kong; if not, TD should consider amending the legislation and/or updating the CoP; and

(e) if TD considers the existing legislation and CoP are still applicable on private roads in Hong Kong, given most of the road humps are unable to comply with the requirements, TD should consider the need to set up a clear priority and standard for taking enforcement actions.

Government's response

959. TD accepted The Ombudsman's recommendations and has taken the following actions.

960. TD clearly stated to the management company that substandard road humps should be rectified during road repaving works in future and the new road humps should have regard to the legal requirements. TD also advised that if the condition of the road humps deteriorated, it could lead to safety problems. TD would request the management company to handle them. If the management company refused to carry out the repairs (such as repairing or removing the damaged road humps), subject to the actual situation, TD would consider taking appropriate enforcement actions. To ensure the newly built road humps complying with the legal requirements, TD had also requested the management company to provide relevant information and records during the reconstruction or new construction of road humps in the future.

961. TD reviewed the legislation and planning standards of road humps in overseas countries (including Australia, Singapore, the United Kingdom and United States), and is now in discussion with the Transport and Housing Bureau about the result of the review and other relevant issues. TD would report to the Office on the latest progress in a timely manner.

Transport Department

Case No. 2015/3391 – Delay in handling and unreasonably rejecting the complainant's Personalised Vehicle Registration Mark application

Background

962. The complainant complained against the Transport Department (TD) for delayed handling and unreasonably rejecting his Personalised Vehicle Registration Mark (PVRM) application.

963. The complainant made a PVRM application in May 2014 and his proposed PVRM was his surname. After paying the deposit, he waited for one year and four months before he received TD's letter on 19 August 2015 advising his application was rejected. The complainant was dissatisfied that TD –

(a) should have notified him earlier if there was any issue in his proposed mark;

(b) had misled him into believing that his application had been approved when he made a telephone enquiry to 1823 on 18 August;

(c) had failed to explain how exactly his proposed mark caused confusion for the purposes of law enforcement; and

(d) was unhelpful and refused to advise him how he might speed up the process or raise the chance of getting approval for his next application.

The Ombudsman's observations

Allegation (a)

964. The Office of The Ombudsman (the Office) could see that TD had taken a longer time than usual to process the complainant's application because TD needed to consider and draw up a holistic set of yardstick or guideline for consideration of confusion cases. It was not possible for TD to notify the complainant earlier before the review was completed.

965. The Office agreed with TD that, if there were frequent concerns about the possible confusion caused by certain marks, it would be better to have a set of yardstick or guideline to facilitate TD and members of the PVRMs Vetting Committee in considering similar applications in future. The yardstick would not only help expedite the processing of confusion cases, but also ensure that a consistent approach would be applied.

966. In view of the above, the Office considered allegation (a) unsubstantiated.

Allegation (b)

967. The Office had examined the record of telephone conversation between 1823 and the complainant. Since the complainant could not provide the application number, 1823 was unable to ascertain the actual status of the application. Nevertheless, the staff of 1823 had tried to be helpful and provided information that was available, e.g. the complainant's application was in Invitation Exercise No. 24; his PVRM was not included in the upcoming auction scheduled for August and September 2015; the two auctions were selling PVRMs in the Invitation Exercise Nos. 23 and 24; and the complainant should be able to get the result soon. Though this might have led the complainant into believing that his application would soon be approved, the 1823 staff had never mentioned that the complainant's application had been or would soon be approved. The Office believed the 1823 staff was trying his best to answer the complainant's questions without any intention to mislead the complainant. This was probably a misunderstanding. The Office thus considered allegation (b) unsubstantiated.

Allegation (c)

968. The Office could understand that applicants whose applications got rejected would want to know the reasons for rejection. The Office was of the view that, if an applicant wanted to know the detailed reason for rejecting the application, TD should inform him/her so. Considering that the information of all allocated PVRMs was already in the public domain, i.e. published in TD's website and shown on vehicles running on the road, the Office did not see any strong justification for refusing to tell the complainant that his proposed PVRM was very similar to another approved mark. Regarding TD's concerns about free expression of views, the Office agreed that TD needed not divulge the details of discussion such as which party raised objection or the comments raised by each party. Yet the Office saw no reason that TD had problem in telling the applicant the final reason for rejection.

969. The Office took the view that TD should have informed the public about the general confusion. Even though TD might not want to publicise the whole set of yardstick, disseminating the general principle or concerns should be able to help the public understand more about TD's criteria in vetting PVRM applications. To avoid misunderstanding, TD could add caveats that those principles are not exhaustive and that each application has to be considered on its own merits.

970. Based on the above, the Office considered allegation (c) substantiated.

Allegation (d)

971. The Office agreed that TD, as the approving authority for PVRM, should maintain impartiality at all times and refrain from giving advice to applicants. In fact, it is not possible to advise how the PVRM combinations should be revised in order to get a better chance for approval as there could be many uncertainties during the vetting stage. Since the application process will normally take months, many new PVRMs could have been allocated in the interim. Moreover, each application has to be considered on its own merits. For example, while "3" and "E" are not generally considered as similar or confusing, "STEPHEN" and "STEPH3N" may fall into the category of confusion cases. These considerations will only emerge during the detailed vetting stage. Therefore, the Office did not consider TD to be unhelpful in this case. This complaint point was, therefore, unsubstantiated.

972. In view of the above, The Ombudsman considered this complaint against TD partially substantiated.

973. The Ombudsman recommended TD to –

(a) review its general directive and give a clearer explanation to applicants about the reason for rejection when asked; and

(b) consider informing the public about the general concern on possible confusion.

Government's response

974. TD accepted The Ombudsman's recommendations, with the note that circumstantial factors played an important role in determining whether a mark under application breached any of the vetting criteria, so that each application had to be considered on its own merits and in accordance with the circumstances at the time. Regarding the recommendations –

(a) TD has in practice been providing further explanations and clarifications to rejected applicants when asked. TD would continue to do so and would, where applicable, further release information on allocated PVRMs to applicants having regard to individual circumstances; and

(b) TD agrees that it would assist the public in their application if more information on TD's vetting criteria and considerations were released to the public for reference. TD has already provided additional explanations and examples under the relevant vetting criterion in Annex 3 of the "Guidance Notes for Application for Personalised Vehicle Registration Mark" to further explain the concept of possible confusion for public reference. The revised Guidance Notes have been in use since May 2016.

Transport Department

Case No. 2015/3918 – Failure to regulate the use of personal electric mobility device

Background

975. The complainant lodged a complaint with the Office of The Ombudsman (the Office) that the Transport Department (TD) did not regulate electric mobility devices. The complainant noticed that different types of electric mobility devices had emerged and were used in public places (such as pavements, carriageways, shopping centres and MTR stations, etc.), but TD did not regulate them. The complainant reckoned that the use of electric mobility devices in public places might create potential dangers and should be regulated.

The Ombudsman's observations

976. TD considered that due to the heavy traffic and dense population in Hong Kong, mobility devices which were not intended for people with impaired mobility were unsuitable for use on carriageways or pavements. This fell under the professional judgment of TD, and the Office did not hold a differing view.

977. TD also considered that the current laws and regulatory measures were adequate. As the legal advice obtained by TD indicated that mobility devices met the definition of "motor vehicle" in the Road Traffic Ordinance, but TD would not licence these devices, the riding of mobility devices on carriageways was thus illegal. As for pavements, enforcement action could be taken pursuant to the Summary Offences Ordinance.

978. The Office was of the view that TD had all along been keeping in view the regulatory issues for mobility devices, and had confirmed that the existing regulation was adequate. Therefore, The Ombudsman considered this complaint unsubstantiated.

979. However, with the rapid technological development and free flow of information, many new products could develop into a trend within a short period of time. Mobility devices were also gaining popularity under this trend, with new products constantly introduced into the market.

980. The Office noticed that some shops in large shopping centres and popular districts had recently been selling Mini Segway/Hoverboard devices; and in a recent electronic fair, many companies were selling Electric Self-balancing two-wheeled Vehicles, with some exhibitors claiming that they could reach the speed of 30 km/hr. The general public could easily purchase these gadgets, but they might well be unaware that using these devices in public places could be illegal and could be arrested by the Police.

981. The Office was of the view that if the situation described in the preceding paragraph continued, the existing regulatory regime and mode might not be sufficient to handle the worsening problem. In particular, where mobility devices were used on pavements, the Police could only take enforcement action pursuant to the Summary Offences Ordinance, and according to the ordinance concerned, various factors had to be taken into account and the judgment of the enforcement officers had to be relied on to a large extent. In reality, the Police would take enforcement action only after accidents or injuries occurred, and this practice might be too passive. If TD considered that mobility devices were unsuitable for use in public places, it might have to consider establishing a clearer regulatory regime to completely ban the use of these devices in public places or on pavements.

982. On the other hand, to tackle the problem at its roots, the Office considered that TD should also adopt more proactive publicity to educate the public to use mobility devices legally and safely.

983. The Ombudsman recommended TD to review its practices in the following areas –

(a) mobility devices were now faster (the speed of some devices might exceed 30 km/hr) and more manoeuvrable. TD should focus on the features of the mobility devices and review the existing regulatory framework and legislation again to see if further refinement was needed, so as to keep them up-to-date;

(b) TD had released public statements in 2005 concerning the introduction and use of electric self-balance two-wheel vehicles. TD should consider reiterating its stance on the use of mobility device to the public again, including the justifications against the use on pavements and carriageways, and points to note before using them; and

(c) TD should consider how to enhance the publicity and public education concerning recommendation (b).

Government's response

984. TD accepted The Ombudsman's recommendations and has taken the following actions.

Recommendation (a)

985. TD has reviewed the existing legislation. Mobility devices were defined as "motor vehicles" under the Road Traffic Ordinance, but TD will not licence these devices. Hence, their use on carriageways will be illegal. As for the use on the pavements, any person who rides or drives mobility devices recklessly or negligently in public places is liable to sanction under the Summary Offences Ordinance. TD considered these existing laws to be sufficient from the public safety perspective. TD would closely monitor the development of new mobility devices. If there are any signs indicating the emergence of mobility devices which cannot be effectively regulated by the current legislation framework, the Government would review and suitably amend the legislation as soon as possible.

Recommendations (b) & (c)

986. TD issued a public notice in January 2016, explaining to the public the reasons why mobility devices are unsuitable to be used on pavements and carriageways, the possible contraventions, as well as where mobility devices could be used.

Part III
– Responses to recommendations in direct investigation cases

Environmental Protection Department and Transport Department

Case No. DI/376 – Government's Implementation of Strengthened Control of Exhaust Emissions from Petrol and LPG Vehicles

Background

987. The Government has implemented a new emission control measure ("the New Measure") from 1 September 2014 to include nitrogen oxides ("NOx") in the regulatory regime in a bid to improve roadside air quality. Under the New Measure, the Environmental Protection Department ("EPD") has set up remote sensing equipment to monitor the levels of NOx and other exhaust gases at various locations throughout the territory. Where the equipment detects excessive exhaust emissions from passing vehicles, EPD will issue an Emission Testing Notice ("ETN") to the vehicle owners concerned, requiring them to send their vehicles within 12 working days for an emission test conducted with a chassis dynamometer (commonly called a "treadmill") at one of EPD's Designated Vehicle Emission Testing Centres ("DVETCs"). Failure to pass the test may lead to cancellation of the vehicle licences in question by the Transport Department ("TD").

988. The New Measure was introduced with good intentions. Nevertheless, the Office of The Ombudsman (the Office) received public complaints shortly after its implementation, in which the complainants alleged that while their vehicles had just passed TD's annual examination, they were then notified by EPD to send their vehicles for the treadmill test. The Office's investigation into those complaint cases revealed that TD has not included NOx emissions, targeted under the New Measure, in its exhaust emission standards adopted in the idle emission test conducted during the annual vehicle examination. Moreover, the 22 Designated Car Testing Centres ("DCTCs") currently carrying out the annual examination for TD are not equipped with treadmills for testing NOx emissions. In other words, vehicles having passed TD's annual examination do not necessarily meet the exhaust emission standards of the treadmill test. As there are now only four DVETCs authorised by EPD to conduct the treadmill test, it is questionable whether they can

cope with the demand for vehicle testing and maintenance generated by the New Measure.

