THE GOVERNMENT MINUTE

IN RESPONSE TO

THE ANNUAL REPORT OF
THE OMBUDSMAN 2017

Government Secretariat
24 January 2018

Table of Content

Page

Introduction 1

Part I
– Responses to Issues presented in the section
***The Ombudsman's Review* of the Annual Report** 2

Part II
– Responses to recommendations in full investigation cases
Architectural Services Department,
Government Secretariat –
Chief Secretary for Administration's Office (Efficiency Unit)
and Leisure and Cultural Services Department 4
Buildings Department 11
Buildings Department
and Food and Environmental Hygiene Department 21
Buildings Department and Lands Department 27
Buildings Department,
Food and Environmental Hygiene Department
and Lands Department 32
Consumer Council 36
Department of Health 38
Department of Health and Labour Department 43
Department of Justice and Fire Services Department 48
Department of Justice
and Working Family and Student Financial Assistance Agency 53
Drainage Services Department,
Environmental Protection Department
and Home Affairs Department 57
Electrical and Mechanical Services Department 61
Environmental Protection Department 64
Equal Opportunities Commission 67
Fire Services Department 71
Food and Environmental Hygiene Department 74
Food and Environmental Hygiene Department
and Lands Department 135
Government Secretariat –
Chief Secretary for Administration's Office (Efficiency Unit) 140

Government Secretariat – Education Bureau 142
Highways Department, Home Affairs Department
and Lands Department 154
Highways Department and Social Welfare Department 157
Home Affairs Department 160
Hong Kong Monetary Authority 162
Housing Department 165
Information Services Department 177
Labour Department 190
Lands Department 192
Lands Department and Planning Department 196
Leisure and Cultural Services Department 201
Office of the Communications Authority 212
Official Receiver's Office 216
Planning Department 218
Post Office 220
Radio Television Hong Kong 224
Social Welfare Department 229
Transport Department 245

Part III
– Responses to recommendations in direct investigation cases

Development Bureau 271
Education Bureau 280
Food and Health Bureau 292
Highways Department, Development Bureau
and Home Affairs Department 297
Housing Department 303
Lands Department 318
Leisure and Cultural Services Department 325
Marine Department 336
Transport Department and Labour and Welfare Department 343

THE GOVERNMENT MINUTE IN RESPONSE TO THE ANNUAL REPORT OF THE OMBUDSMAN 2017

Introduction

The Chief Secretary for Administration presented the Annual Report of The Ombudsman 2017 (the Annual Report) to the Legislative Council at its sitting on 5 July 2017. 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 11 direct investigation and 218 full investigation cases in the Annual Report. This Minute responds to the 11 direct investigation and 95 full investigation cases in which recommendations were made by The Ombudsman. The vast majority of the 254 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. In *The Ombudsman's Review* of the Annual Report, The Ombudsman referred to occasional queries raised by members of public as to the effectiveness of her Office (the Office) in enhancing public administration. The power of the Office lies in investigation, reporting against maladministration and making recommendations for improvement. Government departments are receptive to the Office's advice, as evident from the acceptance rate of the recommendations made by the Office over the years. The Government appreciates the diligence and dedication of the Office in its role as an independent watchdog of public administration, and will continue to collaborate with the Office in tackling both persistent problems and new challenges.

4. The Ombudsman also reiterated her concern about the progress in implementing her Office's recommendations on improving the freedom of access to information and public records management regime in Hong Kong. The Government has seen a significant increase in the number of requests for access to information in recent years. Reaffirming our commitment to complying with the Code on Access to Information, the Government has taken measures to promote public awareness and step up relevant training for public officers. The Government also places great importance on the integrity of

Government records. The Law Reform Commission has set up sub-committees to study the issues of access to information and archives law, including possible enactment of relevant legislation. The Government will carefully examine and follow up any recommendations from the Commission.

5. As The Ombudsman has been pleased to note, the Government has agreed to introduce an apology legislation. The Apology Ordinance (Cap. 631) was passed by the Legislative Council on 13 July 2017 and has entered into effect on 1 December 2017. This encouraging development reflects the effectiveness of the Office as a catalyst for change, as well as the receptiveness of the Government to recommendations from the Office. Government departments will continue to be forthcoming in extending apologies where due.

Part II
– Responses to recommendations in full investigation cases

Architectural Services Department, Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit) and Leisure and Cultural Services Department

Case No. 2016/1771A(I) (Leisure and Cultural Services Department) – Refusing to admit its fault of installing three removable bollards on an emergency vehicular access and failing to comply with the timeframe as set out in the Code on Access to Information in replying to the complainant's information requests and requests for review

Case No. 2016/1771B (Architectural Services Department) – Wrongly installing three removable bollards on an emergency vehicular access

Case No. 2016/1771C(I) (Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit)) – Failing to comply with the timeframe as set out in the Code on Access to Information when replying to the complainant's information requests

Background

6. The complainant was a user of a park (the Park) managed by Leisure and Cultural Services Department (LCSD). He suspected that a path near a new building in the Park (the Path) was part of an emergency vehicular access (EVA) of the Park leading to the soccer pitch and was worried that the removable bollards installed there would adversely affect the provision of emergency services to users of the soccer pitch. The complainant was dissatisfied with LCSD for –

(a) refusing to admit its fault of installing three removable bollards on an emergency vehicular access in the Park;

(b) failing to comply with the response time frame set out in the Code on Access to Information (the Code) when replying to his information access requests; and

(c) delay in replying to his requests for review of his complaint about non-compliance of the Code without reasonable ground.

7. With the consent of the complainant, the Office of The Ombudsman (the Office) extended its investigation to include the Architectural Services Department (ArchSD) under allegation (a) and 1823 Call Centre (1823) of the Efficiency Unit (EU) under allegation (c).

The Ombudsman's observations

Allegation (a)

8. The Office appreciated that park management of LCSD had not been informed of the change of the EVA and it was not unreasonable for park management to rely on ArchSD for the technical propriety of the proposed works. Nevertheless, as the need to install the bollards arose from the users of the cultural facilities nearby, it would be desirable for the park management to have first communicated with the LCSD Cultural Services Branch before conducting the proposed works. The Ombudsman considered allegation (a) against LCSD partially substantiated.

9. ArchSD, being the works and maintenance agent of the Park, was responsible for updating the EVA layout signage of the Park when alteration works to the Park affecting the existing EVAs were carried out. The EVA signage erected at the Path was installed during the construction of the new building, which was designed and supervised by a consultant employed by ArchSD. However, a small section of the EVA covering the Path was missed out on the EVA signage. Based on the incomplete information shown on the EVA signage and without checking the EVA layout plans approved by the Fire Services Department, ArchSD confirmed to LCSD that the Path was not part of an EVA of the Park and proceeded with the installation works.

10. The Office noted that ArchSD had acknowledged that the installation of the three bollards at the location at issue was wrong. ArchSD had clearly failed to ensure the accuracy of the EVA signage in the Park and its staff failed to check proper records of the Park before proceeding with the installation works. Therefore, The Ombudsman considered allegation (a) against ArchSD substantiated.

Allegation (b)

11. The complainant wrote to LCSD via enquiries@lcsd.gov.hk (managed by 1823) on 19 February 2016, expressing his concern over the blockage of the Path and requesting LCSD to provide information about the procedures of approving the installation of the three bollards and the cost of the works (first information request). On 16 and 17 March, the complainant wrote to LCSD again, alleging that LCSD failed to accede to his first information request within the target response time set out in the Code, and requested LCSD to review his case (first request for review).

12. On 17 March, LCSD replied to the complainant's first information request via 1823, explaining that it had consulted ArchSD on the installation of the bollards and confirmed that the Path was not an EVA of the Park. It also provided the cost of the works to the complainant as requested. On 19 March, the complainant made follow-up enquiries with LCSD about the bollards and requested it to provide the EVA layout plan of the Park (second information request)

13. On 20 March, LCSD replied to the complainant's first request for review, explaining that it had adhered to the time frame specified in the departmental guidelines and 1823's guideline for handling complaints. The complainant, however, considered that his case should be handled in accordance with the Code as he had stated "request for access to information" ("要求公開資料") in the subject heading of his email dated 19 February 2016. He reverted to LCSD on the same day requesting that his case be reviewed by the Access to Information Officer (AI officer) of the Department (second request for review).

14. On 18 April, LCSD replied to the complainant's second information request via 1823, informing the complainant that after further verification with ArchSD, it now confirmed that the Path had been designated as part of the EVA of the Park since the completion of the New Wing and that ArchSD had removed the bollards and replaced the obsolete EVA signage on the site. LCSD also provided the EVA layout plan to the complainant as requested. In passing LCSD's reply to the complainant, 1823 forgot to attach the EVA layout plan, which was only provided to the complainant on 19 April 2016. For this omission, 1823 apologised to the complainant.

15. The Office considered that LCSD staff were duty bound to scrutinise cases received carefully and, if necessary, consult each other to coordinate an appropriate and timely reply to the complainant. Allegation (b) against LCSD was substantiated.

16. As for 1823, the Office was surprised to learn that 1823 did not consider the complainant to have "invoked the Code" when he clearly put "request for access to information" in the subject heading of his email of February 2016. 1823 was wrong to refer the complainant's request it to LCSD as a normal complaint rather than a request for information. In fact, the Guidelines on Interpretation and Application of the Code provide that Code and non-Code requests for information should be handled on the same basis. All cases requesting access to information should be handled in accordance with the requirements set out in the Code, irrespective of whether the Code is expressly cited.

17. In addition, 1823 forgot to attach the EVA layout plan of the Park when relaying LCSD's reply to the complainant, causing further delay in fulfilling the complainant's information request. The Ombudsman considered allegation (b) against 1823 substantiated.

Allegation (c)

18. The Ombudsman considered allegation (c) against LCSD substantiated as LCSD failed to process the complainant's second request for review in accordance with the Code due to oversight.

Conclusion and recommendation

19. The Ombudsman considered the complaint against LCSD, ArchSD and 1823 substantiated, and recommended –

LCSD

(a) to conduct staff training to enhance its staff's awareness and understanding on the requirements of the Code in handling information requests. Particularly, for complaints/enquiries which contain requests for information, LCSD should provide clear guidance to its staff to ensure that such cases are processed in accordance with the time frame stipulated in the Code;

(b) to remind frontline staff of the importance of internal coordination and communication in handling matters and works projects involving multi-divisions;

(c) to remind its staff to adopt a more positive attitude in tendering apologies for mistakes made.

ArchSD

(a) to implement measures to ensure that works staff will check proper records before proceeding with works projects, including conducting staff training to share the experience learnt in this case and issuing internal guidelines if necessary;

(b) to review and where appropriate enhance the internal guidelines for monitoring the performance of the consultants employed by the Department to ensure that all components of a works project are fully and correctly completed.

1823

(a) to conduct staff training to enhance staff's awareness and understanding of the requirement of the Code; and

(b) to review the assignment rules with LCSD and other client departments as appropriate on the referral arrangement relating to Code and non-Code requests for access to information.

Government's response

20. LCSD, ArchSD and EU accepted all of The Ombudsman's recommendations.

LCSD

21. For recommendation (a), LCSD has been organising briefing sessions on the Code on a regular basis for all staff to enhance their awareness and understanding of the requirement of the Code in handling information requests. In addition, the new recruits have been given briefing on the Code during the induction courses. The subject officer has been instructed to be familiarised with the operation of the 1823 Case Management System and to go through all relevant information of 1823

when handling cases in order to promptly report to Access to Information Officer. In parallel, LCSD continues to circulate on a half-yearly basis the Circular on Code on Access to Information, including the procedures for dealing with requests not made under the Code and to remind colleagues of the requirements of the Code.

22. For recommendation (b), regular meetings between District Leisure Services Office and the concerned management office of cultural facilities would be held on a half-yearly basis to improve internal coordination and communication to discuss common matters in relation to the management of the park and cultural facilities.

23. For recommendation (c), LCSD has reminded staff to adopt a positive attitude in tendering apologies for mistakes made. Letters of apology were issued to the complainant on 17 May 2016 and 14 December 2016 respectively.

ArchSD

24. For recommendation (d), the lesson learnt from this case was shared with staff of ArchSD and uploaded to the ArchSD's Intranet and Knowledge Management Website for reference by staff. Moreover, the checking of EVA signage was included as one of the items under the Guidance Notes for Site Supervision on Statutory Compliance in Relation to Means of Escape, Means of Access and Fire Resisting Construction.

25. For recommendation (e), a warning letter was issued to the consultant concerned and the irregularity had been reflected in the consultant's performance report. Moreover, an email was issued to all professional staff in ArchSD, reminding them to learn from this case, strengthen the monitoring of consultants' performance and draw consultants' attention to requirements in relevant government circulars.

EU

26. For recommendation (f), 1823 has conducted training for all serving staff to enhance their awareness and understanding of the requirements of the Code. Similar training has also been provided to the new recruits in the induction training. Regular refresher training has been arranged every two months so as to enhance the staff's familiarity with the procedure of handling cases relating to the Code.

27. For recommendation (g), 1823 has reviewed the assignment rules with LCSD and the other 21 participating departments about the handling of requests for information. Under the revised assignment rules, a new subject matter was created on 1 December 2016 with new keywords to guide frontline staff to classify requests for access to information and refer them directly to the departmental Access to Information Officers for follow up. 1823 will continue to work closely with the participating departments with a view to enhancing the relevant guidelines.

Buildings Department

Case No. 2016/0425 – Failing to take enforcement action against unauthorised flat roof structures

Background

28. According to the Owners' Corporation (the OC) of a building (Building A), there were unauthorised building works (UBW) items on the flat roof of a flat in Building A (the Structure). In July 2012, the Buildings Department (BD) issued a statutory order (the Order), requiring the owner of the Structure (Mr A) to remove the UBW items. However, the Structure remained. BD issued a warning letter to Mr A in February 2013, urging him to comply with the Order or face prosecution.

29. In April 2013, BD issued a Building Inspection Notice (BIN) to the OC, requiring that inspection and repairs to the common parts of the building be completed before a specified date. However, the existence of the UBW items made it difficult to replace the drainage pipes of the building and carry out waterproofing works on the flat roof.

30. Mr A had expressed to BD that the five tenants living in the Structure were either financially stricken or in poor health thus unable to move out within a short time. He asked for extension of the deadline for removal and requested social worker service. From November 2013, a social worker contacted Mr A several times. Mr A promised that he would demolish the Structure, but never took any real action. In mid-March 2015, the social worker closed Mr A's case.

31. BD twice prosecuted Mr A in May 2015 and April 2016. He was convicted and fined by the court. In July 2016, the Structure was removed.

32. The OC lodged a complaint with the Office of The Ombudsman (the Office) in February 2016, alleging that BD was slow in taking enforcement action against UBW items such that the OC was unable to comply with the BIN.

The Ombudsman's observations

33. BD explained that the removal deadline specified in the Order was mid-August 2012. Since the Structure posed no obvious danger, BD followed its order of priority and issued a warning letter only in February 2013. Also, while the social worker was following up on the case, BD would not institute prosecution against Mr A.

34. BD's social worker had visited the tenants of the Structure in order to understand their hardships and offer help. He recalled that the tenants had been hostile and even threatened to call the police to report being harassed. So, the social worker failed to persuade them to move out. BD continuously reviewed case progress with the social worker.

35. The Office noted that BD issued a warning letter to Mr A more than six months after the removal deadline specified in the 2012 Order had expired and found such delay unreasonable and detrimental to BD's authority.

36. The Office considered the so-called follow-up action taken by the social worker no more than endless contact with Mr A. Little progress had been achieved on the case. If the tenants were hostile and refused help, as the social worker so recalled, it would simply be asking for the impossible to expect that the social worker could convince Mr A to ask those tenants to move out. Such efforts were destined to fail.

37. As BD had already issued an Order against the Structure, BD should have taken vigorous enforcement action to facilitate the OC's early completion of the inspection and repairs works for Building A. The Office considered that to be a legitimate expectation of the OC and BD had failed to take decisive enforcement action, causing hindrance to the OC's compliance with the BIN. BD's inaction was indeed improper.

38. The Ombudsman considered the OC's complaint against BD substantiated, and urged BD to –

(a) take reference from this case and take prompt and rigorous prosecution action upon non-compliance with an order; and

(b) review the way its social workers follow up on cases such that owners of unauthorised structures could find no excuse to delay their removal.

Government's response

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

(a) the prosecution procedures with regard to non-compliance with removal orders have been reviewed and streamlined to enable more effective use of resources. In addition, the annual target for instigating prosecution action against non-compliance with removal orders has been updated based on the manpower and resource situation. Such annual target has been increased from 3,000 in 2015 to 3,300 in 2016; and

(b) BD has reminded its staff to maintain close liaison with the social workers and to closely monitor the progress of cases, as well as to regularly review the effectiveness of the social workers with a view to directly engaging with owners in a timely manner and taking enforcement actions as needed. If any sign of deliberate delay in compliance with the removal order by the concerned party is identified, prompt enforcement action will be taken.

Buildings Department

Case No. 2016/1360 – Failing to register at the Land Registry a removal order issued in 2009

Background

40. The complainant had in August 2015 purchased a residential flat (the Flat). Before completing the transaction, the complainant's solicitors had searched the land registers of the Land Registry (LR) twice and found no registered removal order issued by BD against unauthorised building works (UBW) items at the Flat. However, after becoming the new owner of the Flat, the complainant received an order from BD in November 2015 (the 2015 Order) requiring her to demolish a UBW item projecting from the external wall of the Flat (the UBW item). It was stated in the 2015 Order that a removal order had already been issued to the Flat's former owner in March 2009 (the 2009 Order).

41. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against BD for failing to register the 2009 Order at LR during the past six years, as a result of which she had purchased the Flat without knowing the existence of the UBW item and the responsibility for removing the UBW item had become hers.

The Ombudsman's observations

42. BD explained that it had issued removal orders in 2009 to a number of property owners of the building concerned, which had been selected as a target building for the Department's "Blitz UBW Clearance" operation. According to BD's enforcement guidelines at that time (the Old Guidelines), removal orders issued under "Blitz UBW Clearance" operations did not required immediate registration at LR, as experience had shown that most property owners would comply with removal orders before the deadline. In order to minimise inconvenience to property owners and to save registration costs, BD would only register those outstanding orders after several months of non-compliance.

43. Moreover, the former owner of the Flat had lodged an appeal against the 2009 Order. Under the Buildings Ordinance (BO), BD should not enforce a removal order when an appeal was under way. Thus BD did not send the 2009 Order to LR for registration.

44. BD argued that it is prospective buyers' responsibility to take measures, such as inspecting the property by themselves or professionals, to ascertain whether there is any UBW item in the property. BD would provide prospective buyers with the information if they enquire of BD about any outstanding orders, or whether there is any order pending issue.

45. BD amended its enforcement policy in April 2011, stipulating that all removal orders issued under "Blitz UBW Clearance" operations must be promptly sent to LR for registration.

46. The Office was of the view that BD's practice of deferring registration of removal orders defeated the original purpose of registering an order, which is to impose an encumbrance on the property concerned, urge the owner to demolish the UBW item voluntarily and protect the interests of prospective buyers and mortgage institutions by notifying them of any removal order (and any UBW item) when they conduct a search of the land registers. The Office found it inconceivable that BD should defer registration of removal orders for the sake of administrative convenience and cost saving. It prejudiced the right to information of prospective buyers and mortgage institutions, and indirectly favoured the former owners who sold their properties despite the existence of UBW items. In fact, any so-called "inconvenience" to the owners would disappear once they had followed the removal orders.

47. Moreover, most people would not know that BD might follow the Old Guidelines and defer the registration of some statutory orders. The Office acknowledged that prospective buyers have a responsibility to ascertain whether there is any UBW item in the property they intend to purchase and that there was a reminder on BD's website alerting the public that they should search the records at LR or write to BD to enquire. Nevertheless, the public would not know that making a land search was actually insufficient to safeguard the interests of prospective buyers and that they must at the same time make an enquiry of BD. The Department's practice of deferring registration of removal orders had undermined the confidence of prospective buyers in LR as a source for verifying the status of a property before completing a transaction.

48. Furthermore, the BO only stipulates that BD should not enforce a statutory order until an appeal is disposed of. Registering a statutory order is different from taking enforcement action. A statutory order remains valid until the appeal is successful. BD should discharge its duty owed to the public by promptly registering a statutory order. At the end of the day, if an appeal proves to be successful, all BD has to do is to cancel the registration. The Office found it extremely improper of BD not to have registered the 2009 Order at LR.

49. The Ombudsman considered the complaint against BD substantiated, and recommended BD to –

(a) amend its website information as soon as possible to alert the public that some of the removal orders have not been registered at LR, and to bring the amendments to the attention of the Law Society of Hong Kong, the Estate Agents Authority and other institutions or organisations engaging in property transactions; and

(b) conscientiously implement the improvement measure by registering the outstanding removal orders at LR when following up on cases of non-compliance with the orders.

Government's response

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

(a) BD has amended its website information to remind the public that some of the removal orders issued by BD have not been registered at LR. The prospective purchasers should thus take measures to ensure that there is no unauthorised building works in the property they intend to purchase. BD also informed the Law Society of Hong Kong and the Estate Agents Authority of such amendment; and

(b) BD will arrange registration of the outstanding removal orders at LR when following up on cases of non-compliant orders and has updated the relevant internal instruction.

Buildings Department

Case No. 2016/3036 – Delay in taking enforcement action against unauthorised building works at a building

Background

51. According to the complainant, the building in which she was residing (Building A) was selected as a target building under the "Large Scale Operations" against unauthorised building works (UBW) about three to four years ago. Statutory orders were issued by Buildings Department (BD) to the owners (including the complainant) of Building A for removal of UBW in their flats. Except for the owner of a flat (Flat A), the complainant and other owners had complied with the removal orders. The complainant reported the outstanding UBW on the flat roof of Flat A (the UBW item) to BD on 5 August 2016. BD responded that prosecution against the owner of Flat A would be instigated. On 10 August 2016, the complainant lodged a complaint to the Office of The Ombudsman (the Office) criticising BD for the delay in taking enforcement action against the UBW item, which was unfair to owners who had complied with the removal orders.

The Ombudsman's observation

52. BD had duly taken enforcement actions against the UBW item from April 2012 to March 2015. However, no further action was taken by BD after summons served on the owner of Flat A were withdrawn in March 2015 due to unsuccessful delivery of the summons. Only until the complainant lodged a complaint against the UBW item to BD in August 2016 did BD resumed follow-up actions. Prosecution against the owner of Flat A was instigated again, and a letter was issued to the owner of Flat A advising him that BD would have its contractor remove the UBW item on his behalf and recover the costs from him afterwards on 4 November 2016. The Office considered BD's progress in handling the complaint slow as 17 months had elapsed.

53. The Office did not dispute the heavy workload and manpower shortage of BD yet considered BD should to a certain extent bear the responsibility for the delay.

54. The Ombudsman considered the complainant's complaint partially substantiated and urged BD to closely monitor the progress and the decision of the court proceedings and to actively follow up the enforcement action of the removal order.

Government's response

55. BD accepted The Ombudsman's recommendation and has reminded relevant staff members accordingly. Prosecution action is in active progress. BD would continue to closely monitor the progress of the court proceedings and would in parallel arrange government contractor to remove the UBW item as works in default and recover the cost with surcharge from the owner concerned.

Buildings Department

Case No. 2016/3949 – Unreasonably stopping a prescribed registered contractor from removing a signboard

Background

56. In August 2016, the Buildings Department (BD) posted a removal notice at a conspicuous part of a building (Building A) requiring the owner or the agent of a signboard found thereat (the Signboard) to remove the Signboard within 14 days. In September 2016, the complainant called BD staff indicating he was a relative of the deceased signboard owner and was willing to remove the Signboard. BD staff advised him to appoint a registered contractor under the Minor Works Control System to carry out the removal works.

57. Subsequently, BD received a Notice of Commencement of Class I Minor Works (Form MW01) from the complainant's appointed registered contractor (Contractor A) advising that the signboard removal works would commence in October 2016. BD acknowledged receipt of the Form MW01 on the same day.

58. Contractor A's attempts to carry out advance signboard removal works on 30 September and 1 October 2016 were stopped by the complainant's sister (Ms A). Between 30 September and 6 October 2016, BD staff contacted the complainant and Ms A repeatedly.

59. On 12 October 2016, Ms A's appointed registered contractor (Contractor B) submitted Form MW01 to BD and BD acknowledged receipt of the Form on the same day. On the following day, BD wrote to both Contractor A and Contractor B requesting a declaration from them on the responsibility of the removal of the Signboard. While awaiting their reply, the Signboard had been removed.

60. On 24 October 2016, Contractor B submitted a certificate of completion of minor works certifying removal of the Signboard.

61. The complainant lodged a complaint with the Office of The Ombudsman (the Office), accusing BD of thwarting his appointed contractor from removing the Signboard.

The Ombudsman's observations

62. BD staff attempted to mediate between Ms A and the complainant as they were siblings and both wanted to remove the Signboard. The Office considered BD's good intention to be no cause for criticism. Moreover, BD staff had repeatedly told the complainant that BD did not intend to deter the complainant from removing the signboard. The Office believed that BD staff had no intention to stop the complainant from removing the Signboard.

63. The Ombudsman considered the complaint against BD unsubstantiated and advised BD to learn from this case and formulate guidelines for staff's reference when handling similar cases.

Government's response

64. BD accepted The Ombudsman's recommendation and has formulated internal instructions accordingly. In general, staff should consult their supervisors if they are in doubt or encounter difficulties in handling a case. Supervisors should regularly monitor case progress. Depending on the complexity and sensitivity of a case, supervisors may bring the case to the attention of senior management.

65. In addition, BD provides training to staff, including conducting regular experience sharing sessions. Summaries of lessons learnt from relevant cases are also uploaded to BD's Knowledge Hub for reference when dealing with similar cases.

Buildings Department
and Food and Environmental Hygiene Department

Case No. 2016/1578A (Food and Environmental Hygiene Department) – Delay in handling a seepage complaint

Case No. 2016/1578B (Buildings Department) – (1) Delay in handling a seepage complaint; and (2) inappropriately allowing consultants to leave the flat suspected to be the source of seepage during inspection

Background

66. In November 2015, the complainant reported water seepage at the bathroom ceiling of his flat (Flat A) to the Joint Offices for Investigation of Water Seepage Complaints (JO) set up by the Food and Environmental Hygiene Department and Buildings Department (BD).

67. After several attempts, staff of JO finally managed to arrange its consultant to conduct stage II investigation (i.e. colour water test) at the drainage outlets of the flat above Flat A (Flat B) on 18 January 2016 and stage III investigation, including colour water ponding test on the floor of the bathroom and colour water spray test on the wall in vicinity of the shower, on 25 March 2016. At the request of the occupant of Flat B, the consultant temporarily left Flat B during the test.

68. On 30 April, the consultant conducted another inspection and found no test colour water at the seepage area. Further reversible pressure test on a water supply pipe was considered unnecessary as no water dripping was envisaged during repeated inspections.

69. JO could not ascertain the source of the water seepage and temporarily ceased to follow up the case on 27 May 2016.

70. The complainant lodged a complaint with the Office of The Ombudsman (the Office) accusing JO of –

(a) not taking follow-up actions according to the procedures, causing delay to the investigation; and

(b) allowing the staff of the consultant to leave Flat B during the ponding test which might have affected the investigation result.

The Ombudsman's observations

71. The Office opined that JO had generally followed the procedures in handling the complainant's case. After inspecting Flat A on 28 November 2015, JO tried to contact the occupant of Flat B and left a "Notice of Appointment" and a "Notice of Intended Entry" with the occupant of Flat B on 5 and 13 January 2016 respectively. Although the process was not expeditious, no obvious delay was noted. The Ombudsman considered allegation (a) unsubstantiated.

72. The Office considered that, in principle, JO and the consultant were carrying out their statutory duties to investigate suspected water seepage arising from the subject premises and should stay at the premises to monitor and ensure the test would not be tampered with. No one should hinder or obstruct their discharging of duties.

73. The result of the investigation and the test would be used to ascertain whether a flat has caused water seepage nuisance and to allow JO to issue the statutory "Nuisance Notice". If staff of the consultant left the premises during the test, the test could be tampered with. Besides, if staff of the consultant did not record the testing conditions before and after leaving the premises, the test result might be called into question if it were to be used as evidence for taking enforcement action.

74. Nevertheless, the Office noted that staff of the consultant had stayed at Flat B for 30 minutes to complete the test after their return. The Office opined that it was not unreasonable for JO to accept the investigation result of the consultant in this regard. The Ombudsman considered that allegation (b) was partially substantiated.

75. The Ombudsman considered the complaint against JO partially substantiated, and urged JO to remind its officers and the consultant –

(a) to avoid leaving the scene during the test as far as possible; and

(b) in case that it is necessary to leave the scene temporarily, the conditions before and after leaving should be recorded in detail by writing or photos in order to provide evidence that the testing conditions have not been tampered.

Government's response

76. Since this is a case on stage 3 investigation of water seepage and falls squarely under BD's purview, BD accepted the recommendations made by The Ombudsman. JO has reminded its officers and issued a reminder letter dated 27 January 2017 to the consultant, urging them to avoid leaving the scene during the tests. In case that it is necessary to leave the scene temporarily, the testing conditions before and after leaving should be recorded in detail by writing and/or photos in order to provide evidence to show that the testing conditions have not been tampered. Also, JO will remind its officers and the consultant of the above issue during their working meetings.

Buildings Department
and Food and Environmental Hygiene Department

Case No. 2016/3823A&B – Failing to properly follow up the problems of water seepage and defective drainage pipe of a flat, and providing investigation results that contradicted with those from other departments

Background

77. The complainant's flat (Flat A) was in a housing estate developed by the Hong Kong Housing Authority under the Home Ownership Scheme. The complainant first reported water seepage at the ceiling of Flat A to the Joint Offices for Investigation of Water Seepage Complaints (JO) set up by the Food and Environmental Hygiene Department (FEHD) and the Buildings Department (BD) via the Estate Management Office (EMO) in December 2012. Staff of JO and its consultant conducted investigations at Flat A and a number of flats above Flat A but could not identify the source of water seepage. JO then replied to the complainant in June 2014 that JO would not take any further action for the time being per established procedures. Nevertheless, JO had identified after conducting the reversible pressure test that the common flush water supply pipe of the building was defective and the case was referred to the Water Supplies Department (WSD) for follow-up action. However, WSD subsequently advised that the water seepage was "insignificant".

78. As water seepage persisted at Flat A, the complainant reported the case to JO via EMO again in June 2015. After investigations were conducted by staff of JO and its consultant, JO replied to the complainant in July 2016 that the floor of the balcony of the flat above Flat A (Flat B) was found defective and JO would consider issuing a "Nuisance Notice" (NN) to the owner requiring repair works. In September 2016, JO advised the complainant in writing that during investigations of other water seepage reports, the common drainage pipe between the premises adjacent to Flat A and Flat B was suspected to be defective and the case was referred to the Independent Checking Unit (ICU) under the Transport and Housing Bureau for follow-up action. However, ICU subsequently replied to JO that no defective drainage pipe was observed.

79. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against JO, WSD and ICU for not properly following up the water seepage at Flat A and the problem of defective common drainage pipe. The complainant also alleged that the investigation findings of different departments were contradictory.

The Ombudsman's observations

80. JO had followed up on the water seepage report according to the established procedures, including conducting all necessary investigations and tests, and had issued a NN to the owner of the concerned premises.

81. The cause of water seepage is complicated and in order not to damage private properties, only non-destructive tests (i.e. colour water test at drainage outlets and on the floor) can be carried out. Given the limitations of such tests, JO has to take a long time for the investigation and the source may not be identified ultimately in spite of that.

82. Regarding the suspected defective common drainage pipe, although there was discrepancy between the testing result of ICU and JO's observation, both ICU and JO were exercising their professional judgement. The Office should not intervene.

83. The Office accepted the explanation of WSD that there was no evidence showing that the common flush water supply pipe was defective to an extent that wastage of water supply was involved.

84. The Ombudsman considered this complaint unsubstantiated, but urged JO to closely follow up the water seepage report of the complainant, take prompt enforcement action if the source of water seepage is identified, and advise her of the investigation result as soon as possible.

Government's response

85. BD and FEHD accepted The Ombudsman's recommendation.

86. JO followed up the seepage complaints lodged by complainants in accordance with established procedures and guidelines. Having examined investigation reports submitted by its consultant, JO found that Flat B had already complied with the NN but the seepage persisted. The source of water seepage could not be identified after performing various "non-destructive" tests; JO ceased to follow up on this case. JO notified the complainant of the investigation result in writing on 26 July 2017.

Buildings Department and Lands Department

Case No. 2016/1033A (Buildings Department) – Ineffective control against the unauthorised building works of an industrial building

Case No. 2016/1033B (Lands Department) – Ineffective control against breach of lease conditions of some units of an industrial building

Background

87. The complainant had complained to the Buildings Department (BD) and the Lands Department (LandsD) about irregularities at four units (the Units) in an industrial building, including removal of fire resisting walls, unauthorised installation on the external wall of a cooling tower of an air-conditioning system, and leasing out of the Units for retail business in violation of the lease conditions. However, BD and LandsD merely issued removal orders and warning letters to the owners of the Units to urge for rectification respectively.

88. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against BD and LandsD for not taking follow-up actions, thus allowing the irregularities to persist.

Powers and Responsibilities of BD and LandsD

89. BD is empowered, pursuant to the Buildings Ordinance, to take enforcement actions against unauthorised building works (UBW) items that pose obvious hazard or imminent danger to life and property. Such items are categorised as "actionable with high priority". Enforcement actions include issuing removal orders and instituting prosecutions. Lands D is responsible for control actions relating to land lease. It issues warning letters to those who violate lease conditions. In case of non-compliance, Lands D will take further actions, which include registration of its warning letters with the Land Registry (LR), and re-entry upon the land if the breach of lease condition persists.

BD

90. BD stated that the industrial building in this case was the target of a large-scale operation against UBW items. One of the Units involved unauthorised removal of fire resisting walls, which fell within the "actionable with high priority" category. Hence, BD issued a removal order to the owner concerned. When the 60-day timeframe for rectification specified in the order expired, BD did not take any follow-up action because further inspections of the whole building by a consultancy firm had been scheduled for later months. The owner concerned later submitted a proposal for rectification works, but the information he provided was insufficient. BD thus issued a warning letter to the owner, indicating that it would consider prosecution. Finally, BD accepted the revised proposal for rectification works and issued a consent letter. It also undertook to closely monitor the progress of the works.

91. Two of the other units were involved in opening up fire resisting walls and adding protected lobbies. BD confirmed that those works were carried out pursuant to the simplified requirements under the Minor Works Control System and were not UBW items. As regards the bracket installed on the external wall of a unit for supporting a cooling tower, BD noted that the bracket fell within the "actionable with high priority" category. BD had issued an advisory letter, a warning letter, and eventually a removal order to the owner concerned, and subsequently initiated prosecution procedures.

92. Although BD had followed its established enforcement policy and issued removal orders against those UBW items which belonged to the "actionable with high priority" category, it had failed to follow up in a timely manner on the removal orders after the expiry of such orders. That not only took away the meaning of the timeframe for rectification specified in the orders, but also undermined BD's authority. The Office considered that even if BD could not immediately compel the owners to make rectification, it should have conducted regular inspections to monitor the situation.

LandsD

93. LandsD stated that Short Term Waivers had been granted to the Units for changing their use of "Factory" as originally set out in the lease to "Showroom" or "Canteen". LandsD had separately received reports about unauthorized retail activities being carried out in two of the Units whose permitted uses were "Showroom". During site inspections,

LandsD confirmed that there were irregularities at one of those units and so issued warning letters to the owner concerned, urging for rectification. In subsequent inspections, LandsD did not find any irregularity. Hence, LandsD took no further action. As regards the other unit, no irregularity was found during Lands D's inspections.

94. After the Office's intervention, LandsD found irregularities at those two units during inspections and issued warning letters. Since the owners concerned still did not make rectification, LandsD proceeded to register the warning letters with LR. LandsD admitted that it could have issued a warning letter much earlier to the owner of one of those units.

95. Unauthorised retail activities had also been found at another unit whose permitted use had been allowed to change to "Showroom". However, the owner concerned moved out soon after LandsD had issued a warning letter. Hence, LandsD ceased its enforcement action. As regards the unit whose permitted use was allowed to change to "Canteen", LandsD conducted a site inspection on receipt of a report and found retail activities there. However, as subsequent inspections confirmed that the unit had ceased operation, LandsD saw no need for further action.

96. LandsD admitted that it had not taken timely enforcement action against the irregularities in one of the Units. The Office also found impropriety in the Department's inspections of another unit. Had its inspections been more thorough, LandsD would have noticed irregularities in that unit and taken enforcement action expeditiously.

97. The Ombudsman considered the complaint against both BD and LandsD partially substantiated, and recommended that –

BD

(a) conduct a comprehensive review on the procedures for following up on the UBW items found during large scale operations (LSO) and actively follow up on those items that fall within the "actionable with high priority" category;

(b) continue to closely monitor the compliance of the removal orders issued in this case, and institute prosecutions promptly if the owners concerned still fail to comply with the orders;

District Lands Office (DLO) of LandsD

(a) enhance inspections of the Units; if the breaches of permitted uses persist or aggravate, consideration should be given to further enforcement actions including re-entry of the Units; and

(b) draw lessons from this case. For future follow-up actions on cases of alleged lease breaches in industrial building units, in addition to investigating the Units, attention should be paid to find out whether the adjacent units are also in breach of the lease conditions and, if so, early enforcement actions should be taken.

Government's response

98. BD and LandsD accepted The Ombudsman's recommendations.

Recommendation (a)

99. BD has completed its review and considered that certain arrangements contained in the existing procedures should be reinforced –

(i) having regard to its manpower situation, BD has set annual targets for clearance of outstanding removal orders and uploaded the indicators onto its website. In April 2014, a review was completed and internal guidelines for clearance of outstanding removal orders (including orders issued in LSO) were issued. In this connection, the number of UBWs removed and irregularities rectified increased from 15,000 in 2013 to 23,000 in 2014 and 24,000 in 2015; and

(ii) BD has engaged outsourced consultants to assist in LSO. The consultancy agreements stipulated the duties of the consultants in the investigation stage, order serving stage, compliance inspection stage and final stage, as well as the reports and information required to be submitted and the time limits for completion of different stages. For instance, as the target building in this particular case covered by The Ombudsman report involved numerous individual units, BD agreed with the consultant's recommendation that the units were to be investigated and served with orders in stages.

Recommendation (b)

100. As the UBWs concerned have been rectified, the removal orders have been withdrawn by BD.

Recommendation (c)

101. One of the Units was found vacant according to the inspection conducted by DLO on 21 July 2017. No further lease enforcement is required for now. DLO would arrange further inspection in due course. As for the other two units, DLO could not detect any retail activity or breach of the user clause of the waiver letter during inspections conducted on 9 January 2017, 7 February 2017 and 21 July 2017 respectively. No further lease enforcement is required for now.

Recommendation (d)

102. An email was issued on 15 November 2016 reminding all relevant staff in DLO to take note of and follow relevant recommendations. Arrangements would be made to re-circulate the reminder in due course.

Buildings Department,
Food and Environmental Hygiene Department
and Lands Department

Case No. 2016/3944A (Lands Department) – Failing to properly follow up the problem of illegal occupation of Government land by a shop

Case No. 2016/3944B (Food and Environmental Hygiene Department) – Failing to properly follow up the problem of street obstruction caused by a shop

Case No. 2016/3944C (Buildings Department) – Failing to take proper follow-up action against unauthorised building works of a shop

Background

103. The complainant had previously lodged a complaint with 1823 in 2015 that a shop (the Shop) unlawfully occupied a back alley (the Alley) which caused obstruction to the pedestrians. 1823 referred the case to the Lands Department (LandsD), the Buildings Department (BD) and the Food and Environmental Hygiene Department (FEHD) respectively for follow-up actions. During the follow-up by the departments concerned, it was found that the Alley was situated in part on government land and in part on private land, and that unauthorised building works (UBWs) were built on that land.

104. The complainant lodged a complaint with the Office of The Ombudsman (the Office) on 11 October 2016, alleging that LandsD, BD and FEHD shifted responsibilities to one another such that the problem remained unresolved.

The Ombudsman's observations

LandsD

105. Lands D indicated that its District Lands Office (DLO) received the complaint referred by 1823 in November 2015. At a site inspection in the same month, DLO found out that the Alley straddle across

government land and private land; UBWs (including cantilevered canopies) and an extension of business area for trading activities were also identified. In its reply to 1823 in December 2015, DLO requested 1823 to refer the case to BD and FEHD for follow-up actions, and said it would assist in joint operation where necessary.

106. In September 2016, 1823 requested DLO to follow up on the complaint again. DLO staff conducted another site inspection and found the Alley in more or less the same condition as previously observed. DLO conducted another site inspection of the Alley in mid-November 2016. In addition to the problem of UBWs observed during earlier inspections, a platform (the Platform) was installed in the Alley; constituting unlawful occupation of government land. In December 2016, DLO affixed a statutory notice on the Platform requiring the occupant to cease occupying the land before a specified deadline.

107. The Office found the irregularities of the Shop extremely serious and persistent. The situation remained roughly the same during various inspections conducted by the departments. As occupation of the government land had been a long-standing issue, DLO should have taken land control actions at an earlier stage. DLO failed to take any proactive actions at the initial stage, but instead repeatedly urged 1823 to refer the case to BD and FEHD for follow up. Only after the intervention of The Ombudsman, more than a year after the complainant lodged the complaint with 1823, did DLO start to take enforcement actions.

108. The Office considered that DLO failed to handle the complaint under its purview in a proper and timely manner, allowing the irregularities in the Alley to persist.

FEHD

109. FEHD stated that during its inspection and investigation conducted in December 2015 and September 2016, no goods were placed in the public area on the pavement in front of the Shop and the pedestrian access was unobstructed; the Alley was allegedly fenced off with illegal structures so as to form part of the shop. FEHD was not able to gain entry for enforcement actions.

110. The Office found no maladministration on the part of FEHD as its staff was unable to enter the Alley to perform their duties due to the obstruction caused by the illegal structure.

BD

111. BD is responsible for handling UBWs on private buildings and lands. BD inspected and investigated the Alley in October 2015, January 2016 and November 2016 and issued removal orders against UBWs in March 2016 and December 2016. Prosecution was also instigated for non-compliance with the removal order.

112. The Office considered it not unreasonable for BD to selectively take enforcement actions against UBWs according to the existing enforcement policy and its purview, and had no adverse comments on BD's enforcement policy on UBWs, namely that enforcement action would be prioritized against new UBWs or UBWs constituting obvious hazard or imminent danger to life or property.

Conclusion and recommendation

113. The Ombudsman considered the complaint against LandsD substantiated, and that against BD and FEHD unsubstantiated.

114. Although the Platform in the Alley had been removed when LandsD inspected the Alley again in March 2017, the Alley remained enclosed and government land was still being occupied. The Ombudsman urged LandsD, BD and FEHD to continue actively following up the case according to their respective jurisdictions, with a view to resolving the problem completely.

Government's response

115. BD, FEHD and LandsD accepted The Ombudsman's recommendation and have taken the following follow-up actions.

116. DLO carried out follow-up site inspections in the Alley on 6 March 2017 and 17 March 2017, which revealed that the Platform had been removed and access to the Alley was not blocked or fenced off. However, there were still some movable goods in the Alley, and overhanging canopies and metal racks were installed on the external walls of the adjacent building. On 10 March 2017, DLO informed FEHD and BD of the latest position of the Alley and requested appropriate follow-up actions on the movable goods, the canopies and the metal racks under their respective purviews. As the Platform had been removed, DLO also requested the Highways Department (HyD) to carry out reinstatement

works of the ground where necessary. HyD advised that reinstatement works had been completed on 29 September 2017.

117. On 5 May 2017, BD advised DLO that prosecution action had been initiated due to non-compliance of the relevant Order issued by BD for removal of the concerned UBWs. BD will continue to closely follow up this case by maintaining close liaison with relevant departments.

118. On 17 May 2017, FEHD informed DLO that a metal mesh had been found in the Alley, blocking access to the rear part of the shop, during their site inspection on 11 May 2017. As such, a joint site inspection was carried out by FEHD and DLO on 8 June 2017. The inspection revealed that the movable metal mesh had been removed by the occupier but other movable objects belonging to the Shop, including storage shelves, goods, miscellaneous articles, etc. were still found in the Alley.

119. DLO will continue to closely monitor the situation and will take appropriate land control action if unauthorised structures are found erected on government land. If movable goods or articles and UBWs are detected at the Alley in future inspections, DLO will refer the issue to FEHD and BD for their appropriate follow-up actions and will offer assistance in any joint operation, if required, to facilitate enforcement.

120. On the other hand, FEHD has arranged biweekly inspections of the Shop to inspect the removal of illegal structure in the Alley. FEHD would keep watch of the situation of the Alley and take appropriate actions under its purview when circumstances permit in order to maintain the environmental hygiene of the Alley.

Consumer Council

Case No. 2016/1489 – (1) Applying different standards in granting legal assistance under the Consumer Legal Action Fund; and (2) unreasonably declining an application for Consumer Legal Action Fund assistance

Background

121. The Consumer Council (CC) is the trustee of the Consumer Legal Action Fund (CLAF) and is advised by a Management Committee (MC) on the eligibility and merits of cases seeking CLAF assistance. In considering CLAF applications, the MC takes into account a number of factors (the Factors), which include the chance of success of the matter, the bargaining power of the aggrieved consumer(s) and whether court action is the most effective means of resolution in the circumstances.

122. The complainant's sister (Ms A) had purchased from a beauty salon (Company X) in 2010 some beauty treatment packages that cost around $95,000 in total. A large portion of the packages was left unutilised when Ms A passed away in May 2012.

123. Ms A's father lodged a complaint with CC against Company X for its refusal to transfer the cost of the unutilised treatments to the estate of Ms A in May 2013, and CC failed to settle the dispute. In October 2014, Ms A's father applied to CLAF for assistance to take legal action for seeking refund from Company X for the unutilised treatments (the Application). The MC refused the Application. CC informed Ms A's father of the decision by letter (the Refusal Letter) in May 2015.

124. Noting that CC had granted legal assistance to applicants in two other cases of a similar nature, the complainant complained to The Office of The Ombudsman (the Office) that CC had applied different standards in granting legal assistance under CLAF and unreasonably declined the Application.

The Ombudsman's observations

125. The Office found that the MC had duly considered the relevant facts and merits of the Application before reaching its decision, which

was not unreasonable. The Office also accepted that each case might involve unique circumstances that the MC has to consider.

126. However, the public nowadays expects public bodies to account properly for their decisions. In this light, the Office found the Refusal Letter unsatisfactory as it just listed all Factors, without specific reference to the facts pertinent to the Application and explanation on why the Application was refused. That was poor administrative practice. Besides, the Trust Deed establishing CLAF, which CC relied on for not giving an explanation in the Refusal Letter, while stating that an applicant has no right to an explanation for refusal of his application, does not in fact prohibit CC from voluntarily giving such reasons. In this case, giving reasons would be a much better course to take.

127. Overall, The Ombudsman considered this complaint unsubstantiated, but found other inadequacy on the part of CC. The Ombudsman recommended that CC review its practice of not giving CLAF applicants exact reasons for refusal of applications.

Government's response

128. CC accepted The Ombudsman's recommendation. CC acknowledges the need to meet the public expectation that administrative practice should be more transparent, and thus the transparency regarding the decision on rejecting application should be enhanced, notwithstanding that it had all along explained in the rejection letters that a holistic approach in considering the applications had been adopted. In order to enhance transparency, CC has started giving brief reason(s) for the decision in the rejection letter with reference to the key facts of the case as well as the salient factors to which it has attached more weight in the consideration.

Department of Health

Case No. 2016/2161 – (1) Failure to provide the complainant with the date of assessment for his daughter; and (2) prolonged waiting time for the assessment

Background

129. In April 2016, the complainant registered with a CAC under DH for an assessment for his daughter. He was dissatisfied that no specific date could be provided for the assessment. The CAC staff simply told him that the waiting time was about nine months to one year and that he would be notified by telephone. Besides, he considered that such a long waiting time might delay the treatment for his daughter.

The Ombudsman's observations

130. A Child Assessment Centre (CAC) under the Department of Health (DH) provides services for children under 12 years of age referred by registered doctors or psychologists for suspected developmental problems. Within three weeks after parents have made a registration, CACs will arrange a preliminary interview of the child. Afterwards, CAC's Assessment Team will hold a pre-assessment case conference, during which information collected via the preliminary interview will be considered. The Assessment Team will then assess the child's development needs and make a professional judgement on the time for the child to receive detailed assessments. The CAC will then, subject to availability of the professionals concerned, fix a date for the detailed assessment. Urgent and serious cases will be given higher priority.

131. Since CACs only ask the parents to wait for notification without providing any further information as to how long they need to wait, parents will naturally feel anxious. Therefore, the Office of the Ombudsman (the Office) recommended that CACs provide a tentative assessment date for the parents after the pre-assessment case conference is conducted. This could help make the whole process more transparent and let parents better understand their children's condition so that they could decide whether they should wait for CAC's assessment or take their children to private organisations for assessment/treatment.

132. On the waiting time required, CACs already have a triage system in place to ensure that children with more serious problems would be accorded higher priority to receive assessment. In this case, the actual waiting time for the complainant's daughter was just three months.

133. The Ombudsman considered this complaint partially substantiated, and recommended DH to inform parents of the estimated assessment date within a reasonable time after the CAC has decided the assessment priority of the child at the Team Intake Conference (TIC).

Government's response

134. DH accepted The Ombudsman's recommendation. DH has decided that the estimated month and year when the child may be expected to receive assessment service (i.e. the estimated waiting time for assessment) should be specified in the existing guidance note for parents, which will be distributed to parents after the first appointment of nurse interview. If the assessment team considers that a higher priority should be accorded to the child for professional assessment at the TIC, the parents would be notified as soon as possible (normally within three months after the first appointment).

135. The guidance note would also include the advice that if the parents notice any changes in their child's condition while waiting for assessment, they can contact the CAC and provide related information for the assessment team's consideration and follow-up actions. The CAC would confirm the scheduled date and time of assessment with the parents by phone about three weeks before the assessment. The updated guidance note has been distributed to parents since October 2016.

Department of Health

Case No. 2016/2400 – (1) Failure to inform the complainant of the date of assessment for her son; (2) Charging an unreasonable registration fee; and (3) Failing to address her complaint properly.

Background

136. According to the complainant, her husband visited a Child Assessment Centre (CAC) on 13 June 2016, bringing along with him a referral letter issued by a doctor at Queen Elizabeth Hospital, to register their son, who displayed delayed development of language skills for assessment and follow-up services. CAC staff said that their son had to wait for about a year for assessment, and would be referred to the Speech Therapy Department of a public hospital only after assessment was made by professionals.

137. The complainant was dissatisfied that the CAC could not provide an exact assessment date. Since the CAC only made referrals and would not provide treatment services, she considered that the arrangement would delay the appropriate treatment of her son. She made a complaint to the Department of Health (DH), but her complaint was passed to the CAC for follow-up and the CAC staff did not address her concerns. As such, she lodged a complaint with the Office of The Ombudsman (the Office) against DH, alleging that –

(1) the CAC had unreasonably charged her $100 for the first appointment, during which the nurse only recorded developmental information of her son without providing any medical services;

(2) upon receipt of the referral letter issued by a doctor from a public hospital, CAC did not refer her son to receive suitable services or treatments, instead only asked her to wait for assessment. The arrangement was inappropriate;

(3) the CAC did not provide an exact assessment date and asked the parents to wait for an indefinite period. The arrangement was unreasonable; and

(4) the CAC did not handle her complaint properly or address her needs, only providing her with bureaucratic response.

The Ombudsman's observations

138. A CAC under DH provides services for children under 12 years of age referred by registered doctors or psychologists for suspected developmental problems. Within three weeks after parents have made a registration, CACs will arrange a preliminary interview of the child. Afterwards, CAC's Assessment Team will hold a pre-assessment case conference, during which information collected via the preliminary interview will be considered. The Assessment Team will then assess the child's development needs and make a professional judgement on the time for the child to receive detailed assessments. The CAC will then, subject to availability of the professionals concerned, fix a date for the detailed assessment. Urgent and serious cases will be given higher priority.

Allegation (a)

139. DH responded that although no treatment would be provided to the child during the first appointment, the nurse would ask the parents for details of the child's condition for further arrangement of comprehensive assessment. That was a service provided by the CAC. The Office considered it appropriate for DH to charge for its services.

Allegation (b)

140. DH had explained the reasons why the CAC could only make appropriate referrals for the child after a comprehensive assessment was made, instead of depending solely on the initial analysis mentioned in the referral letter. That was a professional medical judgment, on which the Office was not in a position to comment.

Allegation (c)

141. The Office understood that the CAC would generally discuss and confirm the assessment date with the parents about one to three weeks before the assessment. However, the Office considered that parents would certainly feel uneasy if they were asked to wait indefinitely for the CAC's notification and were not told the estimated waiting time after the first appointment.

Allegation (d)

142. It was not inappropriate for DH to pass the complaint to the responsible service unit for follow-up; it was an established practice. The CAC staff responded to the complainant's concerns over the language development of her son and provided relevant information for her reference. As such, the Office considered that DH had addressed her complaint appropriately.

143. The Ombudsman considered this complaint partially substantiated, and recommended DH to inform parents of the estimated assessment date within a reasonable time, after the CAC has decided the assessment priority of the child at the Team Intake Conference (TIC).

Government's response

144. DH accepted The Ombudsman's recommendation. DH has decided that the estimated month and year when the child may be expected to receive assessment service (i.e. the estimated waiting time for assessment) should be specified in the existing guidance note for parents, which will be distributed to parents after the first appointment of nurse interview. If the assessment team considers that a higher priority should be accorded to the child for professional assessment at the TIC, the parents would be notified as soon as possible (normally within three months after the first appointment).

145. The guidance note would also include the advice that if the parents notice any changes in their child's condition while waiting for assessment, they can contact the CAC and provide related information for the assessment team's consideration and follow-up actions. The CAC would confirm the scheduled date and time of assessment with the parents by phone about three weeks before the assessment. The updated guidance note has been distributed to parents since October 2016.

Department of Health and Labour Department

Case No. 2016/2746A&B – Mishandling a private dentist's demand note for payment regarding his provision of dental treatment to an injured employee in accordance with the Employees' Compensation Ordinance

Background

146. The complainant was a registered dentist in private practice. He submitted a quotation for dental treatment (amounted to around $50,000) for an employed person injured at work to the Prostheses and Surgical Appliances Board (the Board). Subsequently, the Board accepted the said quotation and issued an "Acceptance of Quotation for Denture" (the Certificate). After treating the injured employee, the complainant submitted a demand note to the Department of Health (DH) according to the instructions specified on the Certificate.

147. However, DH informed the complainant in a letter dated 13 July 2016 that he had to recover the consultation and treatment fees from the injured employee directly, since the injured employee had reached a private settlement agreement with his employer on compensation arising from work injury. DH also wrote to the injured employee, requesting him to settle the consultation and treatment fees with the complainant direct. However, the complainant could no longer get in touch with the injured employee at that time.

148. The complainant lodges a complaint with the Office of The Ombudsman (the Office) against DH and the Labour Department (LD), alleging mishandling of his case as follows –

(a) in handling similar cases, DH's established practice was to settle consultation and treatment fees in full upon receipt of a demand note from the dentist. DH, however, failed to honour its undertaking to settle consultation and treatment fees, and unreasonably requested the complainant to recover such fees from the injured employee direct in this case; and

(b) LD knew perfectly well that the complainant had been approved by the Board to provide treatment for the injured employee and would receive the consultation and treatment fees through the

DH. However, LD still allowed the employee to reach a settlement agreement with his employer. As a result, the complainant was not paid by DH.

149. The complainant provided supplementary information to The Ombudsman on 24 August 2016, that the injured employee had settled the consultation and treatment fees by cheque on 15 August 2016. He confirmed that the cheque had been cleared on 23 August 2016.