989. Meanwhile, EPD and TD have yet to draw up a timetable for upgrading the facilities and functions of most, if not all, DCTCs to enable them to conduct the treadmill test. The Office, therefore, was concerned about whether any inadequate planning and lack of coordination between the two departments in the implementation of the New Measure would cause any inconvenience to the public, and whether the smooth implementation of the New Measure would be compromised because they have failed to fully consider the capacity of existing ancillary facilities (such as the number of repair centres and DCTCs, and their technical levels).

990. In this connection, the Office initiated the direct investigation.

The Ombudsman's observations

991. The Office's investigation has revealed that in the implementation of the New Measure, there are eight inadequacies on the part of EPD and TD in the following four areas.

A. Inadequate Planning

Failure to Provide Adequate Support for Vehicle Maintenance Trade before Implementation of New Measure

992. As early as 2002, the expert group (which included representatives from TD) formed by EPD completed deliberating the consultant's research report, and supported the consultant's proposal of using remote sensing equipment and treadmills for inspection of vehicles with excessive exhaust emissions. However, it was not until November 2011 that EPD studied the specific arrangements. In the first month upon the New Measure coming into effect on 1 September 2014, the overall passing rate was just 50% for vehicles undergoing the emission test with treadmills.

993. Since NOx are colourless and odourless, it will be difficult to detect any excessive NOx emissions without specialised equipment (such as treadmills or other portable sensing equipment for NOx testing). The Office believes that one of the main reasons for the vehicle maintenance trade to consider itself not yet able to master emission-related repair skills

was the lack of suitable equipment for detecting the NOx emissions of vehicles. Apparently, the Government has overlooked the actual support the trade needed under the New Measure.

Failure to Provide Necessary Training for Vehicle Maintenance Trade at Early Stage

994. EPD only started providing the relevant information to the maintenance trade in April 2013 through demonstrations, technical advice hotlines, seminars and short courses offered jointly with the Vocational Training Council ("VTC"). To date, only some 1,000 mechanics have attended those short courses. Given that there are more than 10,000 mechanics in the trade, the shortfall is obvious. Therefore, EPD should take a serious look at the technical issues involved in vehicle maintenance generated by the New Measure, step up its cooperation with VTC and other training organisations, and discuss with the Electrical and Mechanical Services Department ("EMSD") on how to enhance the maintenance trade's ability to provide emission-related repairs through the Voluntary Registration Scheme for Vehicle Mechanics and the Voluntary Registration Scheme for Vehicle Maintenance Workshops.

Failure to Explore the Possibility of Including Emission-related Repairs among Categories of Registered Vehicle Mechanics to Help Maintenance Trade and Vehicle Owners to Find Suitable Mechanics

995. The Vehicle Maintenance Registration Unit under EMSD is responsible for the promotion, general management and operation of the Voluntary Registration Scheme for Vehicle Mechanics under which those with the necessary qualifications and/or experience may apply to become registered vehicle mechanics so that their qualifications and skills can be recognised. While registered mechanics are divided into different categories based on the types of repairs they provide, there is no category for inspection and repairs of vehicle emission systems. EMSD indicates that it has no role in the implementation of the New Measure and the departments concerned have not consulted it on the registration of vehicle mechanics or the question of maintenance skills.

996. The Office considers it necessary to include emission related repairs in the service categories provided by registered mechanics to ensure that the vehicle maintenance trade has adequate skills in repairing vehicle systems. Not only would this help the trade to estimate the demand for mechanics with related skills, it would be easier for vehicle owners to find the right people to repair their vehicles. Vehicle owners

will not know what to do if they cannot get timely service from mechanics with related skills, thus compromising the effectiveness of the New Measure.

B. Lack of Publicity and Unclear Information

Publicity for New Measure Failing to Address Concerns of Interested Parties (Especially Vehicle Owners and Maintenance Trade)

997. Nowhere in the print advertisements including posters and leaflets or the TV commercial has EPD conveyed the most important message to the recipients: "it is possible that vehicles which have passed the annual vehicle examination may still be found emitting excessive exhaust by remote sensing equipment and fail in the treadmill test". Rather, the advertisements merely tell the public about "strengthened control of exhaust emissions", without giving any details as to how it is to be done or how it differs from the annual vehicle examination.

998. The Office considered that the publicity information on the New Measure is not clear and precise and may easily cause misunderstanding. In fact, this may explain why some members from the vehicle maintenance trade have commented that they mistook the New Measure to be something similar to the idle emission test in the annual examination. Obviously, the Government has failed to provide information that interested parties, especially vehicle owners and the trade, would find useful.

No Relevant Information Available on TD's Website

999. TD is responsible for issuing and cancelling vehicle licences, which means it can determine whether a vehicle could still be on the road. Therefore, it plays a major role in the implementation of the New Measure. TD is also the Government department that vehicle owners are most frequently in touch with. Taking a one-government approach, TD and EPD should work together in promoting the New Measure so that vehicle owners can learn sooner and more easily about the arrangements for the New Measure and their obligations (such as having their vehicles maintained properly). The most important thing is to remind vehicle owners that "passing the annual vehicle examination does not mean a vehicle can also pass EPD's emission test by remote sensing equipment and the treadmill test". However, the Office cannot find even a simple leaflet on TD's website, let alone information about implementation of the New Measure. This shows inadequacies on the part of TD.

C. Inadequate Coordination between the Departments

Ineffective Coordination between the Two Departments on Inclusion of Treadmill Test in Annual Examination

1000. The annual vehicle examination that TD conducts on vehicles does not cover NOx emission test. Besides, the standards for carbon monoxide and hydrocarbons emission testing in the annual examination also differ from those for the treadmill test.

1001. To resolve the difference in standards of exhaust emissions between the annual examination and the treadmill test, the most direct way would be to raise the standards of the former to the same level as the latter in exhaust emission tests such that the practice would be consistent with the New Measure. As a matter of fact the discussion papers on this subject submitted by EPD to the Panel on Environmental Affairs of the Legislative Council ("LegCo") in 2012 and 2014 also mentioned the aim to include NOx test in the annual examination.

1002. Nevertheless, TD presents a different view on whether the treadmill test should be included in the annual vehicle examination. TD opines that "not roadworthy" and "exceeding the vehicle emission standards" are two different concepts. Therefore, in principle, NOx testing should not be included in the annual examination. For the convenience of vehicle owners, however, the arrangement should be having the annual examination and emission test conducted at the same time and the same venue where practicable. TD considers that the owners can make an appointment for the annual examination and emission test to be conducted at the same time and the same centre. In so doing, vehicles are still required to go through both the annual examination and the treadmill test; but in practice, the owners need simply to arrange for one examination, without going through duplicated procedures, thereby achieving the effect of including the treadmill test in the annual examination.

1003. The above shows that TD and EPD take on different positions as regards the implementation of the New Measure. It is doubtful whether they have been coordinating effectively with each other.

1004. If this latest view of TD is to put into practice, it would mean that the annual examination still would not include the treadmill test. Currently, the annual exhaust emission test is not required by law. Unless

the relevant legislation is amended to require all vehicle owners to arrange for an annual emission test in addition to the annual examination, EPD has no authority to issue an ETN to require a vehicle owner to arrange for the treadmill test if the vehicle concerned is not found to have excessive emissions. The only thing that EPD can do is to send the owner a cordial reminder. It is difficult to assess whether the setting up of an emission test centre at the same venue can encourage the majority of vehicle owners to put their vehicles through an emission test while undergoing the annual examination. Furthermore, if most of the vehicle owners do take the treadmill test concurrently with the annual examination, the annual examination will take an extra 20 minutes to complete. This may require a significant increase in the capacity of the existing 22 DCTCs to cope with the demand. As the number of vehicles to be examined is increasing every year, EPD and TD should give careful consideration to the capacity of the DVETCs and DCTCs regardless of the future arrangements for the New Measure.

1005. The Office considers that EPD should work proactively with TD to resolve their differences in implementing the New Measure and clarify as soon as possible the direction and specific arrangements for it. They should also review the long-term strategy and principle with the relevant policy bureaux in this regard to ensure the effectiveness of the New Measure.

D. Failing to Adequately Consider the Ancillary Facilities for Implementing New Measure

Failing to Resolve Early the Problem of Installing Treadmills at DCTCs

1006. In April 2012, EPD allocated funds to TD for commissioning a consultant to study the feasibility of installing treadmills at TD's DCTCs or other locations. However, the issue had not been properly dealt with before implementation of the New Measure. As a matter of fact, in March 2014 (i.e. six months before the launch of the New Measure), some DCTCs already indicated to EPD that they would not have the space for installing treadmills. In August 2015 (i.e. one year after the launch of the New Measure), TD's consultant completed the report, concluding that among the 22 DCTCs, only five would be able to install treadmills. At present, there is no specific timetable for installing treadmills at any DCTC, and none of the DCTCs has the capacity to conduct the treadmill test.

1007. As the proposal of conducting emission test with treadmills was made as early as 2002, the Office considers that the Government should have had enough time to study ways of allocating land to install treadmills and inviting more operators to participate as well as assessing the availability of space in existing DCTCs for installing treadmills. Nevertheless, the departments concerned have failed to work out a solution before the New Measure was implemented.

Under-utilisation of DVETCs

1008. There is information that a treadmill may cost up to around $1.6 million to $2.4 million, with a service life of six years and the operating costs of a DVETC at around $230,000 to $240,000 per month, while the largest number of ETNs issued by EPD each month was 660. Assuming 20 working days in a month, an average of 33 vehicles would have undergone the emission test each working day, meaning each of the four DVETCs handling only eight cases per day on average. That was far below their maximum capacity of 32 test cases per day. Given the current operating costs of a DVETC and the number of vehicles tested, the Office believes that the costs could hardly be recovered. If such situation continues, it is highly questionable whether anyone in the vehicle testing trade would be interested to invest further into the provision of emission test service.

1009. The Office considers that before NOx testing becomes part of the mandatory annual examination, EPD should, in order to promote the importance of proper vehicle maintenance, devise incentive measures to encourage vehicle owners to take their vehicles to a DVETC for the NOx test and other emission tests. In this way, the vehicle owners would become aware of the problem of excessive emissions at an early stage. Besides, such measures can improve the sustainability of the existing DVETCs and would be of great help to the policy which aims at reducing emissions.

1010. In the light of the above, The Ombudsman made the following improvement recommendations –

(a) EPD should further discuss with TD on the interrelationship between NOx testing and the annual vehicle examination and ensure that both departments work for the same goal. They should also review with the relevant policy bureaux the long-term strategy and principle in implementing the new measure for controlling petrol and LPG vehicle emissions such

that a specific schedule for implementing such strategy and principle can be drawn up as soon as possible;

(b) Besides requiring new DCTCs to reserve enough space for installing treadmills, EPD and TD should set out a timetable for existing DCTCs that can be retro-fitted with treadmills to proceed with the installation, and provide support to them where needed;

(c) TD should actively consider how to speed up its approval for new DCTCs which have space reserved for installing treadmills. It should also study with EPD ways to ensure that these new centres will have treadmills installed at an appropriate time for conducting emission tests;

(d) TD and EPD should closely follow up on the progress of the task force (comprising representatives from the two departments and DCTC operators) on its assessment of the impact on the time and space needed for the annual vehicle examination should the treadmill test be included as part of the annual examination;

(e) EPD should strengthen its cooperation with the training organisations for the vehicle maintenance trade (such as VTC, universities and other professional bodies) to organise more courses and provide stronger technical support to help members in the vehicle maintenance trade to master the skills of vehicle emission-related repairs;

(f) EPD should discuss with EMSD whether to add mechanics specialised in emission-related repairs as another category of registered vehicle mechanics in order to ensure that members in the trade are equipped with the relevant technical skills. This would also help vehicle owners to find mechanics with the required expertise to repair the exhaust system of their vehicles;

(g) EPD should provide more financial or technical support to the vehicle maintenance trade for carrying out emission tests, so that they can measure the emissions level of vehicles by installing treadmills or with other portable devices that can detect NOx emissions. The Department should also help them obtain information on vehicle maintenance and repairs, such as the repair manuals of different vehicle models;

(h) Before the annual examination can be upgraded to include NOx testing, EPD should step up publicity regarding the New Measure, especially the treadmill testing method. Vehicles owners should also be alerted to the fact that even if their vehicles have passed the annual examination, they may still fail in the treadmill test;

(i) TD should take action to promote the New Measure to the public (for example, it can provide relevant information on its website and at its Licensing Offices) to ensure that vehicle owners are aware of the operation of the New Measure and their own maintenance responsibility;

(j) EPD should watch closely the operation of existing DVETCs and provide support where necessary. It should also make advance planning lest the effectiveness of the New Measure would be compromised if any such centres encounter difficulties in business operation; and

(k) EPD should consider formulating measures to provide incentives to vehicle owners (e.g. a vehicle testing fee subsidy) for them to take their vehicles for an emission test, thereby boosting the effectiveness of the New Measure.

Government's response

1011. EPD and TD accepted all of The Ombudsman's recommendations.

Recommendation (a)

1012. EPD and TD are actively following up the recommendations of the investigation report. The two departments held a meeting in April 2016 exchanging views on the progress of their respective studies. At the meeting, the two departments jointly explored possible options to conduct NOx emission test and annual vehicle examination at the same time and venue, and considered that in-depth studies should be carried out on issues such as the impact of NOx emission test on the mode of operation, operating cost and fee level of DCTCs, the number of additional dynamometers required, the feasibility of the options under existing laws, etc. The two departments are now conducting further studies on the following –

(I) the requirements, workflow, time and resources needed in respect of vehicle maintenance and emission test; and the assessment of the service capacity of existing and new DCTCs and DVETCs;

(II) in consultation with DCTC operators through the Task Force, how to install dynamometers in existing and new DCTCs, and the problems to be solved (e.g. manpower support, space, noise, investment, level of testing fee, technical issues, etc.);

(III) the impacts on vehicle owners; and

(IV) whether there is a need to amend existing laws, and the related follow-up work, etc.

Recommendation (b)

1013. EPD and TD jointly met with existing and new DCTC operators in May 2016 and briefed them on the Government's direction towards conducting annual vehicle examination and dynamometer emission test at the same time and venue. Some operators said they had to get hold of more detailed information, including the space needed for installing dynamometers, the time needed for the test, the environmental problems such as noise, manpower support, equipment investment, operating cost as well as technical issues, before they could make specific comments on the plan. To help the operators better understand the technical requirements for installing dynamometers and their daily operation, EPD subsequently arranged for the operators to visit a DVETC and explained in detail the technical issues of dynamometers and the method for conducting emission tests. Both departments will continue to facilitate the operators to get hold of the information relating to installation of dynamometers.

1014. The provision of explanation and information as mentioned above helped the operating trade understand the Government's proposal. However, as the issues related to emission tests are complicated, the trade reacted very cautiously and considered it necessary to further understand and examine the constraints and resources required, etc. They do not have a timetable for installing dynamometers at the present stage.

Recommendation (c)

1015. TD invited applications from the public for setting up new DCTCs in mid-2015. Starting from late 2015, new centres have come into operation successively. As at July 2016, a total of 18 new centres have been approved. Another five are expected to be approved before September 2016. It is anticipated that upon the completion of the processing of these applications by the third quarter of 2016, a total of 23 new DCTCs will be commissioned. Space has been reserved in these new centres for installing dynamometers for conducting emission tests. However, there is still no timetable for installing dynamometers in these centres due to the reasons mentioned above.

Recommendation (d)

1016. Please refer to the responses to Recommendations (b) and (c). When TD and EPD have examined the various issues mentioned in the response to Recommendation (a) and have come up with an initial proposal, they will work with the Task Force to assess the specific arrangements for conducting the dynamometer test concurrently with the annual vehicle examination, including the impact of the proposal on the time and space needed for the annual examination.

Recommendation (e)

1017. VTC has offered courses on the maintenance of petrol and LPG vehicles for the vehicle maintenance trade since December 2014. Besides, in response to the needs of the trade, EPD has been organising seminars to share information on cases of repairing vehicles with excessive emissions and demonstrating the dynamometer vehicle emission test. From February to April 2016, 17 seminars and demonstration sessions were held by EPD with the participation of 768 vehicle mechanics.

1018. The trade in general finds that the above training can help them repair vehicles to control exhaust emissions. EPD will, having regard to the need of the trade, continue to organise such seminars and demonstration sessions. The technical support hotline operated by EPD will continue to provide technical support to the mechanics in need. In the first half of 2016, EPD received a total of 15 telephone enquiries and provided eight joint vehicle inspections for the mechanics.

1019. Between September 2014 and June 2016, EPD's remote sensing equipment scanned one million plus vehicles and about 6,700 Emission Testing Notices were issued. The overall passing rate of the vehicles undergoing the dynamometer test is 97%. The remaining small number of cases where the vehicles failed the test could be attributed to the vehicle owners' unwillingness to properly maintain their older vehicles. Overall speaking, the vehicle maintenance trade has already mastered the repair skills with EPD's support. EPD will continue to communicate with the trade to jointly cope with the challenges of the new maintenance skills required.

Recommendation (f)

1020. EPD has contacted EMSD and arranged to discuss at the Vehicle Maintenance Technical Advisory Committee meeting held in the third quarter of 2016 the feasibility of creating a new specialized mechanic category for emission-related repairs as suggested by The Ombudsman.

Recommendation (g)

1021. Please refer to the response to Recommendation (e).

Recommendation (h)

1022. Since July 2016, EPD has updated its promotional leaflet to specifically state that "The TD's exhaust emission test in annual vehicle examination is not equivalent to the EPD's vehicle emission test. A petrol or LPG vehicle that passes annual vehicle examination may still not be able to pass EPD's roadside remote sensing and chassis dynamometer aided emission test." Since July 2016, EPD has progressively arranged for the distribution of the leaflet to vehicle owners whose vehicles are undergoing annual examination at the DCTCs. The new leaflet has also been uploaded to EPD's website.

Recommendation (i)

1023. TD has inserted a hyperlink relating to the New Measure into its website since February 2016.

Recommendation (j)

1024. As at May 2016, there are a total of five DVETCs for testing petrol and LPG vehicles in Hong Kong. EPD inspects these DVETCs regularly and monitors their operation closely. EPD has hired some centres for conducting dynamometer emission test demonstrations and studies on the problem of excessive emissions from vehicles. Subject to availability of resources, EPD will continue to work with the automobile industry to co-organise promotion activities with these facilities, so as to promote the awareness of proper vehicle maintenance. Moreover, EPD will closely monitor the operation of such facilities and review the statutory testing fee in a timely manner.

Recommendation (k)

1025. The setting up of DVETCs is not for routine inspections of general vehicles, but to provide facilities for testing caught vehicles in the implementation of the New Measure.

1026. The current overall passing rate of the dynamometer test is 97%, indicating that the maintenance trade can maintain the emission control system of the petrol and LPG vehicles properly without the aid of dynamometers. Therefore, drivers may not make use of dynamometers even if incentives are provided by the Government.

Fire Services Department and Buildings Department

Case No. DI/380 – Problems Relating to Enforcement of Fire Safety (Buildings) Ordinance

Background

1027. In view of the serious fire incidents at old buildings in the 1990s, the Government enacted the Fire Safety (Buildings) Ordinance (FS(B)O), which came into effect in July 2007.

1028. The FS(B)O stipulates that the fire safety measures of composite buildings or domestic buildings completed (or those with the building plans first submitted for approval) in or before March 1987 (collectively termed "Target Buildings") should be enhanced to conform to modern fire safety standards. The FS(B)O is jointly enforced by the Fire Services Department (FSD) and the Buildings Department (BD). The two departments issue Fire Safety Directions (FS Directions) to the owners of Target Buildings, requiring them to upgrade the fire safety measures on their premises.

1029. Some owners have indicated that they had encountered problems in complying with the FS Directions. For instance, allegedly limited by the structure of their buildings or other environmental constraints, some owners were unable to implement the required fire safety measures, and yet FSD and BD did not provide any assistance. In some other cases, the owners had completed the required fire safety installations, but BD asked for those installations to be removed as they were regarded as unauthorised building works (UBW). In this light, the Office of The Ombudsman (the Office) has conducted a direct investigation to examine whether the two departments have provided adequate support to building owners to facilitate their smooth compliance with the FS Directions.

The Ombudsman's observations

1030. The Office has the following observations –

(a) Regardless of the nature of problems that owners may encounter, FSD would normally approve extension of the deadline for compliance with the FS Directions by one year, so long as the owners can provide a reasonable explanation;

(b) If building owners cannot comply with some requirements of the FS Directions owing to environmental or spatial constraints, etc., FSD would consider relaxing those requirements in light of the actual circumstances. For instance, the owners would be exempted from installing a fire service water tank and a hose reel, and instead be required to install portable fire extinguishers of an approved type and a manual fire alarm system at specified locations within the premises;

(c) BD had, however, failed to take priority enforcement action in some cases of UBW items inhibiting building owners' compliance with the FS Directions; and

(d) When encountering problems in complying with the FS Directions, some building owners would, via District Council (DC) members, seek assistance from FSD or the local District Office (DO). For example, they would ask the DC members to explain to FSD on their behalf the difficulties they encounter, or to seek DO's assistance in setting up an owners' corporation.

1031. In sum, the Office finds that FSD and BD have by and large made adequate arrangements and devised suitable and effective measures for providing technical support and financial assistance to building owners, as well as in helping them with coordination. However, in the actual implementation of these arrangements and measures, there is room for improvement in the following areas.

1032. Regarding UBW items inhibiting building owners' compliance with FS Directions, there have been occasions where long delay in enforcement action is found on the part of BD. Such delays are unfair to those building owners who are keen to comply with FS Directions. Obstructions to fire safety improvement works might even jeopardise the safety of users of the buildings and that of the public. Improvement by BD in this respect is urgently called for.

1033. The Office notes that some elderly owners are worried about the costs of the fire safety improvement works. In fact, the Building Maintenance Grant Scheme for Elderly Owners under the Integrated Building Maintenance Assistance Scheme will give them the help they need. FSD should, in conjunction with the relevant organisations, step up publicity on the financial assistance provided by the Government, so that elderly owners would know how and where to seek help.

1034. Moreover, FSD can further strengthen its communication with DCs, so that more adequate assistance could be offered, through DC members, to building owners who are required to comply with FS Directions, especially owners of "Three Nils" buildings[2].

1035. The Ombudsman had made the following recommendations–

FSD

(a) to step up publicity in conjunction with the relevant organisations on the Government's financial assistance for elderly owners;

(b) to further strengthen its communication with DCs so that assistance could be offered, through DC, to nearby building owners; and

BD

(c) to monitor more closely cases involving UBW items that obstruct building owners' fire safety improvement works, so that such cases will be handled without delay.

[2] "Three Nils" buildings are those having no owners' corporations, no residents' organisations, and no property management agencies.

Government's response

1036. FSD accepted recommendation (a) and has implemented the following improvement measures –

(a) FSD is revising the promotion pamphlet on the FS(B)O to incorporate information on the financial assistance schemes provided by the Government, including the enquiry hotlines and websites of the "Integrated Building Maintenance Assistance Scheme" and the "Building Maintenance Grant Scheme for Elderly Owners". The pamphlets will be made available at the offices of the Urban Renewal Authority (URA) for public reference or distribution to parties concerned;

(b) To further promote the "Building Maintenance Grant Scheme for Elderly Owners", information relating to the scheme has been added to the Explanatory Notes of the FS Directions, with the enquiry hotline and website of the scheme included, to facilitate elderly owners and persons or institutions/organizations assisting these owners to make enquiries when necessary;

(c) The hyperlinks of the "Integrated Building Maintenance Assistance Scheme" and the "Building Maintenance Grant Scheme for Elderly Owners" have been added onto FSD's website to further publicise these schemes;

(d) FSD will step up publicity on the "Building Maintenance Grant Scheme for Elderly Owners" and related financial assistance measures through radio programmes; and

(e) FSD will take the initiative to arrange meetings with owners' corporations in need of financial assistance. Representatives of the URA will be invited to attend the meetings to help promote the "Integrated Building Maintenance Assistance Scheme" and the "Building Maintenance Grant Scheme for Elderly Owners".

1037. FSD accepted recommendation (b) and has taken the following follow-up actions –

(a) FSD will maintain close liaison with the DCs by attending meetings of the DCs or their committees to brief DC members on the implementation of the FS(B)O and respond to their questions and concerns;

(b) In May 2016, FSD distributed the "Guidebook for the Compliance of Fire Safety Directions issued by the Fire Services Department" to all District Officers and DC members of the new term with a view to fostering communication with the DCs and enlisting the help of DC members to provide appropriate assistance to the owners concerned at the district level; and

(c) FSD will continue to keep the DCs posted on the latest development relating to the flexible and pragmatic measures adopted and assistance provided in respect of the FS(B)O.