The Ombudsman's observations

150. The Office considered that there was obvious inadequacy in the existing mechanism of LD and DH for handling such cases. According to the "Instruction to I/P (injured person) after dental PSAB (Prostheses and Surgical Appliances Board) for fitting of denture" provided to the injured employee and the dentist by LD, the injured employee should sign the Certificate but needed not settle the consultation and treatment fees with the dentist after completing the dental treatment. Meanwhile, the dentist had to, as instructed under the "Important Notice to Dentist", submit the original copy of the Certificate and a demand note to the Finance Division (FD) of DH in order to recover consultation and treatment fees. The complainant had reasonable expectation that FD of DH would reimburse him with the consultation and treatment fees.

Department of Health

151. Under the existing mechanism, DH asks LD whether a settlement agreement has been reached between the employer and employee only after a dentist has completed the dental treatment and submitted a demand note. If such an agreement has been reached, DH would then advise the dentist to recover consultation and treatment fees from the injured employee. The Office considered this approach unreasonable and very unfair to the dentist involved. If the injured employee refuses to settle his fees or has left Hong Kong, the responsibility for recovery of fees would be shifted to the dentist contrary to his expectation. Fortunately, the injured employee in this case settled the consultation and treatment fees with the complainant eventually, or else the complainant or the Government might have to seek legal remedies.

152. The Office is pleased to note that DH has confirmed, after seeking legal advice, that a settlement agreement reached between employer and employee will not absolve the employer from the

responsibility to settle the relevant costs. DH also undertook to revise the existing mechanism so that its FD would first settle the consultation and treatment fees owed to the dentist and then recover the relevant costs from the employer, regardless of whether a settlement agreement has been reached. DH would also discuss with LD the measures to improve the existing mechanism and explain to employers their legal obligations under the Employees' Compensation Ordinance as early as practicable.

153. The Ombudsman considered the complaint lodged by the complainant against DH substantiated, and recommended that DH should revise the processing procedures as soon as practicable so that its FD would first settle the consultation and treatment fees owed to the dentist and then recover the relevant costs from the employer, regardless of whether a settlement agreement has been reached as long as –

(a) a quotation has been approved by the Board;

(b) a prosthesis or surgical appliance has been supplied and fitted to the injured employee; and

(c) a signed Certificate and a demand note from the dentist has been received.

Labour Department

154. LD clarified that it has no authority to interfere with negotiations between employers and employees regarding work injury compensation or the contents of the settlement agreement. However, allegation (b) revealed the problem where an injured employee might have on the one hand settled the case with the employer, and on the other hand obtained the services of prostheses and surgical appliances under quotation offered by dentists or other professionals and approved by the Board; the employee concerned may obtain double compensation in such cases. The Government may also have greater difficulty recovering relevant fees from the employer.

155. The Office thus considered that LD should improve the existing processing procedures by checking with employee, employer or other stakeholders whether a settlement has been reached and, if so, the contents of the settlement agreement, before deciding whether it is necessary to submit the dentist's quotation for the Board's approval.

156. The Ombudsman considered the complaint against LD unsubstantiated, but found other inadequacies on the part of LD. The Ombudsman recommended that LD –

(a) advise the employer of his obligations under the Employees' Compensation Ordinance (ECO) as early as possible in the course of processing such cases;

(b) notify individual employers involved in cases of fitting prostheses or surgical appliances and the insurer concerned as early as possible. While publicising the liabilities of employers under ECO, LD should also inform stakeholders such as employer associations;

(c) introduce appropriate procedures by instructing front-line staff to proactively remind employers and employees of their respective rights and obligations under ECO upon receipt of quotations relating to the fitting of prostheses or surgical appliances. If the parties have already reached an agreement on compensation, including the cost of fitting prostheses or surgical appliances, then it is not necessary to submit a quotation for the Board's approval; and

(d) explain to injured employees their rights and benefits as soon as possible, especially the fact that in reaching a settlement agreement with employers, depending on the contents of the settlement agreement, the injured employee may give up the cost of maintenance and replacement of the prostheses or surgical appliance for the next 10 years.

Government's response

Department of Health

157. DH accepted The Ombudsman's recommendation. In October 2016, the FD of DH revised the processing procedures which were later implemented. After a quotation has been approved by the Board and a prosthesis or surgical appliance has been supplied and fitted to the injured employee, the FD will first settle the consultation and treatment fees owed to the dentist and then recover the relevant costs from the employer upon receipt of a signed Certificate and a demand note from the dentist, regardless of whether a settlement agreement has been reached.

Labour Department

158. LD accepted The Ombudsman's recommendations.

159. LD has reviewed its existing mechanism. In processing similar cases from 1 January 2017 onwards, LD has implemented the following procedures to explain to employers their liabilities and injured employees their rights and benefits under ECO as early as possible.

160. Starting from 1 January 2017, the Employees' Compensation Division (ECD) proactively reminds employers of their rights and obligations in respect of prostheses or surgical appliances under ECO in writing upon receipt of notification by the Occupational Medicine Unit (OMU) of a possible case of the fitting of prostheses or surgical appliances. Furthermore, when the fitting of a prosthesis or surgical appliance to the injured employee is confirmed and he has been arranged to attend the Board, ECD will liaise with the employer in writing to notify him of the assessment date and request him to notify OMU promptly of any settlement agreement reached with the injured employee before the assessment date so that the appointment to attend the Board can be cancelled accordingly.

161. In addition, when OMU arranges an assessment at the Board for an injured employee, OMU will first confirm with the injured employee that there is no settlement agreement with the employer on fitting of prostheses or surgical appliances. OMU will issue a notice to the injured employee to remind him that if a settlement agreement has been reached with the employer on fitting of prostheses or surgical appliances, the Board assessment will be cancelled and the injured employee will be responsible for the cost of fitting, maintenance and renewal of prostheses or surgical appliances.

162. ECD has also earmarked resources for publicity of employers' obligations (including the supply of prostheses or surgical appliances) under ECO among employers in 2017/18.

Department of Justice and Fire Services Department

Case No. 2016/1392(I) (Department of Justice) – Failing to provide the complainant with the medical records of the injured persons as requested

Case No. 2016/1198A (Department of Justice) – (1) Delay in claiming compensation from the complainant; and (2) depriving him of the right of appeal

Case No. 2016/1198B (Fire Services Department) – (1) Delay in claiming compensation from the complainant; and (2) unreasonable repair charge for the ambulance

Background

163. On 19 August 2010, the complainant met with a traffic accident while driving (the Accident), causing damage to an ambulance and injuries to two ambulance officers (the Officers). He was subsequently convicted of "Careless Driving" by the Magistrate.

164. On 18 February 2015, the complainant received a claim notice from the Department of Justice (DoJ) acting on behalf of the Fire Services Department (FSD), demanding him to pay a sum of $65,775.26 for the repair costs of the vehicle and the employees' compensation paid by the Government to the Officers (the Claim Notice). The complainant alleged that his insurance company had deleted records of his claim in relation to the Accident in 2012, since no claim notice was issued long past the Accident. The complainant requested the insurance company to re-open his claim file, but was denied. The claim notice was dated 17 December 2010; the complainant believes that the insurance company would have settled the claim on his behalf if the claim was initiated against him at that time.

165. The complainant was sceptical of the extent of injuries sustained by and amount of compensation paid to the Officers. He noted from the Officers' Certificate of Assessment that, in case of dissatisfaction with the assessment, an appeal could be made to the Commissioner for Labour or the District Court. However, the window for appeal had expired by the time he received the Claim Notice. The complainant alleged that DoJ had delayed in taking recovery action against him, depriving him of the right

to appeal against the assessment (allegation (a)).

166. On 8 December 2015, the complainant requested DoJ to provide him with the medical records of the Officers and photographs of the ambulance after the Accident for evidence in support of his objection to the damages claimed. However, DoJ did not reply until the complainant wrote again on 4 January 2016. DoJ rejected the complainant and only sent him the photos on 8 April, after the complainant had settled the claim in full and called DoJ on 18 March to again request the photos. The complainant was dissatisfied that DoJ failed to provide the medical records as requested (allegation (b)).

167. On the other hand, the complainant criticised FSD for its delay in taking recovery action against him, and questioned the substance of FSD's claims as regards the assessment of injuries and amount of compensation claimed. Furthermore, the complainant discovered that FSD only submitted three photographs for the loss adjustors to assess the repair costs for the vehicle. In his view, FSD did not handle the matter seriously, resulting in an unreasonable assessment of the repair costs for the vehicle. The complainant was dissatisfied with FSD's delay and handling of the recovery claim (allegation (c)).

The Ombudsman's observations

Cases should be handled as soon as possible

168. It is reflected from DoJ and FSD's replies to the complainant, that departments consider it sufficient for claims to be made before the limitation period expires, and that they have no responsibility to commence recovery action as soon as possible. The Office of The Ombudsman (the Office) disagrees. While the Government has the right to commence a recovery action any time before the limitation period expires, citizens have a reasonable expectation of the Government to be open and responsible, and acts of inordinate delay or inefficiency are considered to be maladministration. Especially in a case involving public funds, recovery action should be taken as soon as possible. The Office is of the view that departments should, as far as practicable, inform subjects of oncoming recovery action against them and commence the recovery procedures within reasonable time.

Allegation (a)

169. DoJ explained that the assessment of injury was conducted in accordance with relevant statutory provisions, and that the right to raise objection to the assessment was confined to FSD and the Officers, who were the subjects of the assessment. The complainant could raise his objection to the court in legal proceedings. The Ombudsman found the explanation reasonable, and allegation (a) unsubstantiated.

Allegation (b)

170. The Ombudsman considered DoJ's view, that the complainant's request for information did not constitute a request under the Code on Access to Information (the Code) and needed not be handled in strict accordance with the requirements of the Code (e.g., time for reply, procedures), to be reasonable. Since the complainant has settled the claim in full, and only asked for the photographs in his phone call on 18 March, it was understandable for DoJ to believe that he no longer required the medical records and cease to follow up on the request.

171. Nonetheless, once the complainant clarified that he would still like to obtain the medical records of the Officers, DoJ should have followed up on his request as appropriate.

Allegation (c)

172. Four months after the accident, FSD issued a letter to the complainant, informing him that he might need to compensate FSD. However, the address (as provided by the Police) was incorrect and the message did not reach the complainant. The Office considered that instead of setting the case aside, FSD should have confirmed the accuracy of the complainant's address, and obtained vehicle owner's information through the Transport Department upon non-delivery of the letter.

173. The Office noted that according to the Government's internal guidelines, the Police would inform departments concerned of the result of prosecution within 30 days from the date of a court hearing. Departments should check with the Police if such notification was not received. In this case, FSD was aware in early February 2011 that the hearing for the Accident would be held later that month, but did not check with the Police for the verdict of the case until April in the following year. There was an apparent delay.

174. Having noted the verdict of the court in June 2012, FSD still took more than a year to prepare claim documents and calculate damages before referring the case to DoJ. The Office noted that meanwhile, the notary public and the Committee on Employees' Compensation had already confirmed the repair cost for the ambulance and completed the assessment of injuries in September and December 2010 respectively.

175. FSD also failed to procure a properly completed notice of intention to claim compensation (Notice of Intention) for over a year after referring the case to DoJ. DoJ and FSD claimed that they discussed the matter on the phone, but no written record was kept. The Office considered it a simple task for FSD to arrange for the Officers to complete and sign the Notice of Intention. FSD's inability to resolve the matter showed a lax attitude in handling this case, resulting in further delay in the claim procedure.

Insurance claim

176. Regarding the complainant's loss of opportunity to make an insurance claim, it was the complainant's own choice and decision to have his insurance company delete records of the Accident. The Office considered that the complainant's inability to make a claim with his insurance company should not be entirely attributed to the departments' delay.

Conclusion and recommendations

177. Having examined the sequence of events and information relevant to the case, the Office considered that DoJ had no obvious delay, but FSD had multiple delays in handling this case. However, there was no evidence that FSD's inadequacy in handling this case prejudiced the interests of the complainant. The Office was pleased to note that FSD had made arrangement to redeploy staff to expedite the handling of claim cases.

178. The Ombudsman is of the view that the complainant's complaint against DoJ is not substantiated, and that against FSD is partially substantiated. The Ombudsman recommended that the parties–

DoJ

(a) follow up on and reply to the complainant's request for relevant medical documents as soon as possible;

FSD

(b) draw up clear guidelines and a flow chart for handling claim cases (including timely issuance of Notices of Intention and follow-up with the Police for court verdicts on traffic offences) to expedite recovery actions and referrals to DoJ;

(c) investigate the reason behind any undelivered letters issued to a member of the public to ensure that the recipient is aware of the message contained therein; and

DoJ and FSD

(d) properly maintain written records of the follow-up actions on claim cases (including records of telephone conversations).

Government's response

179. DoJ accepted The Ombudsman's recommendation (a) and (d). DoJ sought instructions from FSD regarding the complainant's request for medical reports, medical treatment record and medical history of the Officers. However, the Officers refused to authorize DoJ to release copies of the medical certificates relevant to the Accident, and FSD does not have in its possession the relevant medical documents. DoJ informed the complainant and The Ombudsman of the above situation on 11 October 2016. The Ombudsman replied on 28 March 2017, notifying DoJ that the case as relates to the Code was closed.

180. Moreover, DoJ officers handling recovery cases have been reminded to keep proper records regarding follow-up actions taken on the cases (including records of telephone conversations).

181. FSD accepted The Ombudsman's recommendations (b), (c) and (d). FSD has already drawn up and put into use a set of guidelines and a flow chart for handling claim cases arising from traffic accidents, including the procedure for handling undelivered letters and requiring the staff to properly maintain written records of follow-up actions on claim cases arising from traffic accidents.

Department of Justice
and Working Family and Student Financial Assistance Agency

Case No. 2015/5309A&B –Delay in searching for the complainant's valid address to deliver the Court Order regarding a claim against the complainant for outstanding student loan

Background

182. The complainant undertook to act as indemnifier when her former husband (Mr A) applied for student loans from the Student Financial Assistance Agency (now the Student Finance Office of the Working Family and Student Financial Assistance Agency) (WFSFAA) in 2000 and 2002. In 2003, she divorced Mr A and moved out of the address stated on the deed of indemnity (the Old Address). However, WFSFAA was not notified of her change of residence.

183. In July 2009, the Department of Justice (DoJ) instituted legal proceedings in the Small Claims Tribunal against Mr A and the complainant to recover the defaulted student loans; the claim was allowed. It was not until a bailiff went to the Old Address to seize property in March 2012 that DoJ learned Mr A and the complainant had moved out. DoJ then issued a memo to WFSFAA to report case status and seek further instruction, but did not receive any reply from WFSFAA. In September 2015, DoJ searched the land register and found that the complainant owned another property (the New Address).

184. In September 2015, the complainant received a letter from DoJ posted to the New Address, requesting her to repay, on behalf of Mr A, the defaulted student loans together with interest and administration fees, according to a court order issued in October 2009. The total amount was over $60,000, of which some $20,000 was interest. The complainant was dissatisfied that DoJ had delayed searching the land register for her New Address until 2015. She considered it unfair for her to bear the extra interest accrued due to the delay.

The Ombudsman's Observation

185. Since the complainant did not take the initiative to notify WFSFAA of her change of address, the Office of The Ombudsman (the Office) was of the view that she was partly responsible for the incident.

186. Despite both DoJ and WFSFAA reiterating that a collaboration mechanism with well-defined division of responsibilities was in place between them, communication was evidently inadequate. This case had remained inactive for over three years, during which DoJ had failed to actively search for the complainant's latest address, and to make any enquiry with WFSFAA. Moreover, WFSFAA did not clarify with DoJ after it noticed inaccurate information in DoJ's memo (the disputed memo). The Office did not see "close communication" between the two departments as they claimed.

187. The Office understood that DoJ had to prioritise its tasks because of resource constraints and the large number of default cases, however, idling cases only builds up to a greater backlog problem. After putting in the effort to institute legal proceedings, DoJ should follow through by ensuring the efficacy of follow-up procedures, so as to avoid unnecessary wastage of resources. The Office considered DoJ's existing internal guidelines inadequate, in that the importance and urgency of tracing the whereabouts of defaulters was not clearly communicated to frontline staff. It is essential for DoJ and WFSFAA to draw up more specific guidelines and timetables on procedures for handling cases.

188. The Ombudsman considered the complaint against DoJ and WFSFAA partially substantiated, and recommended that DoJ and WFSFAA –

(a) jointly evaluate implementation of their collaboration mechanism to ensure timely follow-up actions taken by their frontline staff;

(b) strengthen their communication and arrange regular and joint review of the progress of cases involving missing defaulters;

(c) review internal guidelines and procedures for handling cases involving missing defaulters and set out a concrete timeframe, with emphasis on the importance of following deadlines ; and

(d) complete reviewing the content of the disputed memo as soon as possible.

Government's response

189. DoJ and WFSFAA accept The Ombudsman's recommendations, and have taken the following actions.

Recommendation (a)

190. DoJ and WFSFAA will continue to closely monitor the overall progress of student loan recovery cases handled by DoJ, by providing each other with progress reports on a regular basis. WFSFAA has also improved the presentation of these progress reports, highlighting cases that require special attention or expedited action, so as to facilitate DoJ in taking appropriate follow-up actions.

191. Regular meetings between DoJ and WFSFAA management will continue to be held to review overall case progress and strengthen the collaboration mechanism between the two bodies. To enhance communication and collaboration, DoJ and WFSFAA will also meet regularly at the working level, in order to step up monitoring of case progress and implementation of the collaboration mechanism, and to discuss issues arising from individual cases.

Recommendation (b)

192. The Student Finance Office (SFO) of WFSFAA prepares half-yearly progress reports that help identify cases of higher priority or difficulty. In addition to the communication arrangements mentioned above, DoJ will make use of these half-yearly reports to find cases of missing defaulters (in particular, those cases where a valid address cannot be obtained after two successive address searches have been conducted with different Government departments, as required by existing internal guidelines) and review whether further follow-up actions are necessary.

Recommendation (c)

193. DoJ has examined its internal guidelines for handling cases involving missing defaulters, and the revised version of the internal guidelines was issued on 29 July 2016. Once DoJ is notified that the last known address of a defaulter is no longer valid, DoJ should inform

and seek the updated address from SFO within four weeks. If SFO advises that it cannot provide an updated address, DoJ will conduct an address search with relevant Government department(s) within four weeks. In the event that the address obtained from other Government department(s) is the same as the invalid address already in hand, or proves also to be invalid, another round of address search would be conducted within six months from the date on which the address obtained from the address search is confirmed to be invalid.

Recommendation (d)

194. DoJ and WFSFAA have reviewed and revised the standard memo in question, mainly by simplifying its contents and refining its wording. The revised memo is more to the point, concise and readable, so as to avoid any misunderstandings. DoJ has instructed the Law Clerks who are responsible for student loan recovery cases to indicate clearly in the revised standard memo the instruction to be sought from and information to be provided to WFSFAA. Correspondingly, WFSFAA has also reminded the staff concerned to seek clarification of the contents of the standard memo with DoJ if in doubt.

Drainage Services Department, Environmental Protection Department and Home Affairs Department

Case No. 2016/1152A&B (Drainage Services Department and Environmental Protection Department) – (1) Failing to explain the details of rural drainage works to the affected villagers and consult them; and (2) failing to deposit the plans and the scheme of drainage works at a designated place for public inspection, as stated in a gazette notice

Case No. 2016/1152C (Home Affairs Department) – Failing to deposit the plans and the scheme of drainage works at a designated place for public inspection, as stated in a gazette notice

Background

195. The complainant is an indigenous inhabitant of a village. A few years ago, the Drainage Services Department (DSD) carried out sewerage improvement works in the village, during which DSD discovered that there were uncharted underground utilities and obstructions. In addition, the villagers objected to the land resumption proposal. The works were eventually not completed as planned. The Indigenous Inhabitant Representative of the village mentioned in the villager forum held in April 2015 that DSD had promised to explore other engineering scheme and would consult the villagers about the new scheme.

196. In January 2016, the Environmental Protection Department (EPD) gazetted the proposed village sewerage improvement works in the village (the Works) which requires resumption of a portion of a piece of private land. The notice (the Notice) stated that relevant plans and scheme (the Plans and Scheme) would be deposited at a number of designated locations, including a public enquiry service centre (the Service Centre) of the Home Affairs Department (HAD), for public inspection.

197. The complainant complained against EPD and DSD to the Office of The Ombudsman (the Office) on 5 April 2016, alleging that –

(a) EPD and DSD did not consult the villagers on the Works and the associated land resumption proposal prior to the gazette. EPD and DSD also did not explain to the villagers the purpose and details of the Works, and ignored their opinions and rights; and

(b) EPD, DSD and HAD did not deposit the Plans and Scheme at the Service Centre in accordance with the Notice. As a result, there were villagers who were unable to inspect the documents when visiting the Service Centre on 4 March 2016.

198. After examining the information provided by EPD and DSD and obtaining the complainant's consent, The Ombudsman considered it necessary to extend the investigation to HAD.

The Ombudsman's observations

Allegation (a) – Failure to hold consultation on the Works and land resumption

199. DSD (instead of EPD) was responsbile for the consultation of the Works before its gazette. Records indicated that DSD had appropriately explained to the villagers details of the Works (including the proposed land resumption area) and consulted their views through the two village representatives. DSD also revised the alignment and plans of the Works in response to the villagers' comments. As such, DSD did not ignore the residents' opinions and rights. Therefore, the Office did not consider the arrangement by DSD improper. The Ombudsman considered allegation (a) against EPD and DSD unsubstantiated.

Allegation (b) – Failure to deposit the Plans and Scheme at the Service Centre

200. The Office considered that EPD had arranged the gazette of the Works in accordance with the usual procedures and arrangements, which had worked effectively in the past. However, the Plans and Scheme were not deposited in the Service Centre throughout the entire consultation period for public inspection mainly because of a misunderstanding by the staff of the Service Centre; EPD should not be blamed for not stating the deposition period at the designated places in its covering memo for the Plans and Scheme. The Ombudsman considered allegation (b) against EPD unsubstantiated.

201. Besides, the Office was glad to note that EPD had learnt from the incident and required that all future covering memos should clearly state the deposition period required for public inspection in order to prevent the recurrence of similar incidents.

202. As for DSD, records revealed that DSD had delivered the relevant gazette documents (including the Plans and Scheme) to the designated locations according to EPD's instruction. It was through no fault of DSD that the Plans and Scheme were not deposited at the Service Centre throughout the entire consultation period. The Ombudsman considered allegation (b) against DSD unsubstantiated.

203. Nevertheless, the Office considered that when DSD staff noticed that members of the public were not able to inspect the Plans and Scheme at one of the designated locations, they should investigate into whether there was any problem on the deposition of the documents. However, DSD only provided assistance to the villager who sought help but did not contact EPD and all the designated locations to thoroughly understand and solve the problem. There were inadequacies on the part of DSD.

204. The Ombudsman remarked that the failure to deposit the Plans and Scheme at the Service Centre was mainly due to misunderstanding of the staff at the District Office (DO) concerned, who might lack the experience in handling such gazettal documents and misinterpreted that they only had to keep the Plans and Scheme in the DO and its three Service Centres for public inspection between the two gazette dates. Allegation (b) against HAD was substantiated.

Conclusion and recommendation

205. The Ombudsman considered the complaint against HAD substantiated, while the complaint against EPD was unsubstantiated; the complaint against DSD was unsubstantiated but other inadequacies were found. The Ombudsman recommended that –

(a) EPD and DSD should step up communication with the concerned departments of the locations where the gazette documents are deposited in the future to ensure that they are clearly aware of the period of depositing the documents for public inspection. Prompt follow-up and rectification should be carried out when problem is encountered; and

(b) HAD should advise all DOs to remind their staff to be fully acquainted with the duration for depositing gazette documents for public inspection, as well as clarifying with the concerned departments as appropriate, in handling these documents.

Government's response

206. DSD, EPD and HAD accepted The Ombudsman's recommendations.

207. DSD will step up training and remind staff to pay more attention to the gazette procedures. If similar public enquiry is encountered again, DSD would contact EPD immediately and follow up with the responsible department of the designated locations promptly to resolve the problem.

208. To prevent recurrence of similar incidents, EPD has already implemented an enhancement measure requiring that all future covering memos should clearly state the deposition period required for public inspection.

209. The DO concerned had reminded the staff concerned of the need to immediately clarify and confirm the depositing period of documents with the concerned departments if their memos do not set out the exact period. Moreover, HAD advised all DOs on 27 January 2017 of the need to be fully acquainted with the duration for depositing gazette documents for public inspection, and to clarify with the concerned departments as appropriate in handling these documents.

Electrical and Mechanical Services Department

Case No. 2016/1749(I) – Failing to properly handle the complainant's request for the investigation report on an escalator incident

Background

210. The complainant alleged that an escalator in a shopping centre abruptly stopped on 20 July 2015, causing the complainant's father to fall and become injured.

211. After on site investigation, the registered escalator contractor[1] (the Contractor) submitted on the next day an investigation report to the Electrical and Mechanical Services Department (EMSD). EMSD then carried out its own investigation, conducting a site visit, interviewing the victim, taking statements from witnesses, and asking the Contractor for supplementary information. Meanwhile, the complainant, who had been provided with the Contractor's incident investigation report, sent email to EMSD several times to query the findings.

212. Through an email dated 11 February 2016, EMSD informed the complainant of its own investigation findings. The complainant considered the email vague and requested a copy of EMSD's investigation report on 17 April 2016. On 6 June 2016, EMSD sent an email to the complainant to reiterate its findings without providing any investigation report or other documents containing its investigation findings.

213. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against EMSD for failing to properly handle her request for its investigation report on an escalator incident.

The Ombudsman's observations

214. According to EMSD, there are thousands of escalator incidents every year and only those which result in fatality, severe injury or which involve critical safety issues that draw the public's concern call for

[1] The Ombudsman's original wordings in her investigation report "lift maintenance contractor" should read "registered escalator contractor" as advised by Electrical and Mechanical Services Department.

investigation reports. No investigation report was prepared in this case. Thus the information requested by the complainant was non-existent.

215. Nevertheless, there were various file records containing the investigation findings and EMSD had replied to the complainant with information compiled from these records. It was evident from EMSD's reply to the complainant that EMSD believed that in the absence of an investigation report, those records were what the complainant sought. If in doubt, EMSD would have provided clarification to the complainant.

216. The Office noted that although the complainant did not cite the Code on Access to Information (the Code) while making her request for information, a non-Code request should be considered on the same basis as requests made under the Code.

217. In its reply of 6 June 2016, EMSD reiterated the findings of its investigation into the incident. However, as laid down in relevant Guidelines, the preferred arrangement was for EMSD to provide a copy of the file records containing the findings or parts of the findings; or refuse to provide such records or such records in parts with reasons. Reiteration of the investigation findings did not equate provision of relevant records. EMSD had *de facto* refused the request without providing any reasons for refusal and information about the avenue of internal review and the right to complain to The Ombudsman, as required by the Code.

218. It took EMSD 50 days to reply to the request. In the interim, no explanation was given. The response time stipulated in the Code was therefore not met.

219. The Office considered that EMSD had failed to make reference to the Code in handling the complainant's request for information; this failure stemmed from EMSD staff's lack of awareness of the requirements under the Code.

220. The Ombudsman considered this complaint against EMSD substantiated, and recommended that EMSD –

(a) reconsider with reference to the Code the complainant's request; and

(b) provide training to its staff to enhance their awareness of the Code.

Government's response

221. EMSD accepted recommendation (a). A reply letter was sent to the complainant on 1 December 2016 explaining that the complainant's requested investigation report for the escalator incident did not exist and the summary of EMSD's findings given in EMSD's reply on 6 June 2016 was compiled based on the collected information and evidence. A copy of "Assessment Form for Incident Investigation", which contained EMSD's investigation findings for the escalator incident, was provided to the complainant. In addition, EMSD apologised for the delay in replying to the complainant's request on 17 April 2016.

222. EMSD accepted recommendation (b). A seminar on the Code was delivered by a representative from the Constitutional and Mainland Affairs Bureau on 10 February 2017 for EMSD staff to enhance their awareness and knowledge of the Code.

Environmental Protection Department

Case No. 2016/1048 – Failing to properly follow up complaints about suspected illegal landfilling or fly-tipping at a site

Background

223. According to the complainant, there were activities of illegal dumping of soil and construction waste (landfilling activities) for many years on a piece of private land (subject site) in Yuen Long. Since 2003, he has lodged a number of relevant complaints to the Planning Department (PlanD) and the Environmental Protection Department (EPD), and requested these two departments to take enforcement actions to restore the subject site to its original condition.

224. The complainant was of the view that PlanD and EPD did not effectively tackle the problem and consequently a massive landfilling area was formed in early 2016.

225. EPD is responsible for the enforcement of the Waste Disposal Ordinance (WDO), according to which it is an offence to deposit waste on private land without the permission of the owner(s) or lawful occupier(s). In addition, EPD should take enforcement actions against environmental pollution problems arising from construction works and landfill activities in accordance with the relevant environmental laws, including construction dust arising from landfilling works under the Air Pollution Control (Construction Dust) Regulation (CDR). Persons in charge of the works should take effective control measures in accordance with the CDR to prevent dust emission, or else EPD could initiate prosecution action.

226. EPD received complaints from the complainant directly or through referral from other government departments in May 2004, February 2006, March 2007, May and December 2008, alleging that there was fly-tipping of soil or construction waste at the subject site. In response, EPD had conducted investigations under its jurisdiction and replied to the complainant afterwards. In summary, investigation of EPD revealed that the occupier of the land had been storing soil and mud at the subject site for many years. As the activity was carried out under the permission of the land occupier, it did not contravene WDO.

227. In addition, the subject site has been used for the operation of outdoor sand depots since the 1980s, thus that continues to be its "existing use" under the Town Planning Ordinance. EPD has inspected the site and considered that the current state of land use did not violate any environmental legislation. Moreover, the person in charge also responded positively to EPD's reminders, and implemented dust suppression measures including installation of water hose at the site entrance for washing vehicles and planting trees on slopes and at both sides of the access road, etc. in 2008.

228. EPD inspected the site from time to time but did not find any violation. The subject site was later gradually covered by vegetation.

The Ombudsman's observations

229. According to records, EPD's investigation revealed that soil storage activity at the subject site was carried out under the permission of the lawful occupier and hence there was no violation of the WDO. As there was no environmental pollution, there was neither breach of other environmental control ordinances, thus no basis for the EPD to take law enforcement action. Nevertheless, EPD reminded the person-in-charge of the sand depot to take measures to avoid excessive dust emission. The Office of the Ombudsman (the Office) considered that the EPD had taken action under their remit in response to the complaints lodged by the complainant between the year 2003 and 2010, and the follow-up actions were generally appropriate.

230. Although the Office found no administrative malpractice, the concerned departments were requested to report the latest development of the case, as the media had widely reported the incident in early 2016. The Office noted that the concerned departments had conducted investigations and most of the vegetation on the concerned land and extension area was removed, thereby exposing large quantities of sand and rock. The concerned departments have taken enforcement actions under their respective remit, including EPD initiating prosecution actions against the concerned persons at the subject site for illegal depositing of construction materials hence violating the WDO and not observing the dust prevention requirements under the CDR.

231. The Ombudsman considered the complaint against EPD unsubstantiated, but recommended that EPD follow up the matter, and take enforcement actions against the offender if there is sufficient evidence.

Government's response

232. EPD accepted The Ombudsman's recommendation. Investigation has been completed and the EPD successfully prosecuted concerned offenders.

Equal Opportunities Commission

Case No. 2015/4044 – Selective disclosure of the content of the minutes of a meeting of the Commission

Background

233. According to the complainant, the minutes of the 104th meeting (104th minutes) of the Equal Opportunities Commission (EOC) on 19 December 2013 recorded the gist of the EOC Chairperson's remarks at the meeting as follows, "…the EOC was acting within its power in the Discrimination Law Review and the study. This view was also agreed by the Constitutional and Mainland Affairs Bureau (CMAB), the EOC's housekeeping Bureau."

234. In April 2015, CMAB clarified to the complainant that CMAB had never expressed the opinion recorded in the 104th minutes. The complainant enquired with CMAB about their follow-up. Subsequently, CMAB referred the complainant's enquiry to EOC.

235. On 4 September 2015, EOC replied to the complainant in writing that the EOC Chairperson had made the necessary clarification at the 110th meeting (the Chairperson's clarification), and the minutes of the meeting (110th minutes), which would be uploaded onto EOC's website after confirmation by EOC members, would reflect the gist of the discussion. However, the complainant later read the 110th minutes on EOC's website and was unable to find the said content. The complainant criticized EOC for providing incorrect information to mislead the public (allegation (a)).

236. In fact, the complainant believed that EOC did discuss and clarify the matter at the 110th meeting, nonetheless the content was not disclosed to the public. The complainant criticized EOC for selective disclosure, an act that lacked transparency and deprived the public of the knowledge of the details of the discussion concerned (allegation (b)).

The Ombudsman's observations

237. Initially, EOC confirmed the 104th minutes at its 105th meeting on 20 March 2014. The 104th minutes, in which the last sentence of

paragraph 32 indeed read “This view was also agreed by CMAB, EOC’s housekeeping Bureau”, was subsequently uploaded onto EOC’s website.

238. In April 2015, EOC became aware of CMAB’s clarification in respect of the 104th minutes, i.e. CMAB had never expressed the opinion recorded in the 104th minutes. On 18 June 2015, EOC discussed at its 110th meeting how they should understand the remarks made by the Chairperson recorded in the 104th minutes; the Chairperson made his clarification at the meeting.

239. At its 111th meeting on 17 September 2015, EOC confirmed the 110th minutes and decided to delete the sentence “This view was also agreed by CMAB, EOC’s housekeeping Bureau” from the publicised 104th minutes. EOC considered the content sensitive, and not appropriate for disclosure to the public. Therefore, the record of relevant discussion at the 110th meeting was not uploaded onto EOC’s website.

240. After deleting said sentence, EOC re-uploaded the 104th minutes onto EOC’s website on 18 September 2015. The original version was removed from the website.

Allegation (a)

241. EOC explained that minutes of its meetings would normally be uploaded onto their website for public viewing. Accordingly, EOC informed the complainant on 4 September 2015 of such practice. However, at a subsequent meeting, EOC decided not to make public the discussion on the Chairperson’s clarification. EOC expressed that the staff member involved did not intend to mislead the complainant. They, however, admitted that they had failed to inform the complainant in time of the change, and apologized for it.

242. As EOC did state in their reply letter to the complainant dated 4 September 2015 that “At the meeting, the Chairperson of the EOC had made the necessary clarification. The minutes of the 110th EOC Meeting will reflect the gist of the matter discussed and will be available on the EOC’s website after confirmation of the minutes by Members at the 111th Meeting scheduled for 17 September 2015.”, the Office of The Ombudsman (the Office) considered it reasonable for the complainant to expect to see the main points of the discussion concerned on EOC’s website. The decision not to make public the minutes of the relevant discussion was not in line with how EOC had informed the complainant. Therefore, The Ombudsman considered allegation (a) substantiated.

Allegation (b)

243. EOC's explanation for not uploading the minutes in its entirety is that all minutes of its meetings have to first be confirmed by EOC members, if members consider any information confidential or sensitive, it will not be made public.

244. The Office raised no objection in principle to EOC's practice of not making public parts of their minutes of meetings where there is confidential or sensitive information. However, the Office did not agree that EOC could rely on this to completely withhold the Chairperson's clarification.

245. The Office has reviewed the full text of the 110th minutes. In fact, key points of the Chairperson's clarification was essentially the same in meaning as those in a letter issued by EOC to the complainant on 11 March 2015: the Chairperson's understanding of the CMAB's view as recorded in the 104th minutes was based on the meetings held in July and December 2013, at which officials did not express objection to EOC's study. EOC, being an independent body, had the autonomy to decide on relevant work. As such, even if EOC considered the rest of the discussion confidential or sensitive, they had no justification for not making public the gist of the Chairperson's clarification. The Ombudsman considered allegation (b) substantiated.

246. Furthermore, the Office noted that after the Chairperson's clarification was made, EOC actually went so far as to delete the sentence, which had been confirmed by EOC members and uploaded onto EOC's website. The Office considered it inappropriate for EOC to do so, because the minutes had truthfully recorded the discussion at that meeting; EOC could have clarified its meaning at subsequent meetings, but it should not have deleted part of the minutes, as that would be detrimental to the completeness and accuracy of the records.

247. The Ombudsman considered the complaint against EOC substantiated, and urges EOC to –

(a) suitably make public the key points of the clarification made by the Chairperson at the 110th meeting (and to explain, in particular: that the Chairperson's understanding of the CMAB's view was based on the meetings held in July and December 2013 at which officials did not express objection to the EOC's study); and

(b) upload again the original version of the minutes of the 104th meeting (the EOC may consider adding note(s) as appropriate to remind readers to read the gist of the clarification in the minutes of the 110th meeting).

Government's response

248. The EOC accepted and fully implemented The Ombudsman's recommendations (a) and (b).

249. The Ombudsman accepted that EOC has fully implemented its recommendations. Follow-up action on this case was discontinued on 12 October 2016.

Fire Services Department

Case No. 2016/1205B – Failing to follow up on the problem of potential fire hazard caused by a suspected unlicensed restaurant

Background

250. According to the complainant, an organisation (the Organisation) held fee-charging basin and snake feasts (the Activities) at its clubhouse in a public housing estate (the Premises) on multiple evenings in January 2016. Members of the public were admitted by purchased tickets. Some of the food was cooked on-site over an open fire. However, the Premises had no restaurant licence and its fire service installations fell short of the fire safety requirements of a restaurant licence. Open-fire cooking at the Premises would constitute fire hazards, endangering the safety of the occupiers upstairs.

251. The complainant complained to FSD and was given the following reply, "FEHD is the licensing authority for restaurant licences. Upon receipt of an application for a restaurant licence referred by FEHD, FSD will conduct an on-site inspection at the Premises to ascertain whether the relevant fire safety requirements are met. In the meantime, FSD will not conduct any inspections of or take any enforcement actions against the Premises." The complainant then filed a complaint to FEHD and was given the following reply, "Our staff have conducted an on-site inspection and found that no activities concerned were held by the Organisation."

252. Afterwards, the Organisation held basin and snake feasts again on multiple evenings in March 2016, the complainant filed complaints again to FEHD and also to the Housing Department (HD). FEHD's reply to the complainant went as follows, "No restaurant licence is required if the Organisation serves members only." The complainant considered the reply from FEHD unreasonable as it was clearly shown in the posters of the Activities that non-members were also welcomed.

253. As for HD's reply, it went as follows, "As it is not provided in the tenancy agreement that cooking and fee-charging activities are prohibited at the Premises, the Activities have not constituted a breach of the tenancy agreement."

254. The complainant criticised HD, FEHD and FSD for shirking responsibilities and failing to follow up on the issues relating to the operation of a suspected unlicensed restaurant by the Organisation and the potential fire hazards arising from such operation.

The Ombudsman's observations

255. Having reviewed the relevant tenancy agreement and records, the Office of The Ombudsman (the Office) was satisfied that there was no basis for HD to take any tenancy control actions against the Activities, and that there was no evidence of impropriety on the part of FEHD in this case[2]. The Ombudsman considered the complainant's complaint against HD and FEHD unsubstantiated.

256. As regards FSD, the Office understood that FSD could not take any enforcement and regulatory actions against the Premises under its licensing and regulatory regimes as the Premises was neither a licensed premises nor an applicant for a restaurant licence.

257. The Office, however, noted that the complainant mentioned in his letter of 30 December 2015 that he had previously written to HD to complain against the Organisation for blatantly using several large stoves for open-fire cooking on the estate's walkway outside the building in which the Premises were located. Relevant records also showed that the complainant filed a complaint to HD earlier in November, describing the same situation, where dishes were served to more than a hundred tables in a large-scale event held by the Organisation. The letter was copied to various government departments including FSD. In response to the complainant's complaint in November, FSD conducted three inspections that month, and a surprise inspection on 13 January 2016, during which neither obstructions to the means of escape or emergency vehicular access, nor cooking activities, were found. In fact, none of the aforesaid inspections by FSD were coincident with the Activities held by the Organisation.

[2] FEHD staff conducted inspection of the Premise on the date of the Activities in January, and found that all participants were members with membership cards. As for the Activities held in March, the relevant poster had specified that the Activities were or members only.

258. The Office considered that FSD's follow-up actions on the complainant's complaint lodged in December 2015 only focused on whether the Premises had a restaurant licence or was applying for one, having no regard to the fact that the Activities would have caused obstruction to the means of escape for participants and constituted other fire hazards. The actions taken by FSD were not sufficiently thorough, and FSD should have conducted inspections on the dates on which the Activities were held so as to ascertain whether such activities would constitute any threat to public safety.

259. The Ombudsman considered complainant's complaint against FSD partially substantiated, and recommended that FSD should learn from this case and remind its staff to handle future complaints with thorough consideration and take appropriate follow-up actions.

Government's response

260. FSD accepts The Ombudsman's recommendation, and has already learnt from the experience of this case and reminded its staff to conduct inspections as appropriate on future complaints to ascertain whether matters of fire safety are involved.

Food and Environmental Hygiene Department

Case No. 2015/4138 – Delay in taking follow-up action against water dripping from air-conditioners

Background

261. On 12 September 2015, the complainant lodged a complaint with the Food and Environmental Hygiene Department (FEHD) via 1823 about nuisance caused by water dripping from an upper floor air-conditioner (the water dripping problem). Although FEHD's local District Environmental Hygiene Office (DEHO) followed up on his complaint, the water dripping problem remained unresolved as at mid-October 2016. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against FEHD, alleging delay in handling the water dripping problem.

262. According to the operational guidelines of FEHD, if no one answers the door on a first visit for inspection of a suspected dripping air-conditioner, DEHO officers should issue a Notice of Appointment to ask the occupants to contact DEHO. In case of no response from the occupants, the officers should visit the premises again within seven working days after issuance of the Notice of Appointment. If the officers still cannot enter the premises on the second visit, they should issue a Notice of Intended Entry to the occupants. The guidelines also stipulate that the officers should as far as possible conduct inspections at the time of water dripping alleged by the person making the complaint.

263. On 17 September 2015, a DEHO officer contacted the complainant and the property management agent of his housing estate (the PMA), and learnt that the dripping problem mainly occurred between 7 pm and 12 midnight and that an upper floor flat (Flat X) was probably the source of the problem. On 23 September, DEHO issued an advisory letter to Flat X, reminding the occupants to check the air-conditioner. Between 17 September and 6 November, DEHO officers went to Flat X many times but no one was at home The officers did not find water dripping during those visits. DEHO then issued a total of three Notices of Appointment to the occupants of Flat X. In late November, the occupants of Flat X contacted DEHO, undertaking to check their air-conditioner and have the problem fixed before using it again.

The Ombudsman's observations

264. FEHD explained to the Office that DEHO officers actively followed up on the water dripping problem, but they encountered difficulties in their investigation, namely that the suspected source of dripping was somewhere in the building's light well, lights were too dim for inspection at night, lines of sight were obstructed, and the occupants of Flat X were seldom at home. Since neither DEHO officers nor PMA staff had witnessed any water dripping from the air-conditioner of Flat X or nuisance caused to the lower floors, there was insufficient evidence for taking further enforcement action, such as issuing a statutory Nuisance Notice to Flat X. However, FEHD admitted that the progress of investigation was affected by the failure of DEHO officers in issuing a Notice of Intended Entry in a timely manner in accordance with the guidelines.

265. The Office found clear inadequacies on the part of DEHO officers in handling the water dripping complaint, including their failure to issue a Notice of Intended Entry in a timely manner. Furthermore, while DEHO officers had already learnt from the complainant that the water dripping problem mainly occurred between evening and midnight, they conducted investigation repeatedly in the morning or afternoon nonetheless. Consequently, they were unable to ascertain the source of water dripping despite time and efforts spent. The way DEHO conducted investigation was far from satisfactory.

266. The Ombudsman considered this complaint partially substantiated and recommended that FEHD –

(a) step up staff training and remind officers from time to time that they should adhere strictly to operational guidelines when handling complaints about water dripping from air-conditioners; and

(b) be on the lookout for water dripping from the air-conditioner of Flat X next summer and take decisive enforcement action to prevent further nuisance to the complainant.

Government's response

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

268. Regarding recommendation (a), the Training Section of FEHD enhanced training for newly-recruited law enforcement officers in handling investigation of water dripping from air-conditioners. Officers shared experience gained from investigation of different cases, and reminded new recruits to adhere to the departmental operational guidelines when handling such cases. In addition, FEHD reminded supervising officers concerned to strengthen the monitoring of frontline staff's performance and give appropriate guidance to ensure strict adherence to relevant guidelines. Frontline staff was also encouraged to take the initiative to discuss with their supervisors any difficulties or problematic cases, in order to work out a proper solution and avoid delay in handling complaints.

269. Regarding recommendation (b), FHED learnt in early 2016 from the PMA that Flat X had changed hands and the new owner had been informed of the water dripping complaint. FEHD was later informed that the renovation works at Flat X were completed in early May 2016. On 6 May 2016, FEHD contacted the new owner and was told that a new air-conditioner had been installed in the living/dining room of Flat X. After conducting site inspection and testing, FEHD confirmed that there was no water dripping from the new air-conditioner. On 17 May 2016, FEHD informed the complainant of its follow-up action and the testing result. According to the complainant, there was no water dripping from air-conditioner as at 24 June 2016. The complainant was advised to inform FEHD immediately for follow up if the water dripping problem resumed.

Food and Environmental Hygiene Department

Case No. 2015/4490 – Ineffective enforcement action against the retractable canopies of two hawker food stalls

Background

270. The complainant had lodged an earlier complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD) in August 2013, alleging that two fixed-pitch cooked food stalls (the Stalls) next to the complainant's shop had erected a row of canopies that impeded the dispersion of cooking fume. FEHD failed to take appropriate action against the problem (the Canopy Problem). On 24 February 2014, the Office completed investigation and pointed out that according to the advice of the Department of Justice, FEHD could take enforcement action against the canopies of the Stalls by invoking section 48 of the Hawker Regulation (the Regulation). At that time, the Office urged FEHD to take enforcement action against the Canopy Problem as soon as possible.

271. The complainant lodged this complaint with the Office in November 2015, alleging that the canopies had not been removed. The workers at the Stalls simply folded up the canopies upon inspection by FEHD staff, and extended them again after FEHD staff left. The Canopy Problem remained unsolved. On 19 August 2015, the complainant complained to FEHD about this problem again, but no substantive reply was received, and the canopies were not removed. The complainant was dissatisfied with FEHD's failure to follow up the Canopy Problem properly.

The Ombudsman's observations

272. According to records, FEHD had been following up the Canopy Problem, including taking follow-up and enforcement actions in response to the complaint, and informing the complainant of the results. That said, the Canopy Problem persisted, showing that FEHD's enforcement lacked deterrence and that operators of the Stalls blatantly disregarded the law.

273. The Office took the view that even though FEHD could not remove the canopies due to limitations of the legislation, as the licensing authority, it has the duty to exercise statutory power to regulate malpractices of licensees. In response to the persistent breaches by the Stalls, FEHD should be able to invoke section 125 of the Public Health and Municipal Services Ordinance (the Ordinance) to suspend or even revoke the licences of the Stalls to solve the Canopy Problem completely. However, FEHD refused to exercise that statutory power on the ground that the case in question was not covered by the current Demerit Points System. The decision of FEHD was deemed inflexible. The Office opined that FEHD should not allow serious malpractices to continue without making its best efforts to rectify the situation.

274. The Ombudsman considered the complaint against FEHD partially substantiated, and recommended that FEHD should continue to monitor the situation closely. If the breaches by the Stalls persisted, FEHD should actively consider invoking section 125 of the Ordinance to suspend or even revoke their licences, and amend the Demerit Points System as appropriate if circumstances so warrant.

Government's response

275. FEHD accepted The Ombudsman's recommendation.

276. FEHD has all along been following up the complainant's case and taking appropriate enforcement actions against the breaches by the Stalls, including inspection and prosecution. In response to The Ombudsman's recommendation, FEHD stepped up efforts in gathering evidence and submitted malpractice records of the Stalls for the court's consideration of imposing heavier penalty. Application had also been made to the court for imposing a daily fine under section 56 of the Regulation.

277. After stepping up the enforcement actions, FEHD found no further use of the canopies by the Stalls between July 2016 and July 2017. FEHD would continue to monitor the situation of the Stalls and take action as appropriate. If the situation does not improve, FEHD would consider exercising the statutory power conferred by relevant ordinances to strengthen enforcement and reinforce the deterrent effect.

Food and Environmental Hygiene Department

Case No. 2015/5330(I) – (1) Failing to provide the complainant with complete information about relocation of a refuse collection point; (2) failing to contact the complainant to clarify the scope of his information request; (3) delay in responding to the complainant's subsequent request for information; (4) failing to provide the complainant with the list of individuals/organisations consulted and consultation result when providing him with the consultation paper; (5) including information not requested by the complainant; and (6) advising the complainant to approach the Lands Department for information which was in fact also held by the Food and Environmental Hygiene Department.

Background

278. According to the complainant, he applied to the Food and Environmental Hygiene Department (FEHD) in writing on 3 November 2015 for information about relocation of a refuse collection point (the RCP) (e.g. documents on the application, consultation, notices, land grant, boundary coordinates, environmental assessment, justifications for site selection, relevant emails, etc.) according to the Code on Access to Information (the Code). On the same day, he called the Access to Information Officer (AIO) of FEHD, clearly indicating that he wished to obtain all information relevant to the relocation of the RCP. The AIO said that an FEHD officer would contact him to clarify the scope of information requested. However, no officer contacted him subsequently.

279. On 12 November, FEHD replied to the complainant in writing that it would provide him with a copy of the consultation paper for the consultation on relocation of the RCP conducted by the District Office (DO) upon FEHD's request in 2013 (the 2013 Consultation). Upon receipt of the relevant fee, FEHD provided the complainant with the said document on 16 November.

280. The next day, the complainant wrote to the AIO to express his dissatisfaction over the fact that no FEHD officer contacted him and that only the consultation paper was provided to him. He requested the AIO to urge FEHD officer to provide him with all the information he requested as soon as possible. However, the complainant did not receive FEHD's reply dated 24 December until 29 December.

281. FEHD stated in its reply letter dated 24 December that in response to his further request for information relating to the relocation of the RCP, FEHD, after consideration, would provide him with copies of the consultation list and result of the 2013 Consultation, as well as copies of the consultation paper, consultation list and result of another consultation conducted by DO upon request by the Lands Department (LandsD) in 2014 (the 2014 Consultation).

282. As for the documents on boundary coordinates and land grant of the RCP, since such information was under the possession of LandsD, FEHD advised the complainant to raise a separate request to LandsD.

283. With respect to FEHD's emails relating to relocation of the RCP, FEHD was of the view that the emails could not be provided to the complainant on the grounds that the information involved internal discussions of the Government, disclosure of which would compromise candid exchange of views within the Government and with stakeholders. For reasons stated in paragraph 2.10 of the Code, FEHD refused to provide the complainant with such information.

284. The complainant lodged a complaint with the Office of the Ombudsman (the Office) against FEHD, alleging that –

(a) the information provided by FEHD about relocation of the RCP was incomplete; in particular, the documents on the land grant, boundary coordinates, environmental assessment, justifications for site selection and relevant emails were not included;

(b) FEHD officers failed to contact him to clarify the scope of information requested as promised by the AIO;

(c) FEHD delayed replying to him after receiving his letter of 17 November 2015;

(d) FEHD failed to provide him with copies of the consultation list and result of the 2013 Consultation when providing him with information in the first instance, thus wasting his time to go to FEHD's office again to collect the information;

(e) FEHD later provided him with copies of the consultation paper, consultation list and result of the 2014 Consultation, but the consultation was only concerned with the re-tendering of a

carpark rather than relocation of the RCP. As FEHD had not clearly explained to him what the information was, he had to pay an additional fee for the information he had not requested; and

(f) FEHD was able to provide information on the 2014 Consultation, which obviously belonged to LandsD rather than FEHD. It was unreasonable for FEHD to advise him to approach LandsD for documents on the boundary coordinates and land grant of the RCP to be relocated when FEHD had the same documents.

The Ombudsman's observations

Allegations (a) and (f)

Documents on land grant and boundary coordinates

285. FEHD did not deny the possession of documents on land grant and boundary coordinates of the RCP to be relocated. It did not appear to the Office that FEHD needed to possess "expertise" to provide the complainant with such information. FEHD was also unable to explain why it was concerned that the information it held might be incomplete. FEHD's advice to approach LandsD for those documents would leave the complainant sceptical, even if the advice was given in good faith. The Office considered that FEHD should have provided the complainant with the documents on land grant and boundary coordinates it held, and advise him to further enquire with LandsD if in doubt.

Document on environmental assessment

286. The Office recognised that it was not possible for FEHD to provide any document on environmental assessment, since such document does not exist.

Justifications for site selection and relevant emails

287. The Office accepted FEHD's explanation that providing documents on justifications for site selection and relevant emails, which set out internal discussion among relevant Government departments, might compromise candid exchange of views within the Government and between the Government and various stakeholders in the community, since participating officers would not have anticipated that their views would be made public later on. As such, the Office agreed that

paragraph 2.10 of the Code was applicable to the said documents and emails.

288. FEHD further explained that while it was inappropriate for FEHD to disclose to the complainant the documents on the justifications for site selection, FEHD did inform the complainant of the reasons for and the process of selecting the site in a letter to him on 18 January 2016. The Office considered that FEHD had given the complainant an account of the justifications for the site selection in the spirit of the Code.

Other Issues

289. According to paragraph 2.1 of the Code, a government department must give an account of the reason(s) set out in the Code on which a refusal to disclose information is based. The Office noted that in its initial reply to the complainant's request, FEHD did not explain its reason(s) for not providing some of the information requested. This was contrary to the requirement of the Code.

290. The Ombudsman considered both allegations (a) and (f) partially substantiated.

Allegation (b)

291. FEHD staff failed to contact the complainant as promised to clarify the scope of information requested at the initial stage. It was not until the complainant requested other relevant information that FEHD finally re-processed his request, causing inconvenience to the complainant. The Ombudsman considered allegation (b) substantiated.

Allegation (c)

292. Apart from paragraph 1.16 of the Code invoked by FEHD, paragraph 1.18 of the Code states that the maximum time frame for government departments in response to an information request is 51 days. That was the exact interval between 3 November 2015 and 24 December 2015 when the complainant made an information request to and received a final reply from FEHD respectively in this case.

293. However, according to paragraph 1.18 of the Code and paragraph 1.18.1 of the Guidelines on Interpretation and Application of the Code, a response to an information request may be deferred beyond 21 days only in exceptional circumstances (such as the need to seek legal

advice or search extensively for files) and the reason for taking a longer time to respond should be given to the complainant. In this case, after receiving the complainant's letter on 17 November 2015, FEHD did not enquire of DO and the District Land Office (DLO) as to whether the information could be disclosed to the complainant until 26 November and 9 December respectively. An obvious delay was involved. The Office considered that there was no reasonable excuse for FEHD to take 51 days to address an information request. Worse still, FEHD, during the process, failed to explain to the complainant in accordance with the Code why such a long time was required.

294. The Ombudsman considered allegation (c) substantiated.

Allegation (d)

295. The complainant did not clearly express in his Application for Access to Information his desire for access to the consultation list and consultation result. So it was not unreasonable for FEHD not to provide him with the consultation list and result along with the consultation paper. The Ombudsman considered allegation (d) unsubstantiated.

296. However, if FEHD had contacted the complainant as soon as possible after receiving his application to clarify the scope of information requested, the regrettable situation of having to re-process the complainant's request and wasting the complaintant's time on obtaining additional information from FEHD could have been avoided.

Allegation (e)

297. The 2014 Consultation paper showed that LandsD had conducted the consultation on retendering the short-term tenancy of a carpark in response to FEHD's proposal to relocate the RCP into that carpark. As such, the 2014 Consultation documents were actually information relevant to the relocation of the RCP, thus falling within the scope of the complainant's initial request in his Application for Access to Information. The Office observed no malpractice on the part of FEHD in providing such information to the complainant. The Ombudsman considered allegation (e) unsubstantiated.