1038. BD accepted recommendation (c). Since May 2016, the Fire Safety Section of BD which is responsible for fire safety improvement works would also be responsible for following up the enforcement actions against UBWs obstructing the works. This arrangement would facilitate co-ordination and monitoring of progress, thereby enhancing the efficiency of the enforcement actions.

Home Affairs Department

Case No. DI/400 – Home Affairs Department's Management of Booking and Use of Facilities of Community Halls and Community Centres

Background

1039. At present, Home Affairs Department (HAD) manages 64 community halls and 39 community centres. Since 2008, the District Councils (DCs) have taken part in the management of community halls/centres, through the District Facilities Management Committees (DFMCs) under the respective DCs. HAD's District Offices (DOs) and the relevant DFMCs, with special reference to district needs, have worked out different sets of application procedures for booking facilities of community halls/centres (the Facilities), the scheduled time slots available for booking, and the rules and requirements for applicants, etc. DOs manage the booking of the Facilities in accordance with the rules and requirements as well as the application procedures thus laid down.

1040. The Office of The Ombudsman (the Office) has received from time to time complaints against HAD for mismanaging the booking of the Facilities. Over the past five years, the Office has received 24 complaints concerning the management of community halls/centres. Of these, seven were related to booking procedures. In particular, there were allegations of people abusing the exemption of charges for the Facilities, and circumventing the penalty system for breach of the terms and conditions of use of the Facilities.

1041. As community halls/centres are primarily meant for the organisation of community-building activities, it is important to ensure that potential organisers of such activities have a fair chance to use the Facilities, and that abuse and wastage should be prevented as far as possible. With this in mind, the Office initiated in August 2015 a direct investigation into HAD's management of the booking and use of the Facilities, with a view to identifying areas for improvement.

The Ombudsman's observations

Applications from Individuals

1042. Most DOs do not accept booking applications from individuals. HAD has explained that this is because the Facilities are meant for use by district organisations holding activities for the districts. Only two DOs accept booking applications from individuals, and two other DOs would consider such applications on their merits on a case-by-case basis.

1043. Those exceptions are acceptable under HAD's relevant guiding principle which has laid down certain prerequisites for applications from individuals. The Office considers it reasonable that in districts where certain Facilities are under-utilised, applications from individuals should be accepted to promote better usage of the Facilities.

Scheme on the Lease of Community Halls and Centres with Management Responsibilities to Non-Government Organisations

1044. In 1991, HAD launched a Scheme on the Lease of Community Halls and Centres with Management Responsibilities to Non-Government Organisations (the Scheme), under which part of the management of community halls/centres is delegated to non-governmental organisations (NGOs). The purpose of the Scheme is to promote the usage of community halls/centres and to encourage NGOs to organise different kinds of activities. Among the 11 NGOs which have participated in the Scheme, six were given priority in booking the Facilities in their districts for specified time slots.

1045. In 2011-12, a working group led by a Deputy Director of HAD (the Working Group) reviewed the Scheme and concluded that given the heavy demand for the Facilities and that the overall utilisation rates of the multi-purpose halls had been on a steady increase, DOs should consider freezing the Scheme and ceasing to accord NGOs priority of booking. In 2013, two DOs responded positively to the Working Group's recommendation. However, there was one other DO which, on the advice of the DFMC, continued to give the privilege of priority booking to two NGOs so that the two NGOs could continue their efforts in promoting culture and sports in the district in the absence of other suitable venues.

Exemption of Charges

1046. Certain designated organisations (designated organisations) are granted exemption of charges for use of the Facilities, subject to the following conditions:

(a) They are required to submit a statement of account on the activity organised, within one month from the completion of the activity;

(b) Failure to submit a statement of account within that time-frame will attract five demerit points;

(c) If the activity attracts an admission fee, the statement of account should list all items of income and expenditure. If a profit has been made, the organisation will be required to pay back the charges for use of the Facilities; and

(d) The receipts on income and expenditure for the activity should be kept for two years for spot-checking by HAD. However, non-compliance will not attract any demerit points. The non-complying organisation may or may not be required to pay back the charges for use of the Facilities.

The Penalty System

1047. Under the Penalty System, an organisation/individual that has been awarded cumulatively 10 demerit points within a 12-month period will be prohibited from booking the Facilities in the district concerned in the next two quarters. To prevent the non-complying organisation/individual from evading the penalty by booking the Facilities in the name of a co-organiser/sponsoring body of an activity, the Shatin DO has stated in its booking guidelines that such a practice is prohibited. However, this prohibition has not been clearly stated in the guidelines of other districts. HAD confirmed that organisations which are debarred from booking the Facilities would also be prohibited from using the Facilities as co-organisers/sponsoring bodies during the suspension period. HAD has agreed to spell out the prohibition in the sample guidelines in its overall review of the penalty system.

1048. More importantly, the current demerit points system is run on a district basis only. An organisation/individual that has been prohibited from booking the Facilities in a district is actually allowed to apply for the use of the Facilities in another district during the six-month prohibition period, which to some extent defeats HAD's intention to penalise organisations/individuals for breach of the relevant terms and conditions for use of the Facilities. In response to the Office's query, HAD stated that different DOs have different terms and conditions for use of the Facilities, which would have to be standardised before the demerit points system can be operated on a cross-district basis.

Supervision

1049. As regards supervision over the use of the Facilities, the on-site staff of DOs are required to carry out regular inspections and fill in a report for every activity. This is to record the activity conducted and to verify that the Facility has not been used to hold an activity different from what was stated in the booking application form, and that no irregularity has been detected. The organisation/individual concerned will be awarded demerit points when acts of non-compliance are detected through this checking system. Moreover, supervisory staff of DOs are tasked to conduct surprise checks on the activities held. The Office has asked for the supervisory inspection records of some DOs. When submitting such records, HAD admitted that some DOs had not kept proper inspection records after conducting surprise inspections.

1050. The Ombudsman urges HAD to –

(a) consider opening up the booking of the Facilities of all DOs to individuals;

(b) consider discontinuing, or rationalising, the practice of giving booking privilege selectively to NGOs;

(c) award demerit points under the Penalty System to designated organisations for failure to keep receipts on income and expenditure for two years, and require the non-complying organisations to pay back the charges for use of the Facilities;

(d) explore the feasibility of operating the demerit points system on a cross-district basis with the introduction of a central database; and

(e) instruct DOs to tighten up their supervision over the use of the Facilities, in particular by keeping proper records on all supervisory inspections conducted.

Government's response

1051. HAD accepted The Ombudsman's recommendations and has taken the following action –

(a) from April 2016 onwards, recommendation (e) has been implemented in order to keep proper records on all inspections conducted; and

(b) as recommendations (a) to (d) touch upon the operation of the booking system, including the administration of the demerit points system on a cross-district basis, HAD would have to consult the 18 DFMCs with a view to mapping out the way to take forward these recommendations. HAD has been examining the relevant information in detail in preparation for the consultation with the 18 DFMCs. Given the complexity, sensitivity and read-across implications of any proposed changes, it is expected that the implementation process would take some time to complete.

**Home Affairs Department, Lands Department,
Food and Environmental Hygiene Department,
Agriculture, Fisheries and Conservation Department
and Water Supplies Department**

Case No. DI/248 – Management of Permitted Burial Grounds

Background

1052. Since 1983, the Government has been implementing its "hillside burial policy" (the Policy) and designated about 520 Permitted Burial Grounds (PBGs) on various pieces of Government land, totalling some 4,000 hectares, for burial of deceased indigenous villagers of the New Territories. The Policy aims to uphold the traditional rights and interests of indigenous villagers and to curb the problem of hillside burial of non-indigenous residents. An array of management problems associated with PBGs have, however, emerged over the years, such as unauthorised grave construction and suspected illegal burials of non-indigenous residents in PBGs. The Office of The Ombudsman (the Office), therefore, initiated this direct investigation to examine the current management system and procedures, with a view to identifying any inadequacies.

The Ombudsman's observations

Current Management System and Procedures

1053. According to the existing Operational Guidelines, when a District Office (DO) under the Home Affairs Department (HAD) receives an application for Burial Certificate (the Certificate) from the family of a deceased indigenous villager, it will verify the eligibility of the deceased before issuing a Certificate to his/her family member. The DO concerned will also ask the family member to mark on a map of the PBG produced by the Lands Department (LandsD) to roughly indicate the proposed location of the grave to be constructed.

1054. The Certificate sets out the conditions that a Certificate holder must observe. Those conditions include –

(a) the remains of the deceased must be buried within the boundaries of the PBG and the serial number of the Certificate must be

inscribed on the gravestone; and

(b) the Certificate holder must follow the rules on land use and public hygiene set by LandsD and the Food and Environmental Hygiene Department (FEHD) respectively in the Attachment to the Certificate. If the grave is located within a country park or a water catchment area, the Certificate holder must also comply with the rules laid down by the Agriculture, Fisheries and Conservation Department (AFCD) and Water Supplies Department (WSD).

1055. DOs would refer cases of non-compliance with the above conditions to the relevant departments for follow-up in accordance with their jurisdictions and the relevant legislation. DOs have the power to revoke the Certificate in such cases, besides referring the cases to LandsD and FEHD for enforcement action, i.e. removal of the grave and the remains.

Unclear Responsibilities and Divided Authority

1056. The aforesaid problem of divided authority and lack of one single department for overall management have made it very difficult for PBGs to be effectively managed.

1057. While HAD is responsible for processing applications for the Certificate and has been vested with the statutory authority to grant permission for deceased indigenous villagers to be buried on hillsides, the Department does not have the statutory authority and the expertise to supervise the burial process and take enforcement action against suspected illegal activities. HAD needs the assistance of other departments which have such statutory authority and expertise in handling issues relating to PBGs, e.g. to confirm whether a burial site falls within the PBG boundaries, to conduct inspections on PBGs, to follow up on cases of illegal burials and to deal with problems of environmental hygiene and illegal tree felling. However, such other departments have failed to render HAD full support. As a result, various problems persist and remain difficult to resolve.

1058. Furthermore, under the Policy, deceased indigenous villagers can be permanently buried in PBGs, and yet PBGs remain unallocated Government land. The Government has never officially allocated PBG sites to any single department for management, nor clearly specified by way of a contract (such as a lease or land licence) the relationship between the Government and Certificate holders and their respective rights and obligations. When management problems relating to those sites emerge, there are bound to be disputes as to which party as allocatee/grantee of the land should handle the problems.

1059. Regarding the aforesaid systemic problems, HAD thinks that the management of PBGs can be improved by setting up inter-departmental management committees. However, the Office believes that a more effective approach is to have one single department or organisation responsible for the overall management of PBGs. Legally binding terms and conditions should also be imposed on the Certificate holders. By doing so, the issue of management responsibility can be resolved once and for all.

Loose Conditions of the Certificate

1060. The Government's regulation of PBGs is based mainly on the conditions of the Certificate issued by HAD, but such conditions are very loose. This is manifested in the following loopholes in the existing system of burial of indigenous villagers.

No Verification of Burial Locations

1061. Under the Operational Guidelines, neither DOs nor the District Lands Offices (DLOs) under LandsD will conduct site visits to check the burial locations of indigenous villagers. In the absence of boundary markers for PBGs, the actual burial locations may not be the same as those indicated in the applications and may even be outside the PBGs. Although LandsD and FEHD can take enforcement actions and remove the graves and human remains in question, such actions would often be seen as disrespect for the tradition of letting the deceased rest in peace and would meet with strong resistance from the surviving descendants, thus rendering all enforcement efforts futile.

1062. HAD has repeatedly proposed that LandsD verify on site the burial locations of indigenous villagers since LandsD has the expertise. Yet, LandsD refused the proposal on grounds of inadequate manpower. We are of the view that since illegal burials outside PBGs do happen, Lands D and HAD should not shy away from their responsibilities. Resource constraints are not a good excuse for inaction.

No Restriction on Size of Burial Site

1063. As there is no restriction on the size of burial site in the conditions of the Certificate, the areas of land occupied by burial sites of indigenous villagers range from a few dozen to several hundred square feet. Given the scarcity of land resources in Hong Kong, the public will find it unfair that the Government has set no restriction on the size of burial site for indigenous villager.

Futility of Some Conditions of the Certificate

1064. The departments concerned have set out conditions in the Certificate that holders must comply with. Nevertheless, we discover that some departments have no procedures or mechanisms for enforcing those conditions. They do not even check whether the Certificate holders comply with the conditions of the Certificate, making those conditions practically useless. For instance, it is stipulated, inter alia, that applicants must not remove any trees without prior permission from the DLO concerned. However, in reality, grave construction at PBGs, located in rural areas as they are, often involves tree removal without prior permission, and yet the DLOs have turned a blind eye to this problem all these years.