298. That said, there was room for improvement in FEHD's handling of the case. If FEHD had explained the relevance of the 2014 Consultation documents to the complainant, rather than simply referring to the 2014 Consultation as "the consultation conducted by DO as

requested by DLO in 2014", the complainant would be able to decide whether he would like to obtain a copy of the documents and the outcome of him receiving unwanted documents could be avoided.

299. The Ombudsman considered this complaint partially substantiated, and recommended that FEHD –

(a) provide the complainant with the relevant documents on land grant and boundary coordinates if he still requires them;

(b) remind staff to clearly state the reason(s) set out in the Code on which a refusal to disclose information is based in future;

(c) contact applicants as soon as possible in case it is necessary to clarify the scope of information requested;

(d) instruct staff to comply with the procedures and requirements set out in the Code and handle public requests for information as soon as possible, which includes, during the process, explaining to the public the reason(s) behind the long lead time for processing the request; and

(e) learn from the incident and make it clear to applicants the nature and content of the document(s) to be provided in future, so that applicants can decide whether to accept the document(s) or not.

Government's response

300. FEHD accepted The Ombudsman's recommendations.

Recommendation (a)

301. FEHD wrote to the complainant on 1 August 2016 and provided him with the documents on land grant and boundary coordinates. According to records, the complainant collected the relevant documents on 16 August 2016.

Recommendations (b), (c), (d) and (e)

302. FEHD has informed its staff of the contents and recommendations of the Office's Report and reminded them to adhere to the procedures and requirements laid down in the Code, as well as The Ombudsman's recommendations.

303. FEHD had all along provided the reference materials relating to the Code including the Guidelines on Interpretation and Application, procedures in handling information requests and precedent cases etc. for staff reference and compliance. Apart from that, FEHD would enhance staff' training in handling information requests.

Food and Environmental Hygiene Department

Case No. 2015/5345 – (1) Failing to take effective measures to tackle the noise problem at the loading area of a market; (2) failing to reply to the complainant; and (3) impropriety in setting an email auto reply when officers were on leave

Background

304. There was a market managed by the Food and Environmental Hygiene Department (the Market) in the complainant's residing estate. In late 2013, the Architecture Services Department (ArchSD) carried out renovation works for the loading and unloading platform (the Platform) in the Market, including laying of metal plates. Subsequently, these metal plates produced noise when market stall operators used the Platform to transfer goods. The noise was particularly loud around 4:00 a.m., causing a serious nuisance to the complainant (the noise problem).

305. In early 2014, through the property management office of his housing estate (the PMO), the complainant lodged a complaint with FEHD about the noise problem. On 21 January 2015, ArchSD conducted improvement works for noise abatement.

306. The complainant lodged his initial complaint with the Office of The Ombudsman (the Office) against FEHD and ArchSD in January 2015, claiming that FEHD had delayed handling the noise problem and ArchSD had been negligent in designing and testing the Platform, thus failing to avoid or solve the noise problem in a timely manner.

307. After completing the investigation, the Office wrote to inform the complainant of the findings on 20 April 2015, reporting that –

(a) the relevant District Environmental Hygiene Office (DEHO) under FEHD and ArchSD had followed up the noise problem by carpeting the Platform, studying ways to reduce noise, meeting with market stall operators, putting up notices to remind users of the Platform to avoid causing noise and moving the carpets as far as possible. The case had also been referred to the Environmental Protection Department (EPD);

(b) in January 2015, EPD measured the noise level at the flat below the complainant's. The result showed that the noise level did not exceed the statutory standard;

(c) the Platform was built in 2005, but the noise problem did not arise until early 2014. There was no sign that the noise problem was caused by the faulty design of the Platform; and

(d) the Office had urged DEHO to closely monitor the noise problem and take necessary action, so that nearby residents would no longer be subject to noise nuisance caused by the Platform.

308. Between 30 November 2015 and 3 January 2016, the complainant wrote to the Office again to complain against FEHD about the noise problem, alleging that –

(a) FEHD had not permanently "covered the entire unloading platform" with floor mats as promised, and ignored his request for taking "immediate remedial measures against the noise problem" by the department;

(b) the "noise insulation materials" (i.e. the floor mats) purchased by FEHD failed to solve the noise problem effectively;

(c) FEHD failed to monitor the Platform and allowed users of the Platform to move the floor mats freely;

(d) the complainant sent an email to FEHD on 19 January 2015. FEHD responded that a substantive reply would be given within 30 days. However, no such reply was made; and

(e) on 31 December 2015, the complainant sent an email to an FEHD officer (Officer A) and received an autoreply that read "Officer A is out of office. For urgent matters, please contact Officer A's supervisor (Officer B)". He then sent an email to Officer B and received a similar autoreply that read "Officer B is out of office. For urgent matters, please contact Officer A". He was of the view that such an arrangement hindered communication with FEHD staff.

The Ombudsman's observations

Allegations (a), (b) and (c)

309. FEHD took follow-up actions to deal with all the complaints about the noise problem, including seeking advice from ArchSD, arranging works to be conducted, placing carpets or floor mats, reminding market stall operators and loading platform users to avoid causing noise as far as possible, putting up advisory notices, conducting inspections, as well as referring the cases to EPD and the Police.

310. The Office understood that the complainant was distressed due to the noise problem. However, the noise level in both the complainant's flat and the flat below, as confirmed by EPD in January 2015 and January 2016 respectively, did not exceed the standard limit.

311. The Office was of the view that FEHD had indeed taken proper steps and measures to handle the noise problem.

Allegation (d)

312. FEHD kept the PMO informed of its follow-up actions on the noise problem and corresponding results all along. The information was then relayed to the complainant. Since December 2015, FEHD had replied to the complainant and the PMO separately concerning the follow-up actions on the noise problem.

313. As regards the emails the complainant sent to FEHD on 19 January and 31 December 2015, it was true that FEHD did not contact the complainant directly. However, it was possible for the complainant to learn about FEHD's follow-up actions and their results from the PMO. The error did not cause much inconvenience to the complainant.

Allegation (e)

314. The complaint made by the complainant on 31 December 2015 had in fact been followed up by another FEHD officer, who already issued an interim reply to the complainant. The complainant could have contacted FEHD staff according to the information provided in the interim reply. Officer A and B's error in making communication arrangements only caused limited inconvenience to the complainant.

315. The Ombudsman considered this complaint against FEHD partially substantiated, and urged FEHD to remind the staff concerned to make improvement with regard to allegation (e) on poor communication arrangement.

Government's response

316. FEHD accepted The Ombudsman's recommendation and has informed the staff concerned of the findings and recommendation of the Office's report. The staff has been reminded to improve the contact arrangements when setting an email auto reply and to contact complainants in a timely manner in accordance with the departmental guidelines.

Food and Environmental Hygiene Department

Case No. 2016/0051 – (1) Failing to give substantive reply in a timely manner when handling a complaint about an unlicensed food business; and (2) failing to take effective enforcement actions

Background

317. The owners' corporation of a building (the complainant) had lodged a complaint with the Food and Environmental Hygiene Department (FEHD) about the sale of lunch boxes without a licence at a shop (Shop A) in the building. The complainant complained to the Office of The Ombudsman that FEHD neither gave a substantive reply to the complainant nor took any effective enforcement action against Shop A. As a result, the problem persisted.

318. According to FEHD's operational guidelines, all complaints should be handled promptly. Within 10 calendar days after receipt of a complaint, the case officer should provide a substantive reply or, if that is not possible, give an interim reply to the complainant. Within 30 calendar days after the interim reply, the case officer should give a substantive reply. Where the case is complex and requires more time to process, the case officer should inform the complainant of progress, review the case regularly (at least once a month) and issue further interim replies if necessary. Meanwhile, supervising officers should monitor the progress of handling the complaint.

319. FEHD's local District Environmental Hygiene Office (DEHO) first received the complainant's complaint in August 2015. About two weeks later, DEHO managed to contact the complainant and promised to take follow-up action. DEHO then conducted inspections but failed to gather sufficient evidence to prove the operation of unlicensed food business at Shop A. The complainant complained to FEHD again in October 2015, pointing out that the food business in question operated between 11 am and 3 pm. Eventually in mid-February 2016, during an inspection, DEHO staff found Shop A's shop attendants collecting money from customers and so prosecuted the shop immediately for operating unlicensed food business.

The Ombudsman's observations

320. The Office noted that after receiving the complainant's first complaint, DEHO had, in the first two weeks, merely given a verbal interim reply without issuing any written reply. DEHO only wrote to inform the complainant of progress 40 days after receiving the first complaint. When the complainant complained again, DEHO took more than three months to issue a written reply, though this time a written interim reply was issued within 10 calendar days. While DEHO had informed the complainant of progress by telephone, it had failed to adhere to the Department's guidelines.

321. Moreover, the initial inspection by DEHO was not conducted within the business hours of Shop A. Hence despite multiple inspections, DEHO staff could not gather any evidence to prove the operation of unlicensed food business at Shop A. It was only after the Office intervened in January 2016 that DEHO conducted inspections within the business hours indicated by the complainant.

322. The Ombudsman considered this complaint partially substantiated and urged FEHD to –

(a) take reference from this complaint case and remind DEHOs to pay more heed to the information on timing provided by complainants when investigating similar cases; and

(b) remind from time to time all staff to follow the departmental operational guidelines in issuing written interim replies to complainants in a timely manner and informing complainants about the outcome of follow-up actions.

Government's response

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

324. Regarding the handling of complaints, as provided in the relevant operational guidelines set out in FEHD's Administrative Circular No. 3/2015 "Handling of Complaints", investigation of complaints should be based on the information (including time of occurrence) provided by complainants, and interim reply/further interim reply/substantive reply should be issued to the complainant in a timely manner. The District

Secretaries of FEHD DEHOs arrange re-circulation of the administrative circular every six months to remind staff to follow the operational guidelines in handling complaints.

325. Moreover, in response to The Ombudsman's recommendations, the FEHD Headquarters advised DEHOs via email on 22 July 2016 that the management should regularly remind their staff to act in accordance with the departmental operational guidelines to pay heed to the information on timing provided by complainants when conducting on-site investigations, and to inform complainants about the latest position of the cases in a timely manner.

Food and Environmental Hygiene Department

Case No. 2016/0430 – Ineffective control of obstructions caused by stalls in a market

Background

326. According to the complainant, over the years some stalls at a market (the Market) constantly put their goods beyond the yellow lines at their stalls, obstructing the passageways and affecting the access of wheelchair users and ambulancemen carrying stretcher (the obstruction problem). The complainant lodged a complaint with the Office of The Ombudsman (the Office), alleging that the Food and Environmental Hygiene Department (FEHD) and its contractor responsible for the management of the market concerned (the Contractor) had failed to exercise effective monitoring and ignored the obstruction problem.

The Ombudsman's observations

327. FEHD and the Contractor had taken some actions to address the obstruction problem. However, stall operators continued to put their goods beyond the yellow lines at their stalls, occupying the common areas and obstructing the passageways.

328. The Office conducted inspections at the Market in February 2016, and found that –

(a) the Market had a high patronage flow with a number of stalls placing their goods beyond the yellow lines, which made the passageways very crowded; and

(b) stall tenants who were operating near two access points to a particular street and near a road junction next to the access point to a particular housing estate put their goods at the entrance lobby and the passageway beyond their stalls, occupying a large portion of the common area and extending their business spaces by about 100%. The obstruction was significant.

329. In May 2016, the complainant provided the Office with photos dated April and May 2016, which showed that the obstruction problem continued after the Office's inspection.

330. FEHD set up a market squad dedicated to combating passage obstruction in May 2016, so as to step up actions against the obstruction problem in markets. Between June and July 2016, the market squad increased blitz enforcement operations at the Market in a targeted manner and instigated a total of 30 prosecutions against stall operators causing obstruction therein. FEHD would strictly enforced the policy of termination of tenancies towards recalcitrant stall operators. The obstruction problem was alleviated after a series of operations by FEHD.

331. The Office observed the following –

(a) when the obstruction problem was found during daily inspection at the Market, the Contractor's staff might issue a verbal warning to the stall operator in question and request immediate rectification of the problem, but they were not in a position to take prosecution action;

(b) FEHD officers, on the other hand, could take prosecution action against stall operators who were found obstructing passageways during blitz prosecution actions;

(c) from the information provided by FEHD, the Office found that FEHD officers or the Contractor's staff issued verbal advice and warning to the stall operators in question every day, requesting them to rectify the obstruction problem. It was evident that these operators caused the obstruction problem very frequently;

(d) between July 2015 and January 2016, FEHD conducted a total of 10 blitz prosecution actions, i.e. an average of 1.4 actions per month, but instigated only 70 prosecutions against the widespread obstruction problem which happened every day; and

(e) it was not until May 2016 that FEHD set up the market squad to step up blitz enforcement operations at the Market. Subsequently, 30 prosecutions were instigated against stall operators obstructing passageways within two months.

332. The number of prosecutions instigated against offending stall operators by FEHD was generally low in the past, letting of operators who ignored the "yellow line restriction". The persistent occupation of common areas by these operators not only caused the obstruction problem, but also created unfair competition to law-abiding stall operators. If all stall operators were to follow the offending stall operators, the obstruction problem would become all the more severe. Fortunately, after intervention by the Office, FEHD set up the market squad in May 2016 to step up blitz enforcement operations.

333. The Ombudsman considered the complaint partially substantiated, and urged FEHD to –

(a) continue to step up enforcement action (including increasing the number of blitz prosecution actions); and

(b) strictly enforce the policy of termination of tenancies towards recalcitrant stall operators to deter future non-compliance.

Government's response

334. FEHD accepted The Ombudsman's recommendations. Apart from regularly reminding stall operators to observe the relevant legislation and tenancy terms, FEHD has also stepped up enforcement action (including increasing the number of blitz prosecution actions) and strictly enforced the policy of termination of tenancies towards recalcitrant stall operators. These measures would be taken on an ongoing basis. Moreover, besides FEHD's district staff, the market squad would also be deployed to continue combating the obstruction problem at the Market.

Food and Environmental Hygiene Department

Case No. 2016/1199 – Unreasonably refusing to provide information on the seating capacities of two restaurants

Background

335. The complainant filed a complaint concerning the overcrowding conditions of a restaurant (Restaurant A) with the Food and Environmental Hygiene Department (FEHD) in late December 2015. In late January 2016, the complainant called an FEHD officer to inquire about the licensed seating capacity of Restaurant A. In reply, the officer said that as advised by the Department of Justice, such information needed not be disclosed. On 7 April, in reply to a complaint filed by the same complainant against a different restaurant (Restaurant B) in February, another FEHD officer said that the department did not keep seating capacity information of restaurants.

336. The complainant understood that in processing an application for a restaurant licence, FEHD needed to determine whether the number of water-closet compartments and the capacity of the exhaust system in the restaurant were sufficient; both items of information are relevant to the seating capacity of a restaurant. Therefore, he believed that FEHD kept seating capacity information of restaurants, and thus complained to the Office of The Ombudsman (the Office) that FEHD unreasonably refused to provide him with the information he requested.

The Ombudsman's observations

337. FEHD did not lay down requirements on the maximum number of customers a restaurant can accommodate when granting a restaurant licence. Moreover, the Buildings Department did not request FEHD to limit the number of customers to be accommodated in Restaurants A and B identified by the complainant.

338. The number of water-closet compartments confines the number of customers a restaurant can accommodate, lest the facilities be insufficient for use. However, this only limits the number of customers to a loose range, and it would be inappropriate to regard such range as representation of the seating capacity of a restaurant. As for the exhaust

system, the number of customers it can accommodate varies as the capacity of the system can be adjusted.

339. The Office opined that FEHD was not making an unreasonable claim when it informed the complainant that seating capacity information of restaurants was not available.

340. The Ombudsman considered the complaint unsubstantiated, and recommended that FEHD provide detailed explanations as far as possible when answering similar public enquiries in future to avoid queries.

Government’s response

341. FEHD accepted The Ombudsman’s recommendation and had reminded the officers concerned to give detailed explanations as far as possible when answering similar public enquiries in future.

Food and Environmental Hygiene Department

Case No. 2016/1487A(I) – (1) Staff omission on the water seepage during the confirmatory test; (2) failing to follow procedures in conducting the test; (3) failing to ensure the tenant of the flat above had carried out proper maintenance; (4) failing to bring the requested documents to the complainant; (5) unreasonably requesting the complainant to obtain his complaint record under the requirement of the Code on Access to Information; (6) poor staff attitude; and (7) improperly disclosing the details of his complaint case

Background

342. The complainant claimed that the Joint Offices for Investigation of Water Seepage Complaints (JO) set up by the Food and Environmental Hygiene Department (FEHD) and the Buildings Department had made a number of mistakes in handling water seepage problem in the flat of the complainant's relative (Flat A). JO informed the complainant in writing on 21 March 2016 that the consultant appointed by JO conducted a follow-up investigation at Flat A on 13 January 2016, in which the source of seepage could not be identified because the colour dye used in the colour water test conducted on 23 December 2015 was not found. JO would take no further follow-up action on his case.

343. The complainant lodged a complaint with the Office of The Ombudsman (the Office), alleging 12 inadequacies on the part of JO –

(a) the complainant provided a photo taken on 13 January 2016 that showed the appearance of colour dye and alleged that the JO officer concerned disregarded the presence of colour dye;

Procedures of the water seepage investigation

(b) JO gave no explanation as to why its staff had failed to follow the instructions set out in the JO training materials about the amount and dilution method of colour dye when they conducted the water colour test at the drainage pipe in the bathroom;

(c) JO officers measured the moisture content of the guest bathroom's ceiling at Flat A on 18 December 2014 and 6 February 2015. Different areas were measured on the two days and a dryer area was measured on the second occasion, the complainant deemed the selective measurement inappropriate;

(d) the complainant suspected that JO took no action to ensure the execution of effective repair after issuing a "Nuisance Notice" (NN) to the flat above Flat A (Flat B);

Complaints against JO staff

(e) on 29 October 2015, the complainant, relying on the Code on Access to Information (the Code), requested JO to provide the colour photos taken at Flat A during the water seepage investigation. The complainant contacted JO to ask about the progress on 11, 17, 20 and 24 November 2015 since he received no reply to his request. On 24 November 2015 in the afternoon, JO sent an email to the complainant, attached was a reply letter dated 9 November 2015. The complainant doubted the integrity of the JO officer involved in backdating the letter;

(f) on 11 December 2014, the complainant contacted JO through 1823 to complain about water seepage found on Flat A's ceiling and window frames and request, for the purpose of answering the complainant's enquiries, the JO officer conducting on-site investigation in Flat A to bring along the case file on his earlier complaint. On 18 December 2014, a JO officer (Officer A) went to Flat A to conduct investigation but did not bring the case file as requested by the complainant. Officer A was thus unable to answer the complainant's enquires;

(g) as Officer A did not bring the case file to Flat A, the complainant called to enquire of Officer A and Officer A's supervisor (Officer B) respectively. The complainant claimed that Officer B displayed a poor attitude, including unreasonably replying that it was unnecessary to check the date of the complainant's case, giving an unreasonable explanation about JO's failure to resend the letter, refusing to verbally reply to the complainant's enquiries, restricting the complainant to obtaining information by application in writing and failing to show up and meet with the complainant in person immediately. In addition, Officer B also gave unclear instructions to a subordinate;

(h) the complainant went to JO and met with Officer A and another staff member (Officer C), and complained that Officer A did not bring the case file as promised to Flat A on 18 December 2014. Officer A replied that it was the decision of Officer B. The complainant requested Officer A to provide relevant 1823 referral records. Officer A told the complainant to fill in an application form as the complainant was required to request for the records from JO under the Code. The complainant considered Officer A's reply unreasonable;

(i) Officer C demonstrated poor attitude during the interview, including unreasonably telling the complainant to stop his hand tremors, falsely claiming not to know passing-by staff who looked at the complainant, behaving in an arrogant manner, taunting the complainant, etc.;

(j) in its reply to the complainant dated 6 April 2016, JO mentioned that an officer (Officer D) had read the "witness statement" of Officer C. However, it was in fact an "incident report", not a "witness statement". The complainant was dissatisfied that Officer D made an incorrect remark;

(k) JO staff had disclosed information of the complainant's case (including audio recording made by JO staff) to staff of the FEHD not responsible for handling this case; and

(l) on 1 December 2015, the complainant went to JO's office located at an FEHD district office to collect requested case information. When waiting, he heard threatening remarks from the office's changing room and was of the view that those remarks were addressed to him.

The Ombudsman's observations

Allegation (a) - JO Officers disregarded the colour dye

344. According to JO, its staff and consultant reviewed the test result at Flat A on 13 January 2016. No colour dye used in the confirmatory test was found at the seepage spots (i.e. the ceiling and external wall of the guest bathroom). JO was not aware that colour dye appeared on the window frames of Flat A's guest bathroom on that day.

345. The Office took the view that while the complainant provided a photo showing colour dye on the bathroom's window frames, that area was not the original seepage spot. It was not surprising that JO staff did not notice the colour dye on that day if the complainant had not pointed it out. The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b) - no explanation given as to why JO staff failed to conduct the test in accordance with the training materials

346. The Office pointed out upon completion of the investigation of a previous complaint lodged by the complainant (OMB 2014/2094) that JO admitted its staff had failed to conduct the colour water test in accordance with training materials. The Office opined that JO had provided an explanation to the complainant by admitting responsibility.

347. The Office learned from JO that due to inadvertence, the staff concerned failed to follow the amount and dilution method of colour dye as set out in the training materials when conducting the colour water test. As the mistake was unintentional, a further detailed explanation was unnecessary. Allegation (b) was unsubstantiated.

Allegation (c) - an area with lower moisture content level was measured

348. JO stated that its officer chose to measure the moisture content at the affected area of the ceiling. Although the areas measured on 6 February 2015 and 18 December 2014 were different, both test results showed that the water seepage problem persisted, hence the investigation result having not been affected. The Ombudsman accepted JO's explanation and considered allegation (c) unsubstantiated.

Allegation (d) - no action taken to ensure that the upper flat's owner would carry out effective repair

349. On 23 April 2014, an NN demanding repair of the drainage pipe of the guest bathroom's bath tub was issued by JO to Flat B's owner. On 13 June 2014, JO noticed that the drainage pipe concerned had been replaced. On 5 August 2014, the JO officer went to Flat A to measure the moisture content, and found that the area affected by water seepage was dry with no further nuisance.

350. Given that the drainage pipe had been replaced and that the seepage area was dry, the JO officer was satisfied that effective repair had been carried out by Flat B's owner. The Office considered this conclusion reasonable. Should the seepage problem resurface, JO would take follow-up action accordingly.

351. On 7 October 2015, JO issued another NN requiring Flat B to repair the enclosing walls of the guest bathroom's bath tub. On 19 October, JO confirmed that the sides of the bath tub concerned had been covered with new waterproofing material. On 17 November, JO officer measured the moisture content in Flat A, and found that the moisture level was still over 35% at the affected area. JO then conducted a confirmatory test in Flat B on 23 December. The test result was reviewed on 13 January 2016 and no colour dye was found in Flat A. As all possible non-destructive tests had been conducted and the source of water seepage was still unidentified, JO had no choice but to suspend the investigation.

352. As illustrated above, JO did not accept repairs at Flat B to be effective simply because the sides of the bath tub had been covered with new waterproofing material. Instead, JO reviewed the test result on 13 January 2016 and found no colour dye in Flat A. The Office considered the test result of "no colour dye found" sufficient proof of effective repair.

353. The Ombudsman considered allegation (d) unsubstantiated.

Allegation (e) - falsification malpractice of JO officer

354. JO received the complainant's request for information on 29 October 2015. On 9 November, the JO officer who handled the request informed the complainant in writing that the information was ready for collection. On 24 November, the complainant emailed the same officer to enquire about the outstanding reply. The officer thus forwarded a copy of the written reply to the complainant through email.

355. There was no evidence that the officer concerned did not issue the written reply on 9 November 2015, nor was there evidence that the copy of the written reply resent on 24 November 2015 by that officer was a false one. The Ombudsman considered allegation (e) unsubstantiated.

Allegation (f) - failing to bring the case file requested by the complainant

356. JO pointed out that there was no mention in 1823's referral of the complainant's request that the case file be brought along during the visit. JO further explained that to avoid information leak or loss of documents, staff would not normally bring along case files when working out of the office. The Ombudsman accepted the above explanation and considered allegation (f) unsubstantiated.

Allegation (g) - attitude problem of Officer B

357. Regarding the reply of Officer B that it was unnecessary to check the date of the complainant's case, the Office understands that Officer B's reply was in response to the complainant's complaint that Officer A visited Flat A without bringing the case file. Officer B considered it unnecessary for Officer A to bring the case file along for verification purpose when out of the office in order to avoid information leak or loss of documents.

358. Officer B explained the failure to resend the letter in that JO believed it to be more appropriate for the error in the subject of the letter dated 19 February 2014 to be pointed out and corrected in JO's letter to the complainant's relative dated 4 August 2014 than to revise and resend the letter dated 19 February 2014. The Office considered Officer B's explanation not unreasonable.

359. As regards Officer B's refusal to give verbal reply to the complainant's enquiries, the reason was that JO had to examine the complainant's requests to ensure the accuracy of information provided to the complainant. JO believed that it was more appropriate for the complainant to request for the information under the Code. The Office agreed that JO could better understand each request by the complainant if the requests were made in writing. It was not unreasonable for JO to request the complainant to make a written request in this case.

360. JO explained that Officer B was not able to show up immediately and meet with the complainant because the visit was unexpected. That said, JO still arranged for two officers to meet with the complainant.

361. The Ombudsman was of the view that while what was said by Officer B could have been presented in a more tactful way, Officer B's attitude was not that bad generally. Allegation (g) was unsubstantiated.

Allegation (h) - unreasonable request for the complainant to apply for complaint records under the Code

362. JO pointed out that it did not mean to refuse providing the complainant with relevant complaint records referred by 1823 when it did not respond immediately to the complainant's request. It was only that the responsible officer believed it to be more appropriate for the complainant to request for the information under the Code.

363. According to the Code and its Guidelines on Interpretation and Application, the approach of government departments to release of information should be positive. In other words, when handling information requests, relevant departments should work on the basis that information requested will be released, and should act according to the Code even if a person does not follow the Code in making the information request. The Office was of the view that it was not necessary for JO to require the complainant to follow the procedures set out in the Code to obtain the complaint records concerned. Allegation (h) was considered substantiated.

Allegation (i) - attitude problem of Officer C

364. JO explained that staff from other sections would pass by the place where Officer C met with the complainant. Officer C did not know all the staff, and that was why on that day he said he did not know some individual who passed by. On the other hand, JO was of the view that the audio recording provided by the complainant did not indicate attitude problem on the part of Officer C during the interview, though there was room for improvement in his communication skills. JO had reminded Officer C in this regard. The Ombudsman agreed with the comments by JO and considered allegation (i) partially substantiated.

Allegation (j) - incorrect remark by Officer D

365. JO explained that Officer D's saying "witness statement" instead of "incident report" was only an unintentional mistake. What he really referred to was the statement made by Officer C in respect of a particular incident. The Ombudsman agreed that the above mistake was minor and considered allegation (j) unsubstantiated.

Allegation (k) - improper disclosure of case information

366. JO pointed out that according to the written report submitted by the staff concerned, no audio recording had ever been made and no details of the case had been disclosed to any staff not responsible for handling this case. As the complainant did not provide any evidence to the Office to support this allegation, The Ombudsman was unable to reach a conclusion. Allegation (k) was considered inconclusive.

Allegation (l) - threatening remarks in the changing room

367. JO stated that the changing room mentioned by the complainant was shared by a hawker control team of FEHD in the district and the staff working on that floor. JO had passed the information provided by the complainant to the District Environmental Hygiene Office concerned for investigation, but the officer-in-charge could not identify the person who made the remarks. The Office was of the view that the audio recording concerned was insufficient to prove that any of JO staff had attempted to verbally threaten the complainant. Allegation (l) was considered unsubstantiated.

Conclusion and recommendation

368. The Ombudsman considered this complaint partially substantiated and urged JO to remind its staff of the requirements set out in the Code in light of the problem reflected in allegation (h).

Government's response

360. FEHD accepted The Ombudsman's recommendation and had reminded the staff concerned that when handling information requests, they should work on the basis that information requested should be released, and should act according to the Code even if the complainant did not follow the Code in making the information request. Moreover, although it was concluded that Officer C did not have any attitude problem during the interview with the complainant, there was still room for improvement in his verbal communication skills. JO has reminded Officer C in this regard.

Food and Environmental Hygiene Department

Case No. 2016/1827 – Ineffective enforcement action against water dripping from air-conditioners

Background

370. According to the complainant, over the years whenever he passed by a building in a district (Building A) at around 6:45 a.m., he would find water dripping from the air-conditioners of the flats of Building A facing a certain road, causing nuisance to passers-by (the water dripping problem). In April 2016, the water dripping problem recurred. In early May 2016, he lodged a complaint with FEHD, but the water dripping problem persisted.

371. The complainant thus lodged a complaint with the Office of The Ombudsman (the Office), alleging that FEHD had failed to handle the water dripping problem properly.

The Ombudsman's observations

372. The Office accepted the explanation given by FEHD as to why the water dripping problem could not be solved completely. Upon receiving a complaint, FEHD could at best conduct investigation, collect evidence and require the owners or tenants concerned to make rectification. Even if the owners or tenants complied by fixing their air-conditioners, this would only address the symptoms of the problem. There was no guarantee that the air-conditioners concerned would not cause the water dripping problem again later on.

373. FEHD conducted multiple inspections in Building A at different times. However, the Office noted the following –

(a) the complainant lodged a complaint with FEHD about water dripping problem as early as 3 May 2016, but FEHD did not conduct the first on-site inspection during the time the dripping problem reportedly occurred until 23 May 2016. It also took some time before FEHD conducted further inspections early in the morning. This indicated that FEHD failed to address the water dripping problem in a targeted manner; and

(b) FEHD found or suspected that the water dripping problem took place in the early morning (i.e. at the time of occurrence reported by the complainant) and at dusk, but FEHD conducted inspections during the morning and afternoon hours and found no dripping problem. This indicated that FEHD did not make good use of resources by conducting inspections at the appropriate time for the best result.

374. Despite the explanation by FEHD, the Office could not understand why FEHD was not able to allocate manpower flexibly and conduct inspection at the most appropriate time in accordance with the operational guidelines in handling complaints about water dripping from air-conditioners (the guidelines). Instead, FEHD had wasted resources to carry out inspection at other times and these inspections proved to be unproductive.

375. Besides, after issuing the Notices of Appointment, which request occupants of a flat to contact FEHD and arrange for a visit from FEHD staff, FEHD did not follow up the cases immediately in accordance with the guidelines, failing to investigate the water dripping problem by entering the flats concerned to conduct tests on the air-conditioners. FEHD repeatedly observed the flats and only took follow-up actions after the water dripping problem was again found. This practice was time-consuming and ineffective.

376. The Ombudsman considered this complaint partially substantiated, and recommended that FEHD –

(a) allocate manpower flexibly, carry out inspections at the times of water dripping reported by complainants as far as circumstances permit and remind staff to strictly adhere to the guidelines when handling complaints about dripping air-conditioners; and

(b) discuss with Buildings Department (BD) on ways to promote the installation of central drain pipes in buildings in Hong Kong, with a view to completely resolving the issue of dripping air-conditioners.

Government's response

377. FEHD accepted The Ombudsman's recommendations.

378. In response to recommendation (a), FEHD has reminded its staff to strictly adhere to the guidelines when handling complaints against dripping air-conditioners.

379. As regards recommendation (b), FEHD has contacted BD. In view of the nature and large number of complaints against dripping air-conditioners, FEHD formulated joint inter-departmental efforts in conjunction with BD to tackle the problem. At present, guidelines for the disposal of condensation from air-conditioning units have been set out in the Practice Note for Authorised Persons and Registered Structural Engineers issued by BD. As stated in those guidelines, building proposals of new buildings and alteration works should include the requirement of the provision of a built-in system for condensation disposal in air-conditioner boxes and platforms, failing which the areas concerned will not be excluded from the plot ratio and site coverage calculations. For existing buildings, such requirement is included in the practice note for the attention of authorised persons. The practice note concerned has been submitted to the Office for reference.

Food and Environmental Hygiene Department

Case No. 2016/2113 – Improper handling of applications for change of trade by some market stalls

Background

380. The complainant was a FEHD market tenant permitted to sell "non-food related dry goods". The complainant accused FEHD of unreasonably approving the application of her neighbouring stalls (the Stalls) to change their trade from selling "food related dry goods" to "non-food related dry goods" (applications for change of trade). Besides, FEHD failed to conduct any consultation before giving approval to these applications and ignored the views of other stall operators as well as the business environment. The complainant later applied for judicial review against FEHD's unreasonable approval of the applications for change of trade. On 16 May 2014, the court held FEHD's decisions invalid.

381. In July 2014, the Stalls submitted afresh applications for change of trade (the 2014 Applications) to FEHD. On 26 August 2014, FEHD sought views on each of these applications at the meeting of the Market Management Consultative Committee (MMCC) concerned. Eventually, FEHD approved the applications again in October 2014. The complainant complained to the Office of The Ombudsman (the Office), alleging that FEHD made the following mistakes during the re-vetting of the applications –

(a) at the MMCC meeting on 26 August 2014, three local District Councillors were absent with apologies. The meeting was only between FEHD staff and stall operators or their representatives. The complainant was of the view that FEHD did not fully consult the MMCC members (i.e. the District Councillors) when considering the 2014 Applications; and

(b) FEHD did not display the notice about the approval of the 2014 Applications on the notice boards in the market to allow other stall operators to raise comments or objections within 14 days. This was against the established procedures of FEHD.

The Ombudsman's observations

Allegation (a)

382. As the complainant had applied to the High Court for a judicial review and lodged an appeal with the Court of Appeal against the judgement concerned, the Office considered that the complainant should wait for the appeal result. Therefore, the Office decided not to comment on allegation (a) at the moment.

Allegation (b)

383. The Office confirmed that the "Operational Manual for Market Services" did not require FEHD staff to display results of applications for change of trade by market stalls on the notice boards in the market for comments by other stall operators.

384. The complainant provided the Office with audio recording of her conversation with FEHD staff. In replying to her enquiry, one of the staff said that after the applications for change of trade were approved, a notice would be issued to stall operators for them to comment within 14 days. The Office did not exclude the possibility that there might be misunderstanding on the work procedures of FEHD by individual staff.

385. The Ombudsman considered the complaint unsubstantiated, but advised FEHD to remind its staff of the need to fully understand the work procedures of the department and provide a clear explanation upon enquiries.

Government's response

386. FEHD accepted The Ombudsman's recommendation and reminded the staff concerned that they need to fully understand the work procedures of the department and provide a clear explanation upon enquiries.

Food and Environmental Hygiene Department

Case No. 2016/2574 – Failing to properly follow through a food complaint and failing to reply to the complainant

Background

387. According to the complainant, he bought noodles from a restaurant in Kwun Tong District on 18 January 2016. When he dipped a pair of disposable chopsticks provided for takeaway food into the noodle soup, light red colour appeared on one chopstick instantly. On 27 January 2016, the complainant filed a complaint with FEHD via email. Two days later, an FEHD officer (Officer A) contacted the complainant. After learning that the complainant was working in Central & Western District, the officer suggested that the chopstick be collected for laboratory analysis by FEHD's District Environmental Hygiene Office (DEHO) in the Central & Western District (CW DEHO). However, no FEHD staff communicated with the complainant afterwards.

388. From February to June 2016, the complainant repeatedly complained to FEHD and enquired about the progress of his case via 1823, but no reply was received. The complainant accused FEHD of failing to reply to him and failing to follow through his complaint.

The Ombudsman's observations

389. FEHD explained that according to its Operational Manual, the location where the food or item under complaint was being kept determined which district's DEHO was responsible for handling the complaint.

390. Records indicated that the complainant's case was received by 1823 on 27 January 2016. It was wrongly referred to the Risk Communication Section (RCS) of FEHD, which was responsible for handling general food safety enquiries rather than food complaints. Despite the mistake, the RCS still offered assistance. On 29 January, Officer A of the RCS contacted the complainant and learnt that the chopstick in question was being kept in the complainant's office in Central & Western District. Officer A then informed 1823 that the complaint was misdirected to RCS and asked that the case be referred to

CW DEHO. Officer A also immediately notified CW DEHO.

391. An officer of CW DEHO received the case the same day and learnt that the incident occurred in Kwun Tong District, but was unaware of Officer A's message. As a result, the complaint was referred to DEHO in Kwun Tong District (KT DEHO) by mistake and received by an officer, who misunderstood that KT DEHO was only required to follow-up after the case was closed (i.e. to inspect the restaurant concerned) without further need to respond to the complainant.

392. During on-site inspection, the KT DEHO officer found the hygiene conditions of the restaurant satisfactory. Nonetheless, the responsible person of the restaurant was reminded of the importance of food hygiene. FEHD did not take further action nor made further contact with the complainant.

393. The Office of The Ombudsman considered FEHD inadequate in handling the complainant's case in that –

(a) when the complaint was received, CW DEHO overlooked Officer A's message and immediately referred the case to KT DEHO simply because the computer record showed that the incident happened in Kwun Tong District. This reflected a lack of prudence on the part of CW DEHO; and

(b) upon receiving the complaint, KT DEHO assumed that the case was closed, and did not realise the need to collect evidence (i.e. the chopstick in question). Despite repeated email enquiries from the complainant, KT DEHO also failed to take a closer look into the case or reply to the complainant.

394. The Ombudsman considered this complaint substantiated, and urged FEHD to look carefully into the reason(s) for mishandling this case and take corresponding measures to prevent recurrence of similar incidents.

Government's response

395. FEHD accepted The Ombudsman's recommendation. After investigation, FEHD found that the case was mishandled mainly because a clerical officer responsible for receiving complaints from the system decided to refer the complaint to another district without consulting any

Health Inspector in advance, which was undesirable. Learning a lesson from this case, FEHD would require relevant officers to clearly record in the system the reasons for making case referrals to avoid misunderstanding in future.

Food and Environmental Hygiene Department

Case No. 2016/2627 – (1) Ineffective enforcement action against street obstruction problem caused by on-street promotional activities; and (2) failing to provide a substantive reply to the complainant

Background

396. The complainant alleged that at the junction of the entrance of an alley and a pavement, with limited space and busy pedestrian traffic, a person (Ms A) sat every day on a folding stool for hours during peak periods, displaying a promotional placard she hung on her body and distributing flyers to passers-by, causing serious obstruction. The complainant had repeatedly complained to FEHD, but FEHD was lax in enforcement and did not evoke its statutory powers to prosecute Ms A for street obstruction, allowing the problem to persist.

397. The Summary Offences Ordinance stipulates that except with lawful authority or excuse, no person shall set out or leave any matter or thing which obstructs, inconveniences or endangers any person or vehicle in a public place (street obstruction provision). Moreover, the Public Health and Municipal Services Ordinance (PHMSO) contains provisions which respectively prohibit articles or things to be so placed as to obstruct scavenging operations (obstruction to scavenging operations provision); or bills or posters to be displayed or affixed on any Government land, except with the written permission of the Authority (unlawful display of bills provision). FEHD is empowered to take enforcement action against those who violate the above laws.

The Ombudsman's observations

398. The Office of The Ombudsman (the Office) accepted FEHD's explanation as to why it had not invoked the obstruction to scavenging operations or the unlawful display of bills provisions to take enforcement action against Ms A.

399. Nevertheless, the complainant was actually complaining about "street obstruction" caused by Ms A. She had been complaining about that for years, with photographs as supporting evidence. Besides, the alley entrance was on a very busy street with heavy pedestrian flow. The Office believed that Ms A's conduct did amount to causing obstruction to

pedestrians by setting out the folding stool in a public place. This met the legal definition of "street obstruction" under the street obstruction provision and should be actionable according to FEHD's internal guidelines on enforcement against such irregularity. FEHD, therefore, should have at least issued a warning to Ms A, rather than just advised her not to cause obstruction to pedestrians.

400. The Ombudsman considered the above complaint partially substantiated, and recommended that FEHD continue to monitor the situation and take enforcement action pursuant to the street obstruction provision. If in doubt, FEHD should seek advice from the Department of Justice.

Government's response

401. FEHD did not accept The Ombudsman's recommendation that FEHD officers should have taken enforcement action against Ms A for street obstruction by invoking the street obstruction provision.

402. FEHD's prime concern in taking enforcement action by invoking the street obstruction provision is to maintain environmental hygiene. According to FEHD's current policies, the street obstruction provision would only be invoked together with PHMSO or its subsidiary legislation when street obstruction occurs during illegal activities related to the regulation of food premises and handling of illegal hawking or other cases of breaching PHMSO.

403. As for street obstruction cases that did not involve environmental hygiene, FEHD considered them street management problems, which cannot be dealt with by any single department. To effectively tackle the root of the problem, departments concerned should perform the duties under their respective purview and closely collaborate to take joint operations. These cases should be referred to District Officers for the co-ordination of inter-departmental enforcement operations under the District Management Committee mechanism, having regard to the actual situation and needs.

404. In respect of the complainant's complaint, FEHD agreed that by sitting on a stool for hours distributing flyers, Ms A's conduct would amount to causing obstruction to pedestrians by "setting out" an article. However, FEHD officers found in previous investigations that Ms A distributed flyers to passers-by while moving around and without setting

out any articles on the pavement, it was thus inappropriate to institute prosecution against Ms A by invoking the street obstruction provision as recommended by The Ombudsman. FEHD has stepped up inspection of the location concerned. Ms A was no longer found carrying out promotional activities at the location concerned, neither was there any further complaint from the complainant.

405. FEHD wrote to The Ombudsman on 2 March 2017 to express its above position. The Ombudsman replied on 13 March 2017 that FEHD was deemed to have implemented the recommendation made in the investigation report. The Ombudsman requested FEHD to continue monitoring the situation at the location concerned. If any person is found sitting for hours on the pavement to carry out promotional activities as Ms A did before, FEHD should take decisive enforcement action and proactively consider instituting prosecution against that person by invoking the street obstruction provision.

406. As observed over the past nine months, no one (including Ms A) was found carrying out promotional activities at the location concerned, and no similar complaint was received by FEHD. At present, the environmental hygiene of the location concerned is satisfactory and no obstruction at the location is observed.

Food and Environmental Hygiene Department

Case No. 2016/3063 – Failing to properly follow up the water dripping problem

Background

407. The complainant had previously lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD) on 18 July 2016 about water dripping from the air conditioner of the flat above the complainant's (Flat A), which caused nuisance to the complainant (the water dripping problem). Although complaints were made to FEHD in June and July 2016, the water dripping problem persisted. The complainant was dissatisfied that FEHD had failed to properly follow up his complaints about the water dripping problem.

408. With consent from the complainant and FEHD, the Office followed up the case as mediator. The complainant accepted the result of mediation on 21 July 2016. The Office closed the case on 28 July 2016.

409. Between 9 August 2016 and 26 September 2016, the complainant lodged another complaint against FEHD to the Office by letter and telephone, alleging that –

(a) since the above case was closed on 28 July 2016, FEHD had not followed up the water dripping problem properly in accordance with the outcome of mediation, including updating him on the progress and result of the work and taking actions with force of law against the offender, such as issuing a warning letter or a Nuisance Notice (NN); and

(b) the complainant found that the condensation drain hole of the air-conditioner at Flat A was not positioned properly, so the dripping condensate could affect the flat below. On 21 July 2016, the complainant contacted FEHD so that FEHD staff would be aware of the issue when conducting investigation on the water dripping problem. FEHD replied on 25 July 2016 that there was no standard requirement on the position of the condensation drain hole of air-conditioners. If the water dripping caused any nuisance to the complainant, he could lodge

a complaint with FEHD. The complainant believed that FEHD had failed to provide him with adequate assistance.

The Ombudsman's observations

Allegation (a)

410. Since the conclusion of the previous complaint case, FEHD had all along followed up the water dripping problem and kept the complainant informed of the progress. However, after replying to the complainant on 25 July 2016, FEHD did not inform him of the investigation results until 2 September. FEHD apologised for such an inadequacy and instructed its staff to improve their practice.

411. Since no water dripping from the air-conditioner was found during FEHD's investigation, the Office considered it understandable that no NN was issued to the owner of Flat A and no further enforcement action was taken.

412. However, during inspection, FEHD staff observed the operation of the air-conditioner in the flat concerned for only about five minutes before concluding that no water was dripping. The test time was so short that it would be difficult to produce any conclusive test result. The Office understood that FEHD staff generally conducted air-conditioner tests for at least 30 minutes when dealing with other water dripping complaints. The Office found the result of the test concerned unreliable.

413. The Office disagreed with FEHD's explanation that it was inappropriate to set a standard for the duration of air-conditioner tests. The time needed for testing an air-conditioner might vary from one case to another. For cases where water dripping was found shortly after commencement of the test, it was naturally unnecessary to continue carrying out the testing for a longer time. However, for cases where water dripping was not found shortly after commencement of the test, FEHD should set a minimum standard for the testing time (e.g. 30 minutes), in order to ensure that a conclusive test result could be obtained and prevent the test result from being subject to challenge. If a longer test time was required, staff could extend the testing time according to their judgement.

414. The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

415. The Ombudsman was of the view that FEHD had responded to the complainant's request for assistance appropriately in its written reply dated 25 July 2016. The Ombudsman considered allegation (b) unsubstantiated.

416. The Ombudsman considered the complainant's complaint against FEHD partially substantiated, and urged FEHD to establish a standard for the duration of air-conditioner tests to be followed by its staff.

Government's response

417. Given the varying circumstances of individual cases, investigating officers would exercise judgement by taking into account the environment and actual situation on site in determining the details of the investigation and the reasonable duration for running tests. Air-conditioners of different brands, models and horse-powers perform differently in their cooling and dehumidifying functions. It is difficult for FEHD to establish a single standard for the duration of test to air-conditioners as recommended by The Ombudsman. Moreover, FEHD has sought professional advice from the Electrical and Mechanical Services Department on the recommendation concerned and was told that professional advice could not be given as the issue in question does not involve electrical and mechanical safety.

418. According to a report on air-conditioners and dehumidifiers published by the Consumer Council, the cooling capacity of air-conditioners for dehumidification may vary depending on their respective designs. As a result, the dehumidifying function of different air-conditioners may vary with their manufacturers. The daily dehumidifying capacity of dehumidifiers in different testing environments (including the temperature and humidity) may differ by up to 100%. Therefore, The Ombudsman's recommendation is actually more difficult to put into practice than it appears.

419. In the absence of relevant scientific or technical data and professional advice, FEHD considers it inappropriate to set a standard for testing air-conditioners to be followed by frontline staff. Setting such standard without scientific evidence and recognised objective criteria will definitely result in controversy and dispute.

420. FEHD will remind its frontline staff to investigate complaint cases of dripping air-conditioners according to actual circumstances. For example, a reasonable duration for running the test should be adopted and the test should be carried out at the times of water dripping from air-conditioners reported by complainants so that complaints might be handled expeditiously.

421. Regarding FEHD's above response, the Office noted that –

(a) in its investigation report, the Office recommended that FEHD set a minimum time for running the air-conditioner test. It mainly referred to cases where dripping did not occur shortly after the test began;

(b) as regards the air-conditioner test time, FEHD currently has no minimum standard but allows the investigation staff to decide. That may render the test time too short and more prone to being queried; and

(c) FEHD is the department responsible for the investigation of dripping air-conditioners. Its experience gained over years of practice should allow it to work out its own standard of test time for dripping air-conditioners. If dripping is found very soon upon the test, FEHD staff may simply end the test without having to run through the minimum time. If the staff concerned considers that a longer test time is required, they may extend the test time according to their judgment. It is beyond the Office's comprehension why FEHD should worry about the risk of controversy and dispute if a minimum test time is set.

422. The Office has urged FEHD to reconsider implementing The Ombudsman's recommendation and to reply to the Office. The Office has requested FEHD again to set a minimum time for running the test to air-conditioners. In this regard, FEHD is endeavouring to follow up The Ombudsman's recommendation by taking a two-pronged approach, namely seeking relevant scientific data and information from academic institutions and professional organisations, and making arrangements for FEHD staff to collect from actual investigation cases relevant data on the time needed for testing an air-conditioner for analysis purpose.

Food and Environmental Hygiene Department

Case No. 2016/3073 – (1) Failing to properly follow up the problem of illegal disposal of pig carcasses; and (2) failing to reply to the complainant

Background

423. According to the complainant, he had lodged a number of complaints via 1823 or directly with the Food and Environmental Hygiene Department (FEHD) since mid-2016, expressing concern over unwrapped pig carcasses that were frequently deposited at a certain refuse collection point (the RCP) and an Animal Carcass Collection Point (the CP) next to the RCP. Despite the complaints, the problem persisted.

424. The complainant alleged that FEHD –

(a) failed to follow up and investigate the problem to curb the offences and ensure environmental hygiene, and only arranged routine removal of pig carcasses by the contractor; and

(b) failed to reply to his complaints.

The Ombudsman's observations

Allegation (a)

425. Records showed that FEHD had taken actions within its purview to follow up the complainant's complaints, including site inspection to ensure that the contractor collected and handled animal carcasses in the CP as required by contract and to find out whether there was illegal disposal of animal carcasses elsewhere in the vicinity. FEHD also referred the issue of disposal of unwrapped pig carcasses at the CP to the Agriculture, Fisheries and Conservation Department for follow-up actions within its purview.

426. Given that animal carcasses were regularly collected three times a day at the CP, FEHD did not arrange for the pig carcasses to be removed by the contractor immediately upon receipt of the complainant's complaints, but left it to the contractor's routine collection service. The

Office of The Ombudsman (the Office) understood that resources were limited and found the arrangement reasonable.

427. The Office considered that FEHD had appropriately followed up the complainant's complaints. That said, the Office considered that the design and management of the RCP and the CP by FEHD were inadequate as follows –

(a) the substandard and dilapidated facilities, as well as poor hygiene conditions, of the RCP and CP were urban eyesores;

(b) without hoarding or a gate, the roadside CP would disgust passers-by and drivers if animal carcasses (especially unwrapped ones) were deposited inside; and

(c) the notices outside the CP were only made with paper, which would be easily damaged during inclement weather. According to FEHD's record, the notices were damaged by typhoon in early August and replaced in early September 2016.

428. As such, The Ombudsman found allegation (a) unsubstantiated, but there were other inadequacies on the part of FEHD. Fortunately, FEHD was aware of the problems in the design and management of the RCP and the CP and took the initiative to remedy the situation.

Allegation (b)

429. FEHD admitted that it did not respond to the complainant's complaints filed between June and August 2016. FEHD has reminded relevant staff to follow departmental guidelines on handling complaints and reply to complainants in a timely manner. Allegation (b) was substantiated.

430. The Ombudsman considered this complaint partially substantiated, and recommended that FEHD –

(a) continue to enhance the design and management of the RCP and CP. Meanwhile, constant improvement should be made to the hygiene conditions inside and outside the RCP and the CP; and

(b) learn from this case and monitor the progress of complaint handling on a regular basis to ensure complainants receive timely replies in future.

Government's response

431. FEHD accepted The Ombudsman's recommendations. Temporary structure had been erected to enclose the CP. Moreover, the pilot scheme of installing Internet Protocol cameras was implemented at the spot along with enhanced enforcement actions. The cleanliness of the CP had improved substantially. On the other hand, FEHD had instructed staff to follow the departmental guidelines when handling complaints and provide complainants with timely replies in future.

Food and Environmental Hygiene Department

Case No. 2016/3361A – (1) Delay in informing the complainant of the removal of his unauthorised roadside banners; (2) failing to explain the irregularities found on the complainant's banners and to provide supporting photographs; and (3) varying charges for removal of banners

Background

432. According to the complainant, he and Mr A had established a Councillors' Joint Office (the JO) in a district. The JO displayed from time to time non-commercial publicity banners at roadside railings in the district as authorised by LandsD. Since mid-April 2016, the complainant noticed that banners of the JO had been removed time and again for no reason. When new banners were made and displayed on the railings, they were removed again. The JO repeatedly reported the case to the Police but the problem persisted.

433. On 28 July 2016, the Food and Environmental Hygiene Department (FEHD) wrote to inform the complainant that between 19 April 2016 and 30 June 2016, FEHD and LandsD removed a total of 34 banners of the JO (the Banners), and that FEHD was considering recovering the expenses of removing the Banners from the complainant; the complainant could retrieve the Banners from FEHD within 10 days. From mid-August to mid-September, FEHD issued demand notes to both the complainant and Mr A for the expenses incurred in the removal of the Banners totalling some $2,600.

434. On 24 August 2016, a written reply was issued by a District Lands Office (DLO) of LandsD in response to the complainant's written enquiry of 5 August, stating that the Banners were removed by FEHD and LandsD in joint operations as they were not displayed according to the Guidelines of the Management Scheme for Display of Roadside Non-commercial Publicity Materials (the Management Scheme).

435. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against FEHD and LandsD, alleging that –

(a) the delay by LandsD and FEHD in informing the complainant of the removal of his unauthorised banners made it impossible for him to retrieve the Banners and sooner follow up the alleged irregularities, wasting his resources and time in producing and putting up new banners and costing him even higher removal expenses when the new banners were removed again;

(b) LandsD and FEHD neither explained the irregularities found on the Banners nor provided supporting photographs to the complainant, preventing him from defending his case; and

(c) FEHD imposed unreasonable and varying charges for removal of the Banners on the complainant and Mr A. Charges imposed for two of the removal actions differed by more than $500.

The Ombudsman's observations

436. Under the Management Scheme, LandsD has been delegated the authority under the Public Health and Municipal Services Ordinance (the Ordinance) by the Director of Food and Environmental Hygiene to examine and approve the applications by Members of the Legislative Council (LegCo) and District Council, government departments, and eligible organisations for the display of non-commercial publicity materials, including banners, at designated roadside spots.

437. LandsD will write to elected councillors to grant them use of publicity materials and advise them to observe the requirements of the Implementation Guidelines of the Management Scheme (the Guidelines). As far as LegCo Members of the term 2012-2016 (including the complainant) are concerned, LandsD and its contractor (the Contractor) issued relevant letters in late 2012 and May 2016 respectively to remind all Members to comply with the Guidelines.

438. As for FEHD, its District Environmental Hygiene Office (DEHO) and the Contractor conduct regular joint operations in the district, during which the Contractor checked whether the display of publicity materials is unauthorised or non-compliant with the Guidelines, while DEHO removed unauthorised items. After a joint operation, DEHO would keep in custody the publicity materials removed for at least 14 days and inform the responsible persons in writing that they may collect the publicity materials in question within 10 days. DEHO would also check and confirm the genuine beneficiaries of the publicity materials and then

claim removal cost against the parties concerned. Concerned parties may appeal to LandsD if they wished to contest FEHD's action.

Allegation (a)

439. The Office agreed with LandsD that the responsibility of issuing a notification letter to inform the complainant that the Banners have been removed lied with FEHD. FEHD explained that in the period between April and August 2016, its DEHO had removed a large number of publicity materials as a LegCo election was drawing near. It took time for DEHO staff to identify the beneficiaries of each item. Thus DEHO was unable to issue a notification letter to the complainant expeditiously; the Office found the explanation acceptable.

440. In fact, the complainant should already be aware of the requirements under the Guidelines. He should not blame the Banners having been removed for breach of the Guidelines time and again on the fact that FEHD did not send him a notification letter expeditiously. The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b)

441. The Office considered it LandsD's duty to explain the violations of the Banner to the complainant, and LandsD had provided such explanation along with photos of the Banners in response to the complainant's request. Allegation (b) was unsubstantiated.

Allegation (c)

442. FEHD had explained the method for calculating the removal cost of publicity materials, as well as the factors that affect the amount. The Office considered FEHD's principle of violators bearing the costs of relevant government actions reasonable and the existing calculation method generally consistent with the stipulation of the Ordinance. The Ombudsman considered allegation (c) unsubstantiated.

443. However, according to FEHD's existing calculation method, the removal cost of each piece of unauthorised publicity materials varies with the number of unauthorised publicity materials found and removed in each joint operation. The difference may be so great as to easily arouse queries from the beneficiaries of unauthorised publicity materials who have to bear the apportioned cost of the joint operation.