1065. Moreover, LandsD, HAD and FEHD do not conduct regular inspections on PBGs. They just passively rely on reports of irregularities from the public. The absence of a mechanism to check the holders' compliance with the conditions of the Certificate amounts to conniving at or even encouraging noncompliance.

1066. In October 2013, HAD held an inter-departmental meeting and proposed that a pilot scheme be introduced to certain PBGs, including the setting up of some management committees and the implementation of a number of improvement measures to strengthen the regulation of the locations and size of burial sites. That would have been a positive move, but it was halted for lack of support from the other departments concerned.

Lax Enforcement against Illegal Burials

1067. Burials of indigenous villagers outside PBGs and hillside burials of non-indigenous villagers (regardless of whether they are within PBGs) are all illegal burials subject to enforcement actions by LandsD and FEHD. HAD can revoke the Certificates if the burial sites of indigenous villagers are outside PBGs.

1068. The Office notices that illegal burials are in fact not rare. However, HAD and LandsD would often suspend or even discontinue their enforcement actions when opposed by indigenous villagers or the villages concerned, and the departments concerned have never made any effort to assess the magnitude of the problem of burials outside PBGs.

1069. While HAD is empowered to revoke the Certificate in case of non-compliance, the DOs have never exercised that power.

Ecological Impact of PBGs on Conservation Areas

1070. The areas where PBGs overlap with the land of Conservation Areas or Sites of Special Scientific Interest (SSSIs) add up to some 800 hectares. Burials are, however, often incompatible with the stated purposes of Conservation Areas or SSSIs. To build a new grave, indigenous villagers would usually remove the trees, shrubs and turf in the vicinity before cementing the burial site. Clearly, such activities can damage the ecological habitat which has conservation value, contrary to the Government's original intent of designating the Conservation Areas. Given that the authorities do not verify the locations of burial sites, nor is there any restriction on the size of burial sites, extensive construction works may be carried out within the conservation zones, thereby causing damage to the natural ecological environment.

Lack of Long-term Planning for PBGs

1071. The land available in rural areas for hillside burials is limited. Since indigenous villagers are entitled to permanent burial within PBGs, the available space within the PBGs will, in the long run, gradually shrink and be less able to cope with villagers' demand. Yet, HAD has not estimated the usable life span of the PBGs.

1072. The Office considers that the Government should have long-term planning. With limited land resources, the Government should give serious thoughts to the matter and contemplate how to uphold the rights and interests of indigenous villagers in hillside burials on the one hand and balance the interests of the general public on the other.

1073. The Ombudsman urges –

HAD, LandsD, FEHD, AFCD and WSD

(a) to launch the pilot scheme proposed by HAD as soon as possible, with the departments concerned actively participating with their respective expertise, to ascertain whether the improvement measures (such as including boundary markers for the PBGs and setting restriction on the size of burial sites) are feasible and effective, with a view to gradually extending them to cover more PBGs;

(b) to review and strengthen the conditions of the Certificate as soon as possible, and establish a mechanism for the departments concerned to monitor the compliance of those conditions and to take enforcement actions where necessary;

HAD and LandsD

(c) to explore ways for their mutual support and set up an effective mechanism to ensure that all the graves are located within the PBGs;

(d) to assess the magnitude of the problem of illegal burials and formulate effective enforcement strategies, including regular patrols of the PBGs and black spots of illegal burials, and step up their efforts in combating illegal burials;

(e) to conduct a comprehensive review of the Policy jointly with the relevant departments and policy bureaux, aiming at incrementally systematising and enhancing the management of PBGs (including exploring the possibility of designating a single department/organisation to take up the overall management of PBGs); and to scrutinise the land use and the impact on natural environment in relation to the Policy, with a view to formulating a sustainable long-term strategy (including a study on the

feasibility of adopting the public cemetery approach for more systematic management of PBGs); and

LandsD

(f) to avoid designating or extending PBGs within conservation zones, so as to avoid causing further damage to the ecological habitat.

Government's response

1074. The Government accepted The Ombudsman's recommendations and has taken/will take the following follow-up actions –

Recommendations (a), (c), and (d)

(a) An Interdepartmental Working Group comprising HAD, LandsD, FEHD, AFCD and WSD has been set up to oversee the implementation of the pilot scheme. Additional resources and manpower have also been secured for LandsD to outsource the improvement measures requiring professional knowledge in the pilot scheme;

(b) The pilot scheme will tentatively cover five PBGs. A Management Committee has been established for each of the five PBGs, comprising representatives of relevant departments and rural personalities. Subject to the actual circumstances of individual PBGs covered by the pilot scheme, the Committee will explore the feasibility of implementing the improvement measures, which consist of –

(i) setting boundary markers to show the boundaries of the authorised PBGs;

(ii) conducting record survey to take stock of the information of the existing burials to facilitate the identification of illegal burial for enforcement action;

(iii) setting the size limits of future burials;

(iv) setting out the burial plots on-site to ensure the location of burial and more efficient use of land;

(v) conducting site inspections to monitor compliance with burial certificate conditions. If non-compliance is found, the applicants will be asked to rectify the fault;

Recommendation (b)

(c) HAD has invited LandsD, FEHD, AFCD and WSD to review the conditions on the burial certificate. Taking into account inter-departmental discussions, HAD aims to finalise the revised burial certificate in the second half of 2016;

Recommendation (e)

(d) The aim of the afore-mentioned pilot scheme is to explore how to improve the management of PBGs and the effectiveness of land use, with relevant departments actively participating according to their respective expertise and statutory powers as well as the participation of rural community. The Government looks forward to coming up with a more effective management model for PBGs and to formulating a sustainable long-term strategy, after reviewing the effectiveness and the experience of the pilot scheme. The Steering Committee on District Administration and HAD will coordinate with relevant departments to review the progress and the effectiveness of the pilot scheme; and

Recommendation (f)

(e) LandsD has revised its departmental guidelines to the effect that in handling proposals for new PBGs or extension of PBGs, it would refrain from designating or extending PBGs within conservation zones.

Housing Department

Case No. DI/374 – Method of calculation of waiting time for public rental housing and release of information

Background

1075. Over the years, the Government's target has been to maintain the waiting time at around three years for general applicants for public rental housing ("PRH"). This target of "allocating a housing unit within three years" has gradually formed the basis of public expectation. However, the Office of The Ombudsman ("the Office") has received from time to time complaints about not getting an allocation after waiting for more than three years. Moreover, in handling individual complaint cases, we noticed that the waiting time for some applicants has far exceeded three years. As such, the Office decided to initiate a direct investigation into the method of calculation of waiting time for PRH and the release of information by the Housing Department ("HD"), the executive arm of the Hong Kong Housing Authority ("HKHA").

Targets for Waiting Time for General Applicants

1076. In line with the Government policy objectives and to monitor the effectiveness of PRH allocation, HKHA has set the targets for waiting time for general applicants at three years and for those elderly one person applicants among them at two years.

Definition and Derivation of Average Waiting Time ("AWT") and Release of Information

1077. According to HKHA/HD, waiting time refers to the time taken from the date on which an application for PRH is registered to the first flat offer made to the applicant. The AWT for general applicants refers to the average of the waiting time for family applicants and those elderly one-person applicants housed to PRH in the past 12 months. Within five weeks after each quarter, HD releases the latest AWT for general applicants and for those elderly one-person applicants among them.

1078. General applicants actually cover the following five types of applications –

(a) Ordinary Families;

(b) Single Elderly Persons Priority Scheme (i.e. applications by elderly one-person applicants);

(c) Elderly Persons Priority Scheme;

(d) Harmonious Families Priority Scheme; and

(e) Express Flat Allocation Scheme (EFAS).

1079. For Type (a), Ordinary Families, there is no "priority" or "express" arrangement in the allocation of PRH. Yet, the AWT for general applicants released by HD covers all the five types.

1080. Moreover, HD provides an update on the Allocation Status on the 15th day of each month for public information. Since 2011, HD has also conducted a yearly special analysis of the housing situation of general applicants for PRH. The Analysis Report includes information such as the distribution of waiting time calculated on the basis of family size and selected district, and the supply of PRH units. The Analysis Report would be submitted to the Subsidised Housing Committee ("SHC") of HKHA for deliberation.

The Ombudsman's observations

HD Unwilling to Break Down and Provide AWT for Different Types of Applicants

1081. HD includes all the five types of applications in calculating the AWT for general applicants. However, each type of applications is accorded a different priority in housing allocation. During investigation, the Office suggested that HD provide the AWT for each type of applicants. If there is any difficulty in doing so, HD should at least provide the AWT for family applicants after excluding the elderly one-person applicants. The Office also requested HD to provide AWT data for each type of general applicants so that the AWT for Ordinary Families can be derived after excluding the elderly one-person applicants and those under the "Priority" and "Express" schemes. However, HD could not provide such data.

1082. HD explained that the AWT for general applicants should be published on an overall basis (i.e. covering Types (a) to (e) in para. 4 above) for assessing whether it can meet the target of "allocating a housing unit within three years".

1083. For PRH applicants registered on the Waiting List but are yet to receive an offer, HD considered it difficult to estimate how long they would still have to wait. The latest Allocation Status updated on the 15th day of each month would, therefore, probably be more useful to the applicants.

1084. The Office considers HD's generalised calculation of the AWT of general applicants not being able to reflect the real situation. In particular, such information can easily mislead applicants from Ordinary Families, resulting in complaints and criticisms of creating a false image of "allocating a housing unit within three years".

1085. In the Office's view, if HD merely provides a generalised, overall AWT figure, applicants can only assess their own cases using that figure. Where there is a discrepancy between their expectation and the real situation, they will naturally feel aggrieved. Without realising the real meaning of the so-called AWT, PRH applicants will inevitably feel indignant when there is no sign of allocation after waiting for more than three years. Their complaints are indeed understandable.

1086. The Office has reservations about HD's reluctance to break down and provide the AWT for different types of general applicants. As a matter of fact, all applicants are anxious to know, or at least have some idea about, when they can be allocated a PRH unit. The AWT for different types of applicants can better reflect the real situation, providing useful reference for PRH applicants, especially those applicants from Ordinary Families who do not benefit from any "Priority" or "Express" schemes, to plan for their own housing arrangements.

HD Unwilling to Release More Information on PRH Waiting Time

1087. HD is in possession of some crucial data on various factors affecting the waiting time, such as applicants' district choice, their family size and the forecast supply of PRH units. While such information is not kept confidential, the general public or PRH applicants may not know where to obtain the information, nor will they all read the Analysis Report in detail. Therefore, in the course of investigation, the Office suggested that HD make an extra effort to collate the key information and

release it through publicity channels after completing the Analysis Report every year.

1088. HD contended that the Analysis Report was only intended for discussion at the SHC of HKHA. As the analysis was conducted only once a year, it could not reflect the latest situation. As such, the information in the Analysis Report may not help PRH applicants to make decisions most favourable to them. Applicants could be misled and try to change their application details such as family size and selected district. In case such changes eventually prolonged their waiting time, the applicants would end up in a more disadvantageous position.

1089. The Office does not accept HD's argument that such information may not be useful to PRH applicants. Even if the data merely reflect the trend of the year past and are not indicative of the future, it does not mean that they are of no reference value. As a matter of fact, many plans are made with past trends as important reference. Besides, an open and accountable government would not cite "the information may not be useful to the public" as a reason for refusing to release information. We do not see how the information would mislead PRH applicants either. If HD is worried about any possible misunderstanding that may arise, it can add explanatory notes to such information when it is released. In short, HD's refusal to make an extra effort is in conflict with the Government's spirit and endeavours in maintaining openness and transparency and that is undesirable.

HD Unwilling to Publish Information on Second and Third Flat Offers

1090. HKHA has set no target regarding the waiting time for valid second and third flat offers. The waiting time may be prolonged if the applicants refuse a flat offer without "acceptable reasons". In deciding whether or not to accept the first offer, if the applicants are fully aware that no target is set regarding the waiting time for the second and third flat offers, and that they may need to wait for a certain period of time before getting the next offer, they would then think more seriously before they refuse the first offer. Therefore, the Office considers that HD should state in its publicity materials on PRH application that there are no waiting time targets for the second and third flat offers. HD should also provide the AWT in the past year for the second and third flat offers as far as possible for applicants' reference.