444. In conclusion, The Ombudsman considered this complaint unsubstantiated, but recommended that FEHD and the Treasury explore with the Department of Justice whether there are any better ways to calculate the removal cost, e.g. calculating the average removal cost of each piece of unauthorised publicity materials based on FEHD's actual data over a recent period (say half year or one year) and setting a uniform rate of charges to be recovered from offenders in the future (say half year or one year).

Government's response

445. FEHD did not accept The Ombudsman's recommendation.

446. FEHD had conducted a comprehensive review from 2011 to 2012 regarding the method for calculating the removal cost of unauthorised publicity materials, with a view to exploring a simpler calculation method for charging each beneficiary of unauthorised publicity materials a removal cost in a fair manner. Under section 104C of the Ordinance, FEHD, after removing publicity materials which have been displayed in public places and verified by LandsD as unauthorised or non-compliant with the Guidelines, may recover the cost of removal from the beneficiaries of the unauthorised publicity materials. Under section 130 of the Ordinance, the cost to be recovered by FEHD may include the cost of labour, transport or materials supplied by public officers for the purpose of carrying out such works as well as supervision charges. FEHD was also required under the charging policy stated in the Financial Circular No. 6/2016 to recover the full cost of carrying out such work from each beneficiary of unauthorised publicity materials.

447. FEHD considered various calculation methods, including the Office's proposal to set a uniform rate of removal charges for each piece of unauthorised publicity materials on the basis of FEHD's actual data. Nevertheless, the data on the removal of unauthorised publicity materials are not stable, for the number of such materials varies invariably with the situations in society and districts in different periods (one example being the number of unauthorised publicity materials stemming from the elections of various scales held by the Government, which is large and unpredictable). It was therefore impracticable to set a uniform rate of charges that can meet the requirements of relevant legislation and the Financial Circular by projecting the number of publicity materials over a period of time. The Financial Services and the Treasury Bureau also indicated at that time that a uniform rate of charges would not be

recommended if the removal costs differed too much from one operation to another.

448. The method currently adopted by FEHD for calculating the removal cost is generally fair and reasonable. Not only is it consistent with the charging policy stated in the Financial Circular No. 6/2016 and the requirements of the Ordinance, but also it was acceptable to the vast majority of the beneficiaries of unauthorised publicity materials. That said, FEHD will conduct again a comprehensive review of the calculation method in a timely manner when circumstances so require.

449. FEHD had informed the Office of the above stance on 5 June 2017. The Office informed FEHD on 27 July 2017 of the Office's acceptance of FEHD's explanation. However, to avoid recurrence of similar complaints, the Office suggested FEHD to explain to all participants of the Management Scheme beforehand the rationale behind the calculations of the removal cost of unauthorised publicity materials which may vary between occasions.

450. FEHD accepted the suggestion. To this end, FEHD updated the relevant webpage where enforcement operations in connection with the Management Scheme were introduced by setting out the rationale behind the calculations of removal cost, and the apportionment of the removal cost among the involved persons. LandsD linked up the above webpage to her website on 19 October 2017 to give participants of the Management Scheme prior knowledge that the removal cost incurred in each operation may vary.

451. Furthermore, FEHD has included a reminder in the covering letter of the demand note for the involved persons to browse the corresponding webpage for details about the calculation of removal cost.

452. FEHD informed the Office of such arrangement on 27 October 2017. The Office subsequently notified FEHD on 11 December 2017 of case closure.

Food and Environmental Hygiene Department

Case No. 2016/3562 – Failing to take effective enforcement action against the street obstruction problem caused by illegal extension of business area by a fruit stall

Background

453. The complainant alleged that although FEHD had indicated that it would step up regulation of the irregularities of extension of business area in front of a certain fruit stall (the Shop), the irregularities aggravated. In the daytime, the Shop occupied over half the width of the pavement for sale of fruits and placed seafood, bean sprouts, bean curd, pig blood curd, etc. for sale on the kerb by the road with no fear of the authority. After the Shop closed at night, it still obstructed half of the pavement and the kerb by placing goods and miscellaneous articles outside the Shop front. As a result, that section of the road could not be cleaned for a prolonged period of time.

454. The complainant alleged that he repeatedly saw FEHD staff issue verbal warnings to the Shop and then leave without staying to ensure compliance. The complainant considered that their actions could hardly have any deterrent effect. The complainant was dissatisfied that FEHD had ignored the irregularities at the Shop and failed to take effective enforcement action.

The Ombudsman's observations

455. After receiving the complainant's complaint, he Office of The Ombudsman (the Office) conducted site inspection on 12 September 2016. The Shop was still open for business near 11 pm and occupied half the width of the pavement in front of the Shop for sale of goods. During another inspection conducted in the evening the following day, it was found that the Shop and other shops in the vicinity had extended their business areas to the pavement in front of the shops in the presence of FEHD staff.

456. The Office conducted site inspections again at around 3 p.m. and around 2 p.m. on 12 and 18 January 2017 respectively. It was found that the Shop had extended its business area, occupying about one-third of the

pavement, similar to other shops nearby. No obstruction to passers-by was observed. During the inspection, there were miscellaneous articles or goods placed at the roadside but no selling activities were observed.

457. The overall order improved on the street concerned after FEHD adjusted its enforcement strategies, which demonstrated that its enforcement work had achieved certain results. FEHD took actions against the irregularities of the Shop, but its problem of occupying the pavement and kerb side of the carriageway as well as conducting hawking activities there still occurred from time to time. FEHD explained that owing to the constraint of resources and low pedestrian flow in the vicinity of the shop at late night, no manpower had been deployed to take enforcement against the irregularities of the Shop at late night. The Office considered such explanation understandable. Nevertheless, FEHD could not be absolved from responsibility for the persistent irregularities of the Shop.

458. As for cleaning the pavement, FEHD carried out washing operations during business hours of the Shop instead of late at night. As such, the Office considered that the Shop leaving articles outside its premises at late night did not cause long-term obstruction to street cleansing operations at that section of the street.

459. The Ombudsman considered this complaint partially substantiated, and recommended that FEHD –

(a) continue close monitoring of those shops (including the Shop) located in the vicinity of the street and take effective enforcement actions in a timely manner; and

(b) enhance street cleansing services whenever necessary.

Government's response

460. FEHD accepted the Ombudsman's recommendations and took follow-up actions. Closely monitoring street obstruction caused by shops located at the site, FEHD will take stringent enforcement actions whenever necessary. During the period between January and June 2017, FEHD launched a total of 75 blitz operations in the street, instituted 43 prosecutions (including 23 cases of street obstruction and 20 cases of unlicensed hawking) and issued 4 Fixed Penalty Notices (FPNs) for obstruction of the street. Meanwhile, FEHD officers also issued 254

FPNs to persons committing cleanliness offences, and instituted 10 prosecutions against owners of articles obstructing FEHD street cleansing services. Following the persistent enforcement by FEHD, the situation where the pavement of the street is occupied by shop operators for business has improved in general and is under control.

461. Apart from deploying street cleansing services every day and street washing every night, FEHD has, after taking into account the actual situation, added an extra time of daily street washing service on the pavement during daytime non-peak hours, and deployed more refuse collection vehicles and cleansing staff to the site for waste collection, with a view to further enhancing the level of cleanliness of the street. In parallel, FEHD has stepped up its enforcement on the street to combat irregularities such as obstruction to street cleansing services and illegal deposit of refuse.

Food and Environmental Hygiene Department

Case No. 2016/3777 – Failing to properly monitor the works of contractors responsible for two refuse collection points

Background

462. According to the complainant, refuse collection points of FEHD in a district (RCPs A and B) had the following problems –

(a) every morning (mostly between 6 a.m. and 7 a.m.), people were spotted dumping refuse and picking up glass bottles outside RCP A (the irregularities), causing environmental hygiene and noise problems (the nuisance). However, the street cleansing service contractor engaged by FEHD (the Contractor) did not take action against the nuisances;

(b) the grab lorry responsible for refuse removal failed to eliminate the nuisance without delay, as sometimes it arrived at RCP A as late as after 9 a.m.;

(c) the complainant took photos showing Contractor staff depositing waste that was inside RCP A outside RCP A (Incident I) and emptying litter bins that were in RCP A outside RCP A (Incident II); and

(d) the complainant also pointed out that accumulation of refuse outside RCP B adversely affected the environmental hygiene.

463. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against FEHD's poor supervision of its contractor, which led to the accumulation of refuse outside RCPs A and B, causing nuisance to residents in the vicinity.

The Ombudsman's observations

Allegation (a)

464. FEHD explained that as Contractor staff did not have powers of enforcement, they were unable to stop people from depositing or picking

up refuse outside RCP A. However, the Office was of the opinion that Contractor staff should have stopped the offenders once the irregularities were discovered, even though they did not possess powers of enforcement. Video footage provided by the complainant showed Contractor staff witnessing the irregularities but doing nothing to stop the offenders on many occasions. FEHD did not remind the Contractor to take action until months after complaints were received, which shows that FEHD supervised the Contractor poorly with regard to the management of RCPs.

Allegation (b)

465. FEHD explained why the grab lorry might sometimes fail to arrive at RCP A at 7:10 a.m. according to the contractual requirements. FEHD has requested the Contractor to make arrangements for its grab lorry to arrive on time as far as practicable, which could be considered a remedial action taken to address this complaint.

Allegation (c)

466. Regarding Incident I, FEHD explained that owing to insufficient space inside the RCP, it was necessary for the Contractor to leave bulky waste temporarily outside the RCP for later clearance by the grab lorry. As for Incident II, FEHD wrote to the Contractor demanding improvement in performance according to contractual requirements.

Allegation (d)

467. FEHD conducted a number of surprise arrest operations after receiving complaints about accumulation of waste outside RCP B. The Office considered that FEHD had already, in general, followed up the illegal deposit of refuse outside RCP B as appropriate.

468. All in all, the problems raised by the complainant stemmed from the following –

(a) insufficient supervision of the Contractor by FEHD; and

(b) lack of places for the public to legally dispose of refuse after the closure of RCPs A and B at night, driving people to illegally deposit refuse outside the RCPs.

469. The Office considered this complaint partially substantiated, and urged FEHD to –

(a) monitor the Contractor's performance more strictly and take concrete disciplinary actions against persisting inadequacy; and

(b) consider further adjusting the opening hours for both RCPs A and B according to actual circumstances, with a view to facilitating disposal of refuse inside the RCPs and preventing the nuisances.

Government's response

470. FEHD accepted the Office's recommendations and took the following follow-up actions:

(a) FEHD staff would, in addition to random checks under the existing mechanism, conduct additional surprise inspection once a month at late night or early morning hours to enhance monitoring of the cleanliness of those RCPs which open round the clock in the district (including RCPs A and B) and the performance of the contractors concerned. As regards the claim that the Contractor ignored the problem of people depositing or picking up refuse, FEHD reminded the Contractor and its refuse collection staff to discourage offenders if they find any irregularities. If necessary, Contractor staff should inform FEHD immediately for follow-up actions.

(b) Opening hours for both RCPs A and B were extended to 24 hours a day with effect from 1 March 2017.

471. According to recent inspections and observations by FEHD, the cleanliness of various RCPs in the district had improved substantially. Meanwhile, FEHD has not received any further complaints about accumulation of refuse outside RCPs A and B.

Food and Environmental Hygiene Department and Lands Department

Case No. 2016/1638A (Food and Environmental Hygiene Department) – Failing to take enforcement action against the shop-front extension and illegal hawking activities of several shops, and against the operation of an illegal food factory and shop-front extension of a food premises

Case No. 2016/1638B (Lands Department) – Failing to take enforcement action against illegal occupation of Government land

Background

472. According to the complainant, a group of illegal structures (the Structures) on government land (the Land) had been causing obstruction to passage for decades. A noodle shop (Restaurant A) had used one of the Structures and the adjacent lane as its kitchen, occupying government land and posing a fire risk. Restaurant A had also placed quite a number of tables and chairs at its shop-front, also occupying government land and affecting environmental hygiene.

473. Furthermore, the bakery (Shop B) adjacent to Restaurant A had installed a fixed platform at its shop-front for holding bakery shelves, thus occupying the passageway. The complainant complained to the Food and Environmental Hygiene Department (FEHD) but to no avail.

474. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against FEHD and the Lands Department (LandsD), alleging that over the years –

(a) FEHD had failed to take enforcement action against the irregularities of the shops concerned; and

(b) LandsD had failed to take enforcement actions against the illegal occupation of government land mentioned.

The Ombudsman's observations

FEHD

475. The Office opined that although FEHD had followed up the problems raised by the complainant, there was clearly no deterrent impact on the non-compliant shop and restaurant due to inadequate law enforcement action against the offences. The Office was particularly concerned about the unlicensed food factory (i.e. kitchen); FEHD should collect evidence and crack down on such offences without delay.

LandsD

476. In November 2015, the District Lands Office (DLO) of LandsD concerned received for the first time referral of the complaint about the Structures from 1823. DLO took the following follow-up actions –

(a) site inspection was conducted and it was found that five small shops and one food factory were operating in the Structures;

(b) an enquiry was made with the Squatter Control Office (under LandsD) concerned as to whether the Structures were surveyed squatter structures. It was subsequently confirmed that the Structures did not have any squatter survey records;

(c) an enquiry was made with the Buildings Department as to whether the Structures were structurally safe, and the reply was that they posed no imminent structural danger;

(d) issues such as hawking without licence and operating unlicensed food factory were referred to FEHD for follow-up actions; and

(e) in-depth investigation was carried out to find out whether the Structures were situated on private land or government land. The results showed that the Land was originally privately owned before it was resumed by the Government in 1981 for development. No information was available to LandsD to indicate why the Government did not remove the unauthorised building works or develop the Land at that time.

477. Given that the Structures had been used for operating the shops and the food factory for years, LandsD and FEHD expected that actions to take back the Land would be met with vigorous resistance. DLO

organised a joint operation with other departments in August 2016, taking control actions under the Land (Miscellaneous Provisions) Ordinance to require the land occupiers to remove the Structures and cease occupying the Land within two months. Should the occupiers fail to remove the Structures by then, further land control actions would be taken by DLO.

478. As to why the irregularities concerning the Land had not been detected over the years, LandsD explained that DLO strategically targeted black spots that were often the subject of complaints about occupation of government land, and land that was prone to illegal occupation for proactive inspection as appropriate. Although the Land was situated in the busy downtown area, no complaints about it had been received by DLO until November 2015. As the Land was not a black spot warranting inspection, DLO had not realised that it was being occupied.

479. The Office was of the view that after receiving the complaint in November 2015, DLO did follow up and initiate enforcement actions against the illegal occupation of government land by the Structures. As to why the Government failed to manage the Land properly in the course of resumption in 1981, it was difficult for the Office to find out the reasons due to a lack of information.

480. Based on the above, the Office considered the complaint lodged by the complainant against FEHD partially substantiated, and that against LandsD unsubstantiated. The Ombudsman recommended that –

(a) LandsD and FEHD should request the local District Office (DO) to arrange inter-departmental joint operations to tackle the problem of shop-front extension in the area as soon as possible;

(b) FEHD should step up enforcement against the shops' irregularities (including unlicensed food factory operation); and

(c) LandsD should remove the Structures as soon as possible and resume the Land.

Government's response

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

Recommendation (a)

482. The local DLO has requested DO to arrange inter-departmental joint operations against the problem of shop-front extension in the area. In reply, DO advised DLO that relevant departments should take actions to address the problem according to their respective purview, and that FEHD should deal with the problem of shop-front extension of the restaurants in the area.

483. DLO has also requested the departments concerned to subsume the problem of shop-front extensions of the shops opposite the Structures under the "District-led Actions Scheme" with a view to mounting inter-departmental joint operation. However, after surveying the dimensions of the shop-front extensions involved and consultation with departments concerned, it was found that the extent of shop-front extensions was about or lower than the tolerated dimensions stipulated by the departments concerned, hence not meeting the criteria of the "District-led Actions Scheme". Nevertheless, as street obstruction by shops in the area is mainly caused by the placing of goods, tables and chairs, LandsD has been informed that other departments have been taking enforcement action against the issues concerned.

Recommendation (b)

484. In mid-October 2016, FEHD issued warning letters against illegal extension of business area to the licensees of restaurants in the area. Up until June 2017, FEHD had deployed more manpower to conduct blitz enforcement actions on 17 and 19 October, 4 and 18 November (in collaboration with DLO) and 2 December 2016, as well as 12 and 24 January, 27 and 28 February, 1 March and 13 April 2017, prosecuting shops which had extended business area illegally. From October 2016 to June 2017, FEHD instituted a total of three prosecutions for street obstruction and two prosecutions for illegal shop-front extension against the food premises (including Restaurant A), as well as a total of 15 prosecutions for causing obstruction in public places against the non-food premises. In addition, as the number of demerit points registered against Restaurant A for illegal extension of business area had reached the limit, its licence was suspended for seven days from 21 to 27 June 2017.

485. FEHD staff did not find Shop B causing street obstruction during the raids. However, on 28 October and 9 December 2016, and on 25 February, 9 March and 21 June 2017, FEHD discovered that the shop

was used as an unlicensed food factory. As such, prosecution was immediately instituted against the responsible person of Shop B. Shop B later applied to FEHD for a food business licence and obtained a temporary food factory licence on 23 June 2017.

486. FEHD staff also inspected the lane adjacent to the Land on various occasions. It was found on 10 December 2016 and 15 March 2017 that an unlicensed food factory was operating there. Prosecution was taken against the operator concerned.

487. FEHD would continue to deploy staff to inspect the location and take prosecution action against anyone operating an unlicensed business.

Recommendation (c)

488. LandsD has already initiated prosecution action against the unlawful occupation of Government land and served a summons to one of the occupiers. The defendant pleaded not guilty to the offence in mid-September 2017, the case was then heard on 29 November and 11 December 2017 at the magistrates' court. Subsequently, the magistrate adjourned the trial to 15 January 2018. LandsD will consider taking further land control actions or prosecution actions subject to the outcome of the ongoing case.

Government Secretariat – Chief Secretary for Administration's Office (Efficiency Unit)

Case No. 2016/4033C – Failing to refer a complaint to relevant Government departments in a timely manner

Background

489. The complainant lived in a village house in Sai Kung, where a storm water drain between her house and the adjacent house had been blocked. When there was heavy rain, it would cause rain water to flow backward through the water pipe and flood into the house (the flooding issue). In May 2016, the complainant lodged a complaint to 1823 under the Efficiency Unit (EU). 1823 referred the case to the concerned departments for follow-up action. In September, the Lands Department (LandsD) replied to the complainant through 1823, saying that it had referred the flooding issue to the Home Affairs Department (HAD), which was the department responsible for the matter. On 12 October, HAD replied the complainant through 1823, saying that it would consider carrying out repair works depending on funding.

490. The complainant alleged that HAD and LandsD shirked the responsibility of carrying out repair works and failed to properly handle the flooding issue.

491. Since 1823 under EU was responsible for referring the case to the departments concerned, The Ombudsman included EU as one of the departments under investigation.

The Ombudsman's observations

492. According to EU, the complainant lodged a complaint to 1823 about the flooding issue on 12 May 2016. The case was then referred to the Drainage Services Department (DSD). On 23 May 2016, DSD replied to 1823 that the drainage system concerned was not built and managed by DSD. It suggested that 1823 refer the case to LandsD and HAD to clarify the maintenance responsibility, and to consider if drainage improvement works could be implemented in the village. DSD also mentioned that it had replied to the complainant direct on the same day, and the complainant had no further comment on its investigation result

and the proposed follow-up action.

493. However, as DSD had replied to the complainant direct, 1823 staff overlooked DSD's request for referring the case to LandsD and HAD. As a result, 1823 did not further refer the case until the complainant called 1823 again on 10 September 2016, requesting 1823 to refer the flooding issue to the departments concerned. 1823 then referred the case to HAD and LandsD.

494. EU admitted that there was negligence by 1823 staff when handling the complaint in May. EU deeply apologised for failing to make the referral timely and causing delay in the follow up of the flooding issue. 1823 had already reminded its staff to pay more attention to the content of replies from departments.

495. 1823's negligence and failure in referring the case in a timely manner caused a delay of almost 4 months before the matter was followed up by LandsD and HAD. That was improper administration.

496. The Ombudsman considered the complaint against 1823 substantiated, and urged EU and 1823 to learn from the experience of this case, evaluate the reasons behind its mistake and make improvement.

Government's response

497. EU accepted The Ombudsman's recommendation.

498. In order to avoid recurrence of similar incidents, apart from strengthening staff training, 1823 has enhanced its computer system so that departments could indicate explicitly in their replies whether follow-up action by 1823 (including the need to refer the case to other departments) would be required. The enhanced system also keeps track of the progress of the cases automatically to ensure that 1823 staff have taken timely actions on the requests made by departments. EU will monitor the situation and introduce further measures as necessary to ensure that referrals to relevant Government departments are made in a timely manner.

Government Secretariat – Education Bureau

Case No. 2015/4487 – (1) Failing to conduct a full inspection of the drainage system of a school and to properly monitor the work of a contractor; (2) failing to properly answer questions from the complainant; and (3) failing to reply to the complainant

Background

499. The Parent-Teacher Association (the PTA) of a secondary school (the School) lodged a complaint to the Office of The Ombudsman (the Office) against the Education Bureau (EDB). According to the PTA, the School has frequently experienced flooding since its establishment in 2001. Despite various repair works being carried out by different government departments over the years, including those taken up by Term Consultants (TCs) and the Maintenance Term Contractors (MTCs) engaged by EDB, the flooding problem remained unresolved.

500. The PTA also complained that they have requested to meet with higher ranking EDB officers to discuss the flooding issues in September 2015 but did not receive any proper response despite written follow-up enquiry sent on 22 September and 15 October 2015.

501. The PTA quoted the findings of a comprehensive inspection of the School's drainage system prepared by a contractor engaged by the School itself, and complained that flooding incidents were not solely caused by drainage pipes blockage as reported by TCs and MTCs, but also due to dislocated drains. Moreover, some pipes were found to be made of improper materials.

502. The PTA reproached the School Premises Maintenance Section (SPMS) of EDB responsible for supervision over TCs and MTCs with the following allegations –

(a) merely carrying out emergency repairs for the School on the grounds that the School had not submitted major repairs requests for the drainage system, without dutifully and examining comprehensively the school's drainage system;

(b) not monitoring effectively the performance of TCs and MTCs, and accepting works conducted previously and the newly added pipes as performing "normal function as designed";

(c) not responding positively to the PTA's enquiry about works related to flooding, but merely instructing TCs to give a reply on its behalf and forwarding a copy of TCs' report to the PTA; and

(d) not responding to PTA's request for EDB officers to join its meeting in its letters to EDB on 22 September and 15 October 2015 respectively.

The Ombudsman's observations

Allegations (a) and (b)

503. The Office noted that SPMS has received from the School three applications for emergency repairs to address flooding problems in August 2010, February 2012 and May 2014 respectively. SPMS processed the applications in accordance with the established procedures and was aware of the effectiveness of the related works. However, it was not until August 2014 that SPMS realised the severe inadequacies of the responsible TC (TC A) in dealing with drainage in the corridors and middle courtyard.

504. It was noted that the flooding has affected many areas within the campus and remained unresolved for years. SPMS should have been aware of the situation when it scrutinised the School's applications for emergency repairs and approved the works proposals by TC A. In fact, SPMS could have addressed the flooding issue earlier by requesting TC A to thoroughly examine and analyse the school's drainage system and urging it to identify a comprehensive solution.

505. The Office, however, noted that SPMS has handled the three Applications in accordance with the established mechanism. It was also glad to note that an interactive "School Maintenance Automated Rapport Terminal (SMART) System" was being refined to facilitate SPMS's better monitoring of the works by TCs and MTCs. With the help of the SMART System, repeated repair requests of the same nature could be identified. TCs could thus be alerted and be more cautious in analysing the problems, with a view to proposing suitable rectification measures. SPMS has also initiated a comprehensive inspection of the drainage

system for the School. The Ombudsman considered allegations (a) and (b) partially substantiated and was pleased to note that SPMS will refine the SMART system to help analyse works-related issues more effectively.

Allegation (c)

506. The Office was of the view that EDB continuously liaised with the School and the PTA on the issue, e.g. meetings were arranged in August and September 2015 by EDB staff and TC A to update both the School and PTA on the progress of the follow-up works. As such, The Ombudsman considered allegation (c) unsubstantiated.

Allegation (d)

507. The Office noted that the PTA wrote to EDB on 22 September and 15 October 2015 for a response to its meeting request raised at an earlier occasion. However, EDB did not respond to this request in its reply to the PTA on 20 October 2015. While EDB offered to meet with the School representatives to further discuss the matter in its letter dated 20 December 2016, with said letter copied to the PTA, EDB has provided no direct response to the PTA on its meeting request. As such, The Ombudsman considered allegation (d) substantiated.

508. The Ombudsman considered this complaint partially substantiated and recommends that EDB –

(a) learn from the experience of the case. Should a persistent works problem be identified in future, EDB should instruct TCs to conduct further analysis as early as possible with a view to working out a thorough solution; and

(b) remind staff to respond precisely and directly to enquiries made by members of the public.

Government's response

509. EDB accepted The Ombudsman's recommendations.

510. On recommendation (a), SPMS introduced a new function to the SMART System in May 2016 on a trial basis to enable the generation of reports on submission of repeated emergency repairs requests for same types of works. The reports would help TCs identify cases which would

require further and closer examination. With more comprehensive inspection and analysis, TCs should be able to come up with thorough proposals to rectify the problems identified.

511. As for recommendation (b), EDB met with representatives of the School and the PTA on 14 January 2016, and briefed them on the proposed follow-up works to effectively address the flooding issues. EDB and its TC have been engaging both the School and the PTA to update them on the progress of the rectification works and incorporate their views and comments where practicable. The rectification works was completed in end-August 2017. As regards The Ombudsman's view that precise and direct replies to public enquiries should be provided, staff have been reminded to observe accordingly.

Government Secretariat – Education Bureau

Case No. 2016/1833 – Failing to properly follow up on a notice returned by Hongkong Post concerning the allocation of Primary One place for the complainant's daughter

Background

512. The complainant had submitted an application for his daughter to participate in the Primary One Admission (POA) for the 2016/17 school year. As at mid-April 2016, the complainant still had not received the letter from the Education Bureau (EDB) inviting him to state his school preferences (the Notification Letter). On 19 April, he called EDB and enquired about the Notification Letter. The Bureau replied that the Notification Letter sent to him was undelivered and had been returned to the Bureau. Since the grace period for completing school selection procedures had passed, he no longer could state his school preferences, and his daughter would be accorded the lowest priority in the Central Allocation stage, meaning she might end up being allocated a primary school place in another district.

513. The complainant was dissatisfied that EDB had failed to properly follow up on the non-delivery of the Notification Letter, thereby depriving him of the opportunity to state his school preferences.

The Ombudsman's observations

514. The purpose for the issuance of a Notification Letter by post to parents in mid-January 2016 was to give them an opportunity to state their school preferences. If a Notification Letter was undelivered, EDB would check the address on the undelivered letter against the address provided by the parent on their POA application form. Where the address on the undelivered letter was found to be incorrect, EDB would resend the letter according to the address provided on the application form. However, should the addresses match, EDB would not contact the parent until the grace period has passed for the reason of time constraint.

515. The Office of the Ombudsman (the Office) considered that it would not have been difficult for EDB to follow up on the cases of undelivered Notification Letters. Take the 177 undelivered Notification

Letters in 2016 as an example, assuming that the 20 EDB officers involved were to call each of those parents twice during the two-month grace period, each officer would only have to make 18 telephone calls, with each call probably lasting for just a few minutes. It would be entirely within EDB's capacity to make such telephone calls. The Office was of the view that EDB should not have refused to promptly contact those parents by telephone on the pretext of manpower constraints.

516. The Ombudsman considered the complaint partially substantiated and recommended that in future, EDB try to contact parents promptly by suitable means (such as telephone calls) in case of non-delivery of the Notification Letters, so that parents can state their school preferences in time.

Government's response

517. The EDB accepted The Ombudsman's recommendation. Working guidelines have been drawn up to follow up promptly on cases of non-delivery of the "Notification Letters for Choice of Schools for Central Allocation" (regardless of whether the undelivered Notification Letters were correctly addressed according to their corresponding application forms) to facilitate parents' school choices. The above arrangement has been implemented since Primary One Admission 2017 (for admission to Primary One in the 2017/18 school year).

Government Secretariat – Education Bureau

Case No. 2016/1964(I) – (1) Failing to properly answer the specific questions when handling the complainant's two information requests; (2) delaying its replies without reasonable explanation; and (3) providing false and misleading information in response to the information requests

Background

518. The complainant alleged that EDB had mishandled his information requests of 22 February 2016 (Request I) and 4 May 2016 (Request II) in the following ways –

(a) failing to properly answer the specific questions raised in the two requests;

(b) delaying its replies without reasonable explanation; and

(c) providing false and misleading information in response to the requests

The Ombudsman's observations

Request I

Allegations (a) and (c)

519. EDB has indicated to the Office of The Ombudsman (the Office) that, for each of the complainant's specific questions as well as subsequent requests for clarification, the Bureau had provided him with the information as requested and the information provided was the most accurate and appropriate answer to his request. EDB did not find fault in its answers to the complainant's questions, nor any false or misleading information provided to the complainant.

520. However, having examined all of the complainant's requests to EDB's replies, the Office noted that EDB had indeed failed to provide clear and direct answers to some of the complainant's questions, justifying his further queries.

521. In fact, it was not until 18 July, after two more rounds of follow-up queries that the complainant made on 5 April and 30 May that EDB finally provided clear answers.

522. On the whole, the Office considered that EDB had failed to handle the complainant's Request I properly. It should have been more forthcoming in responding to the complainant's questions by giving clear, direct and complete answers so as to save his time in making multiple rounds of queries. Although there is no evidence that EDB had provided the complainant with false or misleading information, its drip-feed approach of releasing information was unwarranted and prone to suspicion of being evasive. This is clearly unsatisfactory.

523. The Ombudsman considered allegation (a) substantiated and allegation (c) unsubstantiated.

Allegation (b)

524. EDB has explained to the Office that, for Request I, preparation of a reply involved inputs from various sections of EDB, as well as HKEAA, which is an external body. Preparation of the reply required coordination, collation and verification of information from various parties. In addition, since the reply involved legal issues, clarification of legal points from both the Department of Justice and the legal adviser of HKEAA was necessary. A longer processing time was hence taken to handle the complainant's request. Indeed, according to paragraph 1.18.1 of "Code on Access to Information – Guidelines on Interpretation and Application", the exceptional circumstances for deferring response to a request beyond 21 days include, among others, the need to seek legal advice on a request.

525. The Office accepted the Bureau's explanation for taking 50 days and 49 days respectively to respond to the complainant's follow-up queries of 5 April and 30 May. The Office also consider that EDB had explained to the complainant the reasons for extending the response time. The Ombudsman found allegation (b) to be unsubstantiated.

Request II

Allegation (a)

526. The Office queried why EDB had not responded to three of the questions raised in the complainant's letter of 4 May, the Bureau contended that the answers had been included in its reply of 24 May. The Office is of the view that EDB's responses had all failed to address the complainant's queries, and the three questions remain unanswered .

527. The Ombudsman considers allegation (a) substantiated. EDB eventually provided answers to the three questions in response to the Office's draft investigation report. The Office considered the answers to be succinct and direct answers, but EDB should have provided these answers to the complainant at the outset.

Allegation (b)

528. Despite its failure to answer all of the complainant's questions, EDB had managed to respond to Request II within 21 days, the normal target response time stipulated in the Code on Access to Information. Accordingly, The Ombudsman considered that there was no delay in reply and that allegation (b) is unsubstantiated.

Allegation (c)

529. There is no evidence that EDB had provided the complainant with false or misleading information regarding Request II. Allegation (c) is unsubstantiated.

530. In sum, the complaint against EDB is partially substantiated. The Ombudsman urged EDB to remind staff to adopt a more forthcoming, direct and positive attitude towards information requests/enquiries from members of the public; in particular to respond to enquiries with clear, direct and complete answers.

Government's response

531. EDB accepted The Ombudsman's recommendation.

532. In response, EDB has arranged to regularly circulate, on a half-year basis, an internal circular on the Code on Access to Information. As part of the circulation, EDB will specifically remind officers to adopt a forthcoming, direct and positive attitude towards information requests/enquiries from members of the public, in particular to respond to enquiries with clear, direct and complete answers.

Government Secretariat – Education Bureau

Case No. 2016/2951 – Failing to properly investigate a complaint against a subsidised school and being biased towards the school

Background

533. The complainant's daughter was studying in a subsidised school (the School), when in mid-November 2015, the School pointed out that the complainant's daughter and one of her classmates (Student A) had violated the Academic Honesty Policy of the school during a Chinese History test (the cheating incident). Because of the cheating incident, a demerit was given to the complainant's daughter as a punishment, while a warning letter was issued to Student A in mid-December.

534. The complainant was of the view that the School had punished her daughter unfairly, considering the discrepancy between her punishment and that of Student, as well as the difference in timing. The complainant considered the School in violation of the principles stipulated in the School Administration Guide (SAG) of the Education Bureau (EDB). In this connection, the complainant lodged a complaint to EDB. After the investigation, EDB concluded that the School had handled the incident of cheating in a reasonable manner.

535. The complainant accused EDB of being biased towards the School.

The Ombudsman's observations

536. After scrutinizing the relevant documents and records, the Office of The Ombudsman (the Office) was of the view that EDB had conducted appropriate investigation into the complaint raised by the complainant against the School. The conclusion drawn from the investigation was reasonable and there was no evidence showing that EDB was biased towards the School. The Ombudsman considered the complainant's allegation against EDB unsubstantiated.

537. However, the Office pointed out that EDB had not clearly explained in its replies to the complainant why it considered the School had to reasonably exercise punishments on her daughter and Student A according to the severity of their misconduct, and how the School had not violated the principle of exercising timely punishment to Student A as stipulated in the SAG. Thus its reply was unable to satisfy the complainant.

538. Despite the fact that it was EDB's good intention not to embarrass the complainant, the Office considered that EDB should clearly explain to the complainant the rationale for the conclusion of the investigation instead of just informing the complainant of the conclusion.

539. The Ombudsman found an inadequacy on the part of EDB although the allegation was unsubstantiated. The Ombudsman urged EDB to learn from this experience and remind its staff to clearly explain to the complainants the rationale for the conclusion of the investigation.

Government's response

540. EDB accepted The Ombudsman's recommendation and reminded its staff that in replying to complainants, they should clearly explain the rationale for the conclusion of the relevant investigations so as to avoid misunderstanding on the part of the complainants.

Highways Department, Home Affairs Department and Lands Department

Case No. 2015/2105A,B&C – Lack of coordination in resolving the ponding problem at a vehicular access

Background

541. The complainant alleged that on rainy days, puddles of rain water would form at a vehicular access (the Access Road) which runs across the public footpath of a road and leads to the housing estate where he lives (the ponding problem). He found this a risk to public safety and so lodged a complaint with 1823. Although the Access Road was resurfaced subsequent to his complaint, the problem persisted. He lodged a complaint with the Office of The Ombudsman (the Office), alleging that the Highways Department (HyD), the Lands Department (LandsD) and the Home Affairs Department (HAD) lacked coordination in fixing this problem.

Maintenance Responsibilities for the Access Road

542. The ponding problem involved three locations of the Access Road (hereinafter referred to as Locations A, B and C). Location A is a public footpath maintained by HyD while Locations B and C are on unleased Government land falling within a Temporary Government Land Allocation (TGLA) granted to Water Supplies Department (WSD) for carrying out some works at the time the complaint was lodged. There is no maintenance party for Locations B and C.

543. Improvement works were carried out specifically at Location B by WSD to address the ponding problem during the TGLA period. HyD also did some improvement works at Location A in response to this complaint. However, the ponding problem remained unresolved. WSD advised that the ponding problem at Location B was caused by a congenital defect at the Access Road that required extensive upgrading works to rectify.

The Ombudsman's observations

544. HyD stated that it was only responsible for the maintenance of Location A but not Locations B and C, which were outside its purview. It had already carried out improvement works at Location A. As regards Locations B and C, HyD had referred the complaint to LandsD for follow-up actions and it later learned that LandsD had requested HAD to carry out improvement works.

545. LandsD indicated that it was not responsible for road maintenance and it did not have the expertise to solve the ponding problem at Locations B and C. Based on WSD's advice, the District Lands Office concerned had requested the local District Office to consider carrying out upgrading works under HAD's Minor Works Programme.

546. HAD explained that the Access Road was not a public village access, but an exclusive access to the housing estate concerned and some village-type houses. It was outside the scope of Rural Public Works eligible for the use of funds under the Minor Works Programme. If the improvement works carried out by HyD and WSD could not resolve the ponding problem, the Government departments concerned should review holistically and in a coordinated manner the design and the works done with a view to devising further remedial action.

547. Investigation revealed that none of the three departments under complaint were willing to take the lead in tackling the ponding problem. The Office found it highly undesirable that these departments continued to explain and delineate their own respective purview instead of putting their heads together to really resolve the problem. This kind of compartmental mentality should be cautioned against.

548. Upon the Office's intervention, the departments concerned were willing to discuss the issue and they ultimately worked out a proposal: HyD would act as a works agent for LandsD to carry out on a one-off basis improvement works on the Access Road including slanting of the road and building additional gullies; LandsD would provide the funding for the improvement works; HAD would liaise with HyD, LandsD and the Owners' Corporation of the housing estate concerned and convene a meeting to explain the way forward.

549. The Ombudsman considered this complaint partially substantiated and recommended that the three departments should expeditiously implement the actions agreed at their two joint meetings, specifically that –

(a) LandsD arrange for the necessary funding for HyD to carry out the improvement works;

(b) HyD carry out the improvement works; and

(c) HAD provide the necessary liaison work to facilitate the above and secure the agreement of the Owners' Corporation of Pretticoins Garden to take up the future maintenance responsibilities for the gullies in the Access Road.

Government's response

550. HyD, HAD and LandsD have accepted the recommendation from The Ombudsman.

551. HyD carried out the improvement works at the unallocated government land in March 2016 with the funding provided by LandsD. HAD liaised with the relevant Owners' Corporation on the improvement works and the arrangement of future maintenance work of the gullies, and obtained their agreement to take up the future maintenance responsibilities of the gullies at the unallocated government land. In April 2016, a local District Councillor wrote to HyD, stating that the local residents recognised that the works completed by HyD in March 2016 had effectively alleviated the ponding problem.

Highways Department and Social Welfare Department

Case No. 2016/3195 & 2016/3054 – Ineffective in tackling street sleeper problems

Background

552. Allegedly, the complainant complained to HyD on 26 June 2016 about street sleepers occupying a pedestrian subway connecting Morrison Hill Road, Sports Road and Leighton Road (the Subway). On the following day, 1823, being responsible for handling public enquiries and complaints received by HyD, replied that his complaint had been referred to the Home Affairs Department (HAD), the Fire Services Department and the Food and Environmental Hygiene Department. 1823 later added that his case had also been referred to HyD and the Social Welfare Department (SWD).

553. HAD, HyD and a social welfare organisation subvented by SWD (Organisation A) subsequently replied to the complainant. HAD told him that a multi-department joint clearance operation had been conducted in the Subway on 6 May 2016. Organisation A replied that its social workers had been helping the street-sleepers, some of whom had given up street-sleeping. HyD stated that it had no power to remove the street-sleepers or their belongings.

554. The complainant expressed dissatisfaction with how 1823, HyD and SWD dealt with his complaint and the street-sleeper problem, and complained against the departments for –

HyD

(a) having failed to keep the Subway free from unlawful occupation by street-sleepers;

SWD

(b) having failed to tackle the street-sleeper problem effectively; and

(c) having inappropriately referred his complaint to Organisation A without informing him prior to the said referral.

The Ombudsman's observations

HyD

555. HyD only has a minor role to play in handling the street-sleepers problem in this case. It is involved because the problem happens in the Subway, the maintenance of which is by HyD. In any event, HyD has acted in accordance with its powers and responsibilities. The Ombudsman considered the complaint against HyD unsubstantiated.

SWD

556. Street-sleeping is both a street management problem and a social problem requiring the joint efforts of various government departments. The duty of SWD is to provide a wide range of welfare services through non-governmental organisations to help needy individuals quit street-sleeping and reintegrate into the community.

557. Through Organisation A, which is subvented by SWD, 48 outreach visits to the Subway were conducted between September 2015 and August 2016, and the number of street-sleepers dropped from 5 to 2 by the end of August 2016. The Office considered that SWD had been properly handling the problem through Organisation A, though better results had yet to be seen.

558. As Organisation A is commissioned by SWD to take care of the welfare needs of street-sleepers and the handling is in line with the standing practice on follow-up of referrals from 1823, the Office considered SWD's referral of the complaint appropriate. The Ombudsman considered the complaint against SWD unsubstantiated

559. The Ombudsman considered both complaints against HyD and SWD unsubstantiated, but urged the departments concerned to continue to conduct multi-department joint operations and step up cleansing work.

Government's response

560. HyD and SWD accepted The Ombudsman's recommendation.

HyD

561. HyD carries out regular cleansing operations at the concerned subway and will continue to take part in joint operations organised by Wanchai District Office.

SWD

562. SWD and non-governmental organisations commissioned to provide welfare services for street-sleepers will maintain their efforts to provide counselling as well as referral of financial and accommodation support to street-sleepers so as to facilitate those in need to reintegrate into society.

563. Under HAD's coordination, SWD has been collaborating with other relevant departments and participating in joint departmental operations to tackle the street-sleeper problem.

Home Affairs Department

Case No. 2016/1938 – Improper exclusion of certain stakeholders from consultation on an application for lease modification

Background

564. The complainant enquired of the Home Affairs Department (HAD) about the consultation on an application for lease modification for residential redevelopment of a land lot along a certain road in the Peak and Mid-levels area. In its reply, HAD noted that nearby residents and the relevant Area Committee (AC) were consulted, but Members of the District Council (DC) concerned were not consulted because it would be unfair to other candidates in the DC election, which would soon be held. Allegedly, all houses along the road in question were vacant. The complainant considered HAD's explanation absurd.

The Ombudsman's observations

565. In carrying out local consultation on Government policies and local matters, Government policy bureaux or departments take the lead in determining the time, duration, scope and method while the District Offices (DOs) of HAD play a supporting role by providing advice and assistance as necessary. Where the requirements for consultation are not specified, the consultation will be launched in accordance with the established practices of DOs.

566. Local consultation usually lasts for two weeks and its scope covers DCs, local and residents' organisations and other local residents affected by the proposal/issue. Where consultation starts during the suspension of DCs' operation pursuant to section 28 of the District Councils Ordinance, DC Members are generally not consulted, but they may express their views in their personal capacity like any other members of the public.

567. HAD explained that when Lands Department (LandsD) requested this local consultation, it did not set any specific requirement. The local DO conducted a two-week consultation in accordance with established practices. Apart from residents in vicinity, members of AC, except those who were DC Members, were consulted. The exclusion of

DC Members served to ensure fairness among all candidates in the approaching DC election.

568. In the view of the Office of The Ombudsman, it is essential to solicit opinions and comments from stakeholders or their representatives in any consultation exercises. Normally, HAD's usual practice could have served the purpose, but in this case the DC Members concerned were not consulted owing to the suspension of DC's operation during the election period.

569. Given that the issue under consultation would likely attract community concern, the arrangement was clearly unsatisfactory. The Office considered that the local DO should have devised some special consultation arrangements to cater for the circumstances and advised the LandsD accordingly.

570. The Ombudsman considered this complaint substantiated, and urged HAD to take reference from this case and to ensure in future that stakeholders or their representatives are duly covered in local consultation, for example, by alerting the initiating bureau(x) or department(s) of the suspension of District Councils and advising them to avoid holding consultations during the period concerned, or considering other appropriate ways to engage relevant District Councillors in the discussion process as necessary.

Government's response

571. HAD accepts The Ombudsman's recommendation.

572. HAD agrees that DC members are important stakeholders for local consultation. Taking into account The Ombudsman's recommendation, District Offices will notify all relevant departments at least two months before the suspension of the DC due to the DC election, and remind departments that they should, as far as practicable and with the assistance of the relevant District Office, arrange for any necessary local consultation either before or after the suspension period to ensure relevant DC Member(s) are consulted.

Hong Kong Monetary Authority

Case No. 2016/2413 – Failure to notify the complainant or seek her consent prior to a telephone recording

Background

573. The complainant lodged a complaint with the Office of the Ombudsman (the Office) that the Hong Kong Monetary Authority (HKMA) failed to properly follow up her complaint against a bank (Bank A) in December 2013. The complainant alleged that –

(a) HKMA had initially invited her for an appointment but failed to provide the date and time, so she was unable to respond or attend;

(b) from March 2014 onwards, HKMA failed to refer her further allegations against Bank A to the bank for its direct responses;

(c) between February and June 2016, she made multiple attempts to set up a meeting with the investigation team of HKMA but her repeated requests were unreasonably rejected; and

(d) HKMA recorded a telephone conversation with her without notifying her or seeking her prior consent on 12 December 2013.

The Ombudsman's observations

Allegation (a)

574. From the telephone recording records maintained by the HKMA, HKMA staff called the complainant on 12 December 2013 to invite her for an interview on 30 December 2013 The parties discussed possible meeting times during the telephone conversation. However, the complainant then said that a face-to-face interview was unnecessary because her allegations against Bank A were clearly written in her complaint form. The Office examined the corresponding telephone recordings, which confirmed the above content, and concluded that allegation (a) was unsubstantiated.

Allegation (b)

575. The Office considered HKMA to be in the best position to decide whether Bank A was required to provide further responses to the complainant's allegations, having considered information previously obtained from both parties. Moreover, HKMA had demanded Bank A to provide written explanation about the matter to the complainant twice. Allegation (b) was unsubstantiated.

Allegation (c)

576. After reviewing the correspondence between HKMA and the complainant, the Office considered the complainant's request for a meeting to be merely based on her dissatisfaction towards HKMA's investigation results. It was not inappropriate for HKMA to turn down the complainant's request for a face-to-face meeting, as the Office agreed that whether to take further action against Bank A should be HKMA's decision to make, after reviewing the evidence collected. Allegation (c) was unsubstantiated.

Allegation (d)

577. The Office believed that it was proper etiquette to notify the other party before recording a conversation. In fact, HKMA's guidelines explicitly required its staff to obtain prior consent from the interviewee before recording a telephone interview. HKMA's complaint hotline (the Hotline) also reminded the caller that his/her telephone conversation might be recorded before his/her call is directed to a staff.

578. HKMA contacted the complainant twice on 12 December 2013 in an attempt to set up a face-to-face meeting or telephone conference on another date and time. During one call, it was explicitly brought to the complainant's attention that the call was being recorded, and she did not express any opposition. When the complainant called the Hotline later that day, she heard the pre-recorded message reminding callers that their call might be recorded. However, while the telephone recordings of the complainant absolved HKMA of allegation (a), there was no evidence of the complainant being informed that every phone conversation with HKMA would be recorded.

579. The Ombudsman concluded that the complainant against HKMA partially substantiated, and recommended that HKMA –

(a) explain to staff members the implemented measures to enhance the disclosure of telephone recording and how they should respond to related enquiries; and

(b) evaluate the effectiveness of relevant measures from time to time.

Government's response

580. The HKMA has accepted The Ombudsman's recommendations and implemented the following enhancements –

(a) it has been clearly stated in the Complaint Form and the acknowledgment letter issued to complainant that "*all telephone conversations between you and the HKMA may be recorded, irrespective of whether you dial in or we call you back so as to ensure our service quality*";

(b) the message "*all telephone conversations between you and the HKMA may be recorded, irrespective of whether you dial in or we call you back so as to ensure our service quality* " has been included in the pre-record messages of the Hotline, the "Complaints about Banks – Frequently Asked Questions" and the "Contact Us" sections of the HKMA website; and

(c) an internal briefing was given to relevant staff members to explain the above-mentioned measures, and the effectiveness of the implemented enhancements would be reviewed where necessary.

Housing Department

Case No. 2015/4242 – Failing to properly handle complaints about unauthorised operations by some market stalls

Background

581. The complainant was a tenant in a market (the Market) under the Housing Department (HD) and she operated a flower stall. HD had contracted the day-to-day management of the Market to a property management agent (the PMA), which would routinely patrol the Market and conduct special inspections to investigate allegations of tenancy condition violation.

582. To ensure that goods offered by markets can serve the needs of residents, the nature of the trade for each market stall is specified in HD's tenancy agreement. The agreement also stipulates that tenants should not use their stalls for storage of goods other than a reasonable stock for business.

583. The complainant had lodged numerous complaints with HD, alleging that several stalls operated by members of a family were frequently in breach of the tenancy agreements, including selling paper offerings and joss sticks at a flower stall, and selling flowers at a leather goods stall and in a storeroom. Meanwhile, the family concerned also made frequent complaints against the complainant for illegal extension of business area.

584. The complainant considered HD to have acted unfairly and delayed in taking follow-up actions and giving her replies. Moreover, the PMA had often alerted stall tenants under complaint of oncoming inspections, calling into suspicion whether the PMA was harbouring those tenants. On the other hand, HD followed up on complaints against the complainant immediately, and directed the PMA to inspect her stall on a daily basis.

The Ombudsman's observations

585. The Office of The Ombudsman (the Office) considered it imperative for market stall tenants to exercise self-discipline, and show tolerance and respect to other tenants. If tenants always make and reciprocate complaints to harass each other, HD would have to deploy a lot of manpower and resources to handle complaints, and it would be difficult to foster an amicable business environment. HD should give advice and issue warnings where necessary. If the situation persisted, HD should consider denying lease renewal upon expiry of their tenancies.

586. After scrutinising relevant work records, the Office was satisfied that the PMA had conducted inspections and given replies to the complainant in a timely manner. There was also no evidence that HD or the PMA had condoned irregularities in other tenants' stalls as alleged.

587. While the PMA had not found any sale of commodities outside the scope of specified trade by the family concerned, it found that they had stored or displayed in their stalls goods and advertisement notices unrelated to the specified trade. The Office opined that HD should not allow tenants to place unrelated articles at their stalls, since the original intent of restrictions imposed on inventory should regulate against storing or displaying unrelated articles, in addition to limiting stock of trade goods.

588. The Ombudsman considered this complaint unsubstantiated, but recommended that HD consider imposing control over the storage or display of goods and other articles unrelated to the specified trade of market stalls.

Government's response

589. HD accepted The Ombudsman's recommendation. HD has enhanced the relevant standard terms in the tenancy agreement of market stalls, and has revised the guidelines in relevant Estate Management Division Instructions for implementation.

Housing Department

Case No. 2015/4608 – Mishandling complaints against the complainant as an operator of a market stall

Background

590. The complainant was a tenant in a market (the Market) under the Housing Department (HD) and she operated a fruit shop. HD had contracted the day-to-day management of the Market to a property management agent (the PMA), which would routinely patrol the Market and conduct special inspections to investigate allegations of tenancy condition violation.

591. To ensure that goods offered by markets can serve the needs of residents, HD's tenancy agreement for market stalls specifies the nature of the trade. The agreement also stipulates that tenants should not use their stalls for storage of goods other than a reasonable level of stock for their business.

592. The complainant claimed that a certain family (the Family), out of personal grudge, repeatedly lodged complaints with HD since June 2014 against her, alleging that she conducted business and had meals outside the specified area of her stall. In response to these complaints, HD conducted surprise inspections and took photos of her stall. Though she was not found to have breached any regulations, photos were taken of her stall several times a day, seriously affecting her business. The complainant thought that HD deliberately picked on her.

593. On the other hand, the complainant filed a complaint with HD at the end of 2014 against the Family for breaching the tenancy conditions. She alleged that the Family was selling paper offerings and displaying Buddhist altars at their stalls, and HD would only inspect their stalls after giving prior notice to the family. The Family was allowed to take away or cover the unauthorised articles before photos were taken during inspections. Eventually, HD replied that no irregularities were found at the Family's stalls after investigation.

594. The complainant therefore filed a complaint with the Office of The Ombudsman (the Office) against HD for mishandling complaints about alleged irregularities of market stalls, and alleged that HD victimised her and harboured the Family.

The Ombudsman's observations

595. The Office scrutinised relevant work records and was satisfied that the PMA, apart from conducting daily routine patrols, had also carried out follow-up actions upon receipt of complaints. There was no evidence that the PMA had condoned any alleged offending tenants. Furthermore, it was the duty of the PMA to take photos while conducting routine patrols and special inspections, the PMA did not single out the complainant to treat her unfairly.

596. Although the Family was not found to be selling goods outside the scope of specified trade during the PMA's inspections of their stalls, goods unrelated to the specified trade, however, were found displayed at the stalls. The Office opined that HD should not allow tenants to place unrelated articles at their stalls, since the original intent of restrictions imposed on inventory should regulate against storing or displaying unrelated articles, in addition to limiting stock of trade goods.

597. There was no evidence that HD had picked on the complainant, or it had failed to follow up on the complainant's complaint or had harboured the Family. Therefore, The Ombudsman considered the complaint unsubstantiated. However, The Ombudsman recommended that HD consider imposing control over the storage of goods and articles unrelated to the business of the stalls

Government's response

598. HD accepted The Ombudsman's recommendation. HD has enhanced the relevant standard terms in the tenancy agreement of market stalls, and has revised the guidelines in the Estate Management Division Instructions for implementation.

Housing Department

Case No. 2016/0079(I) – (1) Failing to provide proper assistance to the complainant in respect of her claim for compensation and poor attitude of staff; and (2) reneging on its promise to release information relating to her claim

Background

599. The complainant alleged that flush water pipe replacement works carried out by HD's outsourced contractor had caused a flood in her flat in a public rental housing estate (the Estate), drenching her furniture, electrical appliances, piano, etc., but HD staff failed to render proper assistance in respect of her claim for compensation, and their attitude was poor and evasive (allegation (a)). Furthermore, the complainant made a number of requests to HD for information relating to her claim (such as incident reports, works records, photographs and so on), HD had agreed verbally, but later reneged on its verbal agreement to release such information (allegation (b)).

The Ombudsman's observations

Allegation (a)

600. Since HD and the property management agency of the Estate (the PMA) had kept in touch with the complainant in writing, and met with her a number of times, the Office of The Ombudsman (the Office) did not find HD's attitude evasive. Regarding the allegation of poor attitude, the account given by HD was different from that of the complainant. In the absence of corroborative evidence, it was difficult for the Office to comment on the attitude of HD staff.

601. However, the Office found deficiencies on the part of HD in handling the complainant's claim. Back in August 2009, the Office published a Direct Investigation Report "Handling of Complaints Involving Claims" (the Report) on HD. The investigation concluded that it was inappropriate and inadequate for HD to solely rely on loss adjusters' investigation in determining compensation. A number of recommendations were made in the Report, which included reminding staff to conduct parallel investigations of complaints, while investigations

were being conducted by loss adjusters, to get at the root cause(s) of the problem and to improve as appropriate, as well as providing information or other forms of assistance to claimants in need. At the time, HD accepted all of The Ombudsman's recommendations.

602. In the present case, HD claimed that a parallel investigation had been conducted after the water seepage incident. However, upon further enquiry by the Office, HD admitted that it was only after the Office had intervened that the District Maintenance Office responsible for the investigation was instructed to prepare the relevant report in May 2016. This casted doubt on whether the investigation was conducted properly and whether HD had diligently scrutinised the loss adjuster's conclusion against its own findings.

603. In addition, while HD should have been aware of certain disagreements between the contractor and the loss adjuster's conclusion of the investigation, HD did not actively intervene convening a case review meeting between all parties until October 2015, which indicated that HD had neither identified the root cause(s) of the problem in a timely manner, nor addressed possible deficiencies in the loss adjuster's investigation at the earliest opportunity. HD also adopted a passive approach in following the loss adjuster's advice to refuse disclosure of certain information to the complainant.