1091. HD noted that whether or not to accept an offer is strictly a personal decision of the applicant and beyond HD's control. On the other hand, when an applicant who has rejected a previous flat offer will get another offer depends on a number of factors. Their time of getting another offer may vary greatly. As such, HD considers the AWT data concerning the second or third flat offers to be of little reference value to PRH applicants.

1092. The Office, however, is of the opinion that release of information on the second and third flat offers should be useful in helping applicants to make a serious and prudent decision on receiving their first offer.

1093. In sum, HD lacked transparency in its release of information concerning PRH waiting time. The information mentioned above can help PRH applicants to understand better the operation of the Waiting List and can, therefore, help reduce complaints and grievances resulting from prolonged waiting time. HD should, in the spirit of openness and accountability, release such AWT-related information as far as possible. In the light of the above, The Ombudsman recommends that HD re-examine its justifications for non-disclosure of further information with regard to the following areas and submit the results to HKHA for further deliberation –

(a) to calculate separately and provide an AWT for each of the different types of applicants. If this cannot be done in one move, HD should at least calculate and provide the AWT for other family applicants after excluding those elderly one-person applicants. The information thus derived would then be more practical and realistic. Relevant stakeholders (e.g. PRH applicants) should be consulted where warranted;

(b) to collate the information concerning the distribution of waiting time calculated on the basis of family size and selected district, and the supply of PRH units as contained in the report of the special analysis on housing situation of general applicants. The information should be uploaded to the "Flat Application" webpage for public reference; and

(c) to explain in the Application Guide for PRH that there are no waiting time targets for the second and third flat offers. AWT data for the second and third flat offers of the past year should also be provided as far as practicable.

Government's response

1094. HD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

1095. HD had examined the issues raised in the Investigation Report, and submitted them to the SHC of HKHA for deliberation. The Office's investigation findings were discussed in detail by the SHC at its meeting held on 15 March 2016.

1096. Regarding issue (a), according to HA's existing policy, general applicants (including different types of family applicants and elderly one-person applicants) are accorded priority over non-elderly one-person applicants, and the target is to provide the first flat offer to general applicants at around three years on average. In order to meet the housing demand of the elderly, HA further sets the target for providing the first flat offer to elderly one-person applicants at around two years on average. Waiting time refers to the time taken between the date of registration for PRH and the first flat offer, excluding any frozen period during the application (e.g. when the applicant has not yet fulfilled the residence requirement, has requested to put his/her application on hold pending arrival of family members for reunion, or is imprisoned, etc.). The AWT for general applicants refers to the average of the waiting time of those general applicants who were housed to PRH in the past 12 months.

1097. SHC noted that, based on data for each and every actual case in the past 12 months, HD compiled and announced the AWT for general applicants as a whole, and the AWT for elderly one-person applicants amongst such general applicants, to assess whether HA could achieve these two targets based on actual data. SHC also noted that since the elderly also belonged to the category of general applicants, they should not be excluded from the assessment as to whether HA's AWT target for general applicants could be achieved simply because HA went one step further to take care of the elderly.

1098. As regards the view stated in the investigation report that the AWT for Elderly Persons Priority Scheme, Harmonious Families Priority Scheme and EFAS applicants should be calculated and announced separately, SHC noted that these three types of applicants were all "general applicants". As the target of providing the first flat offer at around three years on average also applied to them, their waiting time was also reflected in the AWT of general applicants. Besides, not all applicants would apply for these three schemes. The number of flats available for allocation under these schemes was also subject to different factors. Among these schemes, EFAS was launched in accordance with the PRH resources available and was not a queue for waiting.

1099. In order to enhance information transparency, SHC considered that links to information about the number of applications and the AWT for PRH could be placed at more prominent positions of the website for easy reference of the public. In light of SHC's views, HD has added links to the homepage and the "Allocation Status" page of the website, so that applicants can access information about the number of applications and the AWT for PRH more easily.

1100. As regards issue (b), SHC noted that the paper on HD's annual special analysis of the housing situation of general applicants would be uploaded onto the webpage of "HA Paper Library" after SHC's discussion. In light of the views of the investigation report, HD has provided a link of the paper at the "Flat Application" webpage for easier reference of the public. Moreover, SHC considered that the distribution of waiting time of general applicants housed to PRH over the past year by their district choice and household size could be uploaded onto HD's website for public reference. In response, HD has uploaded such information onto its website with regular updates to further enhance information transparency.

1101. As for information on the supply of PRH flats, SHC noted that HD currently released the latest public housing production forecast for the next five years on its website. The forecast would be updated on a quarterly basis for public reference. HD also reported the Public Housing Construction Programme to the Legislative Council Panel on Housing every year.

1102. SHC also noted that the latest allocation status of PRH applications of different family sizes in different districts might be more useful to individual applicants. Over the years, HD had been publishing the latest PRH allocation status of different family sizes in different districts in newspapers on a monthly basis. It was also uploaded onto the website for applicants' reference.

1103. On issue (c), SHC noted that in the application guide for PRH, HD had explained clearly in the definition of AWT that waiting time refers to the time taken between the date of registration for PRH and the first flat offer. Generally speaking, as applicants who refuse to accept the first offer are already on the top of the waiting list, HD will arrange flat allocation to these applicants as soon as suitable flats are available. HD will not change the priority of applicants because of their refusal of the first or second offer(s). However, the availability of flats suitable for allocation to these applicants depends on a range of factors, including the supply of newly completed and recovered flats in different districts, the release of flats from the rejection of offers which are made to other applicants at the same time, circumstances of individual applicants (e.g. some applicants may be recommended by the Social Welfare Department to be allocated flats within specific areas, but suitable flats are not yet available in those areas, etc.). These factors will lead to large variations in the waiting time of the second and third offers, and past trends are not indicative of the future. Therefore, the provision of AWT figures for the second and third offers cannot help applicants estimate their waiting time more accurately, and may even lead some applicants into making unfavourable decisions since such information does not represent the general situation.

1104. Although applicants are given a maximum of three flat offers, they are already provided with a housing opportunity at the first offer. In other words, applicants can be housed if they accept the first offer. Whether applicants accept the first offer or wait for the remaining offers is entirely a matter of personal choice, and applicants' personal choices or considerations are beyond the control of HD.

1105. In summary, SHC noted that HD had all along been providing relevant information about the wait for PRH through different channels, and had further enhanced information transparency in the light of the investigation report and the views of SHC. These include –

(a) explaining the definition of AWT and its calculation basis in detail in the application guide for PRH and on HD's website;

(b) publishing the latest PRH allocation status of different family sizes in different districts in newspapers and on HD's website on a monthly basis;

(c) uploading the latest quarter-end figures of PRH applications and AWT in about five weeks' time after the end of each quarter onto HD's website. In light of the views of SHC, HD has also added links to the homepage and the "Allocation Status" page of its website, so that applicants can access information about the number of applications and the AWT for PRH more easily;

(d) releasing the latest public housing production forecast for the next five years through HD's website, and updating the forecast on a quarterly basis;

(e) uploading the paper on the annual special analysis of the housing situation of general applicants onto the webpage of "HA Paper Library". In light of the views of the investigation report, a link of the paper has been provided at the "Flat Application" webpage; and

(f) in light of the views of SHC, the distribution of waiting time of general applicants who were housed to PRH over the past year by their district choice and household size has been uploaded onto HD's website with regular updates to further enhance information transparency.

1106. HD had submitted the above responses to the Office in June 2016.

Lands Department and Fire Services Department

Case No. DI/342 – Regulation of Fire Safety Measures for New Territories Exempted Houses

Background

1107. The Building (Planning) Regulations under the Buildings Ordinance stipulate that all buildings shall be provided with an emergency vehicular access (EVA) to facilitate rescue services. As New Territories Exempted Houses (NTEHs) are not subject to the Regulations, the Government can only use administrative means to regulate fire safety measures for NTEHs.

1108. The efficacy of fire safety measures has a direct bearing on the lives and safety of NTEH residents. The Office of The Ombudsman (the Office), therefore, conducted this direct investigation to look into the current system and procedures for regulating fire safety measures for NTEHs, with a view to identifying any inadequacies.

The Ombudsman's observations

1109. Since 1 July 2006, the Government has been using "A Guide to Fire Safety Requirements for New Territories Exempted Houses" ("the Guide") as an administrative means to regulate fire safety measures for NTEHs. The Guide stipulates that –

(a) if there is a "cluster" of ten houses or more (including the house proposed to be built) within a circle with a radius of 30 metres measuring from the site of the proposed house, an EVA should be provided by the NTEH applicant; and

(b) if provision of an EVA is impracticable due to problems such as geographical constraints or land ownership issues, an NTEH applicant can apply to the Lands Department (LandsD) to adopt alternative safety measures such as automatic sprinkler system, fire detection system and hose reel system in his house. If the applicant adopts any of the safety measures other than automatic sprinkler system, he or his representative will have to attend a fire safety training course arranged by the Fire Services

Department (FSD).

1110. The Office's investigation has revealed that implementation of the fire safety requirements in the Guide for NTEHs failed to meet the original objective of providing adequate fire safety protection for NTEH residents. Furthermore, the monitoring of fire safety measures for NTEHs by LandsD and FSD is less than satisfactory.

Requirement for Provision of EVA More or Less Non-existent

1111. According to the stipulations in the Guide, provision of an EVA is certainly the most preferred option among all the fire safety measures. The alternative safety measures, while allowed by the Government, are in fact second-rate.

1112. Nevertheless, since the introduction of the Guide, in over 90% of the cases in which LandsD considered the provision of an EVA necessary, no EVA was eventually provided, meaning that the NTEHs are not served by this more effective means for fire safety protection. What is more worrying is that even when an NTEH applicant succeeds in providing an EVA, there is no assurance that the EVA would not be blocked or rescinded later on, and there would be little that LandsD and FSD could do in such cases.

1113. While NTEH owners are required by the Government to provide an EVA under the Guide, that requirement exists more in form than in substance.

Existing NTEHs Not Covered by Alternative Safety Measures

1114. LandsD pointed out that when the number of NTEHs increases to a certain level, there would be a "cumulative effect" (including greater difficulty for fire engines and ambulances to access a house in distress), which means that the provision of an EVA is essential. In other words, an EVA is for the benefit of all the NTEHs within a "cluster", not just the house newly built.

1115. By the same logic, if provision of EVA is impracticable, it is advisable for all the houses within the "cluster", including those existing ones, to adopt the alternative safety measures mentioned in the Guide. Having alternative safety measures in the newly built NTEH only is not going to help any of the existing houses in the "cluster".

1116. Other findings in this direct investigation include –

(a) neither LandsD nor FSD has set up a database for the EVAs of NTEHs. This would affect the efficiency of FSD's enforcement action;

(b) FSD has failed to conduct regular inspections of the EVAs of NTEHs; and

(c) it is too lax of LandsD to allow the NTEH applicant to be represented by just any fellow resident of his village in attending the necessary fire safety training course.

1117. The Ombudsman made the following recommendations to LandsD and FSD –

LandsD and FSD

(a) to comprehensively review, jointly with the policy bureaux and departments concerned, the Guide to evaluate whether it is providing adequate protection to NTEH residents against fire hazards, and to explore feasible improvement measures;

LandsD

(b) to set up a dedicated database for the EVAs of NTEHs, and open it to the public for inspection;

(c) to tighten up the procedures for approving attendance of fire safety training courses by proxy, stipulating that the NTEH applicant can only appoint a resident who is going to live in the same house as representative unless he has genuine difficulties;

FSD

(d) to formulate a system of regular inspections of villages and EVAs, so as to ensure quick and safe access by firefighting and rescue services in case of emergency; and

(e) to step up publicity and education on fire safety among NTEH residents, clearly informing them of the associated fire risks and advising them to adopt fire safety measures in their own houses.

Government's response

1118. The Government accepted The Ombudsman's recommendations (a) to (d), and partially accepted recommendation (e). The progress of implementing those recommendations is set out below.

Recommendations (a) and (c)

1119. The Development Bureau has embarked on the review of the Guide, and is consulting relevant departments (including LandsD and FSD) on the preliminary review direction and recommendations. LandsD will report to the Office on the results of the review upon its completion.