604. The Office was of the view that HD, as the owner and management authority of the communal facilities in the Estate, had the obligation to ensure that the complainant's claim would be handled properly. Although HD had kept in touch with the complainant and provided most of the information she requested, HD failed to conscientiously conduct a parallel investigation, and to intervene and resolve deficiencies in the loss adjuster's investigation, prolonging the complainant's grievance unnecessarily. The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

605. The complainant alleged that HD had reneged on its verbal agreement to release a document, while having fulfilled all other requests for information from the complainant. According to HD, the office staff at the time had not made any promise that the related document would be provided to her; they told the complainant that the document could only be released with the consent of the meeting participants. In the absence of corroborative evidence, the Office had no way to verify the actual

conversation at the time, and thus had difficulties in ascertaining whether the complainant's allegation of "reneging on the verbal agreement" against HD staff was true. The Ombudsman considered allegation (b) inconclusive.

606. The Ombudsman considered this complaint partially substantiated, and found other inadequacies on HD's parts. The Ombudsman recommended that HD –

(a) step up staff training to ensure that they strictly comply with the provisions of the Code on Access to Information (the Code) and the Guidelines on Interpretation and Application;

(b) remind its staff of the need for parallel investigation of complaints with diligence to identify the root causes of problems and make rectifications as appropriate, even after the relevant claims have been referred to loss adjusters for processing; and

(c) review and strengthen the procedures for monitoring claims handled by the loss adjuster, and avoid over-reliance on the loss adjuster's advice.

Government's response

607. HD accepted The Ombudsman's recommendations, and has taken the following follow-up actions.

608. For recommendation (a), HD has stepped up staff training, and, at the same time, issued a General Circular to its staff, reminding them that upon any requests for information (including those without making specific reference to the Code), they should take appropriate actions in accordance with the provisions of the Code and the Guidelines on Interpretation and Application.

609. For recommendation (b), HD issued an Estate Management Division Instruction (the EMDI) on 16 November 2016. Officers handling compensation claims are instructed to conduct their own independent case investigations. To prevent the recurrence of similar incidents, they are also advised to maintain records of investigations, in a bid to identify the cause(s) of the incident and examine appropriate improvement measures.

610. For recommendation (c), as stipulated in the relevant paragraphs of the EMDI, apart from monitoring the work progress of loss adjusters, officers handling the compensation claims should report to the Risk Management Unit (RMU) and the Public Liability Insurance (PLI) Claims Review Sub-group via the representative(s) of the respective regions in case they find the performance or work progress of loss adjusters falling short of their performance pledges to HD, so that proper follow-up actions can be taken by RMU or PLI Claims Review Sub-group. In addition, it is also pointed out in the EMDI that if the preliminary investigation results indicate that the problem possibly involves other stakeholders (e.g. maintenance contractors), HD should proactively clarify the investigation findings with stakeholders concerned before responding to the complainants.

Housing Department

Case No. 2016/0117(I) – Unreasonably refusing to provide information about the actual rents and rental increases of some factory units

Background

611. The complainant was a tenant of a factory estate (the Factory) managed by the Housing Department (HD). In July 2015, he was notified by HD that the rent of his unit would be increased. Dissatisfied with the increase rate, he requested, via a letter by a Legislative Councillor to HD, that the rent be reduced. However, HD decided to uphold the decision subsequent to a review. On 23 October, the complainant wrote to HD requesting an explanation on how the rent was determined.

612. On 12 November, HD replied that in assessing the prevailing market rents, it would make reference to the rental information of similar factory premises at the time of tenancy renewal, taking into account various factors affecting the rental value of the factory premises, such as the location and age of the property, traffic conditions in the vicinity, quality of the building, size and floor level of the unit, floor loading and ceiling height. In addition, HD also made proper adjustments taking into consideration Hong Kong's overall economic situation and the current trends in the rental market of industrial buildings when determining the rental value.

613. On 18 November, the complainant wrote another letter to HD requesting further rental information on the Factory, and asked HD to explain how the relevant calculation was made. On 3 December, HD replied that it had already explained how the rent was assessed in an earlier reply. As for the rental adjustment information of other units requested by the complainant, HD could not release such data as they were HD's "internal information".

614. The complainant was dissatisfied with the reason given by HD for refusing to disclose the information. He therefore filed a complaint with the Office of The Ombudsman (the Office) against HD for refusing to provide the rental information of the Factory, in contravention of the Code on Access to Information (the Code).

The Ombudsman's observations

Unreasonably refusing to disclose the rental information

615. Although "internal information" was the reason HD gave to the complainant, HD later explained to the Office that their justification was actually based on para. 2.14(a) of the Code, which provides for withholding information due to it being "third party information".

616. The Office obtained legal advice that because the rates of rent increases of the factory units were determined by HD, HD was the owner and holder of such information, the information was not held nor can it be provided by the tenants (the third party). Even though HD might have negotiated with individual tenants on the rates of rent increases and incorporated such information into the tenancy agreement, HD's right to own and make use of such information was not compromised, and the information should not be considered "third party information". The Office was of the view that HD improperly invoked paragraph 2.14(a) of the Code as the reason for refusing to disclose the percentages of rent increases and the data of the tenants concerned.

617. Moreover, HD explained withholding certain information on the grounds that it had already provided sufficient information for the purpose of settling the complainant's concern. This contravened the stipulation in paragraphs 1.9.2 and 1.10.2 of the Guidelines on Interpretation and Application of the Code (the Guidelines) that "the purpose of the request, or refusal to reveal the purpose on the part of the requestor, should not be a reason for withholding the information requested in part or in full." HD needed not speculate on the purpose behind the complainant's request, and should not unilaterally decide whether certain information can fulfil such purpose. The Office deemed HD's actions contradictory to the spirit of the Code.

618. The Factory is a public resource and its vacant units are leased by open tender. The rents set for successful bids are announced on the spot to ensure fairness and impartiality, as well as to safeguard the Government's revenue. Upon the expiry of the tenancies, the rents will be assessed and adjusted by HD based on the prevailing market rents. By checking the Factory's rental terms against the market rents, tenants and the general public can monitor HD's assessment. Therefore, it is in the interest of the public and in line with public expectation to disclose the rental information.

619. HD failed to explain why it had to keep the relevant information confidential. Although it appears to be usual HD practice to refuse disclosure of information on rents or rates of rent increases to persons other than the relevant tenants, this practice is improper in the first place and not a valid reason for withholding information. The Office opined that in addition to the disclosure of all rental information, HD should consider including a new term in tenancy agreements upon tenancy renewal to make it clear to tenants that HD may disclose details of rent adjustments.

Failing to reply to the complainant in accordance with the requirements of the Code

620. According to the Code, if departments have to refuse a non-Code request, they should give reasons for refusal in accordance with Part 2 of the Code, quoting the relevant paragraph number of the Code and inform the requestor of the review and complaint channels.

621. In this case, HD cited "internal information" as the reason for refusing the complainant's request in its reply on 3 December 2015, without referring and adhering to Part 2 of the Code. Neither did HD inform the complainant of the review and complaint channels. This was indeed improper. HD's understanding of the Code and its Guidelines was inadequate, and its grounds for refusing to release the information requested by the complainant were unjustified.

622. The Ombudsman considered this complaint substantiated, and recommended that HD –

(a) review the complainant's request for information in accordance with the Code, and fully disclose the relevant information to the complainant unless there is a justified and valid reason as stipulated in Part 2 of the Code to withhold it;

(b) consider including a new term in the tenancy agreement of the factory units which would allow HD to disclose details of the adjusted rents upon tenancy renewal; and

(c) actively implement measures to enhance the staff's knowledge of the Code and its Guidelines.

Government's response

623. HD accepted The Ombudsman's recommendations (a) and (c), and has taken the following actions in response.

624. For recommendation (a), HD has reviewed the complainant's request for information in accordance with the Code and dealt with the complainant's request according to the Code's specific criteria.

625. For recommendation (c), HD has stepped up relevant training, including circulating the related circulars/guidelines periodically and organising seminars, etc., so that HD staff can fully understand and properly follow the requirements of the Code.

626. HD did not accept The Ombudsman's recommendation (b). At present, the public can make requests for information to HD under the Code. HD will determine whether to accede to or refuse such requests according to the provisions of the Code. HD will handle any requests for information based on the facts of individual cases in accordance with the Code and does not consider that there is a need to include a special term in the tenancy agreement upon tenancy renewal. The Ombudsman has noted HD's above stance.

Information Services Department

Case No. 2016/1692 – Unreasonably denying an online media organisation access to cover Government press conferences and briefings

Background

627. The complainant is an online media organisation that publishes a monthly periodical (Periodical A) on the Internet. After repeatedly being denied access to cover press conferences hosted by Government officials at different levels, the complainant asked the Information Services Department (ISD) for an explanation. ISD replied that it was not possible to admit journalists of all mass news media organisations, including registered printed and broadcasting media and news agencies, for on-the-spot reporting. Moreover, given that the online media organisation in question belongs to the new media, and there was as yet no universally accepted or clear definition of new media, it was difficult for ISD to distinguish which new media organisations belong to the category of "mass news media organisations" that were admitted.

628. In the complainant's view, Periodical A is a registered publication that fits the definition of news reporting media. It was, therefore, unfair that ISD should refuse the complainant's requests for on-the-spot news reporting. Besides, online media have become increasingly popular. It was unreasonable for ISD to deny new media across the board a proper avenue to cover Government news.

The Ombudsman's observations

629. ISD issues press releases and invitations to press conferences through its Government News and Media Information System (GNMIS). However, even organisations registered under the Registration of Local Newspapers Ordinance do not automatically become GNMIS users. GNMIS users must be "mass news media organisations", such as newspapers, radio and television stations and news agencies, engaged mainly in current news reporting.

630. The public’s right to freedom of the press should always be upheld. The Office of The Ombudsman (the Office) considered that any control and restrictions imposed by ISD on any media have to be justifiable, and their scope and magnitude should not exceed what are necessary.

631. According to ISD, the justifications or legitimate purpose for imposing restrictions on media reporting are to avoid overcrowding the venue, which would disrupt the proceedings, and to satisfy security requirements and maintain order in the venue. When needs arose, ISD would adopt the press mode of pool coverage, or limit the number of journalists from “mass news media organisations” permitted on site, even if they had received invitations via GNMIS.

632. Nevertheless, the Office noticed that ISD would reject all requests for on-the-spot reporting by organisations other than “mass news media organisations”, irrespective of the venue size and level of security risks. Such restriction was clearly excessive. In the Office’s view, even though some organisations might have previous records of disrupting order in venues, ISD should not across the boards reject all requests from organisations other than “mass news media organisations”.

633. Furthermore, ISD did not have a clear set of criteria or any mechanism to determine whether an organisation engages mainly in current news reporting. ISD only stated that it would take into account various factors when deciding whether an organisation can become a GNMIS user. This is far from ideal. The media industry and the public are not clear on the requirements for registration as a GNMIS user. ISD staff members themselves would not know what factors should be taken into account when there are no internal guidelines to follow.

634. At the LegCo meeting on 22 January 2014, the Government indicated that it would discuss with the media industry the formulation of a new set of criteria for GNMIS subscription. It also undertook to closely monitor the advancement of information technology and changes in the media industry. However, there was no progress afterwards. The Office considered that ISD should keep up with the times and should not continue to reject all new media organisations.

635. The Ombudsman considered this complaint substantiated and recommended that ISD –

(a) enhance the transparency and currency of its policy, review quickly its policy of denying all online media organisations that are not associated with the traditional "mass news media organisations" the access for on-the-spot news reporting;

(b) review and relax the requirements for registration as GNMIS users as far as possible and draw up relevant work guidelines for its staff and media organisations to follow; and

(c) before completion of the above reviews, be more flexible in dealing with requests from individual media organisations to carry out news reporting, wherever the venue and security conditions permit.

Government's response

636. ISD has accepted The Ombudsman's recommendations (a) and (b). ISD has conducted a comprehensive review on the arrangements for the admission of media (including online-only media) to press areas and the criteria for registration as a GNMIS user.

637. ISD has adopted an open and inclusive approach in conducting the review, making reference to the practices of LegCo, international organisations and other economies. Since October 2016, LegCo has allowed journalists of online-only media equal access as traditional media to the LegCo Complex. In all the international organisations and economies that ISD has studied, online media (including online-only media) are generally granted access to media events or meetings, although some organisations have imposed additional requirements for accreditation of online media. ISD has also exchanged views on the issue with five major industry organisations.

638. On 19 September 2017, the Chief Executive announced that following the completion of this review, ISD has put in place a registration mechanism to give online-only media access to Government press conferences and media events. In general, online-only media which are bona fide "mass news media organisations" whose principal business is the regular reporting of original news for dissemination to the general public can apply for registration with GNMIS to receive press releases and media invitations issued by the Government. As at 28 December 2017, 11 online-only media organisations have been

registered with GNMIS.

639. Regarding recommendation (b), a new set of guidelines and the application form for registration with GNMIS are now available in ISD's website. Separately, internal guidelines and procedures for processing GNMIS applications have been introduced. ISD officers have been briefed on the new arrangements.

640. ISD has not accepted recommendation (c), mainly because before the establishment of a set of objective criteria and applicable mechanism, it is difficult in practice to deal with requests from individual organisation flexibly as this may bring about complaints against unfair treatment. In any event, this recommendation has been overtaken by event since the Government has implemented the aforementioned new arrangements.

641. Since ISD has implemented new arrangements to allow qualified online-only media to cover Government press conferences and media events, The Ombudsman informed ISD on 6 November 2017 that their follow-up on this case had been completed.

Information Services Department

Case No. 2016/2126 – Unreasonably denying online media organisations access to cover Government press conferences and briefings

Background

642. The Information Services Department (ISD) issues press releases and invitations to press conferences through its Government News and Media Information System (GNMIS). However, even organisations registered under the Registration of Local Newspapers Ordinance do not automatically become GNMIS users. GNMIS users must be "mass news media organisations", such as newspapers, radio and television stations and news agencies, engaged mainly in current news reporting.

643. A media organisation (the complainant) alleged that under existing Government policy, journalists from online media are categorically barred from attending Government press events and have no access to GNMIS. The justifications given by ISD for denying online media representatives access for coverage of such activities were that –

(a) ISD normally allowed journalists of registered or licensed mass news media organisations to have access to Government press conferences or media events. However, owing to the overall circumstances including venue constraint, security needs and on-site order, it may not be possible for all registered media to enter into the reporting venues; and

(b) since there was as yet no statutory registration or licensing regime for "online media" and the society has no universal or clear definition of "online media", ISD is unable to differentiate within the wide range of online media in operation.

644. The complainant did not accept ISD's explanation and considered the Government's policy against digital-only news websites and journalists unfair for the following reasons –

(a) ISD's practice infringed upon press freedom as protected by the Basic Law. Even if representatives of online media could produce press cards issued by the Hong Kong Journalists

Association, ISD had time and again denied them entry to cover press conferences and briefings hosted by the Government, including the Legislative Council (LegCo) New Territories East geographical constituency by-election and a press briefing by the Chief Executive;

(b) dissemination of information via the Internet has become increasingly popular, but ISD has ignored the trend and still refused, without justifications, to let online media have access to Government events;

(c) contrary to the Government's claim that it is difficult to define digital-only media and journalists, the Hong Kong Journalists Association, the Hong Kong Press Photographers Association, the LegCo and various multinational institutions such as the European Commission have clear criteria for accrediting digital-only media and journalists; and

(d) despite repeated appeals by the complainant, affected news organisations and legislators, ISD has not made an effort to address the problem, nor has it tried to work out a solution with the Industry.

The Ombudsman's observations

645. It is the view of the Office of The Ombudsman (the Office) that the operation of ISD's GNMIS should be in line with the Government's policy on news dissemination. Any regulation and restriction imposed by ISD on the media should serve a legitimate purpose, with scope and magnitude not exceeding what is necessary to achieve the purpose.

646. According to ISD, the justifications or legitimate purpose for imposing restrictions on media reporting are to avoid overcrowding the venue, which would disrupt the proceedings, and to satisfy security requirements and maintain order in the venue. When needs arose, ISD would adopt the press mode of pool coverage, or limit the number of journalists from "mass news media organisations" permitted on site, even if they had received invitations via GNMIS.

647. Nevertheless, the Office noticed that ISD would reject all requests for on-the-spot reporting by organisations other than "mass news media organisations", irrespective of the venue size and level of security

risks. Such restriction was clearly excessive. In the Office's view, even though some organisations might have previous records of disrupting order in venues, ISD should not across the boards reject all requests from organisations other than "mass news media organisations".

648. Furthermore, ISD did not have a clear set of criteria or any mechanism to determine whether an organisation engages mainly in current news reporting. ISD only stated that it would take into account various factors when deciding whether an organisation can become a GNMIS user. This is far from ideal. The media industry and the public are not clear on the requirements for registration as a GNMIS user. ISD staff members themselves would not know what factors should be taken into account when there are no internal guidelines to follow.

649. At the LegCo meeting on 22 January 2014, the Government indicated that it would discuss with the media industry the formulation of a new set of criteria for GNMIS subscription. It also undertook to closely monitor the advancement of information technology and changes in the media industry. However, there was no progress afterwards. The Office considered that ISD should keep up with the times and should not continue to reject all new media organisations.

650. The Ombudsman considered this complaint substantiated and recommended that ISD –

(a) enhance the transparency and currency of its policy, review quickly its policy of denying all online media organisations that are not associated with the traditional "mass news media organisations" the access for on-the-spot news reporting;

(b) review and relax the requirements for registration as GNMIS users as far as possible and draw up relevant work guidelines for its staff and media organisations to follow; and

(c) before completion of the above reviews, be more flexible in dealing with requests from individual media organisations to carry out news reporting, wherever the venue and security conditions permit.

Government's response

651. ISD has accepted The Ombudsman's recommendations (a) and (b). ISD has conducted a comprehensive review on the arrangements for the admission of media (including online-only media) to press areas and the criteria for registration as a GNMIS user.

652. ISD has adopted an open and inclusive approach in conducting the review, making reference to the practices of LegCo, international organisations and other economies. Since October 2016, LegCo has allowed journalists of online-only media equal access as traditional media to the LegCo Complex. In all the international organisations and economies that ISD has studied, online media (including online-only media) are generally granted access to media events or meetings, although some organisations have imposed additional requirements for accreditation of online media. ISD has also exchanged views on the issue with five major industry organisations.

653. On 19 September 2017, the Chief Executive announced that following the completion of this review, ISD has put in place a registration mechanism to give online-only media access to Government press conferences and media events. In general, online-only media which are bona fide "mass news media organisations" whose principal business is the regular reporting of original news for dissemination to the general public can apply for registration with GNMIS to receive press releases and media invitations issued by the Government. As at 28 December 2017, 11 online-only media organisations have been registered with GNMIS.

654. Regarding recommendation (b), a new set of guidelines and the application form for registration with GNMIS are now available in ISD's website. Separately, internal guidelines and procedures for processing GNMIS applications have been introduced. ISD officers have been briefed on the new arrangements.

654. ISD has not accepted recommendation (c), mainly because before the establishment of a set of objective criteria and applicable mechanism, it is difficult in practice to deal with requests from individual organisation flexibly as this may bring about complaints against unfair treatment. In any event, this recommendation has been overtaken by event since the Government has implemented the aforementioned new arrangements.

656. Since ISD has implemented new arrangements to allow qualified online-only media to cover Government press conferences and media events, The Ombudsman informed ISD on 6 November 2017 that their follow-up on this case had been completed.

Information Services Department

Case No. 2016/2962 – Unreasonably denying online media organisations access to cover Government press conferences and briefings

Background

657. The Information Services Department (ISD) issues press releases and invitations to press conferences through its Government News and Media Information System (GNMIS). However, even organisations registered under the Registration of Local Newspapers Ordinance do not automatically become GNMIS users. GNMIS users must be "mass news media organisations", such as newspapers, radio and television stations and news agencies, engaged mainly in current news reporting.

658. The complainant is an online media organisation. Allegedly, the complainant had been denied entry to cover various Government press conferences and briefings since 2013. In particular, the complainant's journalists were denied access to the press area during the Legislative Council (LegCo) New Territories East geographical constituency by-election on 28 February 2016, despite that they could produce press cards issued by the Hong Kong Journalists Association.

659. The justifications given by ISD were that –

(a) ISD normally allowed journalists of registered or licensed mass news media organisations to have access to Government press conferences or media events. However, owing to the overall circumstances including venue constraint, security needs and on-site order, it may not be possible for all registered media to enter into the reporting venues; and

(b) since there was as yet no statutory registration or licensing regime for "online media" and the society has no universal or clear definition of "online media", ISD is unable to differentiate within the wide range of online media in operation.

660. The complainant was dissatisfied that ISD –

(a) ignored the fact that dissemination of information via the Internet by media organisations had become increasingly popular, and unreasonably refused to grant the same reporting right to online media as the traditional and mainstream media; and

(b) rejected the complainant's application to be a subscriber of GNMIS on the ground that the use of GNMIS was confined to "newspapers, radio and television stations, news agencies and periodicals" only.

The Ombudsman's observations

661. It is the view of the Office of The Ombudsman (the Office) that the operation of ISD's GNMIS should be in line with the Government's policy on news dissemination. Any regulation and restriction imposed by ISD on the media should serve a legitimate purpose, with scope and magnitude not exceeding what is necessary to achieve the purpose.

662. According to ISD, the justifications or legitimate purpose for imposing restrictions on media reporting are to avoid overcrowding the venue, which would disrupt the proceedings, and to satisfy security requirements and maintain order in the venue. When needs arose, ISD would adopt the press mode of pool coverage, or limit the number of journalists from "mass news media organisations" permitted on site, even if they had received invitations via GNMIS.

663. Nevertheless, the Office noticed that ISD would reject all requests for on-the-spot reporting by organisations other than "mass news media organisations", irrespective of the venue size and level of security risks. Such restriction was clearly excessive. In the Office's view, even though some organisations might have previous records of disrupting order in venues, ISD should not across the boards reject all requests from organisations other than "mass news media organisations".

664. Furthermore, ISD did not have a clear set of criteria or any mechanism to determine whether an organisation engages mainly in current news reporting. ISD only stated that it would take into account various factors when deciding whether an organisation can become a GNMIS user. This is far from ideal. The media industry and the public

are not clear on the requirements for registration as a GNMIS user. ISD staff members themselves would not know what factors should be taken into account when there are no internal guidelines to follow.

665. At the LegCo meeting on 22 January 2014, the Government indicated that it would discuss with the media industry the formulation of a new set of criteria for GNMIS subscription. It also undertook to closely monitor the advancement of information technology and changes in the media industry. However, there was no progress afterwards. The Office considered that ISD should keep up with the times and should not continue to reject all new media organisations.

666. The Ombudsman considered this complaint substantiated and recommended that ISD –

(a) enhance the transparency and currency of its policy, review quickly its policy of denying all online media organisations that are not associated with the traditional "mass news media organisations" the access for on-the-spot news reporting;

(b) review and relax the requirements for registration as GNMIS users as far as possible and draw up relevant work guidelines for its staff and media organisations to follow; and

(c) before completion of the above reviews, be more flexible in dealing with requests from individual media organisations to carry out news reporting, wherever the venue and security conditions permit.

Government's response

667. ISD has accepted The Ombudsman's recommendations (a) and (b). ISD has conducted a comprehensive review on the arrangements for the admission of media (including online-only media) to press areas and the criteria for registration as a GNMIS user.

668. ISD has adopted an open and inclusive approach in conducting the review, making reference to the practices of LegCo, international organisations and other economies. Since October 2016, LegCo has allowed journalists of online-only media equal access as traditional media to the LegCo Complex. In all the international organisations and economies that ISD has studied, online media (including online-only

media) are generally granted access to media events or meetings, although some organisations have imposed additional requirements for accreditation of online media. ISD has also exchanged views on the issue with five major industry organisations.

669. On 19 September 2017, the Chief Executive announced that following the completion of this review, ISD has put in place a registration mechanism to give online-only media access to Government press conferences and media events. In general, online-only media which are bona fide "mass news media organisations" whose principal business is the regular reporting of original news for dissemination to the general public can apply for registration with GNMIS to receive press releases and media invitations issued by the Government. As at 28 December 2017, 11 online-only media organisations have been registered with GNMIS.

670. Regarding recommendation (b), a new set of guidelines and the application form for registration with GNMIS are now available in ISD's website. Separately, internal guidelines and procedures for processing GNMIS applications have been introduced. ISD officers have been briefed on the new arrangements.

671. ISD has not accepted recommendation (c), mainly because before the establishment of a set of objective criteria and applicable mechanism, it is difficult in practice to deal with requests from individual organisation flexibly as this may bring about complaints against unfair treatment. In any event, this recommendation has been overtaken by event since the Government has implemented the aforementioned new arrangements.

672. Since ISD has implemented new arrangements to allow qualified online-only media to cover Government press conferences and media events, The Ombudsman informed ISD on 6 November 2017 that their follow-up on this case had been completed.

Labour Department

Case No. 2016/3528 – (1) Failing to notify the complainant that his application for Work Incentive Transport Subsidy had been randomly selected for investigation; and (2) failing to pay the subsidy during the application investigation stage

Background

673. According to the complainant, he submitted application to the Labour Department (LD) for the Work Incentive Transport Subsidy (WITS) on 16 August 2016. The Work Incentive Transport Subsidy Division (WITSD) of LD issued an "Acknowledgement of Application" to him on 22 August 2016. As the complainant had not yet received WITS as at 9 September 2016, he enquired with WITSD by phone. WITSD replied that his case had been randomly selected for investigation and it was expected that WITS would be disbursed to him in one or two months' time. The complainant alleged that WITSD –

(a) did not informed him in a timely manner by phone or in writing that his case had been randomly selected for investigation and that the disbursement of WITS would be deferred; and

(b) disregarded his financial needs by not disbursing WITS to him during the investigation of his application.

The Ombudsman's observations

Allegation (a)

674. It should be within reasonable expectation of WITS applicants to be granted the subsidy as soon as possible to relieve their burden of travelling expenses on commuting to and from work. Under the current mechanism, if an application was randomly selected for investigation, the disbursement of WITS to the applicant would be deferred without being given timely notice. This would unnecessarily trouble the applicant. The Ombudsman, therefore, considered allegation (a) substantiated.

675. The Office of The Ombudsman (the Office) was pleased to know that LD has implemented improvement measures to notify in writing such

applicants whose applications have been selected for random investigation.

Allegation (b)

676. The Office considered it understandable for LD to follow the established procedures to process WITS applications prudently. However, the deferred disbursement of WITS to applicants due to random investigation went against the intent of providing prompt relief to applicants. Besides, in certain circumstances where the information provided by applicants randomly selected for investigation was complete and there were no other queries, they were still not granted WITS in the same manner as other applicants. This was not in line with the principle of fairness.

677. Applicants who made false statements or concealed information should be held criminally liable, but it should be sufficient to reduce any possible abuse of the WITS Scheme if LD could conduct in-depth investigation to verify the information provided by applicants. According to LD's records, the number of cases where applicants were found to have made false statements or concealed information during random investigation was very small. The Office therefore considered that even if WITS was disbursed to applicants before the completion of random investigation, the possibility of LD having to recover the disbursed WITS should not be high. The Ombudsman considered allegation (b) partially substantiated.

678. The Ombudsman considered this complaint against LD partially substantiated and recommended that LD should consider revising the application processing procedures to disburse WITS to applicants before the completion of random investigation in order to relieve their financial difficulties.

Government's response

679. LD accepted The Ombudsman's recommendation.

680. After consulting the Audit Commission, Treasury and Independent Commission Against Corruption, LD has implemented The Ombudsman's recommendation to disburse WITS to applicants before the completion of random investigation with effect from 19 June 2017.

Lands Department

Case No. 2015/4502B – Delay in handling the irregularities of a squatter hut and ineffective control against the obstruction problem caused by its occupier

Background

681. According to the complainant, there was a passageway (the Passageway) of about a metre wide, which was a piece of government land, between her house and the adjacent house (the House). Since early 2015, the occupier (the Occupier) of the House had committed a number of irregularities on the Passageway, including –

(a) erecting a canopy (the Canopy) to enclose the area above the Passageway, blocking sunlight to the complainant's house;

(b) blocking one end of the Passageway with a metal sheet (the Metal Sheet) connected to the Canopy, resulting in poor ventilation;

(c) connecting water pipes and gas installations, etc. behind the Metal Sheet unlawfully; and

(d) occupying the Passageway by placing household sundries and drying clothes there.

682. The complainant complained to the Squatter Control Office (SCO) of the Lands Department (LandsD) about irregularities (a), (b) and (c), but SCO did not take any follow-up action for months; not until the complainant complained to the Director of Lands in June 2015 did SCO require that the Metal Sheet be converted into a door to ensure ventilation. However, the Occupier only cut an opening in the Metal Sheet. SCO indicated that as the Metal Sheet itself was not a structure and the Passageway enclosed on one end did not cause any obstruction to the residents, no control action would be taken against the irregularities.

683. As for irregularity (d), the complainant had complained to FEHD. FEHD deployed staff to inspect the site and discovered that a metal gate (the Gate) that can be locked has been installed at the entrance to the Passageway; FEHD considered that the enclosed Passageway had become

an unauthorised building works. Irregularity (d) was thus a problem of unlawful occupation of Government land by "unmovable" objects and should be referred to LandsD for follow-up action.

684. However, LandsD considered that irregularity (d) was beyond SCO's purview and should be followed up by the Environmental Protection Department (EPD) instead. EPD replied that it focused its resources on construction waste disposal and issues concerning disposal of household sundries and waste should be followed up by FEHD.

685. In November 2015, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against LandsD and FEHD for failing to handle the complaint properly, resulting in the persistence of the irregularities.

The Ombudsman's observations

Irregularities (a) and (b)

686. LandsD first received the complainant's complaint on 10 June 2015 and referred it to SCO for follow-up actions. Between June and July 2015, SCO found the Canopy and the Metal Sheet during inspection. There was a nullah adjoining a slope behind the Metal Sheet. Subsequently, SCO learned from the Occupier and the local District Council member(s) that the local residents supported the retention of the Canopy and the Metal Sheet as they considered that the Canopy protected them from inclement weather whereas the Metal Sheet prevented anyone from falling into the above-mentioned nullah and kept snakes and vermin away. The Occupier agreed to remove the top part of the Metal Sheet to facilitate ventilation and light penetration.

687. In September 2015, SCO conducted another inspection and found that the top part of the Metal Sheet had been removed. On 29 October 2015, SCO informed the complainant in writing of the outcome of its follow-up actions and indicated that as the Metal Sheet was neither a structure nor an obstruction of access, SCO did not intend to take any further action for the time being.

688. LandsD considered that SCO had duly followed up on the complainant's complaint about irregularities (a) and (b) in accordance with the existing policies having regard to the practical needs of the residents and the views of the locals.

689. For irregularity (a), the Office considered that SCO learned about the existence of the Canopy as early as in June 2015, but SCO procrastinated over checking whether the Canopy matched the Squatter Survey Records to confirm if the Canopy or even the House would still be “tolerated”. Not until the Office had initiated an investigation into the case did SCO approach the Survey and Mapping Office, also under LandsD, in December 2015 to check the aerial photos. The Office considered that SCO was not proactive in taking follow-up actions.

690. For irregularity (b), the Office considered that it was not entirely groundless for SCO to regard the Metal Sheet as a safety measure rather than an obstruction of access; the suggestion made by SCO to the District Office of the district (DO) in December 2015 for the latter’s consideration of replacing the Metal Sheet with permanent safety installations at the location concerned was also worth exploring. However, SCO did not act upon the complaint until six months after receipt, and after the Office had initiated an investigation into the case. There was indeed a delay.

Irregularities (c) and (d)

691. LandsD clarified that neither LandsD nor SCO had received complaints on irregularities (c) and (d).

692. Having learnt of irregularity (c) from the Office, LandsD referred the case to the Water Supplies Department and Electrical and Mechanical Services Department in December 2015 for follow-up under their respective purview. The Office considered LandsD’S action appropriate.

693. As for irregularity (d), the Office agreed with FEHD that there is suspected unlawful occupation of Government land for private use. Since FEHD did not find any environmental hygiene issue during its investigations, it was appropriate for the case to be referred to LandsD.

694. The Ombudsman considered the complainant’s complaint against LandsD partially substantiated and that against FEHD unsubstantiated. The Ombudsman urged LandsD to –

(a) closely follow up on the condition of the Canopy and take prompt enforcement actions in accordance with the existing policies if the Canopy had not been reverted to the original state as required by SCO;

(b) take land control actions regarding the Gate as soon as possible; and

(c) closely follow up with DO on whether the Metal Sheet can be replaced with permanent safety installations.

Government's response

695. LandsD accepted all of The Ombudsman's recommendations.

696. In April 2016, SCO issued a letter to the Occupier requiring that the size of the Canopy be reverted to its original state in 1982. Subsequent inspection by SCO staff confirmed that the irregularities had been purged and no further irregularities were identified.

697. The concerned District Lands Office (DLO) under LandsD removed the Gate in June 2016. DLO staff conducted site inspection again on 17 September and 10 October 2016, and no metal gate was found erected at the location concerned.

698. SCO had requested the DO of the district to consider converting the Metal Sheet into permanent safety installations. DO finally decided that as no such suggestion had been received from the District Council or the persons concerned, it would not take any follow up action in that regard. Given that the metal sheet constituted illegal occupation of government land, on 31 October 2016, SCO removed the Metal Sheet and put up a sign at the site warning against fly tipping on, illegal excavation on and occupation of government land. In its memo of 1 November 2016, SCO also advised DO of the latest position so that DO would consider the need for any other follow-up actions.

Lands Department and Planning Department

Case No. 2016/0471A&B – Ineffective control against the unauthorised development on a private land lot

Background

699. The complainant had previously complained to the Office of The Ombudsman (the Office) in November 2012 and August 2013 that the Lands Department (LandsD) and the Buildings Department (BD) had been ineffective in their enforcement actions against an unauthorised structure (Structure A) on a private land lot (the Lot). In March and November 2013, the Office informed the complainant in writing of the findings of its respective inquiries, including that –

(a) the Lot was an Old Scheduled Agricultural Lot upon which erection of structures without approval was not permitted, and doing so would be a breach of lease conditions;

(b) a District Lands Office (DLO) of LandsD confirmed that Structure A was an unauthorised structure in breach of lease conditions. In January 2013, DLO issued a warning letter (Warning Letter I) requiring the Lot's owner to rectify the breach of lease before a prescribed deadline. As the owner failed to do so, Warning Letter I was sent to the Land Registry for registration (commonly known as "imposing an encumbrance");

(c) four inspections conducted by BD and its consultant between October 2012 and June 2013 revealed that Structure A was neither newly erected nor constituted an obvious danger. Therefore it did not fall into the category of "actionable" unauthorised building works warranting priority action under established enforcement policy of BD; and

(d) the Office was of the view that DLO's follow-up actions were appropriate in general. BD had also handled the case according to its established enforcement policy.

700. In a new complaint to the Office in February 2016, the complainant alleged that in the past few years, in addition to complaining repeatedly to DLO and BD about Structure A, he had also complained to

the Planning Department (PlanD) about the illegal change in land use of the Lot for storage of containers and construction materials (the subject use). He criticised DLO, BD and PlanD for shirking responsibility and failing to take any enforcement actions, resulting in the continued existence of the land use irregularities.

The Ombudsman's observations

LandsD

701. LandsD indicated that after imposing an encumbrance on the Lot in February 2013, DLO conducted over ten inspections from January 2014 to March 2016 to monitor the lease breaches in the Lot. During an inspection on 21 January 2014, a new structure converted from a small container (Structure B) was identified on the Lot. However, the lease-breaching condition in general showed no signs of worsening.

702. DLO had reviewed the need for according priority to re-enter the Lot according to the existing mechanism. DLO decided not to take further action on this case and instead focus its resources on handling other more serious cases of a higher priority and with an encumbrance imposed, having regard to its observations, BD's advice that the structures posed no obvious danger and the Environmental Protection Department's advice that the Lot had no environmental pollution problem.

703. In June 2016, on learning from the Land Registry that the Lot was carved out into five sections in May 2015 and that Structure B fell on two of the sections, DLO again issued a warning letter (Warning Letter II), requiring the owners of the five sections to purge the breach as detailed in Warning Letter I before the specified deadline. In the warning letter issued to the owners of the Lot, DLO pointed out that Structure B was in breach of lease conditions. As the breach persisted after the specified deadline, DLO registered Warning Letter II in the Land Registry, imposing an encumbrance on the Lot for a second time.

704. Since imposing an encumbrance on the Lot in early 2013, DLO has not accorded priority to re-enter the Lot. The Office deemed DLO's justifications acceptable, especially as DLO issued Warning Letter II and imposed another encumbrance in the meantime.

705. However, the Office also considered that DLO, after learning from BD the existence of Structure B, should have taken enforcement actions from the perspective of breach of lease conditions. DLO only repeatedly requested that BD take priority enforcement action against the unauthorised structures, without taking any lease enforcement actions against Structure B. Not until the Office initiated its investigation did DLO issue Warning Letter II to require the land owners to rectify the breach in Structure B; it had been 28 months since DLO noted its existence. The Office considered that DLO had not been proactive in following up on Structure B and clearly failed to meet public expectation.

PlanD

706. By making reference to aerial photos taken on 19 June 1993 (i.e. the day immediately following the first publication in the Gazette of the notice of the relevant draft development permission area plan), PlanD considered that the subject use had been in existence before gazettal of the relevant statutory plan and could be regarded as an "existing use" under the Town Planning Ordinance (i.e. a use of a building or land that was in existence immediately before the publication in the Gazette of notice of the draft plan of the development permission area). For this reason, PlanD did not take enforcement action.

707. The Office queried whether those photos taken on the day after gazettal were sufficient to prove that the subject use had been in existence before the gazettal of the plan. After all, it was not impossible to convert the use of the Lot to the subject use within the day after the gazettal date. However, the Office understood that PlanD had been unable to take enforcement action as it could not prove that the subject use was not an "existing use" before the gazettal date.

708. In conclusion, The Ombudsman considered the complaint against LandsD partially substantiated and that against PlanD unsubstantiated, and recommended that –

(a) LandsD and DLO should continue to monitor the Lot, and regularly review the priority of re-entering the Lot; and

(b) PlanD should further discuss with LandsD to ensure that the latter will, on the gazettal date, take photos as convincing evidence for proving whether a use is an "existing use" so as to prevent creating loopholes for malpractices after the gazettal.

Government's response

709. LandsD and PlanD accepted The Ombudsman's recommendations.

Recommendation (a)

710. Since the Warning Letters had been sent to the Land Registry for registration (i.e. encumbrance had been imposed), DLO had regularly conducted inspections to monitor the site situation of the Lot. The inspections revealed that the unauthorised structures on the Lot remained unchanged, and the overall breach of lease conditions showed no sign of deterioration. DLO will continue to closely monitor the latest situation of the Lot. In the meantime, DLO will regularly review the re-entry priority in accordance with the existing system.

711. Since stepping up its enforcement actions against unauthorised structures on private agricultural land from April 2014, LandsD, up to the end of September 2017, took enforcement actions against around 3 900 cases, of which 1 036 cases involving a total of 1 077 private agricultural lots have been completed. As at the end of September 2017, of the completed cases, 21 private agricultural lots were re-entered by LandsD under the Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap. 126) as the owners had not demolished the unauthorised structures despite repeated warnings; demolition works of all unauthorised structures on 1 027 private agricultural lots were undertaken by the owners themselves upon LandsD's enforcement actions; and demolition works of all unauthorised structures on another 29 lots were arranged by LandsD.

Recommendation (b)

712. PlanD has all along requested LandsD to take aerial photos on the date of the first gazettal of the development permission area plan as evidence for enforcement work. However, the task is subject to weather and other technical conditions. If LandsD is unable to properly complete the photo taking on the gazettal date due to weather and other technical difficulties, PlanD will accept a date closest to the gazettal date under permissible weather and other technical conditions.

713. In the light of the Office's recommendation, PlanD has met with LandsD to review the above established procedure. LandsD has stated that they would continue the well-established practice of taking aerial photos on the gazettal date of the statutory plan. However, if the weather is not permissible (e.g. rainy and foggy conditions) or other technical problems arise, LandsD would have to complete the aerial photo taking work on a date closest to the gazettal date as far as possible, having regard to the prevailing circumstances. PlanD will continue to coordinate and communicate with LandsD to ensure that the aerial photos are effectively taken to support PlanD's enforcement work.

Leisure and Cultural Services Department

Case No. 2015/4140(I) – Refusal to disclose the full text of a management deed

Background

714. In late September 2015, the complainant, citing the Code on Access to Information (the Code), requested Leisure and Cultural Services Department (LCSD) to provide the full text of the management deed (the Deed) it signed with a private organisation (Company A) concerning the management and maintenance of the Avenue of Stars (the Avenue). In reply, LCSD said that Company A did not agree to release the Deed to the complainant. It also cited various provisions of the Code, including sections 2.14(a), 2.16 and 2.18 to refuse her information request. The complainant was dissatisfied with LCSD's decision.

715. The Avenue is a tourism project designed and taken forward through a public-private partnership. In 2003, Company A agreed to make a donation and construct the Avenue. In the Deed it signed with LCSD, Company A agreed to manage and maintain the Avenue for 20 years at a nominal consideration of HK$1.

The Ombudsman's observations

716. Government departments should handle information requests on the premise that access should be granted. The Code should never be used as a device to obstruct release of information. After investigation and referring to legal advice and overseas documents and cases, the Office of The Ombudsman (the Office) had the following comments on LCSD's justifications for refusing to disclose the Deed.

Section 2.14(a) of the Code – Third Party Information

Whether the Information was Held for or Provided by a Third Party

717. Contracts signed between the Government and a third party should not normally be deemed information obtained from a third party. It was therefore inappropriate for LCSD to regard the Deed as information held for or provided by a third party.

718. Taking the Deed as a "work of joint authorship" by LCSD and Company A and applying the concept of copyright to refuse disclosure was farfetched. The Deed was very similar to the other general management service agreements LCSD had signed and its contents are hardly original. If LCSD insisted that the content could be reproduced or used only with the other party's consent because of shared copyright, then numerous other public business contracts had to be treated this way. That would not only defy common sense but also contradict the stance of the Government on other management service agreements. Besides, Company A never claimed copyright, while LCSD, contrary to the spirit of the Code, used it as a pretext to refuse disclosure of the information.

719. In fact, the provision about "public records" in the Copyright Ordinance (CO) stipulates that "for material communicated to the Government in the course of public business, the Government may for the purpose for which the work was communicated to it, or any related purpose which could reasonably have been anticipated by the copyright owner, copy the work, or issue or make available copies of the work to the public without infringing any copyright in the work". The Deed, drawn up specifically for the management of the Avenue, could not have been published before it was drawn up. Besides, the Deed, together with the set of technical plans (the Plan), met the definition of "public records". The Office considered it highly unlikely that the architectural firm which drew the Plans would have been unaware that they were for some purpose (i.e. management of public facilities on the Avenue) communicated to the Government.

720. Given the rising public expectation of the Government's accountability and transparency, disclosure of information by the Government in response to information requests should be a related purpose that a copyright owner would have reasonably anticipated. Making a copy of the Deed, therefore, would not constitute infringement of copyright. If LCSD was still unsure, it could really invite the complainant to its premises to inspect the document, or have the document read out to her by its staff. Such actions would not violate the CO.

Whether Company A was under an Explicit or Implicit Understanding that the Deed would not be Further Disclosed

721. The Deed contained no clause of confidentiality. Neither was there any record indicating that in the drafting process, Company A and

LCSD had reached a consensus or tacit understanding that its content should be kept confidential. If they ever had, such an important piece of information should have been put on Government record. A unilateral claim of confidentiality by the information provider was not sufficient.

722. Just like other general management service contracts, the Deed set out the rights and responsibilities of the Government and the service provider (Company A), but it was not clear how the disclosure or certain information of the Deed would affect fair competition between Company A and its rivals. This Office could not understand why the Deed was above disclosure. Furthermore, with rising public expectation of Government transparency and accountability, any third party entering into a joint-venture with the Government should have anticipated that the project would be subject to public scrutiny.

723. The Office did not agree with the Constitutional and Mainland Affairs Bureau's opinion *(i.e. the Code and its Guidelines on Interpretation and Application (the Guidelines) do not require the third party to provide proof of any harm it may sustain from disclosure of information before the information in question can be regarded as confidential. Unless the information in question has already been made public, for the information to remain confidential, and explicit or implicit understanding between the Government and the third party should suffice)*. Company A asserted that the Deed must be kept confidential. In such case, LCSD, as required by the Code, had a duty to assess whether the reasons for confidentiality were justifiable. An important basis for LCSD's assessment would be Company A's explanation on how disclosure of the Deed would cause it harm or benefit its competitors. All in all, as far as the Deed was concerned, there existed no explicit or implicit understanding that it should be treated as confidential, and LCSD did not have sufficient information or justifications that could support its treating the Deed as confidential.

Whether the Public Interest in Disclosure of the Information Outweighed any Harm or Prejudice that could Result

724. Section 2.14(a) of the Code aims to support the Government's disclosure of third party information where disclosure could have been refused based on an understanding about its confidentiality. As regards this case, such an understanding did not even exist, considerations about the public interest (or the harm that would result) could not be used to justify non-disclosure of the information.

725. Besides, LCSD adopted a very narrow interpretation of "public interests". The Code does not define public interests. Section 2.2.6 of the Guidelines further points out that perception about public interests changes with time, social environment and government policies. The coverage of public interests can be very wide. A more transparent and accountable government, for instance, could also be of public interest. The Government had commissioned the management of the Avenue to Company A years ago without a public tender. The fairness of the arrangement and whether resources had been properly used were issues of wide public concern. The public interest in disclosing the Deed could not be more obvious.

726. LCSD's argument on "transferal of benefits" also neglected the fact that benefits could be intangible (e.g. the Avenue would bestow reputation on Company A and enhance its advantage in property development). The fact that LCSD had repeatedly provided information to the public and the Legislative Council to answer public queries reflected that the public's worries about "transferal of benefits" were not completely groundless.

727. On the harm that could result to Company A if the requested information was disclosed, LCSD and Company A had never elaborated on how the disclosure of the Deed might cause it harm. As for LCSD's concern about the adverse effect to the Department, such as that Company A might refuse to cooperate, leading to difficulties in managing the Avenue, the Office considered such concerns were mere conjectures. Even if this happened, LCSD could rely on relevant clauses of the Deed to resolve the problem. On the risk of claim for breach of consensus in maintaining confidentiality, the Office considered that there was never such consensus in the first place. Besides, the Government could have used overriding public interests to defend the disclosure, and the claims of possible harm resulting from disclosure were without solid basis. As for the allegation that the disclosure might breach the confidence of the business community, the Office considered that such mutual trust should be built on clear contract terms and consensus.

728. In view of the above, the Office considered that, unless the Government had a better way to allay the public's worries about transferal of benefits, the public interest in disclosing the Deed outweighed the harm or prejudice to Company A or the Government that might result. Hence Section 2.14(a) could not be used as the basis for refusing disclosure of the Deed.

Section 2.16 of the Code – Business Affairs

729. Company A declared that details of the financial arrangements for the Avenue contained in the Deed were commercial secrets, the disclosure of which would bring it obvious harm. However, information on the financial arrangements was neutral in nature and Company A had publicly admitted to the long-term deficit incurred in managing the Avenue. The Office could not see how the disclosure of the relevant clauses could bring it actual harm. Notwithstanding, the Office agreed in principle that financial arrangements were sensitive business information. If Company A insisted that those financial arrangements should be kept confidential, LCSD could disclose its content with the relevant details redacted, instead of refusing to disclose the Deed outright.

Section 2.18 of the Code – Legal Restrictions

730. Section 2.18.5 of the Guidelines states that legal advice should be sought if it is proposed to withhold disclosure of information on ground of legal restrictions, and the requestor be informed of the relevant legal provisions. However, LCSD refused the complainant's information request without explaining to her how the disclosure would violate any laws applied in Hong Kong. It only mentioned the CO upon our inquiry and pointed out that the copyright owner was the architectural firm that drew the Plans. LCSD later said that the Plan's copyright owner was Company A instead.

731. The Plans were public records; regardless of who own the Plan's copyright, making a copy should not infringe anyone's copyright. If LCSD still considered this a problem, it could consider providing the content of the Deed without the Plans, or have the information it deemed "sensitive" or "confidential" obliterated, or to provide a clear and intelligible summary of the Deed if the extent of obliteration is such that the original documents becomes meaningless or misleading.

732. In the present case, the Office did not foresee this to happen when the sensitive details about the financial arrangements were redacted and the Plans omitted. Hence, although Company A had agreed to provide a summary of the Deed, the Office considered that LCSD should still furnish the complainant with the Deed after obliterating the information concerned.

Conclusion and recommendation

733. Overall, LCSD had not followed the requirements of the Code in handling the complainant's information request. The Ombudsman considered this complaint against LCSD substantiated, and recommended LCSD to -

(a) provide the information requested to the complainant as soon as possible, unless there were other justifiable reasons as stated in Part 2 of the Code that suggest otherwise. If LCSD were worried that copying the document would infringe copyright, it could invite the complainant to its premises to inspect the document or have the document read out to the complainant by its staff; and

(b) step up staff training to ensure that they adhere to the Code and the Guidelines strictly when handling information requests from the public.

Government's response

734. LCSD accepted The Ombudsman's recommendations.

Recommendation (a)

735. In handling the request of the complainant, LCSD had followed the procedures and consulted the third party. As this case touched on complicated legal views and the legal interpretation of the Code and the Guidelines, it was far beyond the ability of LCSD's staff in handling general cases. Therefore, LCSD sought advice from the Department of Justice and other relevant Departments as regards the legal views of The Ombudsman. Although LCSD and The Ombudsman held different views on Section 2.14 (a) - "Third Party Information", Section 2.16 - "Business Affairs" and Section 2.18 – "Legal Restrictions" of the Code, LCSD accepted the Ombudsman's recommendation (a).

736. LCSD had informed Company A about The Ombudsman's recommendation (a). In response, Company A expressed that they would proactively cooperate to meet LCSD's request. Following The Ombudsman's comment and recommendation, LCSD will furnish the complainant with a copy of the Deed in which the "sensitive" and "confidential" information (such as the financial arrangements, the Plans, etc.) has been obliterated.

Recommendation (b)

737. In handling the request of the complainant, LCSD had followed the procedures and consulted the third party. As this case touched on complicated legal views and the legal interpretation of the Code and the Guidelines, it was far beyond the ability of LCSD's staff in handling general cases. Nevertheless, the stepping up of staff training can ensure that they would adhere to the Code and the Guidelines strictly when handling information requests from the public. LCSD has therefore accepted the Ombudsman's recommendation (b).

Leisure and Cultural Services Department

Case No. 2016/2190(I) – Unreasonably refusing to provide tree inspection reports and failing to respond to the complainant's e-mail.

Background

738. The complainant was dissatisfied with the failure of the Leisure and Cultural Services Department (LCSD) to provide all tree inspection reports on a dangerous tree in front of a building on Po Kong Village Road (WTS 905) as requested by the complainant. LCSD had instead only provided the Tree Group Inspection Form of WTS 905 and another fallen tree on Fung Mo Street, refusing to provide the independent tree inspection report(s) and the assessment report(s) prepared before WTS 905 was felled (information in question). In addition, the complainant sent an e-mail to the Director of Leisure and Cultural Services to request the information in question, but LCSD did not reply.

The Ombudsman's observations

739. The Office of the Ombudsman found the following inadequacies on the part of LCSD in handling this case –

(a) unreasonably refusing to provide the Tree Risk Assessment Form (Form 2) and the relevant documents of WTS 905; and

(b) failing to respond to the complainant's e-mail properly.

740. The Ombudsman considered the complaint substantiated, and recommended LCSD to –

(a) disclose all the reports and records of the tree in question to the complainant, including Form 2 regarding WTS 905 and the records of the decision to remove the tree, unless LCSD has reasonable justifications in line with the provisions in Part 2 of the Code on Access to Information (the Code) for refusing to disclose information;

(b) enhance training of staff to ensure that they are familiar with and strictly comply with the provisions of the Code and the Guidelines on Interpretation and Application for the Code;

(c) remind staff to better respond to public enquiries and seek help from the technical staff concerned when encountering technical difficulties; and

(d) make it clear to staff that they should adhere strictly to relevant guidelines to decide whether Form 2 should be completed when handling complaints about trees with structural problems.

Government's response

741. The Government accepts The Ombudsman's recommendations.

742. For recommendation (a), LCSD provided to the complainant on 22 December 2016 the tree inspection checklist of WTS 905 and records of application for removal of the tree submitted to the Tree Preservation Board.

743. For recommendation (b), LCSD has included the Code in the training course for new recruits and has been organising briefing sessions on a regular basis for staff to enhance their understanding and awareness of the requirements of the Code. Furthermore, LCSD will continue to circulate the relevant circular on the Code among staff on a half-yearly basis to remind them of the procedure for handling information requests involving the Code.

744. For recommendation (c), LCSD has reminded staff to better respond to public enquiries and provided the "Guidelines for LCSD Colleagues to follow when they encounter e-mails which cannot be forwarded / printed". In addition, staff is reminded to seek help from technical staff when encountering technical difficulties.

745. For recommendation (d), LCSD has drawn up the "Checklist of Signs and Symptoms of a Tree and Recommendation of Mitigation Measures" for frontline staff to handle tree complaints and sent it to the staff responsible for tree management via e-mail on 25 January 2017. Staff is also reminded to adhere to the "Guidelines for Tree Risk Assessment and Management Arrangement" drawn up by the Tree Management Office when completing Form 2.

Leisure and Cultural Services Department

Case No. 2016/2483 – (1) Failing to restrict a Leisure Link user from abusing the telephone reservation service to enrol in a training course; and (2) failing to impose a penalty on that user in accordance with the Conditions of Use

Background

746. From 20 to 30 June 2016, the complainant attempted repeatedly to enrol in a training course organised by the Leisure and Cultural Services Department (LCSD), but was unable to enrol. Although there was still one available place in that course, he was informed by LCSD that it had been temporarily held by a "Leisure Link" service user (Mr A), who had made the reservation by telephone, only to cancel it within three working days and then book it again immediately. By doing that repeatedly, Mr A manages to hold the place for 10 days without making any payment.

747. The complainant alleged that LCSD had failed to take proper remedial action to stop such abuse of the telephone reservation service. He also stated that LCSD should have invoked the penalty clause under the Conditions of Use of Leisure Link System (the Conditions) and suspended Mr A's right to use the telephone reservation service.

The Ombudsman's observations

748. Telephone reservation, unlike other enrolment channels which require immediate payment, allows Leisure Link users to make payment within three working days. The purpose is to give users some flexibility to settle the payment within a reasonable time. Allowing users to cancel their reservations repeatedly does not serve this purpose, and would instead create a loophole in the system. The Office of The Ombudsman (the Office) found it unreasonable for LCSD to not consider repeated cancellation to extend payment deadline a breach of the Conditions and to do nothing to rectify the problem.

749. The Conditions clearly stipulate under Clause 11 that a user who has made a telephone reservation but failed to confirm the enrolment by payment on more than two occasions shall be penalised by suspension from using the telephone reservation service for 180 days. As there was

no alternative stipulation about cancellation arrangement in the Conditions, the Office saw no reason why the penalty clause was not applicable in this case.

750. The Ombudsman considered this complaint substantiated and recommended that LCSD promptly implement its proposed measure of upgrading the Leisure Link System such that telephone reservation is only allowed within the first three working days after a sports programme is open for public enrolment, after which interested parties can only enrol through other channels and immediate payment is necessary.

751. LCSD undertook to further review its telephone reservation service to kerb possible abuse. However, it remained of the view that users should be allowed to cancel a telephone reservation. The Conditions were thus amended to state clearly the cancellation arrangement in the latest version.

Government's response

752. LCSD accepted The Ombudsman's recommendation. Through upgrading the Leisure Link System such that telephone reservation service is available only within the first 3 calendar days starting from the first day of the enrolment period for all leisure programmes organized from April 2017 onward. Only one place for one programme or event may be reserved by each telephone call. After that, the enrolment will be open to the general public on a first-come-first-served basis through other channels if there is still remaining quota and immediate payment is necessary.

Office of the Communications Authority

Case No. 2016/3185 – (1) Failing to take enforcement action against two unregistered Mark Six newspapers; (2) the Director-General of Communications refusing to talk to the complainant over the phone; (3) unreasonably taking different enforcement actions against newspapers; and (4) lack of effective control over unregistered newspapers and books

Background

753. According to the complainant, his company had been publishing Mark Six newspapers in Hong Kong for years. In late 2015, he noticed that two Mark Six newspapers (the newspapers concerned), which had been sold in Hong Kong for more than 20 years, had not been registered with Office for Film, Newspaper and Article Administration (OFNAA) under the Office of the Communications Authority (OFCA) in accordance with the Registration of Local Newspapers Ordinance (the Ordinance) (the registration issue). He then lodged a complaint with OFNAA. However, OFNAA completed registration for the Newspapers Concerned shortly afterwards. He believed OFNAA did so with the intention to cover up its dereliction of duty (allegation (a)).

754. The complainant made a phone call to the Director of Film, Newspaper and Article Administration (i.e. the Director-General of Communications) (the Director) regarding the registration issue. However, the Director refused to talk to him and only assigned a staff member to call him back (allegation (b)).

755. In addition, OFNAA had referred suspicion of the complainant's company being in breach of the Ordinance for not having the name and address of its printer printed on a newspaper it published to the Police, resulting in prosecution and a court sentence of a fine. The complainant took the view that OFNAA had not taken equal enforcement actions against the newspapers concerned (allegation (c)).

756. The complainant also alleged that a number of unregistered books and newspapers, including two annual publications about Mark Six (Publications A and B), were available for sale at newspaper stalls and convenience stores due to OFNAA's dereliction of duty (allegation (d)).

The Ombudsman's observations

Allegation (a)

757. The Office of The Ombudsman (the Office) was of the view that OFNAA had established procedures to check for unregistered newspapers on the market, and had followed up the registration issue properly.

758. OFNAA explained that the newspapers concerned were not found to be in breach of the Ordinance in inspections conducted since 2013. The first complaint against the newspapers concerned was received in 2015. OFNAA could not ascertain when the newspapers concerned were first published and sold. Although the complainant provided photos of front pages of the newspapers concerned, the Office could not confirm whether these photos were sufficient to prove that the newspapers concerned were on the market over 20 years ago; neither can the Office ascertain whether there was any oversight on the part of OFNAA's staff when conducting the inspections.

759. In the absence of concrete evidence, the Office was unable to determine whether OFNAA was "derelict in its duties". The Ombudsman was of the view that allegation (a) was inconclusive.

Allegation (b)

760. The Office understood that it was not possible for heads of government departments to attend to every matter personally, given their heavy workload. In this case, there was no impropriety for OFCA to assign a suitable staff member to return the complainant's call on behalf of the Director and listen to his concerns. In view of the above, The Ombudsman considered allegation (b) unsubstantiated.

Allegation (c)

761. OFNAA had explained in a reply to the complainant why it did not refer the registration issue to the Police for follow-up. The Office confirmed that OFNAA had handled the registration issue in accordance with the principles set out in that reply. The Office considered OFNAA's decision to not refer the case to the Police reasonable.

762. The Office was of the view that OFNAA had made its previous decisions to refer cases to the Police in accordance with established principles. The Ombudsman considered allegation (c) unsubstantiated.

Allegation (d)

763. Publications A and B were annual publications. According to the Ordinance, only newspapers that are published at intervals not exceeding 6 months are required to be registered under the Ordinance. As such, annual publications need not be registered.

764. As for unregistered books, while all books are required to be registered under the Books Registration Ordinance, this is under the purview of the Leisure and Cultural Services Department (rather than OFNAA). The Ombudsman considered allegation (d) unsubstantiated.

765. The Ombudsman considered this complaint unsubstantiated, but recommended that OFNAA should be more vigilant when conducting inspections in future, with a view to checking for any unregistered newspapers available on the market.

Government's response

766. OFNAA accepted The Ombudsman's recommendation. As mentioned in an earlier reply to the Ombudsman, OFNAA will continue with its existing efforts in conducting inspections and handling complaints and enquiries. When conducting inspections, OFNAA will be more vigilant in checking for any newly published newspapers, and immediately refer such cases to the staff responsible for newspaper registration for follow-up actions.

767. Regarding The Ombudsman's view that allegation (a) was inconclusive, OFNAA would like to stress that it has adopted a consistent approach in enforcing the Ordinance, and that there has never been any covering up of dereliction of duty. As pointed out in OFNA's earlier reply to The Ombudsman, if OFNAA identifies any newspapers or publications that should be but have not been registered under the Ordinance, OFNAA will contact responsible persons to gain a better understanding of the cases. Should the reason for failure to register be a simple misunderstanding of the definition of "newspaper" or related registration requirements, etc. under the Ordinance, and where no other offences are involved, OFNAA will request that registration be completed as soon as possible. Experience indicates that responsible persons would promptly submit applications and complete the registration procedure upon knowing the requirements. In line with prevailing

practice, OFNAA would not take further actions in such cases.

768. Upon receipt of the first complaint on the non-registration of the newspapers concerned in December 2015, OFNAA had already taken prompt follow-up actions in accordance with established principles. The Ombudsman acknowledged that OFNAA had followed up on the registration issue properly and that OFNAA's decision to not refer the case involving the newspapers concerned to the Police was reasonable. In addition, in the absence of concrete evidence, both The Ombudsman and OFNAA could not ascertain whether the newspapers concerned had been on the market for over 20 years as alleged by the complainant. In OFNAA's view, the complainant's allegations against OFNAA were ungrounded.

Official Receiver's Office

Case No. 2016/1703 – Unreasonably requesting the complainant's employer to provide information without prior notice to the complainant, thereby disclosing the complainant's identity as a bankrupt

Background

769. A bankruptcy order was issued against the complainant by the court in November 2005. In November 2009, he was discharged from bankruptcy. According to the complainant, he had not informed his employer (Company A) of his bankruptcy all along.

770. On 11 November 2015, without notifying the complainant, the Official Receiver's Office (ORO) wrote to the trustee of the provident fund scheme in which the complainant participated (the PF Trustee), stating that as the PF Trustee had confirmed that there was no "Forfeiture Clause" in the Trust Deed applicable to the complainant's provident fund account, the PF Trustee should remit to ORO the accrued benefits payable to the complainant as at 29 November 2009 (i.e. the day before the complainant's discharge from bankruptcy) (the Accrued Benefits).

771. On 1 April 2016, the PF Trustee remitted the Accrued Benefits to ORO. ORO sent a letter on 7 April (the April 7 Letter), requesting Company A to authorize in writing ORO to obtain copies of the said Trust Deed and relevant documents (the Documents) from the PF Trustee, in order to confirm that there was no "Forfeiture Clause".

772. The complainant alleged that ORO did not notify him in advance or try to obtain the Documents from him before issuing the April 7 Letter. As a result, Company A learnt about his bankruptcy. The complainant was dissatisfied that ORO had revealed his private information without considering his feelings.

The Ombudsman's observations

773. Generally speaking, once a bankruptcy order is issued by the court, ORO will publish the bankruptcy order in the Gazette and two newspapers. Therefore, the fact that the complainant is bankrupt is

information in the public domain. In other words, the April 7 Letter by ORO to Company A did not in fact "disclose" the complainant's private information.

774. The Office of The Ombudsman agreed that before the Accrued Benefits could be distributed to the creditors, it was necessary for ORO to obtain a copy of the Documents, so as to confirm that the Accrued Benefits were legally vested in ORO. However, if ORO found it necessary to contact the complainant's employer for the Documents, it would be more appropriate for ORO to notify the complainant in advance, so that he could prepare to answer relevant questions from his employer.

775. ORO sending the April 7 Letter, requesting Company A to authorize them to obtain the Documents from the PF Trustee, would unavoidably notify Company A of the complainant's bankruptcy. Being the subject of the bankruptcy case, it was reasonable for the complainant to expect that ORO would notify him in advance before sending Company A the April 7 Letter, or give him a chance to provide the Documents on his own. By contacting the complainant's employer directly, without giving prior notice to him, ORO had obviously disregarded the complainant's feelings.

776. The Ombudsman considers that the complaint is partially substantiated, and recommended ORO to learn from this case, and notify bankrupts in advance if they have to contact the bankrupts' employers regarding the bankruptcy cases in future.

Government's response

777. ORO accepted The Ombudsman's recommendation. If ORO has to contact bankrupts' employers regarding the bankruptcy cases in future, ORO agrees to give prior notice to the bankrupts in appropriate circumstances (e.g. where the investigation and assessment work would not be affected, criminal investigation on commission of bankruptcy offences is not involved, etc.). ORO instructed its staff in October 2016 to follow the said practice and give prior notice to bankrupts in appropriate circumstances.

Planning Department

Case No. 2016/0881 – Failing to properly follow up complaints about suspected illegal landfilling or fly-tipping at a site

Background

778. According to the complainant, illegal fly-tipping of soil and construction waste had been found from time to time on a private land lot (the Site) over the years (the soil filling problem). Since 2003, the complainant had repeatedly complained to the Planning Department (PlanD) and the Environmental Protection Department (EPD), and requested them to take enforcement actions to reinstate the Site.

779. In March 2016, the complainant lodged a complaint with the Office of The Ombudsman (the Office), alleging that PlanD failed to address the soil filling problem, resulting in a massive soil fill area formed at the Site in early 2016.

The Ombudsman's observations

780. Relevant records showed that PlanD had followed up, within its purview, the complaints lodged by the complainant between 2003 and 2010. As storage of sand was an "existing use" (i.e. a use of a building or land that was in existence immediately before the publication in the Gazette of notice of the draft plan of the development permission area) at the Site under the Town Planning Ordinance (TPO) and did not constitute an unauthorised development (UD), there was no basis for PlanD to take enforcement actions against the landfilling activities at the Site.

781. Besides, PlanD had, in light of its investigation and observation findings, taken enforcement actions against the UDs in the area adjacent to the Site (the extended area) twice, including issuance of Enforcement Notice (EN) and Reinstatement Notice (RN).

782. The Ombudsman considered the complaint against PanD unsubstantiated, but urged PlanD and EPD to keep following up the incident. Should there be sufficient evidence, enforcement actions should be taken against the offender in a decisive manner to put things right. PlanD should also closely monitor the land owners' compliance

with the ENs and RNs issued in the past few months. In case of non-compliance, further actions should be taken as soon as possible.

Government's response

783. PlanD accepted The Ombudsman's recommendation.

784. PlanD has in accordance with TPO taken enforcement and prosecution actions since March 2016. As open storage of sand at the Site existed before the first gazettal of the relevant draft development permission area plan on 18 June 1993, open storage of sand within the Site did not constitute an UD under the TPO.

785. Regarding the extended area, the Planning Authority (PA) has issued 45 ENs to the concerned land owners of 9 UD cases (including 7 land filling cases and two cases for parking of vehicles or storage use), requiring discontinuance of these UDs. Since notice recipients in two of the unauthorised landfilling cases failed to comply with the ENs, PA has taken prosecution actions. Four defendants were fined by the court a total of $120,000 in December 2016 and March 2017.

786. As the fill materials in one of the 9 cases were subsequently removed, PA issued 43 RNs for the remaining 8 cases requiring removal of fill materials or hard-paving and grassing in the land concerned. The notice recipients in these 8 cases have complied with the RNs and the PA had issued Compliance Notices (CN) between November 2016 and October 2017.

787. Regarding the follow up at the Site, PA took prosecution actions on 21 March 2016 according to TPO against the land owners and responsible persons for failing to provide information as requested in the Notice to Require Provision of Information. Six land owners and responsible persons were fined a total of $140,000 in May 2016. In late January 2017, it was found that part of the Site was paved with concrete, which constituted a UD. As such, PA issued an EN to the concerned land owner on 26 January 2017, requiring discontinuance of the UD. An RN was also served on 15 March 2017 requesting the notice recipient to remove the concrete within three months. The concrete on the Site was removed and a CN was issued in July 2017.

788. PlanD will continue to closely monitor the area and take appropriate enforcement and prosecution actions according to TPO.

Post Office

Case No. 2015/4796 – Improperly delivering a prohibited article and failing to trace it upon its getting astray

Background

789. The complainant alleged that she had posted a surface registered mail to Fuzhou, China with the content indicated as "Ba Bai Guang Ginseng" (「八百光人參」) in March 2015. Since the addressee had not received the mail item, the complainant approached Post Office (PO) respectively in April, June and July to trace the item. PO finally replied in November that the mail item was lost and offered apologies. Since the item supposedly contained ginseng, which is prohibited from being sent into Mainland China, no compensation would be given for the loss. The complainant was dissatisfied that PO staff had allowed her to post the item, knowing that ginseng is a prohibited article, and that PO staff failed to trace her mail item.

790. PO stated that it should be the responsibility of the sender to ensure the mail item does not contain any prohibited articles, though its staff would generally be able to remind the senders if they spot any common prohibited items in the marked content. Since the mail item was sent some time ago, the staff concerned could not recall the incident. Moreover, PO was unable to ascertain whether the complainant had marked "ginseng" on the mail item because the mail item had gone missing.

The Ombudsman's observations

791. The Office of The Ombudsman (the Office) studied the relevant ordinance governing articles prohibited from the post and guidelines on handling prohibited articles stipulated by the Universal Postal Union and PO. The Post Office Ordinance clearly states that no person shall post, tender for posting or send by post anything prohibited by any regulation from being sent by post. The Office agreed with PO that it should be the responsibility of the sender to ensure mail items do not contain any prohibited articles. Given that there are hundreds of items forbidden to be posted to Mainland China, it is not practicable for the staff to identify at a glance whether the marked content is prohibited or not, except for

obviously prohibited articles such as firearms and bombs. It was more reasonable for the sender to check the item against the list of prohibited articles before posting.

792. Besides adopting the guidelines from the Universal Postal Union, the Post Office Guide (POG) provides senders with details on the handling of prohibited articles and the list of prohibited articles for each destination country. In addition, PO has also displayed relevant notices in every post office and has disseminated the message on prohibited articles through various channels. Senders may check with the post office staff or refer to the POG.

793. The Office opined that it was difficult to ascertain whether PO had the knowledge that the content of the mail was a prohibited article and accepted PO's action of posting without reminding the complainant.

794. Regarding the whereabouts of the mail item, the Office agreed that PO had tried to trace the mail item but did not receive any reply from China Post, and the fault was not with PO.

795. In view of the above, The Ombudsman considered the complaint unsubstantiated, but found PO lacking in efficiency. PO only initiated contact with China Post to trace the mail item over one month after it first received the enquiry from the complainant. The Ombudsman recommended that PO should consider setting a timeframe on handling mail tracing enquiries, conclude cases with inconclusive tracing results as lost items and proceed with the compensation procedures without delay.

Government's response

796. PO accepted The Ombudsman's recommendation and has revised its procedures of handling mail tracing enquiries to expedite the processing of compensation claims for cases with inconclusive tracing results where appropriate. PO has introduced an alert function on the case handling time into the Mail Tracing Automation System to facilitate supervisory monitoring of mail tracing.

Post Office

Case No. 2016/4154 – Delay in handling and unreasonably refusing a request for compensation arising from damaged mail item

Background

797. The complainant alleged that he had made enquiries and filed a compensation claim regarding the damage caused to a registered airmail item he sent to Mainland China, but the Post Office (PO) took six months to reject the claim. PO was accused of delay in handling the case (allegation (a)) and shirking its responsibility (allegation (b)).

798. Since there was no sign that PO had repaired the mail item in any way, PO held the view that the damage occurred outside Hong Kong. PO had repeatedly followed up with China Post (CP) about the liability for the damaged mail item, however, all CP branch offices claimed that the packaging was intact during their handling and denied the liability.

799. PO provided three justifications for refusing the compensation claim: there was no indication on the packaging that the mail item was fragile, the damage occurred outside Hong Kong and the sender had not declared the value of the contents on the customs declaration form.

The Ombudsman's observations

800. The Office of The Ombudsman (the Office) considered that PO should have closed the case and informed the complainant of the outcome at an earlier stage, given PO would not offer compensation and CP had twice denied the compensation claim. At the request of the complainant, PO had repeatedly negotiated with CP despite slim chance for a successful claim, resulting in delay and a waste of resources on both sides. The Office considered there to be delay on the part of PO in handling the case. Allegation (a) was substantiated.

801. After examining photos of the mail item and the customs declaration form, mail damage report and relevant clauses in the Post Office Guide as provided by PO, The Office accepted PO's explanation for refusing the compensation claim, and opined that PO did not have the liability of compensation in this case, nor could PO force CP to give

compensation. Allegation (b) was unsubstantiated.

802. The Ombudsman considered the complaint against PO partially substantiated, and recommended that PO should instruct its staff to –

(a) inform enquirers of the outcome of investigations and/or compensation claim as early as possible;

(b) clarify and explain the reasons to enquirers as soon as possible if it is confirmed that no compensation will be made by PO or other postal administrations (PAs); and

(c) determine in accordance with the established mechanism whether the PAs concerned should assume liability of compensation for cases of damaged mail before deciding whether or how to proceed with the negotiation.

Government's response

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

(a) PO has enhanced the Mail Tracing Automation System to issue alerts on the case handling time to remind the handling officers to reply to the enquirer within the timeline. The System will issue daily reports to facilitate progress monitoring by supervisors. Complicated cases will be discussed at the weekly briefings of the Mail Tracing Office to expedite the handling of these cases;

(b) frontline staff were reminded to issue timely replies to enquirers if it is confirmed that no compensation would be made by other Pas; and

(c) The internal guidelines were updated to remind staff to check the relevant provisions in the Post Office Guide before negotiating compensation claims on damaged mail items with other PAs.

Radio Television Hong Kong

Case No. 2016/1709 – (1) Failing to resolve the problem of time lag in digital broadcasting of live football commentaries; and (2) failing to respond to the complainant's request for resumption of FM broadcast for live football commentaries

Background

804. The complainant pointed out that ever since Radio Television Hong Kong (RTHK) changed its broadcasting mode for live commentaries on regular local football matches (regular football commentaries) from analogue Frequency Modulation (FM) to digital broadcast, there had been a time lag of around 10 seconds in broadcasting such commentaries. He had written to RTHK, requesting RTHK to resolve the problem and resume FM broadcast for regular football commentaries as soon as possible, but to no avail.

805. The complainant criticised RTHK for failing to resolve the problem of time lag (allegation (a)), which had made watching football matches less enjoyable for him. He also complained that RTHK had failed to respond to his request for resumption of FM broadcast (allegation (b)).

The Ombudsman's observations

806. Since the problem of time lag in regular football commentaries is an inherent technical feature of digital audio broadcast and there is currently no way to resolve it, The Ombudsman considered allegation (a) unsubstantiated.

807. At present, RTHK only broadcasts on FM live commentaries of local and international matches that attract a lot of attention or are more important, whereas regular football commentaries are provided via digital audio broadcast and time lag is inevitable.

808. The complaint requested that FM broadcasting of regular football commentaries be resumed, and RTHK's response was that it had been providing FM broadcasting of live commentaries all along. RTHK's reply had not addressed the complainant's concern at all. The Ombudsman considered allegation (b) substantiated.

809. Overall, The Ombudsman considered this complaint partially substantiated and recommended that RTHK –

(a) remind its staff to respond with substance to public requests; and

(b) conduct an in-depth review on its current use of digital broadcast for live football commentaries on regular local matches, with a view to ensuring that the public can really benefit from the service provided and avoiding adverse comments.

Government's response

810. RTHK accepted all of The Ombudsman's recommendations, and has taken the follow-up actions below –

(a) reminded staff to respond with substance to public requests as always; and

(b) conducted in-depth reviews of programme arrangements, and would review from time to time the types and themes of programmes of all channels, and to make the appropriate editorial decisions in light of circumstances. As a public service broadcaster, RTHK would certainly adhere to professional broadcasting principles and fulfill its mission of serving a broad spectrum of audiences in making programme arrangements.

Radio Television Hong Kong

Case No. 2016/2199 – (1) Failing to activate the telephone voicemail box for a staff as promised; and (2) failing to respond to telephone calls

Background

811. The complainant claimed that he called Radio Television Hong Kong (RTHK) on 8 and 10 June 2016, requesting to speak to a staff member (Staff A). As voicemail for Staff A had not been activated, and the staff who answered the call refused to take a message for Staff A, the complainant asked other RTHK staff to relay his request to Staff A. Neither Staff A nor any other RTHK staff replied to the complainant.

812. The complainant alleged that RTHK failed to activate voicemail for Staff A as promised (allegation (a)); and that Staff A failed to respond to his telephone calls (allegation (b)).

The Ombudsman's observations

Allegation (a)

813. RTHK explained that their staff telephone devices were used to facilitate work-related communication. Since telephone functions were arranged with consideration to practical operational requirements of staff members with different responsibilities, it was difficult to develop a set of general guidelines for the setting up of voicemail, and voicemail was not enabled for all telephone lines. RTHK staff could apply to activate or deactivate voicemail based on operational requirements.

814. As voicemail had not been enabled for Staff A's telephone line, whenever she was on leave or away from the office, incoming calls would be transferred to her deputy, whose telephone line had voicemail enabled. The complainant had suggested enabling voicemail for Staff A in an earlier complaint, to which RTHK replied on 30 July 2015 that it would take the suggestion into consideration but did not promise to do as the complainant requested.

815. The Office of The Ombudsman (the Office) was of the view that RTHK indeed did not promise to enable voicemail for Staff A in its earlier reply. Since RTHK has set up hotlines for the public, the complainant was not barred from expressing his opinions to RTHK, regardless of whether Staff A had voicemail or replied to him directly.

816. However, the Office noted that while incoming calls to Staff A would be transferred to her deputy whenever she was on leave or away from the office, no arrangement had been made for occasions when Staff A could not answer the phone because she was otherwise occupied. Telephone numbers of RTHK staff are listed in the Government Telephone Directory. It was evident that Staff A's telephone number served to facilitate work-related communication with the public. If voicemail and call-forwarding function were not activated when staff concerned was unable to answer a call, the member of the public who made the call would have to hang up and try to contact other staff by making another call. The Office considered that such arrangement would cause inconvenience to callers.

817. The Office noted that voicemail could facilitate work-related communication, and the telephone lines of RTHK staff members at positions similar to Staff A had voicemail enabled. It was therefore very difficult to understand why RTHK would not do the same for Staff A. As a government department serving the public, the public would not accept, without reasonable explanation, the inconsistency arising from staff being able to decide for themselves whether to enable voicemail or not.

818. The Ombudsman considered allegation (a) unsubstantiated but found other inadequacies on the part of RTHK.

Allegation (b)

819. The Office noted that RTHK staff replied to the complainant on behalf of Staff A on 14 June 2016, which was no more than 3 working days since the phone calls from the complainant were received. RTHK had provided an appropriate reply to the complainant.

820. The Ombudsman considered allegation (b) unsubstantiated. The Ombudsman considered the complaint against RTHK unsubstantiated, but found other inadequacies on RTHK's part. The Ombudsman urged RTHK to draw up reasonable guidelines on whether voicemail should be activated on their staff telephone lines.

Government's response

821. RTHK accepted The Ombudsman's recommendation. After reviewing the arrangement of the telephone system's voicemail function and making reference to the general practices of other government departments, RTHK has drawn up guidelines regarding the activation of the telephone voicemail function for implementation from 3 July 2017.

Social Welfare Department

Case No. 2015/3190B – Unreasonably asking the complainant's wife to produce proof of their son's return

Background

822. The complainant's son (the son) is a recipient of Normal Disability Allowance (NDA). As the son is medically certified as unfit to make statements, his mother (the appointee) acted as his appointee for the purpose of the NDA. According to the complainant, the son departed from Hong Kong (HK) on 26 March 2014 on a cruise to Singapore and returned to HK on 7 April 2014.

823. The Social Welfare Department (SWD) and the Immigration Department (ImmD) have in place a data matching mechanism whereby SWD regularly conducts data matching with ImmD on records of travel using Hong Kong Identity Cards (HKICs), so as to ascertain the eligibility of recipients of NDA. The data matching mechanism does not generate records of travel using travel documents other than HKICs, but Government departments can separately ask ImmD for full travel records on a need basis, and in accordance with the Personal Data (Privacy) Ordinance (PDPO).

824. In July 2015, SWD sent the appointee a "Notification of Suspension of NDA Payment" (the Notification), asking her to contact the assigned SWD officer, or else the son's NDA would be suspended. SWD issued the Notification because according to data matching between SWD and ImmD, the son had not returned to HK since his departure on 26 March 2014, therefore failed to fulfil the relevant post-application residence requirement. In response, the appointee showed the SWD officer the son's travel tickets to prove that he had returned to HK on 7 April 2014. She also signed a declaration to confirm the veracity of the information. The complainant queried SWD why ImmD's records did not show the son's return to HK, but was advised to approach ImmD direct.

825. The complainant was dissatisfied that SWD asked the appointee to produce proof of the son's return and to sign a declaration instead of itself verifying the facts with ImmD.

The Ombudsman's observations

826. On 4 July 2015, SWD issued the Notification stating that on account of "duration of absence from HK", the son's NDA would be suspended if SWD received no response within 7 days. On 14 July 2015, an SWD officer sought the appointee's clarification on the matter. Subsequent to the officer's repeated reminders, the appointee produced on 13 August the son's cruise tickets as proof, and signed a declaration confirming, among other things, that the son had returned to HK on 7 April 2014.

827. SWD accepted her declaration, and the son continued to receive NDA. It transpired that the son had in fact used his Hong Kong Special Administrative Region passport when he returned to HK on 7 April 2014, as a result of which SWD had no knowledge of his return just by making use of the data matching mechanism.

828. Despite ImmD's readiness to provide SWD with full travel records on a need basis, SWD was actually unable to avail itself of that service, since the son was not mentally fit to give SWD the prescribed consent, nor was the appointee a "relevant person" under the PDPO authorised to give such consent on behalf of the son. Furthermore, since SWD could resort to asking the appointee to provide proof and to make a declaration, SWD was not entitled to the exemption under the PDPO to have access to the son's full travel records. Hence, The Ombudsman considered it reasonable for the SWD officer to approach the appointee for proof and a declaration.

829. The Ombudsman considered the complaint unsubstantiated, however The Ombudsman found inadequacies on the part of SWD in that –

(a) the Notification threatened suspension of the son's NDA and yet the Notification did not give a clear account of SWD's findings (i.e. the son had departed from HK on 26 March and not returned) nor SWD's reason for possible suspension of the son's NDA; and

(b) instead of merely advising the complainant to approach ImmD direct on his query regarding the son's travel records, the SWD officer could have given the appointee a more detailed explanation on the data matching mechanism between SWD and ImmD, SWD's inability to ask for the full travel records of the

son from ImmD and its need for proof and a declaration from the appointee.

830. The Ombudsman recommended SWD to remind staff to give clients sufficiently clear and detailed explanation for any action taken or to be taken by the Department.

Government's response

831. SWD accepted The Ombudsman's recommendation and provided a progress report on its implementation.

832. The learning drawn from this case was shared with frontline staff in the regular Social Security Meeting on 21 January 2016. The staff was reminded to clearly explain to social security recipients and their families the reason(s) for possible suspension of social security payment. It was also stressed that where a social security recipient was mentally unfit to make a statement and unable to give prescribed consent to the Department to check their movement record with the ImmD, staff should clearly explain to the recipient's appointee that the appointee's declaration on the movement records of the recipient would suffice for proving compliance with the relevant residence requirement.

Social Welfare Department

Case No. 2016/0971 – (1) Ineffective monitoring of a residential care home for the elderly which had allegedly failed to take proper care of the complainant's father; and (2) unreasonably allowing another residential case home for the elderly to delay admitting the complainant's father

Background

833. The complainant's father (Mr A) had been staying at a residential care home for the elderly (RCHE1) since 2011 and from August 2015, the complainant lodged a number of complaints with the Social Welfare Department (SWD), alleging that RCHE1 was negligent in taking care of Mr A. She also requested that Mr A be transferred to another RCHE.

834. In October 2015, SWD informed the complainant that it had found an available place in another RCHE (RCHE2) for Mr A. However, RCHE2 kept refusing to admit him on the grounds of "communication problem" with the complainant. The matter dragged on until Mr A died from illness in January 2016.

835. The complainant alleged that the heating facilities in RCHE1 were inadequate, causing Mr A's health condition to deteriorate significantly before his death, which was due to low body temperature. She complained that SWD was ineffective in monitoring the care services provided by RCHE1 (allegation (a)) and did nothing to resolve the dispute when it was aware that RCHE2 had delayed the admission of Mr A (allegation (b)).

836. Both RCHE1 and RCHE2 are operated by subvented non-governmental organisations (NGOs). Under the current mechanism, SWD will refer complaints against those NGOs to the Lump Sum Grant Independent Complaints Handling Committee (the Committee) for handling. In general, the Committee Secretariat, staffed by SWD officers, will ask the NGOs concerned to handle the complaints and issue a reply to the complainants directly. Should the complainants still feel dissatisfied, they can write to the Committee and request follow up investigation.

837. The licensing office of RCHEs (the Licensing Office) under SWD is responsible for monitoring the operation of RCHEs on an ongoing basis. Four inspectorate teams have been set up for conducting regular inspections in different areas, namely building safety, fire safety, health care and hygiene, and social work. For subvented RCHEs that renew their licenses every three years, the Licensing Office has stipulated a target of conducting a total of eight regular inspections in those four areas every three years. On receipt of complaint, inspectors will conduct surprise inspections.

The Ombudsman's observations

Allegation (a)

838. SWD referred the complainant's various complaints to the Committee, which then forwarded the complaints to the NGO concerned for handling and issuing a direct reply to the complainant. Subsequently, the Committee conducted investigations and found her complaints unsubstantiated, but suggested RCHE 1 to adopt improvement measures. Meanwhile, the Licensing Office also conducted more than ten inspections in response to the complaints. In particular, an inspector visited RCHE 1 in February 2016 to check its heating facilities and interview its elderly residents. Based on the investigation by the Licensing Office, SWD found no evidence that RCHE 1 did not provide adequate heating facilities or was negligent in taking care of Mr A.

839. Although SWD has put in place an established inspection mechanism, the inspections of subvented RCHEs by the Licensing Office are infrequent. For example, in the health care and hygiene area, only one inspection is conducted every three years. As such, it was difficult for SWD to monitor the actual situations in RCHE1. Even when complaints against RCHE1 arose, they were referred to the Committee and handled by the NGO concerned, SWD did not conduct site inspections of its own. The regulatory approach was obviously inadequate.

840. The complainant alleged that RCHE1 was insufficiently heated, placing the well-being of elderly residents in peril. That was a very serious allegation. SWD should not have taken it lightly and delayed its follow-up action. The Ombudsman considered allegation (a) partially substantiated.

Allegation (b)

841. SWD indicated that NGOs are required to take up RCHE admission applications referred by SWD and report back within three weeks. After examining Mr A's case, SWD decided that RCHE2 did not have sufficient grounds to reject his application. SWD then issued three reminders, urging RCHE2 to admit Mr A as soon as possible. Eventually, Mr A's case was closed upon his death.

842. The Office of The Ombudsman understood that the existing mechanism did not provided SWD with any specific or punitive measures to compel RCHE2 to admit Mr A. SWD only repeatedly issued an ineffective reminders and did not make any proactive efforts to coordinate between the complaint and RCHE2, although it was fully aware of the dispute. The Ombudsman considered allegation (b) partially substantiated.

843. The Ombudsman considered the complaint on the whole partially substantiated, and recommended that SWD –

(1) review its mechanism for monitoring subvented RCHEs and step up inspections, so as to ensure that their facilities and services are up to standards; and

(2) review the mechanism for admission of elderly applicants to prevent recurrence of refusal or delay on the part of RCHEs.

Government's response

844. The Government accepted The Ombudsman's recommendations. SWD has taken follow-up actions as follows.

845. In order to enhance the service quality of RCHEs, SWD has suitably adjusted its strategy of inspections and regulation. As far as subvented RCHEs are concerned, SWD has increased the frequency of inspections by the social work inspectorate team and the health inspectorate team with a view to strengthening the monitoring of RCHEs.

846. In response to recommendation (b), SWD has enhanced the mechanism for handling service admission of applicants by RCHEs. Where RCHEs failed to admit applicants within the prescribed period, the Long Term Care Services Delivery System Office of SWD, apart from

requiring RCHE managers to report case progress according to the Manual of Procedures, will proactively contact the service units concerned with a view to identifying any difficulties and providing appropriate advice and assistance.

847. Where refusal or delay of admission is involved, SWD will assign a Senior Social Work Officer to examine the cases and, where necessary, contact RCHE managers, referral workers, applicants and their families to understand challenges, expectations and disagreements, so as to reconcile the differences to form a consensus on service admission, so that the applicants may receive residential care service as soon as possible. All such cases are reviewed and instructed by a Chief Social Work Officer of the Residential Care Services Section under the Elderly Branch, who will directly discuss and follow up with the management of the agencies operating the RCHEs concerned, if and when necessary.

848. Since the implementation of the aforementioned measures in September 2016, no cases involving refusal of admission have been found by or reported to SWD.

Social Welfare Department

Case No. 2016/2180B – Failing to take care of the complainant's housing and welfare needs

Background

849. The complainant is a recipient of Comprehensive Social Security Assistance (CSSA) and used to live alone in his public rental housing (PRH) unit. On 14 February 2015, he passed out and was sent to hospital for treatment. He was considered by a doctor to be mentally unfit to make statements and in need of long-term care. A medical social worker arranged for him to be admitted to a private residential care home for the elderly (RCHE). The complainant opposed admission vehemently and called the police upon arrival at the RCHE. He was later sent to hospital again.

850. On 1 April, the Social Welfare Department (SWD) decided that an appointee should manage CSSA payment for the complainant, hence suspended payment, including transfer of rent for his PRH unit to the Housing Department (HD). On 15 April, SWD arranged for the complainant to be admitted to another RCHE chosen by his son, and asked his son to notify HD and deal with matters concerning the PRH unit on behalf of the complainant. Family members of the complainant declined appointment to manage his CSSA, so SWD appointed an officer (the Appointee) on 22 July.

851. HD noticed that rent for the complainant's PRH unit was not being paid, but was not able to contact the complainant. Hence a "Notice to Quit" was issued on 30 June. Thereafter an "Eviction Notice" was issued, and the complainant's PRH unit was recovered in September; with his belongings in the unit subsequently auctioned off. Through June to August, HD repeatedly enquired SWD on the complainant's case and referred the complainant's request to continue living in his PRH but was unable to pay the rent due to lack of economic means to SWD. But SWD advised that the complainant had moved into an RCHE, and was not eligible for CSSA payment to cover rent.

852. In mid-December, the complainant wrote to the Chief Executive, the Chief Secretary for Administration's Office and HD to seek assistance for his housing and welfare needs. HD again referred the case to SWD

for assessment and assistance. SWD thus requested from the hospital[3] an assessment on the complainant's capability to live alone in a PRH unit, for the consideration of recommending PRH allocation through compassionate rehousing (CR).

853. On 18 February 2016, a specialist clinic at the hospital reported that the complainant was not mentally fit to make statements, his disability level amounted to 100%, and required long-term care. But on 17 March, a psychiatrist determined that the complainant was mentally fit to make statements and could live alone in a PRH unit. SWD requested the complainant's daughter to provide support to the complainant when he was allocated a PRH unit. The complainant's daughter signed a declaration in agreement.

854. A SWD caseworker recommended the complainant's CR application to his superiors for consideration, but management returned the case for reassessment on the basis of insufficient information. On 24 June, the complainant withdrew his CR application and instead applied for the "Pilot Residential Care Services Scheme in Guangdong". Then the complainant changed his mind and again applied for CR on 15 July.

855. SWD requested from the hospital a reassessment of the complainant's health condition in consideration of his CR application. On 20 September, the hospital determined the complainant mentally fit to make statements and that he could live alone in a PRH unit. The CR application was submitted for reconsideration, but SWD considered it necessary to first clarify the complainant's asset profile in the Mainland. On 3 November, the complainant made relevant clarifications, and SWD subsequently recommended to HD the arrangement for CR. The complainant accepted the PRH unit arranged under CR on 3 February 2017.

856. The complainant claimed that he had not received CSSA payment for years, he suspected that the Appointee arranged by SWD had embezzled the funds. The complainant was homeless after the recovery of his PRH unit, but HD and SWD shirked responsibilities to one another without providing appropriate assistance.

[3] The hospital where the complainant had appointment for follow-up consultation

The Ombudsman's observations

Management of CSSA payment

857. Regarding the allegation of embezzlement, SWD's records showed that CSSA payments had been deposited directly into the complainant's designated personal bank account since the complainant's application for CSSA in 1997. Since the instatement of the Appointee in July 2015, the payments have been deposited into the bank account of the Director of Social Welfare Incorporated for management on behalf of the complainant. The Office of The Ombudsman (the Office) saw no evidence of the CSSA payment to the complainant being embezzled by the staff of SWD.

Tenancy of PRH Unit and Rent Allowance

858. SWD should have anticipated that the complainant's PRH unit would be recovered for rent arrears upon suspension of his rent allowance, and should have proactively coordinated with HD. Even though SWD had notified the complainant's son, it should have followed up. The Office considered that SWD had the responsibility to contact HD directly for discussion about the complainant's rent and tenancy right. It was insufficient for SWD to pass responsibility to the complainant's son.

859. Moreover, SWD was already aware of the complainant's family's reluctance to act as his appointee when CSSA payment to the complainant was suspended in April 2015. However, not until 22 July did SWD appoint an officer to manage the complainant's CSSA, resulting in overdue rent arrears for the complainant's PRH unit. The arrangement was not appropriate.

860. Besides failing to notify HD on its own accord, SWD did not provide clear answers to HD's repeated enquiries. In reply memos dated 3 August and 31 August, SWD merely reiterated that the complainant was not eligible for other assistance for repayment of rent arrears. Although SWD claimed that its staff had given a verbal reply on relevant operational guidelines, there was no record of such. On the other hand, HD kept on record its correspondence with various offices of SWD in relation to this case, and no record indicate that SWD had explained the arrangement of granting additional rent allowance on discretionary grounds and retention of the complainant's tenancy right.

861. As SWD made arrangements for the complainant to be admitted to an RCHE, he was never actually homeless. However, SWD failed to handle the issues of rent and tenancy right regarding the complainant's PRH unit in a timely manner. This revealed delay and negligence on the part of SWD.

Compassionate Rehousing (CR)

862. The complainant made two CR applications, one by referral from HD in December 2015 and another directly to SWD in July 2016. Upon reviewing relevant files provided by SWD, the Office found that the SWD caseworker neither recorded progress on the Register of CR according to the operational guidelines, nor acknowledged receipt of the complainant's application within seven working days.

863. The Office understood that a host of factors played a part in affecting the case progress. Nevertheless, follow-up by SWD was extremely slow. The first application took nearly six months to process, while the outcome of the second application was still outstanding after nearly five months. The time taken was far longer than the timeframe of six weeks as specified in the operational guidelines for the completion of case assessment and recommendation.

864. On the issue of whether the complainant was "fit to make statements", the findings of the two medical assessments dated 18 February and 17 March 2016 were entirely different. It was obviously inappropriate for SWD to rely only on the assessment of 17 March in making the recommendation in May 2016, while conflicting views in the assessment of 18 February were not considered. As a result, SWD subsequently had to arrange for reassessment by the hospital.

865. The Ombudsman considered the complainant's complaint against SWD partially substantiated, and provided the following recommendations to SWD in December 2016 –

(a) with regard to the rental payment for the PRH unit of the CSSA recipient, take the initiative to notify HD and make the rental and tenancy right arrangements as soon as possible in case SWD decides to stop the rental payment, unless it is indicated that the tenant is capable of handling the matter himself;

(b) review the procedures and timeframe for the appointment of a CSSA appointee and draw up guidelines on appointment of an appointee for the CSSA recipient in a timely manner;

(c) remind the officers concerned to properly record the correspondence with other departments;

(d) remind the officers concerned to process CR applications within the timeframe specified in the operational guidelines;

(e) provide training for the officers concerned to enhance their capacity for investigation and assessment of CR applications, e.g. clarification should be sought as soon as possible if inconsistencies are found in the results of the applicant's medical assessments; and

(f) process the complainant's outstanding CR application as soon as possible.

Government's response

866. SWD accepted The Ombudsman's recommendations (c), (d), (e) and (f), and has taken the following follow-up actions.

Recommendation (c)

867. The district social welfare office concerned has reminded its staff by email and at staff meetings that information on service provision, programme arrangements and correspondence with other departments should be recorded in a timely and accurate manner, and that such record should be maintained properly.

Recommendations (d) and (e)

868. The "Guidelines and Procedures for Processing Applications for CR and Other Housing Assistance" provide guidance on procedures and mechanism for social workers of both SWD and non-governmental organisations to process CR applications. In this case, while the complainant's first CR application was being processed by SWD in December 2015, the complainant made repeatedly changed his mind about his future care and accommodation arrangements. This, coupled with inconsistent findings in two closely-timed medical assessments,

affected the progress of SWD's assessment. Eventually, the complainant decided to withdraw his CR application in June 2016. While the complainant's second CR application was being processed by SWD in July 2016, the complainant was found to have made an incorrect statement about property ownership during the application process. He was thus required to make clarifications, which took time to handle. The assessment was therefore postponed. As soon as the assessment was completed in mid-November of the same year, SWD made a CR recommendation to HD on 22 November. Although SWD had not neglected and procrastinated in handling the two CR applications, SWD could not complete the investigation and assessment within the timeframe specified in the departmental guidelines due to various unexpected factors.

869. In the meeting of the Committee on Integrated Family Service Centres (IFSCs) held on 31 May 2017 and the Like Service Meeting of IFSCs on 20 July, IFSCs were reminded to process CR cases in accordance with the procedures specified in the departmental guidelines, and the officers-in-charge of IFSCs were asked to strengthen the supervision of frontline social workers. Such reminders will be given to other relevant service units from time to time through appropriate channels. Moreover, SWD will continue to review the investigation and assessment criteria of CR applications by the relevant service units, and inform them as soon as possible if any area for improvement is identified.

870. SWD will continue, through the annual introduction course on IFSC services and the recently launched e-learning course on IFSC services, to provide social workers with training that covers investigation and assessment of CR applications. In order to further improve the processing of CR cases, the eligibility criteria for CR as well as the processing procedures and mechanism are being reviewed and enhanced by SWD through the platform of the Working Group on Review on the Operation of IFSC Services under the Committee on IFSCs. SWD is conducting case analysis and exploring improvement proposals, including drawing up more detailed guidelines on the eligibility criteria for CR, so as to help officers assess whether cases are eligible for recommendation to HD for approval, according to the actual circumstances. Sharing sessions and staff training will be held by SWD after the completion of the review, with a view to strengthening the capacity of the officers concerned to investigate and assess CR applications.

Recommendation (f)

871. In July 2016, the complainant of this case indicated that he might submit a CR application to SWD again. In August, he notified SWD to confirm his application. As mentioned above, the complainant was found to have made an incorrect statement about property ownership during the application process, and took time to make clarifications to SWD. The assessment was therefore postponed. As soon as the assessment was completed in mid-November, SWD made a CR recommendation to HD on 22 November. Subsequently, HD asked the complainant for supplementary documents relating to his property in Mainland China. With the help of SWD's caseworker, the complainant submitted the relevant information. He accepted the PRH unit allocated to him on 3 February 2017 and moved into the new home on 1 March.

872. SWD does not accept recommendations (a) and (b). The Ombudsman has noted SWD's stance.

Recommendation (a)

873. Under existing arrangements, SWD will notify HD of cases where rent allowance under CSSA payment is suspended or stopped. However, since the relevant payment may be suspended or stopped for various reasons, in view of the actual circumstances and the personal data protection principles, SWD is not able to take the initiative to notify HD of the details of each and every case. In response to the recommendation made by The Ombudsman, SWD and HD have discussed and reviewed the existing mechanism. Under normal circumstances, the rent is paid by SWD to the Housing Authority directly through bank autopay, with regular matching of the autopay information being conducted by the two departments as approved by the Privacy Commissioner for Personal Data. HD may also seek updates from the CSSA recipients or their appointees on the payment of rent allowance. Both departments are of the view that the current arrangement has effectively served the purpose of the recommendation made by The Ombudsman. The complainant's case was only an individual and uncommon incident.

874. For those CSSA recipients who are incapable of making their own arrangements for rental payment and tenancy right regarding their PRH units, or those who do not have relatives to make the arrangements on their behalf, SWD and HD have already enhanced communication and discussed a collaboration proposal. Under special circumstances

rendering HD unable to obtain the necessary information, HD may, after obtaining the consent of the relevant CSSA recipient, make enquiries regarding the arrangements for rent allowance for the CSSA recipient to SWD via a designated memo, so as to facilitate HD's handling of PRH rent and tenancy rights issues. The arrangement has been implemented with effect from September 2017.

875. Further to SWD's response to The Ombudsman on recommendation (a) on 18 August 2017, The Ombudsman wrote on 26 September 2017, requesting SWD to respond why there was concern on actual situation and Data Protection Principle (DDP). SWD responded to The Ombudsman on 29 December 2017 explaining that when CSSA applicants / recipients signed on the application / review forms under CSSA Scheme, consent given for the personal data collected by SWD was for the purpose of CSSA applications or provision of assistance or service as appropriate. The personal data collected by SWD is therefore mainly for the purpose of assessing the eligibility criteria for CSSA. Owing to the purpose of collecting the personal data from the applicants / recipients under SWD being different from releasing such personal data to HD, in accordance with DPP3 of Personal Data (Privacy) Ordinance (Cap 486) on the use of personal data (i.e. personal data shall not, without the prescribed consent of the data subject, be used on a new purpose), SWD should not disclose applicants' / recipients' information including their eligibility for rent allowance under CSSA Scheme to HD directly without their consent.

876. Moreover, in a SWD's Social Security Meeting held on 23 February 2017, the officers were reminded to maintain good communication with HD and provide relevant information as well as other appropriate assistance for HD where necessary.

Recommendation (b)

877. The Social Security Manual of Procedures (SSMP) clearly stipulates the procedures and detailed guidelines for appointing CSSA appointees. As cases requiring appointees to be assessed and recommended by the social workers of IFSCs usually involve relatively complicated family situation, the social workers need to have adequate communication with potential appointees in order to make the most appropriate arrangement for the recipients. In addition, the time required for the appointment will be affected by factors such as the availability of suitable persons and their willingness to accept the arrangement. Therefore, setting a timeframe for the appointment of

appointee may not fit the actual needs of the cases.

878. However, SWD already has in place an established mechanism to issue reports on outstanding cases with expired CSSA payment (including those pending the appointment of appointees) to the supervisors of the social security field units on a monthly basis, so that they can monitor the progress for the cases. The SSMP also requires officers to expedite the processing of cases where CSSA payment is suspended because the appointment of appointees is still outstanding.

879. At a special meeting held on 3 August 2017, Senior Social Security Officers at district level were invited to remind supervising officers in the social security field units to pay special attention to those cases where appointment of appointees was pending upon receipt of relevant reports, and urge staff concerned to complete the appointment procedures as soon as possible. Moreover, at the SWD's Social Security Meeting on 23 February 2017, supervisors were also reminded to assign experienced caseworkers to handle complicated CSSA appointee cases in the future. In-service training for newly-recruited or relatively inexperienced officers would also be strengthened, with supervisors closely monitoring work progress and providing assistance as appropriate.

Transport Department

Case No. 2015/2982 – Failing to resolve the frequent malfunctioning of Bus Stop Announcement System on franchised buses

Background

880. The complainant, who was visually-impaired, repeatedly reflected to TD that the Bus Stop Announcement System (BSAS) on board buses serving the Cross-Harbour Tunnel Route no. 102 frequently malfunctioned or was turned off, causing inconvenience to visually-impaired persons. He considered that TD was ineffective in monitoring the bus company and failed to address the problem properly.

881. The BSAS is designed to provide aid to passengers, especially visually- or hearing-impaired passengers, tourists, and infrequent passengers of the bus routes concerned. All franchised bus companies have installed BSASs that disseminate textual information and audio announcements through display panels and broadcasting system on their bus fleets, in order to alert passengers of the names of upcoming stops so that they can get ready to alight.

882. Audio bus stop announcements were generally available on the lower decks of franchised buses. However, audio bus stop announcements were unavailable on the upper decks of some buses, including Kowloon Motor Bus Limited (KMB) that were installed with multi-media audio-visual system, as well as buses of older models of Citybus Limited (CTB) and New World First Bus Services Limited (NWFB), owing to technical constraints. Nevertheless, passengers on the upper decks could still obtain information on the next stops through display of textual information.

883. In general, bus companies would pre-set the broadcasting volume of BSAS at a level clearly audible and acceptable to most passengers, and bus drivers are not allowed to adjust the level on their own. As required by the bus companies, bus drivers have to check whether the BSAS functions properly before driving off every day.

The Ombudsman's observations

884. The Office of The Ombudsman (the Office) considered the BSAS very important to visually-impaired persons. Apart from the present case, The Office also noted some media reports on complaints about the BSAS, such as that the system frequently malfunctioned or was turned off, announced wrong bus stops, broadcasted at too low a sound level, etc., raised by some visually-impaired persons and groups. The Office considered that the BSAS had the following four major problems, and commented on TD's handling of each.

No audio bus stop announcement on upper decks of buses

885. TD responded that all bus companies have already put in place plans to replace old buses with new ones or carry out improvement works in phases. It is expected that all franchised buses will be equipped with audio bus stop announcement system on both upper and lower decks by 2017. Upon receipt of the complainant's complaint, TD requested bus companies to redeploy their buses so that all the buses serving Route no. 102 could provide audio announcements on both decks. The complainant's concern has been fully addressed.

Inaccurate announcements (i.e. announcing wrong bus stops)

886. TD admitted that human error was the main factor affecting the accuracy of the BSAS. In this connection, the Office was of the view that if the system relied on the manual operation of bus drivers at one bus stop after another, it would be difficult to eliminate human error, regardless of measures bus companies take to remind bus drivers to stay alert. The most effective way to remedy the situation would be to convert the system to automatic BSAS utilising the Global Positioning System (GPS). In this regard, bus companies planned to install the automatic BSAS utilising GPS on its entire bus fleet by 2017. The Office believed that the accuracy of the BSAS would be greatly enhanced upon implementation of the plan.

Malfunctioning of the system

887. Mechanical failure, turning off and malfunctioning of the BSAS have long drawn criticism from passengers. While the Office agreed that bus companies may continue deploying buses with defective BSAS to avoid loss, the Office was of the view that TD's approach was too passive and lacked deterrent effect. The complaints and enquiries

figures in relation to BSAS received by TD between the first half of 2013 and the second half of 2015 showed that the number of complaints against malfunctioning of BSAS was relatively high. However, bus companies lack incentive to take proactive steps to ensure the proper operation of BSAS, as they generally do not have to stop deploying buses with defective BSAS and their profits would not be affected.

888. The Office was of the view that TD should adopt more effective monitoring measures, such as requesting bus companies to conduct regular inspection on BSASs and provide data related to the occurrence of malfunctions, as well as giving advice or warnings to bus companies that frequently fail to carry out proper maintenance on BSASs, so as to ensure that the management of bus companies face the problems squarely.

Inappropriate volume level of the system

889. According to passenger survey findings and complaint figures kept by TD, some passengers considered the volume of audio bus stop announcement too high, while some visually-impaired persons and groups considered the volume too low. In fact, the ambient noises of a moving bus can be affected by a host of factors, in particular the fluctuation in noises emitted by bus engines might make it difficult for passengers to hear the bus stop announcements clearly one moment, and make them feel that the volume of the bus stop announcements is too loud at another. This is beyond the control of TD or bus companies.

890. The Office considered the smartphone applications provided by various bus companies very useful in informing passengers, especially visually-impaired persons, when buses will arrive at which bus stops. In fact, smartphone applications and the BSAS could operate complementarily. The Office urged TD to request the bus companies to promote wider usage of these smartphone applications and enhance passengers' understanding and utilisation of them.

891. Based on the above analysis, the Office was of the view that no impropriety was involved on TD's part since TD had taken positive step to tackle the problems of the BSAS and had followed up on the complainant's complaint according to established procedures.

892. The Ombudsman considered this complaint unsubstantiated, but suggested TD to explore ways to improve the monitoring of BSASs by –

(a) closely monitoring the progress of replacement and retrofitting works of buses by various bus companies to make sure that audio BSASs on upper decks and automatic BSASs utilising GPS are installed as promised;

(b) adopting more effective monitoring measures, such as requesting bus companies to conduct regular inspection on BSASs and provide data related to the occurrence of malfunctions, as well as giving advice or warnings to bus companies that often fail to carry out proper maintenance on BSASs, so as to ensure that the management of bus companies face the problems squarely; and

(c) requesting bus companies to promote wider usage of smartphone applications and enhance passengers' understanding and utilisation of these applications.

Government's response

893. TD accepted all the recommendations of The Ombudsman and has taken the following actions.

Recommendation (a)

894. Since June 2016, franchised bus companies have been required to report to TD, on a monthly basis, the latest position of the provision of audio BSAS on upper decks of buses and the progress of upgrading manual BSAS to an automatic system.

895. At present, the upper decks of all franchised buses are equipped with audio BSAS.

896. As at November 2017, the bus fleets of NWFB, LWB and CTB (Franchise 1 and 2) have fully adopted automatic BSAS. KMB and NLB have completed the upgrading of BSAS to an automatic system on 93% and 77% of their bus fleets respectively. The remaining buses of KMB which currently do not have automatic BSAS will retire by end-2018 and be replaced by new buses equipped with automatic BSAS. As for NLB, after fixing some technical issues, it is expected that all of its buses will be equipped with automatic BSAS by the first quarter of 2018.

Recommendation (b)

897. TD understands that BSAS malfunctioning causes inconvenience to passengers. At present, all franchised bus operators require bus drivers to report any malfunctions of the BSAS for the operators to take prompt actions. To better monitor the BSAS maintenance arrangements of various franchised bus companies, TD has requested the franchised bus companies to submit records of BSAS malfunctions to TD on a monthly basis since June 2016. Should there be frequent malfunctions of the BSAS, TD will request the franchised bus companies concerned to take follow-up actions to improve the situation.

Recommendation (c)

898. To enhance the understanding of passengers (especially the visually-impaired) and utilisation of smartphone applications provided by the franchised bus companies, TD has requested various franchised bus companies to step up promotion of their smartphone applications. For example, franchised bus companies have made use of their meetings with groups representing the interest of persons with disabilities to introduce the functions of their smartphone applications so that these groups can help promote and explain to other persons with disabilities the usage of these applications.

Transport Department

Case No. 2015/3989 – Delay in handling the complainant's Personalised Vehicle Registration Mark application and responding to her complaint

Background

899. The complainant was a Personalised Vehicle Registration Mark (PVRM) applicant. Her application had passed the preliminary assessment and she had paid the deposit for the application. However, the Transport Department (TD) rejected her application after almost two years, with no notification or follow-up action during that period. The complainant was dissatisfied with TD for failure in handling her PVRM application properly, for ignoring the complaint she lodged in December 2014 and for not taking her enquiries seriously.

The Ombudsman's observations

900. The Office of The Ombudsman (the Office) appreciated that a considerable number of applications for PVRMs were received in each invitation exercise (with the quota up to 1,500 per exercise), and the vetting procedures were complex in that TD had to conduct research and internal assessment on the proposed PVRMs, including making reference to similar cases in the past, to ensure consistency, in addition to consulting relevant bureaux/departments. Therefore, the vetting procedures would generally take eight months or more to complete.

901. The complainant's application was processed in the last batch of that exercise. Due to adverse comments on her application received from law enforcement, the Commissioner for Transport considered it necessary to further consult relevant government departments, thus the vetting time was further lengthened by six months. The Office was of the view that although the vetting of this application took longer than usual, TD was engaged in consultation and discussion with different departments throughout. There was no apparent delay.

902. The complainant also alleged that TD ought to have informed her sooner about the rejection of her application so that she could submit another application as soon as possible. The fact was that TD only

arrived at the final decision regarding her application in the same month she was notified, it was impossible for TD to inform the applicant of the vetting result at an earlier time. The Office was pleased to note that TD initiated improvement and undertaken to proactively inform applicants of the latest development if their applications require further assessment.