Recommendation (b)

1120. The existing application system of Geospatial Information Hub and the website of GeoInfo Map will serve as the electronic platforms to provide information on the EVAs provided under the Guide referred to in the Report for inspection by both government departments (including FSD) and the public. FSD supported the incorporation of information on EVAs into the application system of Geospatial Information Hub. The relevant information had been made available in the said electronic platforms in late August 2016.

Recommendation (d)

1121. FSD has formulated a system of regular inspections of villages and EVAs. The system was introduced in May 2016, beginning with the regular inspections of villages. FSD personnel are deployed to carry out inspections of the 642 villages on the List of Recognised Villages under the New Territories Small House Policy published by LandsD, generally at a frequency of twice a year. Moreover, FSD has carried out inspections of EVAs since an EVA database was set up by LandsD in late August 2016.

Recommendation (e)

1122. FSD accepted part of recommendation (e). FSD accepted the recommendation in relation to stepping up publicity and education on fire safety among NTEH residents, clearly informing them of the associated fire risks. FSD is planning a variety of fire safety publicity and education activities to enhance the fire safety awareness of NTEH residents, including organising various district fire safety activities with relevant District Fire Safety Committees, and producing fire safety pamphlets and promotional posters for NTEHs.

1123. However, FSD has reservations about The Ombudsman's recommendation of advising NTEH residents to adopt fire safety measures in their own houses. FSD stresses that even without the fire safety measures, the pre-existing NTEHs fully satisfy the existing fire safety requirements. For FSD to formally advise the residents of pre-existing NTEHs to adopt fire safety measures in their own houses may give rise to a misperception amongst NTEH residents and other villagers that the NTEHs concerned might have failed to meet the minimum fire safety requirements, and that the Government might have neglected their safety when processing their applications for NTEH development, causing unnecessary worries. FSD had raised this concern in its reply to the Office in June 2016.

Rating and Valuation Department

Case No. DI/367 – Rating and Valuation Department's Regulation of Display of Building Numbers

Background

1124. The Rating and Valuation Department (RVD) is responsible for allocation of building numbers. Where an allocated building number is not displayed, RVD can serve a Display Order under the Buildings Ordinance on the owner of the building. It is an offence for any person to fail to comply with a Display Order.

1125. However, it is not uncommon for buildings in Hong Kong not to display their building numbers. That not only causes inconvenience to citizens and tourists, but also affects the discharge of public duties such as police operations and ambulance, fire and postal services. Although RVD does remind the owners or occupants of ground-level shops and the owners' corporations of buildings to display their building numbers, such efforts have been largely ineffective. Moreover, RVD has never prosecuted those who fail to display their building numbers. It is doubtful whether RVD has diligently performed its duties.

1126. In view of the above, the Office of The Ombudsman (the Office) conducted this direct investigation to identify inadequacies in RVD's regulation of the display of building numbers.

Inadequate Checking on Non-compliance

1127. The Office's findings show that RVD officers might, when performing outdoor duties, spot irregularities in the display of building numbers in the vicinity. However, the Department has not made it their duty to monitor the proper display of building numbers. We think that RVD should establish an inspection regime requiring its officers to discharge the duty, as well as to record the inspection results systematically.

1128. Since 2013, RVD has conducted district-based Building Numbering Campaigns, involving inspections of buildings/shops and issuance of warning/advisory letters to residents and shop operators. However, only two have taken place so far, in Wan Chai and the Central and Western District, and not covering those problematic districts made up mostly of old or renovated tenement buildings (e.g. Sham Shui Po).

Lax Enforcement Procedures

1129. RVD does not have guidelines for staff on the procedures for taking actions against failure to display building numbers, which should set out the number of prior warnings to be issued and the timeframes for conducting follow-up inspections, issuing a Display Order and instituting prosecution. RVD has no rules governing such significant steps which have a bearing on the effectiveness of its enforcement action. The system is very lax.

Reliance on Warnings and Too Much Tolerance

1130. RVD's enforcement cases show that the statutory Display Order is a very effective enforcement tool. Any building owner in receipt of a Display Order would promptly take rectification measures, sparing RVD from the need to take the ultimate step of prosecution. However, RVD seldom issues Display Orders. It just keeps on issuing warning/advisory letters, which are more often than not ignored by building owners.

Need for More Encouragement to Old Buildings

1131. Understandably, the problem of failure to display building numbers is more serious with existing buildings (especially those in the older districts) and buildings which have undergone renovation works or repairs to their external walls. We consider that RVD could enlist the help of the Home Affairs Department ("HAD") to remind the owners' corporations, owners' committees or management agents of buildings of their statutory duty to display building numbers. HAD should offer advice/assistance to owners of buildings that do not have an owners' corporation or management agent.

1132. The Urban Renewal Authority provides doorplates with correct building numbers free of charge to those buildings participating in renovation projects under its Operation Building Bright. The Office hopes that RVD would consider extending this free service to more buildings.

Need for More Publicity and Public Education

1133. Most members of the public do not know much about building owners' statutory duty to display correct building numbers. They may not realise that RVD's requirements for display of building numbers are in fact quite simple. RVD should widely disseminate such messages to the public.

The Ombudsman's observations

1134. The Ombudsman recommended RVD to –

(a) require its officers to monitor the display of building numbers when performing outdoor duties and to systematically record and analyse their inspection findings;

(b) conduct more district-based Building Numbering Campaigns and in more districts;

(c) devise detailed guidelines on the procedures for enforcement actions on cases of failure to display building numbers;

(d) review its enforcement strategy and issue Display Orders as soon as possible to enhance its effectiveness of enforcement;

(e) enlist the help of HAD to step up publicity and public education for owners of old tenement buildings, and request HAD to act as an intermediary where necessary;

(f) consider providing more old buildings free of charge with doorplates showing correct building numbers; and

(g) consider making Announcements in the Public Interests (API) on radio and television to educate building owners on their statutory duty to display building numbers and on how they can discharge that duty.

Government's response

1135. RVD accepted The Ombudsman's recommendations and has taken the following follow-up actions since the release of the direct investigation report.

1136. In respect of recommendations (a), (c) and (d), RVD reviewed its enforcement strategy and issued internal guidelines on 31 August 2015, stating specifically that when performing outdoor duties, its officers had to inspect adjoining buildings to monitor the display of building numbers, systematically record and keep their inspection findings, and appropriately follow up with cases of failure to display proper building numbers. The guidelines also set out the follow-up actions in respect of the non-compliant cases with a view to enhancing the effectiveness of enforcement. The guidelines cover the procedures for issuing warning letters, the time frame of follow-up inspections and follow-up actions after the issue of Display Orders.

1137. In respect of recommendation (b), RVD plans to increase the frequency of district-based Building Numbering Campaigns so as to remind the public of the importance of proper display of building numbers. Following the campaign conducted in the Central and Western District in 2015 as mentioned in the Ombudsman's report, RVD has conducted another campaign in Tsuen Wan in 2016 and plans to conduct a similar campaign in another district in 2017.

1138. In respect of recommendation (e), RVD discussed with HAD in June 2015 how best to step up the publicity and public education for owners of old buildings. As an interdepartmental collaboration project, HAD has been displaying posters on building numbering and distributing the relevant promotional pamphlets at its Home Affairs Enquiry Centres in all 18 districts since August 2015. To further reinforce the message to the relevant stakeholders, HAD has also been assisting in promoting the message of proper display of building numbers during its regular visits to owners' corporations and mutual-aid committees.

1139. In respect of recommendation (f), RVD has touched base with the Urban Renewal Authority (URA). URA is currently providing free building and shop number plates through its "Integrated Building Maintenance Assistance Scheme" (IBMAS) which assists target buildings to carry out building maintenance works or to form Incorporated Owners. Since 1 July 2015, URA has extended the service area of the IBMAS from nine districts to the whole territory. As a result, more buildings can benefit from receiving free number plates showing building numbers when they join the IBMAS of URA.

1140. In respect of recommendation (g), RVD rolled out in March 2016 new API on radio and television to widely disseminate the message about building owners' statutory duty to properly display building numbers. The API is also available on the website of RVD and the Youtube Channel of the Information Services Department.

Water Supplies Department

Case No. DI/364 – Mechanism for handling leaks of private water pipes

Background

1141. Water is a very precious resource in Hong Kong. As such, it is an important work target of the government department responsible for water supply (i.e. the Water Supplies Department (WSD)) to ensure that there is no leakage in all water supply facilities (public water supply facilities and private water pipes inclusive), and that proper repair works are carried out as soon as there is a leak. Nevertheless, the Office of The Ombudsman (the Office) has from time to time received public complaints against WSD for delays in following up incidents of leaking private water pipes, resulting in wastage of fresh water for prolonged periods and residents nearby being affected by the nuisance of water leakage. The Office's preliminary inquiry revealed that repair works in about half of the cases of leaking private water pipes took more than 60 days to complete. In an extreme case, the repair works took more than two years. Meanwhile, the leakage continued and it was virtually impossible to assess the huge amount of fresh water wasted. In this light, the Office decided to initiate a direct investigation into the issue.

The Ombudsman's observations

1142. The Office's investigation found the following seven major deficiencies of WSD in handling leaks of private water pipes –

Over - tolerance in Case Handling, Tending towards Inaction

1143. WSD's internal instructions stipulate that after a site inspection by WSD staff upon receipt of a report on leaking water pipe, a Waterworks Inspector or an engineer will, depending on the circumstances, determine a period for repairs and issue a Repair Notice. Normally, a period of 14 days would be allowed unless the leakage is serious and repairs must be completed within seven days. Non-compliance will lead to issuance of a Disconnection Notice by WSD, followed by a disconnection of water supply in seven days except in special circumstances.

1144. However, the cases the Office had examined revealed that WSD would not arrange disconnection of water supply even when the repair works remained outstanding after expiry of the period prescribed in the Repair Notice. Instead, reminders were issued one after another to remind the consumers of their responsibility to carry out the repairs. Meanwhile, the leakage continued. WSD's attitude amounted to procrastination and a waste of time and manpower. Such over-tolerance and connivance only gave the public the impression of inaction.

Staff Failing to Follow up Cases Properly According to Established Procedures

1145. Upon receipt of a report on leaking water pipe, WSD will arrange site inspection by its staff. A Waterworks Inspector or an engineer would then issue a Repair Notice prescribing a period for repairs based on actual circumstances. According to WSD's internal instructions, when the specified period expires or when repair work is completed, the staff concerned should conduct a site inspection again at the premises in question within five working days in all circumstances. If the registered consumer or agent is found to have failed to comply with the requirements of the Repair Notice, a Disconnection Notice would be issued within two working days after the second inspection. However, the cases cited in the Office's investigation report showed that WSD staff had not followed these instructions strictly. When consumers were found to have failed to repair the leaking pipes, WSD staff just conducted inspections time and again without escalating the actions, let alone disconnecting the water supply.

1146. Furthermore, it is stated in the instructions that in cases where a communal service involves fresh water supply to multiple domestic units, and where no agreement can be reached after mediation by the local District Office ("DO") and the parties concerned eventually fail to repair the leaking pipes, water supply to the concerned premises may be disconnected with the approval of the Director of Water Supplies ("DWS"). However, WSD staff just kept copying Repair Notices to the DOs without specifying what substantive actions they expected from the DOs. Nor did the staff seek DWS's approval to arrange for disconnection of water supply afterwards. This showed that WSD's frontline staff did not fully understand the requirements in the instructions, and senior management also failed to monitor staff efficiency and the case progress effectively.

Instructions Unclear and Incomprehensive

1147. The instructions that WSD had been using before May 2015 did not define clearly the circumstances under which a leakage would be classified as serious. The Office considered that in the absence of clear guidelines, deviations in judgement by different officers was no surprise, as the frontline officers could only rely on their own experience in assessing the magnitude of a leakage. An even bigger problem was that the assessment results of the individual frontline officer would affect the follow-up actions to be taken. Incorrect assessment might result in delay in taking more decisive actions, resulting in more fresh water being lost.

1148. WSD staff's failure to act in accordance with departmental instructions to take decisive action (such as disconnecting water supply) after issuing the Repair Notice was attributable to the absence of monitoring procedures in WSD's old instructions. There was no mention of a mechanism for bringing up cases regularly for examination. Nor were the staff instructed to set a target timeframe for case resolution or bring more complicated cases to their supervisors for reviewing progress such that contingency measures (such as joint-departmental actions to resolve a case) could be taken where warranted. Even though the new guidelines stipulate that supervisors should review the case progress, specific measures for speedy resolution are not set out. The Office took the view that if WSD could establish in its new guidelines a mechanism for regular case review and monitoring of case progress with specified timeframes for case resolution, it would help its staff take more decisive and proper actions to resolve leakage cases promptly.