903. The Office scrutinised the complaint letter sent from the complainant to TD in December 2014. It was stated clearly in the letter that she would like to 'lodge a serious complaint', 'request an investigation into whether the matter involved negligence or procedural loopholes' and 'be given a written reply' in relation to the serious delay in TD's handling of her application. Nevertheless, TD's staff deemed it a 'suggestion' and did not respond to that with a letter, exhibiting inattentiveness and sloppiness. TD admitted that the way its staff handled the letter was inappropriate, and has reminded staff members to handle letters from members of the public with due care and attention, as well as to respond and take follow-up action as and when required.

904. The Ombudsman considered this complaint against TD partially substantiated. Regarding TD's plan to proactively identify applications requiring further consultation or scrutiny, and inform the applicants concerned of the status of their applications as well as contact details of responsible officers, The Ombudsman recommended TD to draw up internal guidelines for this improvement measure and work towards its early implementation.

Government's response

905. TD accepted The Ombudsman's recommendation. The improvement measure has been implemented since the 29th PVRM invitation exercise held in January 2016. Internal guidelines have been drawn up such that when applications requiring further consultation or scrutiny are spotted, TD will proactively inform the applicants concerned of the status of their applications and furnish them with contact telephone numbers of responsible officers to facilitate them to make enquiries if necessary.

Transport Department

Case No. 2015/5159 – Faulty procedures in registration of imported cars from Japan

Background

906. The complainant ran a business of importing vehicles bought from Japan (Japanese parallel-imported vehicles) into Hong Kong for sale. Japanese parallel-imported vehicle should be registered in Japan and issued with an Export Certificate, which TD required vehicle traders to produce when a Japanese parallel-imported vehicle is presented for pre-registration inspection. Japanese parallel-imported vehicles should then be categorised as "Imported Used" on the Vehicle Registration Document (VRD).

907. However, when an applicant registers a Japanese parallel-imported vehicle at TD's Licensing Office (LO), he is not strictly required to produce an Export Certificate, nor does LO check inspection records for the Export Certificate presented by the applicant during the inspection. If an applicant did not produce proactively an Export Certificate, LO would categorise the vehicle as "Brand New" erroneously.

908. The complainant alleged that there was maladministration on the part of TD in handling registration applications for Japanese parallel-imported vehicles. As a result of not strictly requiring applicants to produce an Export Certificate nor verifying the information against relevant records of vehicle inspection, TD erroneously categorised some Japanese parallel-imported vehicles as "Brand New".

The Ombudsman's observations

909. TD explained that not all Japanese parallel-imported vehicles are issued with an Export Certificate. Hence, TD cannot strictly require an applicant to produce Export Certificates for all registration applications for Japanese parallel-imported vehicles.

910. Instead, TD's existing vehicle registration process is mainly based on the documents provided by applicants. Vehicle information would then be verified against declarations made to the Customs and

Excise Department (C&ED). TD may not be able to detect wilful concealment of information concerning registration of the vehicle outside Hong Kong, but an applicant who makes a false declaration may be identified and face criminal sanction.

911. As the tax payable for a brand new vehicle is higher than a used vehicle, the Office of The Ombudsman (the Office) agreed with TD's argument that vehicle traders do not have much incentive to falsely declare a used vehicle as a brand new one. Although TD's vehicle registration system cannot be completely rid of cases of wilful false declaration, isolated cases will not give rise to a systemic problem, and do not indicate maladministration on TD's part. However, the existing vehicle registration process may not fulfil public expectation of information presented on the VRD to be correct, due to failure in verifying some of the vehicle particulars, such as whether the vehicle has been registered outside Hong Kong.

912. The Ombudsman considered this complaint unsubstantiated, but recommended that TD –

(a) consider adding a remark on the VRD stating that categorisation of "Imported Used" and "Brand New" vehicle is based on declared information, so as to avoid misunderstanding that such information has been verified correct;

(b) consider reviewing the form "Application for Registration and Licensing of a Vehicle" by requesting the applicant to declare whether the vehicle under application has been registered outside Hong Kong; and

(c) keep in view the practice of the Japanese Government and the vehicle trade regarding vehicle sale, registration and export, with a view to exploring enhancement to the procedures of processing vehicle registration and licensing applications.

Government's response

913. TD accepted The Ombudsman's recommendations.

914. TD has reviewed the documents relating to vehicles registration and licensing application. In the existing procedures of submitting Import Return for imported motor vehicles to C&ED, vehicle importers

must declare to the Commissioner for Transport whether the imported vehicle is new or used on the Import Return. It is also clearly stated on the Import Return that submitting a false or inaccurate declaration may lead to prosecution and criminal sanction. According to "Notes to Motor Vehicle Importers/Distributors" provided by C&ED (available on C&ED's website), vehicles which have been registered outside Hong Kong will be categorised under "Imported Use" (i.e. "Used Vehicles"). When registering vehicles, TD uses the information provided in the Import Return to establish First Registration Vehicle Status on the VRD.

915. As a vehicle may be first registered by an owner or distributor, instead of the person who imported the vehicle, an applicant for vehicle registration may not have information on whether the vehicle has been registered outside Hong Kong. TD considers it inappropriate to require such applicants to declare whether the vehicle under application has been registered outside Hong Kong on the form "Application for Registration and Licensing of a Vehicle".

916. With reference to the practice of overseas governments and vehicle trade, TD considers that vehicles can be, based on documents obtained from vehicle importers, categorised with objective descriptions into "never been registered outside Hong Kong prior to importation into Hong Kong" and "has been registered outside Hong Kong prior to importation into Hong Kong". TD has consulted the trade and relevant stakeholders about this proposal and will discuss the implementation details with the trade in early 2018, with a view to implementing the proposal in April 2018. Besides, TD is working on the corresponding programme modification in the computer system which is scheduled for completion in April 2018.

Transport Department

Case No. 2016/0660(I) – (1) Unreasonably refusing to accept the payment advice issued by a professional organisation as an acceptable address proof for the complainant's vehicle licence renewal application; (2) refusing to release the internal guidelines for assessing the acceptability of address proof and the list of acceptable address proofs; and (3) providing ambiguous and misleading information about acceptable address proof in its publicity leaflet.

Background

917. The complainant applied for renewal of his vehicle's licence at a licensing office of Transport Department (TD). He presented to the counter staff a payment advice issued by a professional organisation as proof of his address along with his application. However, his application was rejected on the ground that the payment advice was not an acceptable proof of address. The complainant disagreed with the counter staff. He argued that there was an "etc." at the end of the acceptable address proof listed in TD's publicity leaflet, implying that documents similar to those listed were also acceptable. He requested to see TD officers of a higher rank for review of his case.

918. On the same day, TD officers interviewed the complainant and explained that his payment advice did not fall within the scope of acceptable address proof under TD's existing internal guidelines. The complainant's application was rejected because he did not indicate any difficulty in producing commonly accepted address proof, nor accept other options of submitting address proof proposed by TD officers. The complainant then requested access to TD's assessment guidelines and the list of documents acceptable as address proof. TD officers declined his request on the ground that the requested information was meant for internal reference to facilitate operational staff to process applications.

919. The complainant alleged that TD –

(a) unreasonably refused to accept the payment advice issued by a professional organisation as proof of address for his vehicle licence renewal application;

(b) failed to release the internal guidelines for assessing the acceptability of address proof and the list of acceptable address proof upon request; and

(c) provided ambiguous and misleading information about acceptable address proof in its publicity leaflet.

The Ombudsman's observations

Allegation (a)

920. The Office of The Ombudsman (the Office) appreciates the need for TD to set out a manageable scope of acceptable address proof to facilitate processing the large volume of licensing applications. In the present case, the complainant did not indicate difficulty in producing commonly accepted address proof, and declined other suggested options for submitting acceptable address proof. It was therefore reasonable for TD officers to reject his application; there was no evidence of maladministration on the part of TD. The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b)

921. TD refused the complainant's information access request on the basis that "the requested information was for internal reference". This is not a reason set out in Part 2 of the Code on Access to Information (the Code) for withholding information. Moreover, TD did not quote the relevant paragraph of the Code to support its refusal nor advise the complainant of the review and complaint channels, failing to fulfil requirements set out in the Code.

922. TD elaborated that releasing sensitive information in the internal guidelines would undermine the effectiveness of law enforcement and hence the operation of the Department. The Office accepted that part of the requested information is sensitive information, and disclosure could harm or prejudice the proper and efficient conduct of the operation of the Department. However, the list of acceptable address proof is not sensitive information, and should have been provided to the complainant. The Office considered TD's concern, that the disclosure of the list may invite unnecessary queries or disputes from the public, unnecessary and against the spirit of the Code.

923. TD displayed inadequacies in handling the complainant's information request and failed to comply with the requirements of the Code. The Ombudsman considered allegation (b) partially substantiated.

Allegation (c)

924. The complainant disputed the use of "etc." in TD's publicity leaflet on acceptable address proof. The Office agreed that "etc." may give rise to the impression that documents other than those listed on the leaflet would be accepted; the publicity leaflet is apparently not clear enough. TD should be more client-oriented and cater for the situation where the applicant wishes to provide address proof other than those listed. The Ombudsman considered allegation (c) partially substantiated.

925. This case reflected room for improvement on the part of TD in handling information requests from the public. The Office was pleased to note that the Department has taken remedial action promptly in the light of this case, releasing the full list of acceptable address proofs for public information, and deleting "etc." from the publicity leaflet.

926. The Ombudsman considered this complaint partially substantiated, and urged TD to strengthen staff training and supervision to ensure strict compliance with the Code by its staff in handling information requests in the future.

Government's response

927. TD accepted The Ombudsman's recommendation and has taken measures to strengthen staff training and supervision for strict compliance with the Code in handling information requests.

928. In terms of staff training, an experience sharing session on handling access to information requests was organised for staff and supervisors from the Licensing Offices (LOs). Guest speakers, including a representative from the Constitutional and Mainland Affairs Bureau, explained the requirements stipulated in the Code and shared their experience in handling access to information requests.

929. Apart from that, guidelines have been drawn up to facilitate frontline staff at LOs to handle access to information requests. The guidelines set out key points in responding to verbal requests from customers made over the counter and through the enquiry hotline, and were disseminated in the briefing sessions designed for frontline staff of LOs. Supervisors in TD reminded their staff of the requirements stipulated in the Code and reminded them to adhere to guidelines for handling access to information requests. Refresher briefings for frontline staff will be conducted annually and the guidelines will be re-circulated on a half-yearly basis.

Transport Department

Case No. 2016/2794 – Unreasonably reducing the residents' bus service of some housing estates in a district without considering the residents' transport needs

Background

930. Under the current transport policy, the Government gives priority to the development of mass transit carriers of high capacity such as railways and franchised buses. In the public transport system, residents' services (RS) perform a supporting role to provide auxiliary bus service between housing estates and nearby railway stations or public transport interchanges during peak hours, and when regular public transport services cannot meet the demand.

931. In processing new applications for operation of RS, the Transport Department (TD) will take into account such factors as transport demand, existing regular public transport service or services under planning, intended service coverage and traffic conditions. Operators of the existing RS are usually required to renew their licences each year, and should not presume that licenses would always be renewed. In deciding whether to approve a renewal application, TD will consider factors such as utilisation of the RS concerned, whether the existing public transport services can meet the passenger needs if the RS is cancelled or reduced, and the residents' level of acceptance.

932. The complainants alleged that TD had reduced the number of RS buses in the afternoon at some housing estates in a certain district, despite objections from the residents. They claimed that TD had neglected the residents' transport needs and acted in contradiction against the original intent of reducing RS, which was to improve traffic flow on the roads, since reducing those services would lead to an increase in the use of other vehicles.

The Ombudsman's observations

933. In the view of the Office of The Ombudsman (the Office), allowing all housing estates to have their own RS is not feasible in the long run. To cope with the increasing traffic needs alongside the

population growth in the district, TD should increase the regular public transport services, and adjust and rationalise the existing RS. That is in line with the Government's transport policy and the principles of increasing the efficiency of road usage and reducing air pollution.

934. Nevertheless, the Office considered that TD lacked a comprehensive plan for rationalising the RS in the district. Since residents can easily compare their RS with those of nearby housing estates, TD should devise a comprehensive plan, and provide clear information to all residents, so as to avoid giving them an impression of handling applications inconsistently. Moreover, if TD consults the District Council (DC) on its overall plan for strengthening franchised bus services and rationalising the RS, it will help in assessing the residents' response and explaining the situation to the affected residents.

935. Given the residents' long-time reliance on RS, TD should carry out due consultation and allow sufficient time for the residents to accept the change when cancelling or reducing the existing RS. In this case, TD had given the residents less than one-month notice, which was obviously inadequate.

936. The Ombudsman found this complaint unsubstantiated, but found other inadequacies on the part of TD. The Ombudsman recommended that TD –

(a) formulate a comprehensive plan, with a detailed timetable and route map, for rationalising RS in the district concerned;

(b) notify and consult the affected housing estates of such plan as soon as possible, and explain to the residents in detail the improvement proposals/specific measures for franchised bus services;

(c) consult the DC on the overall transport plan for the district (including plans for enhancing franchised bus services and rationalising RS);

(d) revamp the work procedures, and give at least three months' prior notice to the affected residents and consult the relevant DC members with regard to service reduction of RS in future;

(e) consider the RS already approved for nearby housing estates in addition to existing factors of consideration when processing

new applications for operation of RS, so that the response of residents can be assessed; and

(f) closely monitor the utilisation of franchised bus services in the district, and to proactively discuss with the franchised bus company improvement proposals if the services fail to meet residents' transport demand.

Government's response

937. TD accepted all the recommendations of The Ombudsman and has taken the following actions.

Recommendations (a), (b), (c) and (e)

938. In the light of the objection from residents and recommendations made by The Ombudsman, TD has reviewed the RS in the district. TD has included applicants' expectation arising from the RS already approved for nearby housing estates as one of the factors of consideration. However, when regular public transport is already sufficient, RS that is approved solely due to the applicant's expectation (i.e. "above-benchmark RS") should only be permitted if -

(i) residents in the district not served by RS or those who rely on regular public transport would not be adversely affected by adjustments of the district's regular public transport services according to the changes in passenger demand resulting from such above-benchmark RS; and

(ii) the operation of such above-benchmark RS would not unduly cause traffic congestion.

939. After review, TD consulted the DC concerned in March 2017 about the RS in the district, including the newly added factor of consideration and the pre-requisites for approving the above-benchmark RS, as well as the plans to approve an application for a new RS and another application for extension of operating hours having regard to the newly added factor of consideration. TD also advised the DC that it would adjust the services of relevant franchised bus routes as necessary, having regard to the changes in passenger demand and with reference to the established guidelines, with a view to optimising the use of road resources. The DC agreed to TD's proposals and made further

comments on the RS applications in the district. TD will continue to closely monitor the operation of franchised buses and RS, and communicate with the DC members concerned.

940. Separately, TD has revised the internal guidelines to include the applicants' expectation and response arising from RS already approved for nearby housing estates as one of the factors of consideration for processing applications for new RS.

Recommendation (d)

941. TD has implemented the arrangement. Before the reduction or adjustment of the RS, residents of the affected housing estates would be informed and consulted as soon as possible, unless the adjustment plan is already supported by user groups. New measures taken include strengthening the communication with the DC members and user groups concerned, and explaining to them in detail the proposals and specific measures for improving franchised bus services, as well as giving residents at least three months' prior notice to prepare for the change.

Recommendation (f)

942. TD has been closely monitoring the utilisation of the franchised bus services. TD's surveys show that the provision of franchised bus services in the district concerned is stable and the services have sufficient capacity to cater for the transport demand of the residents. TD will continue to closely monitor the utilisation of relevant bus routes and changes in passenger demand, and will make timely adjustment to the services accordingly.

Transport Department

Case No. 2016/2842 – (1) Unreasonably reducing the residents' bus service of a housing estate; and (2) failing to consult the residents concerned

Background

943. Under the current transport policy, the Government gives priority to the development of mass transit carriers of high capacity such as railways and franchised buses. In the public transport system, residents' services (RS) perform a supporting role to provide auxiliary bus service between housing estates and nearby railway stations or public transport interchanges during peak hours, and when regular public transport services cannot meet the demand.

944. In processing new applications for operation of RS, the Transport Department (TD) will take into account such factors as transport demand, existing regular public transport service or services under planning, intended service coverage and traffic conditions. Operators of the existing RS are usually required to renew their licences each year, and should not presume that licenses would always be renewed. In deciding whether to approve a renewal application, TD will consider factors such as utilisation of the RS concerned, whether the existing public transport services can meet the passenger needs if the RS is cancelled or reduced, and the residents' level of acceptance.

945. The owners' committee and property management office of a housing estate complained to the Office of The Ombudsman (the Office) against TD for –

(a) unreasonably cancelling the services of their RS from 2 p.m. to 4 p.m., with blatant disregard of residents' objection;

(b) blindly following transport policy by unilaterally giving reasons and notice without consulting residents of the housing estate or discussing with the representatives of residents in advance; and

(c) unsatisfactory franchised bus services and bus stop facilities in the district, with franchised bus fares being higher than those of the RS.

The Ombudsman's observations

946. In the view of the Office, allowing all housing estates to have their own RS is not feasible in the long run. To cope with the increasing traffic needs alongside the population growth in the district, TD should increase the regular public transport services, and adjust and rationalise the existing RS. That is in line with the Government's transport policy and the principles of increasing the efficiency of road usage and reducing air pollution.

947. Nevertheless, the Office considered that TD lacked a comprehensive plan for rationalising the RS in the district. Since residents can easily compare their RS with those of nearby housing estates, TD should devise a comprehensive plan, and provide clear information to all residents, so as to avoid giving them an impression of handling applications inconsistently. Moreover, if TD consults the District Council (DC) on its overall plan for strengthening franchised bus services and rationalising the RS, it will help in assessing the residents' response and explaining the situation to the affected residents.

948. Given the residents' long-time reliance on RS, TD should carry out due consultation and allow sufficient time for the residents to accept the change when cancelling or reducing the existing RS. In this case, TD had given the residents less than one-month notice, which was seriously inadequate.

949. The Ombudsman considered that TD lacked a comprehensive plan and proper consultation, and found this complaint partially substantiated. The Ombudsman recommended that TD –

(a) formulate a comprehensive plan, with a detailed timetable and route map, for rationalising RS in the district concerned;

(b) notify and consult the affected housing estates of such plan as soon as possible, and explain to the residents in detail the improvement proposals/specific measures for franchised bus services;

(c) consult the DC on the overall transport plan for the district (including plans for enhancing franchised bus services and rationalising RS);

(d) revamp the work procedures, and give at least three months' prior notice to the affected residents and consult the relevant DC members with regard to service reduction of RS in future;

(e) consider the RS already approved for nearby housing estates in addition to existing factors of consideration when processing new applications for operation of RS, so that the response of residents can be assessed; and

(f) closely monitor the utilisation of franchised bus services in the district, and to proactively discuss with the franchised bus company improvement proposals if the services fail to meet residents' transport demand.

Government's response

950. TD accepted all the recommendations of The Ombudsman and has taken the following actions.

Recommendations (a), (b), (c) and (e)

951. In the light of the objection from residents and recommendations made by The Ombudsman, TD has reviewed the RS in the district. TD has included applicants' expectation arising from the RS already approved for nearby housing estates as one of the factors of consideration. However, when regular public transport is already sufficient, RS that is approved solely due to the applicant's expectation (i.e. "above-benchmark RS") should only be permitted if -

(i) residents in the district not served by RS or those who rely on regular public transport would not be adversely affected by adjustments of the district's regular public transport services according to the changes in passenger demand resulting from such above-benchmark RS; and

(ii) the operation of such above-benchmark RS would not unduly cause traffic congestion.

952. After review, TD consulted the DC concerned in March 2017 about the RS in the district, including the newly added factor of consideration and the pre-requisites for approving the above-benchmark RS, as well as the plans to approve an application for a new RS and

another application for extension of operating hours having regard to the newly added factor of consideration. TD also advised the DC that it would adjust the services of relevant franchised bus routes as necessary, having regard to the changes in passenger demand and with reference to the established guidelines, with a view to optimising the use of road resources. The DC agreed to TD's proposals and made further comments on the RS applications in the district. TD will continue to closely monitor the operation of franchised buses and RS, and communicate with the DC members concerned.

953. Separately, TD has revised the internal guidelines to include the applicants' expectation and response arising from RS already approved for nearby housing estates as one of the factors of consideration for processing applications for new RS.

Recommendation (d)

954. TD has implemented the arrangement. Before the reduction or adjustment of the RS, residents of the affected housing estates would be informed and consulted as soon as possible, unless the adjustment plan is already supported by user groups. New measures taken include strengthening the communication with the DC members and user groups concerned, and explaining to them in detail the proposals and specific measures for improving franchised bus services, as well as giving residents at least three months' prior notice to prepare for the change.

Recommendation (f)

955. TD has been closely monitoring the utilisation of the franchised bus services. TD's surveys show that the provision of franchised bus services in the district concerned is stable and the services have sufficient capacity to cater for the transport demand of the residents. TD will continue to closely monitor the utilisation of relevant bus routes and changes in passenger demand, and will make timely adjustment to the services accordingly.

Transport Department

Case No. 2016/2916 – Unreasonably reducing the residents' bus service of a housing estate

Background

956. Under the current transport policy, the Government gives priority to the development of mass transit carriers of high capacity such as railways and franchised buses. In the public transport system, residents' services (RS) perform a supporting role to provide auxiliary bus service between housing estates and nearby railway stations or public transport interchanges during peak hours, and when regular public transport services cannot meet the demand.

957. In processing new applications for operation of RS, the Transport Department (TD) will take into account such factors as transport demand, existing regular public transport service or services under planning, intended service coverage and traffic conditions. Operators of the existing RS are usually required to renew their licences each year, and should not presume that licenses would always be renewed. In deciding whether to approve a renewal application, TD will consider factors such as utilisation of the RS concerned, whether the existing public transport services can meet the passenger needs if the RS is cancelled or reduced, and the residents' level of acceptance.

958. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against TD for unreasonably cancelling the RS of his housing estate (the Estate) from 1:30 pm to 3:30 pm. The complainant alleged that many elderly and student residents of the Estate relied on the RS for commuting, and the reduction of service in the afternoon would leave them without public transport services for commuting to and from the Estate during the period.

The Ombudsman's observations

959. In the view of the Office, allowing all housing estates to have their own RS is not feasible in the long run. To cope with the increasing traffic needs alongside the population growth in the district, TD should increase the regular public transport services, and adjust and rationalise

the existing RS. That is in line with the Government's transport policy and the principles of increasing the efficiency of road usage and reducing air pollution.

960. Nevertheless, the Office considered that TD lacked a comprehensive plan for rationalising the RS in the district. Since residents can easily compare their RS with those of nearby housing estates, TD should devise a comprehensive plan, and provide clear information to all residents, so as to avoid giving them an impression of handling applications inconsistently. Moreover, if TD consults the District Council (DC) on its overall plan for strengthening franchised bus services and rationalising the RS, it will help in assessing the residents' response and explaining the situation to the affected residents.

961. Given the residents' long-time reliance on RS, TD should carry out due consultation and allow sufficient time for the residents to accept the change when cancelling or reducing the existing RS. In this case, TD had given the residents less than one-month notice, which was seriously inadequate.

962. The Ombudsman found this complaint unsubstantiated, but found other inadequacies on the part of TD. The Ombudsman recommended that TD –

(a) formulate a comprehensive plan, with a detailed timetable and route map, for rationalising RS in the district concerned;

(b) notify and consult the affected housing estates of such plan as soon as possible, and explain to the residents in detail the improvement proposals/specific measures for franchised bus services;

(c) consult the DC on the overall transport plan for the district (including plans for enhancing franchised bus services and rationalising RS);

(d) revamp the work procedures, and give at least three months' prior notice to the affected residents and consult the relevant DC members with regard to service reduction of RS in future;

(e) consider the RS already approved for nearby housing estates in addition to existing factors of consideration when processing new applications for operation of RS, so that the response of

residents can be assessed; and

(f) closely monitor the utilisation of franchised bus services in the district, and to proactively discuss with the franchised bus company improvement proposals if the services fail to meet residents' transport demand.

Government's response

963. TD accepted all the recommendations of The Ombudsman and has taken the following actions.

Recommendations (a), (b), (c) and (e)

964. In the light of the objection from residents and recommendations made by The Ombudsman, TD has reviewed the RS in the district. TD has included applicants' expectation arising from the RS already approved for nearby housing estates as one of the factors of consideration. However, when regular public transport is already sufficient, RS that is approved solely due to the applicant's expectation (i.e. "above-benchmark RS") should only be permitted if -

(i) residents in the district not served by RS or those who rely on regular public transport would not be adversely affected by adjustments of the district's regular public transport services according to the changes in passenger demand resulting from such above-benchmark RS; and

(ii) the operation of such above-benchmark RS would not unduly cause traffic congestion.

965. After review, TD consulted the DC concerned in March 2017 about the RS in the district, including the newly added factor of consideration and the pre-requisites for approving the above-benchmark RS, as well as the plans to approve an application for a new RS and another application for extension of operating hours having regard to the newly added factor of consideration. TD also advised the DC that it would adjust the services of relevant franchised bus routes as necessary, having regard to the changes in passenger demand and with reference to the established guidelines, with a view to optimising the use of road resources. The DC agreed to TD's proposals and made further comments on the RS applications in the district. TD will continue to

closely monitor the operation of franchised buses and RS, and communicate with the DC members concerned.

966. Separately, TD has revised the internal guidelines to include the applicants' expectation and response arising from RS already approved for nearby housing estates as one of the factors of consideration for processing applications for new RS.

Recommendation (d)

967. TD has implemented the arrangement. Before the reduction or adjustment of the RS, residents of the affected housing estates would be informed and consulted as soon as possible, unless the adjustment plan is already supported by user groups. New measures taken include strengthening the communication with the DC members and user groups concerned, and explaining to them in detail the proposals and specific measures for improving franchised bus services, as well as giving residents at least three months' prior notice to prepare for the change.

Recommendation (f)

968. TD has been closely monitoring the utilisation of the franchised bus services. TD's surveys show that the provision of franchised bus services in the district concerned is stable and the services have sufficient capacity to cater for the transport demand of the residents. TD will continue to closely monitor the utilisation of relevant bus routes and changes in passenger demand, and will make timely adjustment to the services accordingly.

Part III
– Responses to recommendations in direct investigation cases

Development Bureau

Case No. DI/310 – Government's Tree Management Regime and Practices

Background

969. Hong Kong is a densely populated city. Falling of branches or collapse of trees could easily result in injuries or damage to property in their surrounding areas. The Office of The Ombudsman (the Office) initiated this direct investigation to examine the Government's tree management regime and practices with a view to identifying any inadequacies. Our focus is on the effectiveness of the Government's work to ensure public safety.

The Ombudsman's observations

Tree Management Regime

970. Currently, trees on Government land and those on private land are regulated under two different regimes.

971. The day-to-day management of trees on Government land is shared by various Government departments according to the management responsibility of the land concerned. Their duties include maintenance, inspection and risk assessment of trees. The Tree Management Office (TMO) under the Development Bureau (DEVB) acts as a central coordinator and oversees tree management work.

972. The Expert Panel on Tree Management (the Expert Panel) under TMO is an advisory group made up of local and overseas tree experts. The Expert Panel advises the Government on policies on tree management and maintenance as well as the implementation of those policies.

973. As regards trees on private land, only some land leases contain a

tree preservation clause, which stipulates that, unless there is an emergency, the land owners must obtain written consent from the Lands Department before they can remove or prune any tree within the land boundary.

Lack of Registration System for Arborists

974. Landscape architects and arborists are the major professional practitioners in tree management. In Hong Kong, accreditation of landscape architects' professional qualifications is governed by the Landscape Architects Registration Ordinance. The Landscape Architects Registration Board is the statutory authority that verifies the qualifications of applicants for registration as landscape architects and deals with the conduct and disciplinary matters of registered landscape architects. This registration system serves to maintain the professional standards in the field as well as to safeguard the rights and interests of organisations/individuals who engage the services of registered landscape architects. Arborists, however, are not subject to any registration system in Hong Kong. There is no avenue for the public to file a complaint against an arborist in case of poor quality of service or misconduct.

No Specific Requirements for Arboricultural Practitioners

975. The expertise and work experience of practitioners who conduct inspections and review inspections are crucial for the prompt and accurate identification of trees that are problematic or at risk of collapse. However, the Government merely requires those practitioners to meet some basic standards in these two aspects. Besides, the relevant training programmes offered by TMO are only two-day courses. It is doubtful whether practitioners who just meet such basic requirements are really capable of conducting proper tree inspection work.

976. As frontline practitioners are responsible for routine tree maintenance work, such as pruning, prevention and treatment of insect pests and diseases and fertiliser application, their work quality has a direct and significant bearing on the health condition of trees. It is incongruous that they do not need to meet any specific requirements of qualifications or work experience before they take up their jobs.

Manpower Resources Planning Long Overdue

977. Established in 2010, TMO has organised training courses for Government employees responsible for tree management and also encouraged tertiary and training institutions to offer tree management programmes. However, it was not until mid-2015 that TMO started to study the manpower resources for tree management in Hong Kong for long-term planning purposes. We consider that long overdue.

Inapt Deployment of Staff Resulting in Wastage of Experience

978. Currently, within the civil service, there is not a dedicated grade of officers responsible for tree management. The work is taken up by officers who are also responsible for other tasks (for example, the Leisure Services Managers in the Leisure and Cultural Services Department). Officers in those grades are often deployed to posts not quite related to tree management, resulting in wastage of professional knowledge and experience. That is not conducive to tree management work (including supervision of contractors), which requires specialised knowledge and expertise.

Need for TMO to Enhance Monitoring Work of Government Departments

979. It is essential for Government departments to select the right species and planting locations with adequate growing space for trees. All these factors have a direct impact on the well-being of the trees and their safety in the future.

980. We consider that while the various departments are not hierarchically under TMO, the Office should enhance its communication with them. It should require the departments concerned to properly carry out the duties and monitor their performance in scrutinising the landscape design at the planning stage of works projects and following the DEVB guidelines in selecting the right tree species and planting locations. This would help prevent tree collapse and obviate the need for hasty removal of dangerous trees in the future.

Inadequate Criteria for Risk Assessment

981. We also find it necessary for TMO to revise the criteria adopted in its "Form 2" designed for conducting risk assessment of tree. While the condition of a tree itself and its growing environment are separately recorded in "Form 2", the assessment criteria in "Form 2" have not taken

into account the combined risk factors caused by the two together (for example, whether the weight of the tree itself plus external loading can cause a problem).

TMO's Failure to Effectively Oversee Government Departments' Handling of Public Reports and Complaints

982. In some cases, there was serious delay on the part of both the department concerned and its contractors in handling reports of hazardous trees by members of public. While it is the responsibility of the departments concerned to follow up on those public reports and complaints, TMO, being the central body for regulating and coordinating the tree management work of various departments, should certainly step up its monitoring of their performance in this regard. TMO may even consider positioning itself as the reviewing body for any inadequacies in Government departments' handling of public reports and complaints, thereby directing such departments to take appropriate improvement measures.

Need to Enhance the Expert Panel's Transparency and Accountability

983. By setting up the Expert Panel under DEVB's TMO, the Government can tap expert opinions from independent professionals on matters relating to tree management. To enhance its transparency and accountability, we consider that DEVB should keep proper records of the opinions from the Expert Panel/ Panel members and make them available to the public.

Need for Legislation on Tree Management

984. Compared with trees on Government land, the regulation of trees on private land appears to be even more inadequate. Even for those private leases that contain a tree preservation clause, it is outside the regulatory scope of the clause as to whether and how the owners have maintained their trees. There is also no law at present to require owners of private land to inspect and maintain their trees within their property. In other words, the Government has no power to intervene even if the land owners have not properly maintained their trees to mitigate the risk of tree collapse. Cases have shown that tree collapse on private land as a result of improper management can have very serious consequences.

985. Tree legislation in other jurisdictions and related information show that introduction of tree management laws could help cope with certain tree management problems in Hong Kong, for example, formulating basic criteria for planting, pruning and removal of trees; conferring powers on government authorities to make it compulsory for private land owners to prune or remove dangerous trees on their land; requiring specific works relating to tree care and other tree management aspects to be carried out; as well as publishing the names of approved training providers and training courses on tree management.

986. We consider that the Government should promulgate its intention to introduce tree laws to remedy the inadequacies of the current regulatory regime. The Government cannot just rely on providing public education/advice/guidance, as that is unlikely to get the desired results in the foreseeable future. Besides, studying for and drafting of legislation take time. The Government should start the necessary preparations as soon as possible. Once its intention to legislate is promulgated, that may help change the public's mindset and heighten their awareness of tree management responsibility. Moreover, business opportunities, and hence job openings relating to tree management, will emerge as a result. This will in turn help nurture professionals and practitioners in the field to meet future demand for manpower resources after the enactment of legislation.

987. Meanwhile, when making preparations for legislation, the Government can consider further enhancing the status of the Expert Panel, as well as its participation and accountability. For instance, it can, based on the model of the Antiquities Advisory Board, convert the Expert Panel into a statutory body as part of the proposed tree legislation, thus enabling the Expert Panel to provide the Government with more authoritative and representative opinions.

988. The Ombudsman recommended DEVB to –

Manpower Resources

(a) consider setting up a registration or certification system for arborists;

(b) raise the professional knowledge and work experience requirements of arboricultural practitioners, especially those responsible for inspection and review inspections;

(c) step up technical training for frontline staff;

(d) speed up manpower resources planning;

Management of Trees on Government Land

(e) review the current deployment and training arrangements for staff with tree management duties, or even consider central deployment of dedicated tree management officers to various departments;

(f) step up the monitoring of tree planting arrangements of Government departments;

(g) supplement the criteria for tree risk assessment;

(h) set up a mechanism to strengthen the monitoring of Government departments' handling of public reports/complaints;

(i) enhance the transparency and accountability of the opinions offered by the Expert Panel, record the opinions of the Panel and its members and make such records available to the public;

Management of Trees on Private Land

(j) continue to step up publicity and education on tree maintenance for owners of private land; and

Legislation on Trees

(k) clearly and firmly promulgate its intention to legislate and complete the necessary preparations as soon as possible to enable comprehensive and more effective regulation of tree management and preservation in Hong Kong.

Government's response

989. DEVB accepted recommendation (a) and agreed with the rationale of setting up a registration system for arborists to provide quality assurance of tree management work. To this end, we will build up the overall professional knowledge and standards within the industry. In 2016, the DEVB assisted the establishment of the Arboriculture and Horticulture Industry Training Advisory Committee to draw up the specifications of competence standards and develop a qualification framework for the industry. We are working with the training institutions to incorporate practical urban arboricultural experience in their curriculum. This will form the basis of developing measures to uplift industry standards and uphold quality assurance, such as industry self-regulation or recognition requirements. We will continue to monitor development and review whether the conditions are ripe for the establishment of a registration system.

990. DEVB accepted recommendation (b). Since 2016, on-site tree inspection has been incorporated as part of the assessment in the tree risk assessment training course. Officers are required to go through rigorous assessment after the training.

991. DEVB accepted recommendation (c). DEVB has progressively and proactively strengthened collaborations with educational and training institutions to organise more training programmes on arboriculture, including tree identification, proper pruning, pest and disease, and occupational safety and health courses for tree work to raise the knowledge and skill level of frontline staff in arboriculture.

992. DEVB accepted recommendation (d) and commissioned in 2016 a Human Resources and Competences Survey and Analysis of the arboriculture, horticulture and landscape management and maintenance industry in Hong Kong. The DEVB is working closely with tertiary institutions and training institutions for providing more training courses to speed up the training for professionals to meet market demands.

993. DEVB accepted recommendation (e) and has reviewed the current deployment and training arrangements for staff with tree management duties. Instead of creating a new professional grade on tree management, we will create dedicated tree management posts in the Agriculture, Fisheries and Conservation Department. The Ombudsman's Office has noted and accepted this measure.

994. DEVB accepted recommendation (f). The Greening, Landscape and Tree Management Section of DEVB will step up the monitoring of tree planting arrangements of Government departments through training and promulgating guidelines on proper planting and tree management practices.

995. DEVB accepted recommendation (g). In 2015, a TRIAGE system has been developed for tree risk assessment and management to streamline the risk assessment workflow. The system facilitates departments' maintenance and treatment of trees with major structural defects or health problems. With due consideration to all the factors that can affect tree risks, the tree inspection officer will implement the appropriate mitigation measures for each of the identified tree risk.

996. DEVB accepted recommendation (h). The Greening, Landscape and Tree Management Section of DEVB have been strengthening the monitoring of Government departments' handling of public reports and complaints.

997. DEVB accepted recommendation (i). In January 2017, the DEVB set up the new Urban Forestry Advisory Panel (UFAP), which comprises 18 local and overseas experts in arboriculture and landscape architecture. The DEVB will continue to enhance the transparency and accountability of the opinions offered by the UFAP, and to record and make available to the public key points of its advice.

998. DEVB accepted recommendation (j) and has promulgated a Handbook on Tree Management in April 2016 to provide private property owners with guidelines and standards of good practice on tree management, which will be incorporated into the Code of Practice under the Building Management Ordinance (Cap.344). The DEVB also organises seminars and field demonstrations for property management staff, and has launched a new set of TV and radio announcements to encourage private property owners to carry out regular tree inspections and maintenance, and undertake mitigation measures on trees when necessary to ensure public safety.

999. DEVB has reservations on recommendation (k). One of the prerequisites for the enactment and implementation of such legislation is an adequate supply of qualified personnel with relevant experience to implement the required tree inspection and maintenance work. According to the result of the Human Resources and Competences Survey and Analysis of the arboriculture, horticulture and landscape

management and maintenance Industry in Hong Kong undertaken by the DEVB, there is still a shortage of qualified professionals in the arboriculture industry. DEVB has been coordinating with training institutions and professional organisations in systematically training up tree management personnel at different levels, standardising professional requirements and raising professional requirements by unveiling positive capacity building initiatives for the arboriculture and horticulture industry. In addition, the Handbook on Tree Management, and various other existing regulatory mechanisms are being explored. The Ombudsman's Office has noted DEVB's position in respect of this recommendation.

Education Bureau

Case No. DI/373 – Education Bureau's Regulation of Kindergarten Application Fees

Background

1000. According to the Profile of Kindergartens and Kindergarten-cum-Child Care Centres for the 2015/16 School Year published by the Education Bureau (EDB), 36 kindergartens in Hong Kong had the Bureau's approval for collecting an application fee that exceeds the $40 ceiling. In response to media reports about some kindergartens charging very high application fees, EDB stated that before giving its approval, it always examined the justifications given by the kindergartens for charging an application fee above the ceiling. Nevertheless, there are voices in the community that alleged some kindergartens charging an application fee way above the ceiling may be due to EDB's connivance and laxity in its approval mechanism.

1001. The Office of The Ombudsman (the Office) is very concerned about the effectiveness of EDB's regulation of kindergarten application fees that exceed the ceiling. The Ombudsman, therefore, initiated this direct investigation into EDB's approval mechanism and regulatory system to identify any inadequacies.

The Ombudsman's observations

Approval Mechanism and Regulatory System

1002. The Education Regulations stipulate that all schools including kindergartens must obtain prior written approval from the Permanent Secretary for Education (PSEd) before collecting any fees (including application fees and tuition fees). PSEd has assigned officers at supervisory levels the task of approving/reviewing applications from schools.

1003. In 2014, EDB raised the ceiling of application fees to $40. Once a kindergarten has obtained PSEd's approval to collect an application fee above the ceiling, it is not required to re-apply for approval in subsequent years. As at October 2016, 36 kindergartens, accounting for 4% of all kindergartens (about 1,000) in Hong Kong, had obtained approval for

collecting an application fee above the ceiling, and the application fees they charged ranged from $50 to $3,700 (92.5 times the ceiling). 30 of these were international kindergartens which charged $300 to $3,700 for application, while the remaining six were local kindergartens, charging application fees of $90 or below.

1004. When considering kindergartens' application for collecting an application fee above the ceiling, EDB examines the merits of each application and the justifications and information provided by the kindergarten. This is to ensure that the application fees collected by kindergartens reasonably reflect the actual expenses directly relating to their admission procedures.

1005. Upon receipt of an application, EDB's education professionals at different ranks collate and analyse the information provided, with reference to previous applications and approval records, before submitting the case to their supervisors for vetting and approval.

Lax Approval Mechanism with Inconsistent Criteria and Sloppy Procedures

1006. The Office finds that EDB has not laid down any specific criteria for vetting and approving applications by kindergartens for collection of application fees above the ceiling, resulting in inconsistent treatment of application cases by different officers, and failure to accurately evaluate whether the expense items estimated and claimed by the kindergartens are reasonable or not.

1007. According to EDB's file documents on the aforementioned 36 kindergartens, 17 kindergartens had itemised their expenses in their applications to EDB, while the remaining 19 had only given a general account of the workflow and staffing arrangements for handling admission applications. Without asking the latter group of kindergartens to give further details on the expense items, EDB approved their applications outright.

1008. While claiming on the one hand that in certain cases it would require kindergartens to provide a detailed breakdown of their expenses, EDB has on the other hand indicated that it would not audit the detailed expense items covered by the application fees and any surplus that may be generated. The Office consider EDB's current vetting and approval procedures too lax and incapable of properly evaluating whether the kindergarten application fees are reasonable, or ascertaining whether the

kindergartens are making a profit from the application fees.

Failure to Query Calculation of Staff Costs

1009. EDB has not required the kindergartens concerned to provide any substantive proof for the huge expenses claimed in certain applications, especially the additional salary costs for the teaching and administrative staff engaged in admission-related matters.

1010. Generally speaking, handling of admission-related matters should be part of the duties of the teaching and administrative staff employed by a kindergarten. If admission-related matters are handled during normal office hours or such duties are specified in their employment contracts with no extra remuneration payable by the kindergarten, the Office believes that the salaries of those staff members are already covered in the kindergarten's general income and expenditure account, sufficiently offset by the tuition fees and other general revenues received by the kindergarten. If so, counting part of their salaries towards admission-related expenses would amount to double counting and result in extra income for the kindergarten. The Office noticed that some kindergartens charging an application fee of more than $1,000 included in their admission-related expenses the remuneration and time cost incurred by the teaching and administrative staff and the principal, thus arriving at a much higher figure for those expenses. Yet EDB has never queried such calculation of staff costs.

Failure to Query Profit-making Element in High Application Fee

1011. The Office notes that in one case, an international kindergarten applied to EDB for retrospective approval to collect an application fee exceeding the ceiling. From the information submitted, including the number of applications received and details of admission-related expenses in the previous school year, the Office could easily see that the total amount of application fees collected far exceeded the costs incurred, thus generating a surplus of more than $1 million for the kindergarten. Again, without querying whether the kindergarten's application fee was just for offsetting its admission-related expenses or for making a profit, EDB approved its application. The Bureau did not bother to ask how the surplus had been disposed of. The Office considers that even if the surplus was eventually used on pupils of the kindergarten, it would still be unfair to the parents of the applicants who had to pay an exceedingly high application fee and in effect subsidise existing pupils.

1012. Furthermore, the same kindergarten indicated that one of its expense items was for venue and facilities, amounting to more than $100,000. According to its official website, however, the kindergarten had a well-equipped campus covering several thousand square metres with a gross floor area exceeding 10,000 square metres. Yet EDB failed to query why the kindergarten had to rent a separate venue before approving the kindergarten's application for collecting an application fee above the ceiling. It has also come to the Office's attention that in its application for approval to charge an application fee of more than $1,000, the kindergarten included the cost of setting up an online application system (around $700,000) as an admission-related expense item. EDB granted its approval without noting that the cost of setting up the system was actually a one-off item and the kindergarten should not have treated it as a recurrent item in calculating admission-related expenses. The point is that once the kindergarten has obtained approval to collect an application fee above the ceiling, it is not required to re-apply for approval in subsequent years. Hence for cases like this one, the kindergarten could thereafter collect an application fee not commensurate with its actual expenses.

Failure to Handle Rigorously Cases of Overcharging Application Fees

1013. The Office discovers that in May, October and November 2012, EDB asked/reminded three international kindergartens separately to stop collecting their exceedingly high application fees pending the Bureau's approval. EDB did not approve their collection of application fees above the ceiling until October and December 2013, and March 2014 respectively. However, while processing their applications, EDB did not bother to investigate whether those three kindergartens were still charging application fees above the ceiling. Furthermore, instead of requiring them to refund the excess amounts to the parents of all applicants, EDB merely gave those kindergartens a verbal advice.

1014. Between 2009 and 2014, EDB handled 18 cases of overcharging application fees, but only issued a written warning to one kindergarten. In issuing that warning, EDB was essentially acting on parents' complaints against that kindergarten, which collected an application fee above the ceiling without EDB's approval and failed to handle properly the parents' request for refund of the application fee. The parents were given a refund only after they had lodged their complaints and claim for refund with EDB.

1015. In fact, even when EDB discovered that a kindergarten was collecting an application fee exceeding the ceiling without approval, it would not bother to ask the kindergarten to refund the excess to the parents of all applicants. No proactive follow-up action would be taken by the Bureau unless some dissatisfied parents came forward. This is very unfair to those parents who do not know that they can ask for a refund. EDB should shoulder the blame for being so passive and slack in its regulation of kindergarten application fees.

1016. The Ombudsman recommends that EDB –

(a) expedite its formulation of specific working guidelines so that its officers can vet and approve applications for collecting application fees above the ceiling in a rigorous, fair and just manner;

(b) require kindergartens to give clear details of each estimated expense item together with detailed and substantive evidence, especially those on admission-related staffing and big or year-round expense items; and ask kindergartens also to keep their income and expenditure records relating to application fees for EDB's scrutiny;

(c) raise queries with kindergartens whose budgets show likely surplus from the application fees collected or questionable expense items (including non-essential and non-recurrent expense items), or even reject their applications;

(d) take rigorous action to follow up on reports on false expense items relating to application fees, or on kindergarten's failure to deliver services to applicants' parents as promised; where such reports are confirmed, withdraw the approval granted for a higher application fee and require the kindergartens concerned to provide more detailed information (including the expenditure or audit report of the previous school year) for the Bureau's vetting when making a fresh application for approval to collect application fees above the ceiling; also ask the kindergartens to account for the whereabouts and uses of the surplus from the application fees collected, so as to ensure that they are not making any profit through collecting application fees; and

(e) require kindergartens which have collected application fees above the ceiling without EDB's approval to refund the overcharged amounts to parents; and invoke its statutory power to stop those kindergartens from continuing to charge application fees that have not been approved.

Government's response

1017. EDB accepts all The Ombudsman's recommendations and has taken the following actions –

(a) specific internal working guidelines have been formulated and training have been conducted for the EDB officers to strengthen the consistency and rigor of vetting and approving applications from kindergartens to collect application fees above the approved ceiling;

(b) an EDB Circular was issued to promulgate the revised arrangements and requirements for application to collect application fees exceeding the approved ceiling by kindergartens. The application details were uploaded to EDB website for the reference of kindergartens. According to the revised arrangements, kindergartens applying for collection of application fees exceeding the approved ceiling are required to provide reasonable justifications and relevant supporting documents to EDB, including admission procedures, related services and estimates of future incomes and expenditures with detailed breakdown and justifications. All approvals will be valid for a period of three years, and kindergartens intending to continue to collect application fees above the approved ceiling have to submit a new application. The kindergartens concerned are also required to explain clearly to parents how the fees are to be used and the related services to be provided, and to keep a separate ledger account properly for EDB's scrutiny;

(c) if the budgets submitted by the kindergartens in their application show likely surplus from the application fees collected or questionable expense items, EDB will require the kindergartens to make rectifications or provide justifications for the expense items. Applications without sufficient justifications or clear information will be rejected;

(d) EDB officers will properly follow up complaints related to kindergarten application fees. Moreover, EDB has already requested kindergartens which were approved to collect application fees above the ceiling to review their admission procedures, examine if there is room to lower the approved amount and submit records of their incomes and expenditures relating to student admission in the past three years for EDB's scrunity. These kindergartens are required to conduct the said review at least every three years in future and submit relevant information to EDB for consideration; and

(e) once kindergartens are found to have collected application fees which are not approved by EDB, EDB will require the kindergartens to refund the charged fees to parents and stop charging the unapproved application fees.

Education Bureau

Case No. DI/407 – Education Bureau's Regulation of Institutions Offering Non-local Higher and Professional Education Courses

Background

1018. In Hong Kong, any person intending to offer a course leading to the award of any higher or professional qualification by a non-local institution (non-local course, or NLC) has to apply for registration, or exemption from registration, with the Non-local Courses Registry (the Registry) of the Education Bureau (EDB). The Registry processes such applications in accordance with the Non-local Higher and Professional Education (Regulation) Ordinance (the Ordinance).

1019. The Office of The Ombudsman (the Office) initiated this direct investigation to examine the regulation of NLCs, with a view to identifying any inadequacies in EDB's regulatory mechanism. The Office's investigation covered how EDB monitors the operations of NLCs to prevent fraudulent activities.

The Ombudsman's observations

Legislation on and Mechanism for Regulation of NLCs

1020. According to EDB, the main purpose of the Ordinance is to regulate, through a registration system, the operations of non-local institutions in order to prevent substandard NLCs from being provided in Hong Kong and thereby protect the interests of students enrolled in those courses.

1021. To ensure the standards of NLCs, the Ordinance provides that any NLC offered in Hong Kong by an institution must be at a level comparable to that of the course leading to the same academic/professional qualification awarded by the institution in its home country.

1022. Pursuant to the Ordinance, the Registry requires the operators to submit annual returns to show that the courses they offer continue to meet the requirements set out in the Ordinance. Moreover, the Registry

carries out random checks on NLC advertisements and websites, and follow up on cases that may involve violation of the Ordinance. Upon receipt of complaints, the Registry will also take follow-up actions.

Regulatory Problems Revealed in the Lifelong College Incident

1023. In November 2015, there were media reports that a certain institution, Lifelong College, might have forged documents, backdating the registration of some students to enable premature award of academic qualifications to those students. The regulatory problem thus revealed warrants attention.

1024. EDB indicated that falsification in any material particular by operators through forging or doctoring documents/information involved serious criminal offences under other legislation, and such offences are outside the Bureau's purview under the Ordinance. Therefore, the Registry has no specific procedures for monitoring this aspect.

1025. Section 33 of the Ordinance nevertheless provides that any person who in purported compliance with the provisions of the Ordinance makes any statement or representation of facts which he knows to be false in a material particular commits an offence. Yet EDB is unable to give a definite answer as to whether the registration of an NLC would or could be cancelled by the Registry in case of non-compliance with this provision of the Ordinance.

Students' Interests Generally Protected

1026. The Office finds that EDB's current regulatory mechanism for NLCs has generally achieved the objective of the Ordinance in protecting the interests of students enrolled in such courses. The Office believes that the mechanism is capable of ensuring that –

(a) NLCs offered in Hong Kong meet the equivalent standards of those courses recognised in their home countries;

(b) prospective students of NLCs are well aware before enrolment that it would eventually be up to employers to decide whether the qualifications are recognised, and the Government will not provide any guarantee; and

(c) appropriate assistance is available to students if they encounter problems or unreasonable treatment.

Inadequacies of the Regulatory Mechanism

1027. However, if an operator conspires with some students such that those students can be awarded academic/professional qualifications with omission of part of the course requirements and set criteria, it would bring about all sorts of negative impacts on our society, including unfairness to the following parties: students who have faithfully pursued the course and satisfied all the requirements, employers who have hired the bogus graduates in the mistaken belief that they have attained the course standards, and clients served by the bogus graduates at work.

1028. From the perspective of preventing fraudulent activities by course operators, EDB's current regulatory mechanism is seriously inadequate.

Lack of Self-initiated Monitoring

1029. Prevention is better than cure. But EDB does not conduct any regular inspections of operators' premises, nor has it devised any monitoring procedures specifically for detecting falsification in any material particular by operators that involves forging or doctoring documents. By the time it intervenes after suspected violations are revealed, it may be too late for the Registry to gather the necessary evidence.

No Requirement for Operators of Registered Courses to Keep Relevant Documents

1030. In the course of the Office's investigation, EDB introduced an additional condition to new applications for registration of NLC: the operators are required to maintain documentary records relating to their students as well as the courses taken for the duration of their study and up to two years after completion or discontinuation of their courses, so as to facilitate the Registry's future regulatory and enforcement actions. However, the above additional condition is not imposed on courses already registered. The Office finds that the Ordinance has in fact conferred such power on the Registry, and so EDB should have brought registered courses into the coverage of this enhanced regulatory measure.

Lack of Specific Legal Provisions and Enforcement Guidelines

1031. According to EDB, even when an operator is found to have engaged in fraudulent activities, there is no provision in the Ordinance or the Education Ordinance that EDB can confidently invoke to cancel the registration of the NLCs or the school registration of the operator concerned. This is clearly a deficiency in the system.

1032. The Ombudsman recommends that EDB –

(a) devise a mechanism for periodically conducting surprise inspections of the operators' premises and random checks on documentary records relating to the courses taken by students, in order to prevent more effectively falsification in any material particular by operators that involves forging or doctoring documents;

(b) deliberate further with the Department of Justice (DoJ) on the feasibility of imposing an additional condition on courses already registered, under which the operators will be required to maintain documentary records relating to the courses taken by students for the duration of their study and up to two years after completion or discontinuation of their courses; and

(c) consider amending the Ordinance and the Education Ordinance; pending legislative amendments, EDB should at least devise clear enforcement guidelines as soon as possible, including setting out for staff's information under what circumstances the Bureau can invoke the relevant laws to cancel the registration of fraudulent NLCs and the school registration of the operators concerned.

Government's response

1033. EDB accepted The Ombudsman's recommendations, and has taken follow-up actions as indicated below.

Recommendation (a)

1034. EDB has devised the relevant Procedural Guide for Inspections including the inspection mechanism and procedures. Besides, inspection officers of the Non-local Courses Registry (NCR) were

arranged to attend an Investigation Skills Training Programme conducted by the Hong Kong Police College at the Civil Service Training and Development Institute in July 2017. NCR has scheduled to start conducting regular inspections from September 2017. Apart from random inspections, NCR would draw reference to the complaints received and the contents of annual returns in targeting surprise inspections.

Recommendation (b)

1035. After consulting DoJ, EDB has imposed an additional condition of registration relating to records keeping on courses already registered before 31 October 2016, under which the record-keeping requirement will be applicable to new batches of students admitted on or after 1 September 2017.

Recommendation (c)

1036. EDB is preparing the enforcement guidelines in respect of the Non-local Higher and Professional Education (Regulation) Ordinance, (Cap. 493) and the Non-local Higher and Professional Education (Regulation) Rules (Cap. 493B) (the Rules) to provide a clear reference for NCR's officers about the conditions and procedures for taking enforcement actions under the Ordinance and the Rules. The guidelines cover sections related to the cancellation of the registration of non-local courses, and other offences which are liable to a fine and imprisonment.

1037. In consideration of cases on cancellation of registration of school, the Permanent Secretary for Education would consider various factors and act in accordance with section 22 of the Education Ordinance (EO). EDB considers that at present there is no need to amend the EO. EDB would review relevant provisions of the EO when and where necessary, and make amendments to relevant guidelines if required.

1038. Relevant sections of EDB would continue to enhance communication in order to monitor the matters relating to registered schools operating non-local courses with a view to taking prompt follow-up actions where necessary.

Food and Health Bureau

Case No. DI/399 – Government's Follow-up Actions Regarding Insufficient Provision of Public Columbarium Niches

Background

1039. In recent years, around 90% of the deceased in Hong Kong were cremated. Despite the ever-increasing demand for public columbarium niches, there has not been any significant increase in the number of niches provided by the Government. This has led to an immense unmet demand for public columbarium niches.

1040. There are views in the community that FHB has made slow progress in building more public columbaria. In this light, The Ombudsman conducted a direct investigation to examine whether FHB had duly followed up on the building of public columbaria at the various potential sites, and whether it had been diligent enough in providing more niches and promoting sustainable modes of burial.