Insufficient Records of Private Water Pipe Plans Causing Delay in Repairs

1149. WSD keeps the plans and drawings of all Government-built water mains networks, but the water pipe networks in private lands are not included in these plans and drawings. Nonetheless, when applying to WSD for water supply, registered consumers or agents are required to submit water pipe drawings for the Department to scrutinise whether the routing, specifications and associated fittings are up to standards. After granting approval, WSD will file away the drawings. So, WSD should in principle also have the drawings of the private water pipe networks. WSD stated that such drawings were only schematic and might not clearly show the precise locations of the water pipes in private lands. They would not be helpful to WSD in obtaining sufficient information about the water pipe networks.

1150. The Office considered it highly unsatisfactory for WSD not to know where the water it supplies ultimately goes to. It may not be able to discover, let alone prosecute, any water theft by those who deliberately exploit the loophole. To increase the efficiency in handling cases of leaking private water pipes in future, we urged WSD to actively consider collating the drawings and information provided by consumers/ agents upon their applications for water supply, so that its frontline staff can refer to such records when investigating incidents of water leakage. Even though the drawings may not show accurately the most up-to date locations of water pipes, they can at least provide some general information.

Duration of Leakage Not Regarded a Major Factor in Assessing the Magnitude of Cases

1151. WSD indicated that although the amount of fresh water lost was one important factor in determining the magnitude of a leakage incident and whether disconnection of water supply was necessary, it was not the only factor for consideration. However, we considered that even the leak is minor and the amount of fresh water lost apparently small, it can run into a massive total if the problem persists over time. As shown in the cases cited in the Office's investigation report, WSD had allowed some private water pipes to leak for more than a year. That was simply unacceptable. WSD, therefore, should take into account the duration of leakage as a major factor in assessing the magnitude of a case, so as to closely monitor the problem and take timely and decisive action to resolve it.

Failure to Address the Problem of Complex Responsibility for Repairing Private Water Pipes

1152. Under the Waterworks Ordinance ("the Ordinance"), registered agents are responsible for maintaining the communal water pipes and associated water supply facilities in private estates, while individual consumers are responsible for maintaining the water pipes within their own premises. Problem will naturally arise if a leakage occurs at the communal section of an estate's water supply network and affects a number of domestic units, but no agent is available to arrange for repairs. Moreover, section 12(2) of the Ordinance stipulates that except in case of emergency, WSD officers are not empowered to enter any premises unless the Water Authority ("WA") or a person authorised by him has obtained consent from the occupant of such premises or a magistrate's

warrant for entry. Therefore, repairs of leaking private water pipes can be a complicated task.

1153. According to WSD's internal instructions, if ten households or more are involved in a leakage in private water pipes, or the building concerned is without an owners' corporation/owners' committee/property management office, WSD staff will write to the local DO to inform the latter of the case and ask the latter to liaise and mediate with the registered consumers residing in the affected building, so that repair works can be arranged as soon as possible. However, as seen in a number of cases, WSD staff just routinely copied to the local DO the letters addressed to the consumers/agents, without stating clearly what kind of assistance is expected from the DO, or how the two departments can coordinate their work. Worse still, WSD staff seldom took the initiative to follow up with the DO on the progress of matters. The Office considered it necessary for WSD to work out a strategy and a more proactive approach to address the complex issues regarding the responsibility for repairs and maintenance of private water pipes, such as formulating more specific arrangements on coordination with DOs under the Home Affairs Department ("HAD"), including engaging community leaders or representatives to facilitate the process, and stepping up public education on the maintenance responsibility of private water pipes.

1154. WSD explained that it would try to urge the consumers to carry out the repairs themselves, rather than repairing on their behalf. The Office considered it proper in principle for WSD to adopt such an approach in general circumstances. However, in an emergency (such as when people's lives or property are at risk) or prolonged and serious leakage, or where complicated procedures are involved in the repair works, WSD should be obliged to step in and take prompt action to stop the leakage. Where necessary, it should carry out the repair works first and recover the cost from the responsible parties later, so as to stop the loss of fresh water.

1155. During the investigation, the Office looked up some information from foreign countries and noted that the laws in some jurisdictions empower the local water supply companies to enter private premises for repairing water pipes on behalf of the consumers, with the cost covered by an annual fee prepaid by those consumers. WSD could take reference from such overseas practices and, where necessary, conduct a public consultation before considering if and how it should further explore the feasibility of such practices.

Unwilling to Recover Repair Cost, thereby Encouraging Evasion of Responsibility

1156. Section 17(3) of the Ordinance stipulates that WA can alter or repair an inside service system or a communal service system at the request of a consumer or agent, and the cost thereof shall be payable by the person at whose request such alteration or repair is carried out. Moreover, under section 17(4), if a consumer or agent fails to carry out the repairs or other works as specified in the Repair Notice issued by WA under section 16, WA may carry out the repairs or other works and the cost thereof shall be payable by the consumer or agent. However, before WSD issued the new guidelines on 18 May 2015, it did not recover the cost in each and every case. WSD contended that it would assess the amount to be recovered to see if it would be sufficient to cover the administrative cost before deciding whether the repair cost should be recovered. Several cases we had studied showed that WSD made no attempt at all to recover the relevant cost from the consumers and it had not even issued a demand note. According to information provided by WSD, in the past five years, there were three cases where the Department carried out repairs of private water pipes on behalf of the consumers due to emergency. WSD, however, did not recover the relevant repair cost in the end. Under the new guidelines, WSD will issue a demand note to consumers/agents after conducting repair works to recover the cost involved. Nevertheless, whether WSD will indeed recover the cost proactively after the issuance of demand notes is yet to be observed.

1157. The Office considered WSD's failure to proactively recover the repair cost as indirectly encouraging consumers/agents to evade their responsibility. The cases cited in the investigation report showed that it had cost WSD a lot of money and manpower in repairing the leaking pipes (including excavation, installation of valves, addition of pipes, etc.). It was unreasonable for WSD not to recover any cost from the residents concerned subsequently.

1158. Under section 10(a) of the Ordinance, WA may disconnect a fire service or inside service if any charge in respect of the fire service or inside service is not paid. WSD should be more proactive and decisive in recovering repair cost. In case the consumers concerned are not cooperative, WSD should exercise its power to disconnect the water supply as a deterrent.

1159. The Ombudsman recommended that WSD -

(a) monitor and review promptly the implementation of the new internal guidelines issued in May 2015, and ensure that the magnitude of leakage is clearly defined and the mechanism for monitoring case progress is adequate;

(b) ensure that the frontline staff strictly adhere to the internal instructions, which include site inspection within five working days upon expiry of a Repair Notice. Where repair of the pipe concerned is yet to be carried out, a Disconnection Notice of water supply should be issued and disconnection should be arranged in accordance with the internal instructions, unless there are reasonable justifications not to do so, with approval by senior officers;

(c) strengthen staff training so that staff members are familiar with the instructions on handling of leakage cases, and acquire the methods and skills in handling complicated cases to avoid delay in action;

(d) step up the monitoring of installation or alteration works of water mains networks in private premises to ensure that consumers/agents obtain prior approval from WSD and submit the up-to-date layout of the networks to WSD for records, as well as collating information on these layouts for frontline staff's reference;

(e) consider following the practice of other countries, such as requiring prepayment of charges from consumers for repairing private water pipes in non-emergency situations to prevent persistent leakage and loss of fresh water. Public consultation may be conducted if necessary;

(f) include the duration of leakage as a major consideration when assessing the magnitude of leakage cases;

(g) establish the Water Intelligent Network as soon as practicable to collect data about water mains networks to facilitate more comprehensive and accurate estimates of the amount of water leakage from inside service networks throughout the territory. WSD should also actively install master meters or monitoring meters in private estates where no such meters are installed in order to estimate more effectively the loss of fresh water;

(h) formulate a feasible coordination plan with HAD, such as seeking the cooperation of community leaders/representatives to resolve the repair problems jointly with consumers;

(i) enhance public education on the responsibility of consumers and registered users for repairs of communal service, fire service and inside service under the prevailing Ordinance; and

(j) for cases where repairs have already been carried out for consumers, consider adopting the same approach in recovering outstanding water charges from consumers, i.e. to issue demand notes and recover the relevant costs through legal proceedings. For consumers who have defaulted payments for a long period of time, WSD should consider exercising its power under the Ordinance to disconnect the water supply as a deterrent.

Government's response

1160. WSD accepted The Ombudsman's recommendations and has taken the following follow-up actions:-

(a) WSD monitors and reviews from time to time the implementation of the new internal instruction issued in May 2015. The current situation indicates that the severity of leakage is clearly defined and the frontline staff members also fully understand the content of the instruction. With the launch of the new mechanism, the processing time of private pipe leakage cases has improved significantly;

(b) WSD constantly reminds frontline staff to strictly adhere to the internal instruction and will continue to monitor the implementation of the new instruction by frontline staff, especially in the area of issuing Disconnection Notice and arranging disconnection;

(c) WSD has already conducted a briefing for frontline staff on the new internal instruction of handling private pipe leakages. Handling private pipe leakages has also been included in the training curriculum of the year. WSD will continue to organise training, briefings and sharing sessions, etc., for frontline staff with a view to enabling them to get familiar with the relevant instructions related to handling private pipe leakage cases and master the methods and techniques in handling complicated cases so as to avoid delay in action;

(d) WSD has incorporated messages in its homepage and the Consumer Guidebook to remind members of the public that no person shall, except with the permission in writing of the Water Authority, construct, install, alter or remove a fire service or inside service, and that they are also required to submit plumbing diagrams for the works to the Water Authority for approval. WSD will continue to step up its efforts in publicity and public education through various channels, which include Water Supplies Seminars, public events, and publications by the Department and the trade, etc. to remind the general public as well as the trade of the above requirements. WSD will follow up and take enforcement action pursuant to the Waterworks Ordinance, against those who have carried out construction or alteration of fire service or inside service without the prior approval of the Water Authority. Meanwhile, WSD will also review the existing legislation regarding the construction or alteration of fire service or inside service without prior approval of the Water Authority to ensure that the penalty can serve as a deterrent. On the other hand, starting from 2014, WSD will upload plumbing drawings onto its internal computer system upon their approval for the frontline staff's reference when investigating into private pipe leakage cases. The Department is also arranging for the gradual uploading of plumbing drawings approved before 2014;

(e) When reviewing the existing legislation, WSD will study and consider in details the proposal of repairing private water pipes in private premises under non-emergency situations and requiring the consumer to pay in advance;

(f) WSD has taken the duration of leakage as one of the major considerations in determining the severity of the leakage for deciding the allowed period of time for repair works;

(g) WSD has been progressively establishing the Water Intelligent Network (WIN) by setting up around 2,000 District Metering Areas (DMAs) across the territory in order to keep continuous surveillance of the water supply network, which in turn will help WSD to formulate effective network management measures for maintaining the health condition of the water supply network. The WIN project includes the setting up of DMAs in about 500 housing estates. Apart from this, WSD adopted a Master Metering Policy to install master meter in new housing developments. WSD will monitor the situation of water loss in inside service of housing estates through DMA and master meters;

(h) WSD and HAD have explored ways to engage local community leaders to help solve the problem of communal pipes leakage problem. HAD has set up a hyperlink in its website directing to that of WSD to facilitate members of the public to retrieve information about maintenance of inside service of a building. Apart from this, HAD will also help arrange WSD staff to give talks on maintenance and repair of inside service at briefings or workshops organised for owners' corporations. Meanwhile, WSD has also issued letters to members of the District Councils to appeal for their assistance in coordinating consumers to repair the communal service of a building when necessary;

(i) WSD has strengthened publicity and public education to remind the public of the importance of carrying out regular maintenance and repair works for the communal service, fire service and inside service, and their legal liability by incorporating relevant messages in WSD homepage and publications. WSD will continue to encourage consumers to conduct regular inspection at their inside service and underground pipes to minimise the occurrence of leakage. Various channels used include Water Supplies Seminars, WSD Customer Liaison Group, public events, and departmental publications, etc.; and

(j) WSD has included the procedure for recovery of repair costs from consumers in the internal instruction, stipulating that demand note will be issued to the consumer concerned for recovering the repair costs. WSD will handle the case in accordance with the standing procedures to initiate legal action to recover the debt from consumers who are in default of payments for a long period of time.