The Ombudsman's observations

1041. Between 2010 and 2011, FHB announced in three batches that 24 potential sites in all the 18 districts across Hong Kong had been identified for public columbarium development. However, construction had only been completed at two sites in 2012 and 2013 respectively, providing a mere 2 540 niches. FHB estimated that around 160 000 new public niches will be completed and become available for allocation in 2018 or 2019 at the earliest. However, over 220 000 cremations are expected between 2015 and 2019. The supply of niches, therefore, may not be able to meet the accumulated demand.

1042. The Ombudsman was deeply concerned about the situation. Subsequent to FHB's announcement of the columbarium development schemes, only two small-scale columbaria had been completed, providing 2 540 niches in total. That was far from meeting public demand and expectations. In view of the progress of the development schemes and the number of cremations to be carried out in the next few years, FHB was lagging far behind in its effort to increase the provision of public columbarium niches. It should quicken the pace of building more public

columbarium facilities in order to meet the public demand.

1043. The Ombudsman understood that while enlisting local support for potential sites, FHB often needed to conduct follow-up studies and deliberations because of various concerns and objections from different stakeholders. The process was inevitably time-consuming. FHB had started in 2016 a consultation exercise for those potential sites of which the relevant District Councils (DCs) had not been consulted. FHB should actively enlist the support of the local DCs, residents and stakeholders for more controversial sites so that the public could appreciate the significance and urgency of the projects. To meet the accumulated demand, FHB should give priority to potential sites that were smaller in scale or less controversial since those sites required less manpower resources for implementation.

1044. While FHB's other proposals on public columbarium development were mostly still under study, the Government's plan to increase the supply of private columbarium niches through regulation of the private columbarium industry might not be effective. Given the scarcity of land resources in Hong Kong, FHB should, in the long run, focus on developing sustainable burial services to gradually replace the use of columbaria.

1045. Currently, utilisation of the Government's green burial services was rather low. Apart from stepping up publicity and public education, FHB should explore ways to enhance and promote these services, and continue to actively enlist community support for setting a time limit and renewal requirements on the use of public columbarium niches. Moreover, FHB should be more proactive in exploring other modes of burial that require little land or construction works, with a view to alleviating the shortage of niches.

1046. The Ombudsman urged FHB to –

(a) follow up closely the development schemes which are yet to be completed, especially those potential sites that FHB has not yet consulted the local DCs or those which are more controversial, FHB should start consultation and lobby the local community as soon as possible;

(b) consider giving higher priority to potential sites which are smaller in scale and/or less controversial;

(c) step up publicity and public education on the use of green burial services as well as to enhance such services. Continued efforts should be made to actively enlist support from Councillors about setting a time limit and renewal requirement on the use of public columbarium niches; and

(d) actively explore new modes of public burial services.

Government's response

1047. FHB accepted The Ombudsman's recommendations.

Recommendations (a) & (b)

1048. The Government has spared no efforts in developing public columbaria so as to increase the supply of public niches. It has identified 24 sites in the 18 districts for columbarium development, and determined the priorities of various columbarium projects in the light of different constraints and factors in order to accelerate the provision of public niches. Stepping up lobbying efforts at the district level has been FHB's approach to dealing with controversies.

1049. In 2016, FHB obtained support for projects in Wong Nai Chung Road in Wan Chai, Shek Mun in Sha Tin, two sites in Kwai Tsing District, Lai Chi Yuen in Islands District and two sites in Tsuen Wan District from the relevant DCs. These projects, when completed, will provide a total of over 136 000 niches. FHB has so far secured DCs' support for 14 of the 24 sites identified for development of columbaria. These sites will supply nearly 590 000 new niches, accounting for over 60% of the total number of niches expected to be provided by all 24 sites.

1050. As for the remaining sites, consultation with the relevant DCs will be conducted. In the course of doing so, FHB will appeal to the community for their understanding and support to facilitate its expeditious implementation of various columbaria projects and secure the supply of public niches for the next 15 years. The possible timeline for development of a particular site may be subject to circumstances. For example, the site in Kwun Tong District will only be available for columbarium development upon the completion of landfill restoration in 2023.

Recommendations (c) & (d)

1051. It takes time to make green burial the preferred choice of the public for handling their ancestors' ashes. FHB has made persistent efforts to promote the necessary paradigm shift through the publicity and education work. The Food and Environmental Hygiene Department (FEHD) has deployed additional resources to step up related work, including organising exhibitions, public seminars and talks, producing and broadcasting promotion videos, distributing promotional publications, putting up posters and banners as well as collaboration with relevant non-governmental organisations.

1052. To enhance the green burial services, FEHD is now developing a mobile app for the Internet Memorial Service and creating new webpages for green burial. These two projects are expected to be completed in Q1 2018. To encourage wider use of the Gardens of Remembrance (GoRs) managed by FEHD, it will continue to look for suitable sites for building more GoRs and related facilities. FEHD will, as far as possible, provide GoRs in the new columbaria where appropriate and if circumstances permit.

1053. To strengthen strategy formulation on the promotion of green burial, FHB has set up under the Advisory Council on Food and Environmental Hygiene a working group focusing on green burial and related issues. In May and November 2017, FHB and FEHD consulted the working group on the recommendation of setting a time limit for the use of public niches. Taking into account the views of the working group, FHB and FEHD are now formulating specific recommendations and they plan to consult the LegCo Panel on Food Safety and Environmental Hygiene in Q1 2018.

1054. The Government will continue to communicate with and receive views and feedback from various quarters of the community. FHB will exchange views with them on further promotion of green burial and explore various recommendations in order to enhance the effectiveness of our endeavours. The usage rate of green burial services, the percentage of the number of deceased persons buried using the services has risen from about 10.5% in 2016 to about 12.8% by November 2017. FHB firmly believes that with sustained efforts to enhance green burial services and strengthen education and publicity, green burial will gain wider social acceptance.

1055. The Ombudsman informed FHB on 27 December 2017 that its follow up to this direct investigation case has come to an end.

Highways Department, Development Bureau and Home Affairs Department

Case No. DI/401 – Government's Handling of Four Stonewall Trees along Bonham Road

Background

1056. On the surface of a masonry retaining wall (the stonewall) between Bonham Road and St Stephen's Lane in the Central and Western District, there used to be six Chinese banyan trees (stonewall trees, T1 – T6). On 22 July 2015, T2 suddenly collapsed, causing personal injuries and damage to property. After the incident, Highways Departement (HyD), the department responsible for maintaining those six stonewall trees, removed the remaining five trees for the sake of public safety (T3 was removed on 22 July; and T1, T4, T5 and T6 on 7 August).

1057. HyD's removal of the four stonewall trees on 7 August aroused extensive media coverage and public debate. The Office of The Ombudsman (the Office), therefore, initiated this direct investigation to probe whether HyD had sufficient grounds for removal of those four stonewall trees, whether the departments concerned had followed established policies and procedures in removing the trees and in conducting prior consultation, and whether they had acted in an open and fair manner. The ambit of this investigation covered HyD, the Development Bureau (DEVB) and its Tree Management Office (TMO), and the Home Affairs Department (HAD).

Expert Assessment, Maintenance of Stonewall Trees and Mitigation Measures

1058. As early as in 2012, HyD had commissioned a tree expert to assess the structure and health condition of the six stonewall trees. T4 and T5 were rated at "high risk level", and T1, T2, T3 and T6 at "low risk level". HyD then carried out major pruning works on T4 and T5 in 2013 to mitigate the risk of tree collapse.

1059. HyD also studied various proposals for stabilising or supporting the stonewall trees. It concluded that none of those proposals were feasible. The proposed installation of anchorage structures for the trees was not pursued mainly because of the narrow carriageway and footpath,

heavy vehicular traffic, presence of major underground utilities, and the question of extra loading on the adjacent building structures.

Collapse of T2

1060. On 22 July 2015, when the amber rainstorm warning signal was in force, T2, which had been rated at "low risk level", suddenly collapsed. Later in the evening, HyD found some cracks on the surface of the parapet wall behind T3 (the parapet wall was built along the footpath on St Stephen's Lane near the crest of the stonewall). HyD and TMO considered that the cracks indicated anchorage instability and T3 was at risk of imminent collapse. HyD, therefore, removed T3 that evening.

HyD's Assessment of the Remaining Four Stonewall Trees and Decision to Remove Them

1061. As for the remaining four stonewall trees (T1, T4, T5 and T6), HyD monitored their condition almost daily after 22 July. On 3 August, HyD and TMO, together with TMO's Expert Panel consisting of tree experts, conducted a site inspection and held a meeting. The participants were of the view that the trees were not at risk of imminent collapse and the stonewall showed no sign of instability. On that occasion, members of the Expert Panel put forward three proposals for supporting or stabilising the trees. HyD concluded that none of those proposals was feasible.

1062. Between 5 and 7 August, HyD continued to discover new cracks and gaps on the surface of the parapet wall. After assessment, it considered that those were "warning signs" of tree anchorage instability, outward shift of the tree anchorage, and weakened resistance against toppling.

1063. HyD's assessment showed that upon failure of any one of T4, T5 and T6, the falling tree would generate a traction force through the probably interwoven roots, resulting in the collapse of all three trees at once. The collapse could cover an extensive area, leaving little chance for pedestrians (especially those waiting at the bus stop underneath the trees) and vehicles on Bonham Road to escape and thus possibly resulting in injuries or even deaths. As the trees were quite tall, the residential flats and ground level shops of the opposite buildings might also be severely damaged. As for T1, since it was located at a rather high point, the risk of causing casualties and damage to property in the event of collapse should not be underestimated either.

1064. Moreover, with a Super Typhoon approaching and continual unstable weather forecast by the Hong Kong Observatory (HKO), HyD considered the problem urgent and decided on 7 August to remove the four stonewall trees to ensure public safety.

Notification to Relevant Parties by HyD and HAD

1065. Having decided to remove the four stonewall trees, HyD sent an email to the Central and Western District Office (DO) of HAD that afternoon (7 August), requesting DO to forward a letter (notification letter) to the Chairman of the Working Group on Environmental Improvement, Greening and Beautification Works (the Working Group) under the Food, Environment, Hygiene and Works Committee of the Central and Western District Council (DC) to inform him of HyD's decision and justifications. HyD also copied the notification letter to DEVB by fax.

1066. DO then forwarded the notification letter by email to all DC Members, including the Chairman of the Working Group. DO also notified by telephone six DC Members, namely, the Chairman and Vice Chairman of DC, the Chairman of the Working Group, and the Elected Members of the three DC constituencies which were more likely to be affected by the ensuing road closure and traffic diversion.

The Ombudsman's observations

Decision to Remove the Stonewall Trees Not Unreasonable

1067. With regard to some people's queries on HyD's justifications for removing the four stonewall trees, the Office accepted the clarification/explanation given by the Department –

(a) HyD has explained in detail why the "warning signs" concerning the risk of collapse of the four stonewall trees were credible;

(b) while the Civil Engineering and Development Department had confirmed the structural integrity of the stonewall, the risk of tree collapse could not be ruled out if the tree anchorage had already deteriorated, even though the stonewall itself might be stable; and

(c) HyD has pointed out that after studying various proposals for installing structural supports to reinforce the four stonewall trees, all were found infeasible.

1068. The Office appreciated that tree lovers were saddened by HyD's abrupt decision to remove the four stonewall trees. Nevertheless, the rapid deterioration of the parapet wall and tree anchorage in a matter of three days between 5 and 7 August 2015 indicated that the trees might collapse anytime. Moreover, in view of HKO's forecast of continual unstable weather, it is not unreasonable of HyD to adopt a cautious attitude to ensure public safety. The Office has consulted engineering experts, who concurred with HyD's decision to remove the trees and its justifications. Having taken into account the views of different parties, the Office has holistically examined this controversial issue from an administrative and rational perspective. The Office's conclusion is that there is no substantive evidence that HyD's decision to remove those four stonewall trees was rash or unreasonable.

Involvement of the Expert Panel Should be Strengthened

1069. As to whether HyD was disrespectful to the Expert Panel in having failed to notify Panel members prior to the Department's removal of the stonewall trees, the Office noticed that the Department had previously reported to the Expert Panel on all the proposals (including their infeasibility) to stabilise/support the six stonewall trees. TMO had also consulted Panel members on the health and stability of the four stonewall trees in question. When HyD decided to remove those four trees, it had also followed established procedures and informed TMO of DEVB. The problem was that TMO had not made use of the hour or so before the removal to inform the Expert Panel to allow its members to voice their last-minute opinions. The Office considered this a case of TMO failing to make the best use of the Panel's expertise and professional views.

1070. In future, the Government should as far as possible allow Expert Panel members to express their opinions on any decision to remove trees involving controversy or of special value. Their opinions should be clearly recorded and made known to the public in order to enhance the transparency and accountability of the Government's decisions.

Not Unreasonable of DO to Notify Selected DC Members by Telephone

1071. Besides notifying all DC Members by email of HyD's decision to remove the trees and its justifications, DO had also separately telephoned the Chairman and Vice Chairman of DC, the Chairman of the Working Group as well as the DC Members whose constituencies were more likely to be affected by the incident. The Office considered DO's action reasonable and appropriate. The DC Members concerned, having received early notification, could help explain the situation to the residents affected.

Public Awareness Should be Heightened of the Potential Danger Posed by Certain Kinds of Trees

1072. This incident reflected that some trees might be potentially less stable because of their size, form and shape or the special environment of their locations, thus posing a bigger risk to public safety. The public's awareness of such kinds of risk needs heightening.

1073. The Ombudsman recommended that –

(a) DEVB clearly record and make known to the public the Expert Panel's opinions in future to enhance transparency and accountability;

(b) HAD draw up clear and specific criteria for deciding whom to be specially notified by telephone of the Government's decisions to remove trees, so as to avoid queries; and

(c) TMO explore ways to raise public awareness of the potential danger posed by certain kinds of trees.

Government's response

1074. The Government accepts recommendation (a). DEVB has set up the new Urban Forestry Advisory Panel (UFAP) in January 2017 which comprises 18 local and overseas experts in arboriculture and landscape architecture. The UFAP covers urban tree management amongst other things and the work of the Expert Panel on Tree Management (EPTM) has been subsumed under the UFAP after the Panel's current term expired at the end of 2016. The purpose of the UFAP is to seek advice across a range of urban forestry matters besides

the details of tree management. All members demonstrate practical experience, measurable achievements and the ability to apply knowledge of their discipline onto other fields of studies and are highly recognised within their industries. Members are all appointed on a voluntary basis. Meetings will be held twice yearly. The first UPAP meeting was held on 17 March 2017 and the gist of the meeting was uploaded to the website of the Greening, Landscape and Tree Management Section for public reference. DEVB also invites the UFAP members to deliver public seminars on a regular basis for promoting policy on urban forest and to raise public awareness of urban forestry.

1075. The Government accepts recommendation (b). The Central and Western DC has an established mechanism for notifying DC Members on tree removal matters. In 2016, the Working Group on Environmental Improvement, Greening and Beautification Works under the Central and Western DC prepared a paper to brief DC Members on the mechanism again. After discussion, the mechanism was reconfirmed by Members in July 2016. In the same month, the paper titled "Notification Mechanism on Tree Removal in Central and Western District" was circulated to all DC Members and relevant departments. Since then, relevant departments and the Secretariat of the Central and Western DC have been following the mechanism in notifying DC Members on tree removal matters. The paper explaining the mechanism has also been circulated to DC Members and relevant departments regularly to remind departments to comply with the mechanism. The HAD also sent an e-mail in August 2016 to the other 17 District Offices requesting them to set up notification mechanism by making reference to the one drawn up by the Central and Western DO.

1076. The Government accepts recommendation (c). DEVB has introduced a TRIAGE system in tree risk assessment and management to streamline the risk assessment workflow in 2015. The system facilitates tree management departments in identification and handling of trees with major structural defects or health problems. To raise the public awareness on potential danger trees, DEVB has conducted a pilot trial on installation of TRIAGE tags for trees with major structural defects or health problems in Kowloon Park. The trial was completed in late 2016. After reviewing the feedback from the public, DEVB would further liaise with different tree management departments to extend the pilot trial to cover more areas. DEVB will continue to provide public education and awareness programme to develop deeper community understanding in tree risk management.

Housing Department

Case No. DI/383 – Arrangements on display of publicity materials in public housing estates

Background

1077. In Hong Kong, about one-third of the population reside in public housing estates. HD, being responsible for management of public housing estates, should formulate proper measures for ensuring that the huge population of residents can obtain information on related community services. Such measures include designation of places in public housing estates for relevant persons/ organisations to display publicity materials (PMs) or disseminate information to local residents in those estates. Many groups and organisations with diverse interests in the community are keen to communicate a variety of messages to public housing residents. Any improper management of the display and distribution of PMs in public housing estates and failure to ensure fair and proper procedures could easily lead to conflicts among different organisations, or even among residents. This would not only generate complaints and grievances, but also give the public an impression that HD is acting unfairly and operating in a clandestine manner.

The Ombudsman's observations

1078. The Direct Investigation conducted by the Office of The Ombudsman (the Office) has pointed out three areas where HD has room for improvement, namely the vetting and approval of applications for display of PMs; the criteria for vetting and approving the contents of PMs; and the monitoring mechanism.

Confusing criteria for vetting and approving applications for display of posters, and lack of principles in exercising discretionary powers

1079. HD normally processes applications for display of posters on a "first-come-first-served" basis. However, if HD receives several applications outside office hours and where the available display spots are not enough to cope with the demand, it will give approval according to an order of priority predetermined by HD.

1080. The "first-come-first-served" basis is a clear, simple, practical and fair arrangement in itself. There should be no need to supplement it with other vetting and approving criteria. Substituting the "first-come-first-served" basis by the order of priority for "applications received outside office hours", HD is applying two entirely different criteria to the same type of applications. This would easily cause confusion, and those applicants accorded lower priority would be left with fewer opportunities to display their posters.

1081. Moreover, HD has not set any limit on the number of posters to be displayed by individual applicants. If on the first day of application an applicant applies to display a large number of posters that would take up all the designated spots, HD will have to resolve the problem of insufficient spots with all the stakeholders by means of "professional judgement", "consultation" and "flexible arrangement". Yet HD has not laid down any principles on which "professional judgement", "consultation" and "flexible arrangement" should be applied in a discretionary manner. As a result, the staff of different estate offices might handle cases in vastly different ways, while the public or the stakeholders would have no ways to know the justifications behind the staff's decisions. Such unsatisfactory situation would easily attract complaints and grievances.

Different understanding of PMs, with different vetting and approving criteria

1082. Applications for display of PMs are processed separately by estate offices. Where the contents of PMs may seem controversial, staff of estate offices will refer the applications concerned to the Housing Managers at the Headquarters for approval. However, the decision as to whether the PMs are controversial depends on the staff's own judgement and on whether sufficient training and reference materials are provided by HD. The Office notes that different estate offices have different understanding of what kind of wording is "unlawful". As a result, different housing estates can have different decisions in vetting and approving the display of the same poster. Similarly, staff of different estate offices may hold different views as to what sorts of contents are controversial and should be referred to the Headquarters. Although HD has provided in its guidelines some examples of "acceptable" and "unacceptable" contents and wording of PMs, those examples were compiled in 2012 and no updates have since been provided, despite the fact that many words and phrases now carry a sensitive and controversial meaning following changes in the social environment in the last few

years. HD has failed to keep pace with the time, making it difficult for staff to make proper judgements.

Inadequate monitoring mechanism

Inadequate control of PMs not vetted before display

1083. HD will not screen PMs (and their contents) displayed by Legislative Council (LegCo) and District Council (DC) Members as well as non-government organisation on the notice boards outside their non-domestic rental units or on the notice boards for exclusive use by MACs. Neither will HD check the PMs delivered to tenants' mail boxes. Although HD has set out the requirements for contents of PMs on its website and in its guidelines, HD will only take follow-up actions if complaints about violations or controversial contents are received. However, once the information is disseminated, subsequent follow-up actions may not have much remedial effect and so it may be unfair to those affected or to other stakeholders. Past media reports have revealed a case where a candidate for the LegCo Election obtained HD's approval to deliver PMs to tenants' mail boxes but HD later revoked its approval on finding controversial contents in those PMs. In this light, HD should review the effectiveness of its existing measures of monitoring the contents of PMs.

1084. Regarding the Office's views in the above paragraph, HD has noted that prior screening of posters to be put up on the notice boards outside the non-domestic unit leased out to Councillors/organisations may arouse controversy about censorship and freedom of speech. Given the large quantities of PMs to be delivered to tenants' mail boxes and the tight schedule for vetting and approving applications, it may not be feasible to vet the contents of PMs every time. Yet HD has agreed that it should draw the attention of applicants (persons/organisations) to the rules of display of PMs to prevent violations.

1085. In the Office's opinion, even though HD finds it inappropriate to vet those PMs prior to display, it should step up its inspections to prevent violations as soon as possible or recurrence of the problem.

Lax enforcement of tenancy agreements

1086. The Office noticed a Councillor displayed the PMs of another Councillor inside and outside of the non-domestic unit rented as office. That was in violation of the terms and conditions of tenancy agreements

for non-domestic units. Nevertheless, HD only gave a verbal reminder without any follow-up actions in accordance with the tenancy agreement. Such lax enforcement has caused unfairness.

No penalties for violations by persons or organisations

1087. HD pointed out that estate offices can, at any time without prior notice and at an administrative cost to be recovered, revoke an approval for displaying PMs, remove unapproved PMs or those violating the display conditions or exceeding the approved display period. However, HD's records showed that no relevant administrative cost had ever been recovered. The Office also noted that HD issuing warning letters to offenders could not stop the recurrence of such violations.

No measures to prevent conflict of interests involving individuals with "dual identities"

1088. The Office noted that an elected DC Member of the constituency concerned would automatically become a member of the local EMAC and be given priority in his/her applications for displaying PMs in the estate. There was a case where the local DC Member, while attending an EMAC meeting in the capacity as an EMAC member, also participated in the discussions and expressed his/her opinions on a proposal to designate more display spots in the estate. The proposal was rejected in the end. Setting aside the question of whether his/her participation had led to the proposal being rejected, stakeholders concerned considered it unfair that HD had not drawn up any written guidelines for the reference of EMAC members to prevent such cases of conflict of interests.

No management information system regarding display of PMs

1089. HD has not set up a central database for the management and storage of information on applications for display of PMs (including the original versions of PMs) vetted by the Headquarters, the application results and relevant justifications. The absence of such a database has not only hampered the management's monitoring of the efficiency in processing applications for display of PMs, but also led to missed chances of providing valuable reference materials to frontline staff responsible for processing applications.

1090. The Ombudsman recommended that HD -

(a) fully and consistently adhere to the “first-come-first-served” basis in processing applications for displaying posters;

(b) consider setting a limit on the number of posters to be displayed. Where the design of housing estates varies, individual estates should set their own limit on the number of posters allowed to be displayed by the same applicant;

(c) consider drawing up the prerequisites and principles for exercising discretion in processing the applications for display of PMs;

(d) update regularly the departmental guidelines concerning “acceptable” and “unacceptable” contents of PMs with examples in order to help frontline staff to identify “controversial” contents of PMs;

(e) organise regular training courses for staff to enhance their ability to vet contents of PMs;

(f) consider stepping up inspections of PMs put up on notice boards outside non-domestic rental units and those on notice boards for exclusive use by MACs so as to ensure that they comply with the terms and conditions of the tenancy agreement; and to regularly remind those persons/ organisations who deliver PMs to the tenants’ mail boxes of the rules of applications for display, such that violations can be prevented;

(g) consider drawing up penalties for persons/ organisations for breaching the display conditions;

(h) consider formulating clear guidelines on handling cases of conflict of interests due to “dual identities” as cited in the Direct Investigation report; and

(i) consider setting up a management information system for more effective monitoring of applications for display of PMs.

Government's response

1091. HD accepted The Ombudsman's recommendations and will take the following corresponding follow-up actions.

(a) HD will revise the relevant guidelines as follows –

(1) To fully and consistently adhere to the "first-come-first-served" basis, applications will be accepted only if applicants (persons or organisations) or their authorised representatives take the poster for display to the estate office concerned in person for an office chop.

(2) Except for elected DC Members of the constituencies concerned, whose display spots will be reserved by the estate office, all applications will be processed on a "first-come-first-served" basis.

(3) There will be two rounds of application for each display period. The first round will start on the first day of each of the three display periods (i.e.1st, 11th and 21st of the month).

(4) The second round of application will start on the 2nd, 12th and 22nd of each month.

(b) A limit will be set on the number of posters allowed to be displayed by the same applicant (person or organisation) at each display spot to ensure that all persons or organisations have equal opportunities to disseminate information to public housing residents.

(c) Where circumstances require, matters relating to applications for display of PMs such as the number of PMs to be displayed, display period, application methods or other administrative measures will be decided by Senior Managers at their discretion after taking different situations into account.

(d) To enable staff of estate offices to handle different cases more effectively, HD Headquarters will upload "acceptable" and "unacceptable" wording, image excerpts and depictions of posters to HD's intranet every January and July for reference by frontline staff of public housing estates, and will promptly

update them if necessary.

(e) HD agreed to strengthen staff training and will organise two training courses and briefing sessions on the handling of PMs by mid-2018. Controversial cases will be selected for sharing with colleagues to enhance their ability to understand the criteria for assessing the contents of PMs. An experience sharing session on the handling of PMs will be held in the following year. Subsequent reviews will be conducted as needed, based on which HD will draw up the timetable for future sharing sessions.

(f) HD will remind estate staff to step up inspections of PMs put up on notice boards outside non-domestic rental units and those on notice boards for exclusive use by MACs so as to ensure that they comply with the terms and conditions of the tenancy agreement. In April every year, all tenants of non-domestic rental units (including Councillors) and Chairmen of MACs will be reminded in writing to comply with the terms and conditions of the tenancy agreement. Applicants delivering PMs to the tenants' mail boxes will also be reminded of the rules of application for display, such that violations can be prevented.

(g) HD will draw up management and control measures, whereby written advice and written warnings will be issued to organisations, persons and Councillors' ward offices breaching the display conditions. Further control actions will be taken if the PMs in violation of the display conditions are not rectified/ removed or if such violations recur.

(h) In addition to providing clear guidelines, HD sent reminder emails to estate management staff on 7 April 2017 on handling cases of conflict of interests.

(i) HD will, by making use of the database referred to in item (d) above, manage and store relevant information to serve as useful reference materials for frontline staff.

Implementation details are being studied by HD. It is expected that revision of the guidelines will be completed by the end of the first quarter of 2018.

Housing Department

Case No. DI/404 – Housing Department's Mechanism for Follow-up Action against Unauthorised Alterations by Public Housing Tenants

Background

1092. Public housing units allocated to tenants by the Housing Department (HD) are generally provided with various fixtures and fittings. Under the Tenancy Agreement, tenants are not allowed to install any fixtures, partitions or other erections, or to remove any original fixtures or fittings in their units without the prior written consent of HD. These agreement terms aim to ensure the structural safety of public housing as well as better utilisation of original fixtures and fittings.

1093. Nevertheless, the Office of the Ombudsman (the Office) has found from handling past complaint cases that HD has failed to properly follow up cases involving unauthorised alterations by public housing tenants. It should be noted that unauthorised alterations may not only adversely affect nearby housing units but, in more serious cases, also affect the building loading. In order to gain a better understanding of the issue, The Ombudsman decided to initiate a direct investigation into HD's mechanism for taking follow-up action against unauthorised alterations by public housing tenants.

The Ombudsman's observations

Classification of Fixtures in Public Housing Units

1094. HD has classified the fixtures provided in public housing units into three categories, namely Categories A, B and C. Under the procedures stipulated by HD, estate management offices should explain to prospective tenants the renovation arrangements when they complete the intake formalities. The tenants are to sign an undertaking immediately to indicate that they understand the requirements relating to renovation and agree to comply with such requirements.

1095. Generally speaking, alterations to Category A fixtures may constitute imminent danger or obvious hazard, lead to water seepage or serious nuisance to health or the environment, impair the uniformity of

housing estates, contravene prevailing statutory requirements, and breach the statutory acoustic requirements. Applications for alteration to Category A fixtures will, therefore, be rejected by HD.

1096. Alterations to Category B fixtures require prior written application to HD and compliance with prescribed conditions. Besides, successful applicants must comply with requirements for such alteration works to ensure that only appropriate works are carried out and appropriate materials used.

1097. Prior approval of HD is not required for alterations to Category C fixtures. Nor is it necessary to notify the estate management office concerned on completion of such alteration works.

HD's Mechanism for Follow-up Action against Unauthorised Alterations to Public Housing Units

1098. Subsequent to a review on regulation of alterations to fixtures in public housing units, HD issued a set of internal guidelines in November 2009. Based on The Ombudsman's recommendations in relation to an earlier complaint involving unauthorised alterations, HD amended the said guidelines in August 2016. The mechanism used prior to August 2016 is referred to as "the Old Mechanism" and the one adopted thereafter "the New Mechanism" below.

The Old Mechanism

1099. If a tenant was found to have altered any of the Category A fixtures, HD would carry out works to reinstate the original set-up of the housing unit and charge the tenant for the costs. That was to ensure that the materials used and installation method adopted would meet established standards and criteria. Where unauthorised alterations to Category B fixtures were found, the tenants must reinstate the housing unit at their own cost. If tenants refuse to cooperate, HD would invoke the Marking Scheme for Estate Management Enforcement in Public Housing Estates (the Marking Scheme) and allot penalty points to the tenant concerned. A tenant having accrued 16 points within two years may have their tenancy terminated. Moreover, under section 19(1)(b) of the Housing Ordinance, HD may issue a notice to quit, requesting the tenant who contravenes tenancy terms and conditions to vacate and return the housing unit to HD by a prescribed date.

1100. According to internal guidelines under the Old Mechanism, estate management offices were not required to inspect the housing units to check if completed alterations made meet the relevant requirements. Nor did HD lay down in those guidelines the duties of frontline officers, procedures and timeframes in following up unauthorised alterations, or the responsibilities of supervising officers.

1101. HD's monitoring of unauthorised alterations under the Old Mechanism have the following problems.

Delay in following up cases

1102. Under the Old Mechanism, HD had not formulated any procedures and timeframes for following up cases, or the duties of officers concerned. According to HD's records, of the 65 cases of reinstatement works completed in the four financial years from 2012/13 through 2015/16, 10 cases took six months or longer (in fact 7 cases took more than nine months) to complete, while the longest-standing case was not successfully handled until after more than two years. As at 30 June 2016, there were 27 pending cases of unauthorised alterations, of which 18 cases took six months or longer and yet the reinstatement works had not been completed (in fact 13 cases took nine months or longer), while the oldest pending case had been pursued for nearly three years. The delay is clearly serious.

Staff failure to follow guidelines

1103. Under established guidelines, reinstatement works of Category A fixtures must be carried out by HD in order to ensure that the materials used and installation method meet established standards and criteria and to guarantee building safety. Nevertheless, according to HD's records, 61 of the 65 cases of reinstatement works completed involved unauthorised alterations to Category A fixtures, of which 28 cases were reinstated by the tenants themselves and not HD. Such practice violated established guidelines and can be a potential danger to building safety.

1104. Meanwhile, for some long-standing cases of delay in reinstatement of housing units with unauthorised alterations, HD's attitude was too lax and it failed to exercise the Marking Scheme for Estate Management Enforcement in Public Housing Estates or exercise tenancy control to enhance deterrent effects.

Rashness in follow-up actions and laxity in enforcement

1105. When following up individual cases, estate management offices had failed to request tenants to fully rectify all unauthorised alterations. They actually accepted the tenants' "promise" to reinstate the housing units when they return their units in future. They then closed the case without further follow-up actions, thus showing their rashness in follow-up actions and laxity in enforcement.

Ineffective monitoring

1106. The problems noted above occurred when estate management offices were following up individual cases, showing ineffective monitoring by HD over the management of the problems of unauthorised alterations to fixtures, as well as the progress and quality of follow-up actions by its staff. HD has simply allowed the problems to persist.

The New Mechanism

1107. On the basis of the categories of fixtures under the Old Mechanism, HD has added some new items of fixtures while deleting others under the New Mechanism. It has also reclassified some of the fixtures. One of the major changes to the categorisation under the New Mechanism is relaxing the requirements by transferring some items from Category A to Category B. Those items include: floor tiles of balcony/toilet/bathroom/kitchen, shower tray, shower cubicle, bath-tub, water closet pan, cooking bench, branch pipe and fitting.

1108. Under the New Mechanism, the timeframes for monitoring and taking enforcement actions are clearly stated in the guidelines. HD adheres to its previous practice of rejecting all applications for alterations to Category A fixtures while requiring tenants to obtain its consent before making any alterations to Category B fixtures. Normally, the estate management office concerned should conduct a site inspection within 90 calendar days upon receipt of the application at apartments where alteration applications have been approved to check for any irregularities, especially those involving alterations to Category A fixtures.

Duties of Frontline and Supervising Officers

1109. The guidelines under the New Mechanism include provisions that set out the duties of various ranks of officers. If estate management offices are aware of any unauthorised alterations by tenants, frontline

officers must conduct site inspections with the support of works staff to verify the unauthorised alterations. Besides, the officers must, within 60 calendar days upon knowledge of the situation, serve an enforcement notice to the tenant concerned demanding reinstatement.

1110. Where the tenant refuses to cooperate, HD should carry out reinstatement works as soon as possible. If the estate management office encounters any difficulties, it should seek support from the District Tenancy Management Offices under HD. If the tenant concerned is willing to cooperate, he/she should complete the reinstatement works witin 60 calendar days after the receipt of the enforcement notice. If the tenant has difficulty to comply, he/she may request to extend the works completion date by up to 90 or 180 calendar days, provided that he/she has obtained prior approval from the Housing Managers/Property Service Managers (for applications for an extension of 90 days) or from the Senior Housing Managers/Senior Property Service Managers (for application for an extension of 180 days). In fully justified cases, works completion may be extended to beyond 180 calendar days, provided that prior approval is granted by the Regional Chief Manager.

1111. Regional Chief Managers should maintain proper records of cases involving unauthorised alterations and review their progress as appropriate.

Inadequacies Still Found under the New Mechanism; Need to Review Effectiveness for Further Improvement

1112. The new guidelines issued in August 2016 offer a set of standardised criteria for follow-up actions. This would help to avoid inconsistencies in practices among different estate management offices and even among different officers.

1113. However, under the new guidelines, some fixtures have been reclassified from Category A to Category B. The Office considers that this may be a potential hazard to tenants' living environment, such as causing water seepage or unstable structure. In fact, according to information from HD, of the 92 cases of unauthorised alterations mentioned in paragraph 11 above, 33 cases (i.e. more than one-third) involved water seepage from ceiling. The causes of water seepage from ceiling were mostly due to unauthorised alterations to kitchen/toilet/bathroom installations and floor slab, such that the waterproof layer beneath the floor slab was damaged, resulting in water seepage. HD has reclassified alterations involving kitchen, toilet,

bathroom installations and floor slab from Category A to Category B. It is questionable whether this would affect building structures over the long term and hence lead to more cases of water seepage from ceiling.

1114. Moreover, although the new guidelines require that estate management offices conduct a site inspection within 90 calendar days for those units with approved alteration works, if the relevant works are still in progress, the guidelines do not require estate management offices to conduct another inspection to ensure that all the alterations meet relevant requirements. On the other hand, where the works are completed, it is uncertain whether a site inspection can discern if any hidden works/ materials like waterproofing works/materials meet required the standards.

1115. Anyhow, the effectiveness of the new guidelines has yet to be assessed. HD should regularly review whether the New Mechanism is being effectively implemented and, where necessary, further improve the guidelines in order to properly follow up the problems of unauthorised alterations to fixtures by tenants.

1116. The Ombudsman recommends that HD –

(a) regularly review the effectiveness in implementing the New Mechanism to ensure that the expected results are achieved, prevent any recurrence of faults under the Old Mechanism, and, where necessary, enhance the working guidelines, which include formulating clearer provisions to stipulate that estate management offices should arrange inspections following completion of alteration works in order to ensure that all alterations meet the requirements of the relevant categories of fixtures;

(b) closely monitor the impact of revising the categories of fixtures, giving particular attention to whether the reclassification of those fixtures from Category A to Category B affect building structures and lead to more cases of water seepage from ceiling and, where necessary, further revise the categories of fixtures;

(c) step up monitoring to ensure that frontline officers follow the guidelines, including resolutely enforcing the Marking Scheme for Estate Management Enforcement in Public Housing Estates and other punitive measures where necessary;

(d) actively follow up those outstanding cases of unauthorised alterations, especially those cases that have been pending for more than six months;

(e) review those cases with unauthorised alterations not fully rectified, and with Category A fixtures being reinstated by tenants, to ensure that appropriate follow-up action have been taken;

(f) regularly hold training courses for frontline officers with a view to enhancing their abilities to handle unauthorised alteration cases , especially those difficult ones;

(g) step up inspections and actively detect cases of violations;

(h) step up publicity on the categories of fixtures and installations under the New Mechanism, and demonstrate the determination to deal with cases of unauthorised alterations; and

(i) consider imposing heavier penalties on tenants who refuse to reinstate unauthorised alterations to fixtures made in their units.

Government's response

1117. HD accepted The Ombudsman's recommendations. The actions taken and future follow-up actions are as follows –

(a) HD has started to review the effectiveness of the New Mechanism after its implementation and will consider enhancing the working guidelines where necessary;

(b) HD is closely monitoring the impact of reclassification of some fixtures from Category A to Category B to ensure that the implementation of the New Mechanism does not have any adverse effect on the building structures and water seepage situation;

(c) HD has requested Regional Chief Managers to step up monitoring to ensure that frontline personnel follow the guidelines in carrying out their duties;

(d) As at May 2017, follow-up actions were completed for 15 of the 27 outstanding cases of unauthorised alterations, including cases where reinstatement works had been completed and cases involving reclassification of fixtures from Category A to Category B under the new guidelines that had been handled properly. HD will continue to follow up on the remaining 12 cases;

(e) HD is reviewing those cases where follow-up works have not been completed and those with Category A fixtures reinstated by tenants, so as to ensure that appropriate follow-up actions have been taken;

(f) After launching the New Mechanism in August 2016, HD organised training courses in December 2016 and March 2017 for frontline personnel, including HD staff and employees of property services companies;

(g) HD has requested Regional Chief Managers to step up the monitoring of frontline staff's inspections to detect any violations;

(h) In the Estate Newsletter issued in May 2017, HD publicised the reclassification of fixtures and the enhanced regulatory actions against unauthorised alterations. HD will distribute the pamphlet "Points to Note for Alteration Works in Public Rental Housing Flats" to tenants when they go through the intake formalities to notify new tenants of the issue; and

(i) HD is reviewing the effectiveness of the New Mechanism, including the current follow-up actions against tenants who refuse to reinstate unauthorised alterations to fixtures in their flats.

Lands Department

Case No. DI/371 – Lands Department's System of Regularisation of Illegal Occupation of Government Land and Breach of Lease Conditions

Background

1118. The Lands Department (LandsD) is responsible for taking enforcement actions against illegal occupation of Government land and breach of lease conditions. Where illegal occupation of Government land is found, LandsD can take land control actions pursuant to the Land (Miscellaneous Provisions) Ordinance. In case of breach of lease conditions by a landowner, LandsD can take lease enforcement actions.

1119. Nevertheless, in practice, LandsD has all along allowed illegal occupiers of Government land and landowners in breach of lease conditions to apply for regularisation of such irregularities by way of short-term tenancy (STT) and short-term waiver (STW) of lease conditions respectively.

1120. LandsD often takes more than a year to complete processing regularisation applications. Moreover, when an application is being processed, LandsD would normally suspend its enforcement actions, resulting in possible prolonged nuisance or inconvenience caused to nearby residents as the irregularities persist. The Office of The Ombudsman (the Office), therefore, conducted this direct investigation to probe inadequacies in the existing system of regularisation.

Procedures for Processing Regularisation Applications

1121. Applications both for regularisation of illegal occupation of Government land by way of STT and for regularisation of breach of lease conditions by way of STW are processed by the local District Lands Office (DLO).

1122. Once an STT application is approved, DLO will require the applicant to pay rent and an administrative fee. Upon approval of an STW application, DLO will charge the applicant a waiver fee and an administrative fee. In general, charging of rent or waiver fee will take retrospective effect from the date when the irregularities first came to

DLO's attention.

1123. DLO should complete processing simple STT applications within 24 weeks. With regard to applications for STW for changing industrial premises to commercial use, after the applicant has obtained the permission from the Town Planning Board and paid the administrative fee to DLO, the latter should issue within 4 months a notification letter specifying the basic terms (including the amount of waiver fee) of the STW.

The Ombudsman's observations

1124. The Office's investigation has found clear inadequacies in LandsD's enforcement policy against illegal occupation of Government land and breach of lease conditions, as well as in its system of regularisation of such breaches.

Enforcement Policy against Illegal Occupation and Lease Breaches

1125. For years, citing resource constraints as the reason, LandsD has not proactively conducted regular inspections to detect illegal occupation of Government land and breach of lease conditions. Normally, LandsD will conduct inspections only upon receipt of public complaints or referrals from other departments. Even so, LandsD allows those who have committed breaches to apply for regularisation. This amounts to encouraging and conniving at cases of people first committing breaches and then applying for regularisation or not applying for regularisation at all, thus aggravating the problem of illegal occupation and breach of lease conditions. The Office considered that in order to resolve the problem effectively, LandsD should as soon as possible discontinue its enforcement policy of not conducting self-initiated inspections.

Design and Implementation of the Existing Regularisation System

1126. Deficiencies are found in the following four aspects of LandsD's system for regularising illegal occupation of Government land and breach of lease conditions –

(a) Applications for regularisation of breaches are at "zero cost". Furthermore, when an application is being processed, the applicant can have the "benefit" of continuing with the breaches during the period. This amounts to encouraging those caught

having committed breaches to stall LandsD's enforcement actions by simply applying for regularisation. The Office considered that LandsD should introduce the concept of "paying a price for breaches" into the regularisation system. For example, LandsD should require the applicants to pay a "forbearance fee", so as to deter them from abusing the regularisation system;

(b) there were often delays on the part of DLOs in processing regularisation applications. Some applications were even left idle for years. Such delays resulted in deferred enforcement actions, and also led to decrease in (and in some cases, even noncollection of) revenue in respect of rent or waiver fees. The Office considered that LandsD should seriously review its system for monitoring the progress of processing regularization applications;

(c) some cases show that even though public complaints had already been received about the premises in question or relevant Government departments had already raised concerns about the regularization applications, DLOs still suspended enforcement actions; and

(d) LandsD does not maintain statistics on STTs granted for regularisation of illegal occupation of Government land. In other words, the Department has no way of grasping the overall situation with respect to those STTs, such as the area and distribution of the land involved, and the amount of revenue generated.

1127. LandsD reiterated that with limited resources, the Department found it hard to proactively conduct regular inspections. Nevertheless, in the past years, LandsD had strategically conducted self-initiated inspections and stepped up enforcement actions in targeted areas.

1128. After considering the Office's comments on the existing regularisation system, LandsD at long last agreed to make improvement, i.e. to tighten up the practice of suspending enforcement actions during DLOs' processing of regularisation applications. Unless there are "special reasons" for suspending enforcement actions, DLOs will no longer suspend enforcement actions even if those having committed the breaches have applied for regularisation. "Special reasons" include cases where enforcement action would contradict a policy direction of the

Government, have an adverse impact on people's livelihood or pose a safety risk.

1129. LandsD also proposed the following improvement measures –

(a) to consider charging regularisation applicants a "forbearance fee" in cases where enforcement actions have to be suspended, and to strengthen its monitoring of the processing of such cases;

(b) to consider requiring all applicants for regularisation by way of STT or STW to pay the administrative fee as soon as DLO starts processing their applications; and

(c) to enhance its database on STTs by adding a new field of data to record whether the STTs are for regularisation.

1130. The Office notes that in recent years, LandsD has stepped up inspections and enforcement actions in response to major incidents revealed by the media. However, such reactive actions could at best cope with those specific cases only. The Office does not think that the Department can deter illegal occupation of Government land or breach of lease conditions by conducting inspections only when it has learned about the breaches from public complaints, referrals from other departments, or media reports. The reasons are as follows –

(a) Ordinary citizens may not know what amounts to a lease breach. They only make complaints when they find themselves subject to nuisance or their safety under threat; and

(b) by the time a problem gets reported in the media, the situation is likely to have become so serious and widespread that the problem can hardly be resolved.

1131. The Office welcomes LandsD's positive move to abandon its practice of generally suspending enforcement actions during DLOs' processing of regularisation applications. However, the Department must implement the new measure strictly, otherwise its purpose could not be achieved. The Department should not conveniently invoke the "special reasons" to avoid taking enforcement actions.

1132. The Ombudsman recommended that LandsD –

(a) re-deploy its resources to set up a mechanism for proactive inspections to detect illegal occupation of Government land and breach of lease conditions, and enhance its enforcement efficiency, so as to deter irregularities more effectively;

(b) tighten up, as soon as possible, its practice of suspending enforcement actions while processing regularisation applications (including introduction of "forbearance fee"), devise clear and specific guidelines on the application of "special reasons" for suspension of enforcement actions, and restrict the authority to suspend enforcement actions to high-ranking officers of the Department only;

(c) set a timeframe for processing cases where enforcement actions have not been suspended, and closely monitor and timely escalate the enforcement actions to ensure that the breaches can be rectified as soon as possible;

(d) implement, as quickly as possible, the new measure of requiring applicants for regularisation by way of STT or STW to pay the administrative fee as soon as the District Lands Office starts processing their applications; and

(e) add, as soon as possible, a category of regularisation to the database on STT, and by phases record all old and new STTs under that category.

Government's response

1133. LandsD accepted recommendation (a) and will, in the light of the societal concerns, carry out proactive inspections and strengthen control and enforcement in key areas of concerns. For illegal occupation of Government land, LandsD will step up investigation and information gathering by means of unmanned aircraft systems and aerial photos in an attempt to detect illegal erection of structures in the announced new development areas and the existing squatter areas. Regarding lease breaches, LandsD has adopted a risk-based enforcement strategy for cases in industrial buildings, and will conduct proactive inspections in targeted buildings.

1134. LandsD accepted recommendation (b). For cases of unlawful occupation of government land commencing from 28 March 2017, LandsD no longer accepts any regularisation applications made by the occupiers. In other words, the department does not allow the occupiers any opportunity to continue the occupation through regularisation applications. Upon identification of unlawful occupation, the occupier must cease occupying the land concerned and demolish the structures thereon before the date stipulated in the statutory enforcement notice; otherwise the department will consider instituting prosecution. As for unlawful occupation of government land that has already commenced before 28 March 2017, if the occupiers submit applications for regularisation before expiry of the period stipulated in the statutory enforcement notices, LandsD will tighten the arrangements for processing the regularisation applications to prevent these applications from being abused to stall enforcement actions. The tightened arrangements include –

(i) Upon receipt of the applications, the DLOs will first examine if the basic requirements are met. These requirements include: the government land concerned cannot be leased out separately to other persons (except the applicant) given its location, configuration, size and the like; there are no other uses of the government land in the short term (or even long-term uses have not been identified); the application is for non-domestic purposes; and the uses under application are either always permitted under the relevant outline zoning plan or in respect of which an application can be made to the Town Planning Board. If these basic requirements cannot be met, LandsD will not further consider the applications and will continue to take enforcement actions.

(ii) Advance payments are required for applications accepted for further processing: if the regularisation applications meet the preliminary requirements as mentioned above, DLOs will first charge an administrative fee and a one-off punitive fee equivalent to 12 months' market rent. DLOs will further process the applications only after the applicants have paid all the fees. The applicants will also have to agree to pay a forbearance fee chargeable on a quarterly basis at market rental rates during the period when their applications are being processed. All the paid fees will not be refunded regardless of whether the applications accepted for processing are ultimately approved or not.

(iii) If, after consulting the relevant departments and further consideration, an application is finally rejected, DLOs will resume their enforcement actions.

1135. LandsD accepted recommendation (c). DLOs regularly review cases of illegal occupation of unleased land in District Review Board chaired by the District Lands Officers. The priority of enforcement actions is adjusted in a timely manner at these meetings in an endeavour to curb unlawful occupation of unleased land with the existing manpower as far as possible.

1136. LandsD accepted recommendation (d). Regarding applications for STTs, LandsD has implemented a new measure requiring applicants to pay an administrative fee before their applications can be further processed by DLOs. For details, please refer to the response to recommendation (b) above. At this stage, LandsD's top priority is to examine, formulate and introduce measures for deterring unlawful occupation of government land and processing applications for regularisation by way of STT in accordance with the tightened arrangements. LandsD will, in the light of the availability of manpower resources, study how to implement other recommendations on processing applications for regularisation of breach of lease conditions by way of STW and relevant enforcement actions as set out in the Report in due course.

1137. LandsD accepted recommendation (e) and has added a category of regularisation to its STT database. For all new direct grant STTs, LandsD will specify in the database whether the STT is a regularisation application.

Leisure and Cultural Services Department

Case No. DI/368 – Temporary Closure of Public Swimming Pools / Beaches under the Leisure and Cultural Services Department Due to Shortage of Lifeguards

Background

1138. Suspension of services at public swimming pools and beaches due to shortage of lifeguards happened at times, for a number of reasons. While some cases were caused by industrial actions staged by the lifeguard unions, some were due to the Leisure and Cultural Services Department (LCSD)'s inadequacies in the management and deployment of lifeguards. The Office of The Ombudsman (the Office) learned while investigating a complaint case that between June and September 2013, the number of days that some swimming pool facilities at the Kowloon Park Swimming Pool were closed due to concurrent sick leave of lifeguards far exceeded that during the same periods in 2011 and 2012. That means the problem may be getting worse.

1139. Concerned that the suspension of services at LCSD's swimming pools due to shortage of lifeguards has caused not only a waste of public facilities and resources but also inconvenience to the public, The Ombudsman initiated this direct investigation. As stipulated in The Ombudsman Ordinance, the Office cannot investigate personnel matters in respect of the pay, conditions of service, discipline, etc. of Government departmental positions, the focus of this direct investigation was not on LCSD's personnel management matters but on how the Department managed its swimming pools and beaches, including the deployment of lifeguards, to protect the public's rights to use swimming pools and beaches, with a view to identifying any inadequacies and areas for improvement.

The Ombudsman's observations

1140. The Office's investigation revealed the following inadequacies and areas for improvement in LCSD's handling of closures of swimming pools and beaches due to shortage of lifeguards.

Ineffective Deployment of Lifeguard Manpower

1141. According to LCSD, apart from deploying an adequate number of basic manpower for each shift, it would in general deploy one or two extra lifeguards as buffer staff to strengthen lifeguard service. Where the number of lifeguards on sick leave at short notice exceeds the buffer manpower, leaving insufficient lifeguards on duty at a swimming pool or beach, the officer-in-charge of the venue concerned will follow established procedures and immediately contact the substitute staff, staff on the next shift and those on vacation leave of the same venue or in the same district to cover the duties of absentees. Or, the officer-in-charge may contact other swimming pools and beaches in the same district to discuss possible staff secondment to maintain the services of the swimming pool or beach concerned.

Insufficient Buffer Manpower and Lack of Substitute Staff Duty Rosters

1142. Nevertheless, in reality, the substitute staff or staff on vacation leave are not yet ready to go to work. Even if they agree to report for duty, it would still take some time for them to get to the venue. As regards secondment of lifeguards between venues, from the perspective of a venue's officer-in-charge, seconding the buffer manpower to help resolve the shortage of lifeguards at other venues may result in partial or even complete closure of his own venue should something unexpected happen and affect the venue's manpower. Besides, LCSD has no clear instructions on secondment between swimming pools and beaches. If the lifeguards to be seconded believe that the lifeguards of the swimming pool concerned are staging a boycott by concurrently taking sick leave, they would be reluctant to cover their duties because they do not want to be rejected by their colleagues. LCSD, therefore, should consider increasing the buffer manpower where appropriate and rationalising the staff secondment arrangements to avoid disputes. This should also allow the officers-in-charge to feel more comfortable about secondment arrangements when necessary.

Manpower Strain during Peak Season (June to August)

1143. Some lifeguards choose to take vacation leave between June and August, the busiest period of the year, thereby affecting the deployment of staff. LCSD should take effective measures to ensure that there is adequate manpower for smooth operation of the facilities during the peak season. It should also make arrangements for lifeguards to take leave in the nonpeak season.

Difficulties in Hiring Seasonal Lifeguards

1144. In recent years, hiring seasonal lifeguards has become more and more difficult for LCSD, with the ever-growing demand for lifeguards of the swimming pools of large clubhouses in new private estate developments. Given the increasing market competition, LCSD must adopt a flexible approach in searching for a solution to the hiring problem of seasonal lifeguards, such as considering restructuring their grade and pay package, having regard to their job nature and requirements in experience and skills.

Arranging Part-time Hourly-rated Seasonal or Voluntary Lifeguards

1145. The services of part-time hourly-rated seasonal or voluntary lifeguards can enhance LCSD's flexibility in deploying manpower of lifeguards and its ability to handle contingencies. Part-time hourly-rated seasonal or voluntary lifeguards are not as experienced as full-time lifeguards. However, through regular training (such as drills) and awards schemes, LCSD can enhance their professional skills, boost their confidence and ability in carrying out lifesaving duties and increase the incentive for them to provide services. In the meantime, the Department should also improve the current duty rosters for part-time hourly rated seasonal or voluntary lifeguards by obtaining more precise information on when and where these lifeguards (especially students not in employment) can be on lifesaving duties. By doing so, LCSD can deploy manpower more swiftly when substitutes are suddenly needed so as to minimise the chance of partial or even complete closure of swimming pools and beaches because of insufficient lifeguards on duty.

Outsourcing Lifeguard Services

1146. Management for the Island East Swimming Pool and Tai Kok Tsui Swimming Pool was once outsourced by LCSD to private companies in 2001 and 2005 respectively. Later on, the service contractor of Island East Swimming Pool was accused of falsifying the shift duty records of lifeguards. Concerned with the safety of swimmers, LCSD finally decided in 2011 to terminate all plans to outsource lifeguard services. The Office considers that whether LCSD should reconsider outsourcing lifeguard services hinges mainly on whether it can set up a proper monitoring mechanism. In the long run, outsourcing lifeguard services can be a viable means to augmenting the lifeguard manpower. The Office shall leave the matter to LCSD for further study

and planning.

Lax Measures to Monitor Sick Leaves Taken by Staff Members Compared with Other Departments and Ineffective Execution

1147. Under the Civil Service Regulation (CSR) 1291, if there are reasonable grounds for a Government department to suspect that an officer might have abused sick leave, it can require the officer to attend any or a particular Government or Hospital Authority clinic and produce medical certificates issued by its doctor before sick leave is granted. However, the Office noticed a rising trend in both the number of cases in the lifeguard grade where the LCSD management had to invoke CSR 1291 and the percentage of such cases among LCSD staff cases as a whole. The number of grade members involved in CSR 1291 cases had increased from 4 to 57 in the past five years and the overall percentage of lifeguards involved among LCSD staff had reached 80% in the past two years. In recent years, the number of days on which individual swimming pools and beaches had to be partially or even completely closed owing to lifeguards being absent or on sick leave was on the rise.

1148. Regarding the monitoring of sick leaves taken by staff members (including lifeguards) by invoking CSR 1291, LCSD's practice had been laxer than that of other Government departments. The "trigger point" for LCSD to invoke CSR 1291 was nine days of sick leave in three months, as opposed to five days in three months for other departments. Besides, before invoking CSR 1291, the LCSD management would first meet with the staff members concerned in person to review the sick leave situation (pre-monitoring procedure), instead of taking action right away. This was also laxer than other Government departments.

1149. As can be seen from the cases cited in the Office's investigation report, while invoking CSR 1291 early might not eradicate abuses of sick leave, it did have a certain deterrent effect on some lifeguards. In some more serious cases, invoking CSR 1291 had made it costlier and riskier for the lifeguards involved to defy the Regulation. Nevertheless, the Office noticed that LCSD had failed to set off the procedure to invoke CSR 1291 early in a number of cases where the lifeguards had taken nine days of sick leave in three months. In some cases, LCSD activated the procedure only after the problem had persisted for more than a year.

Failing to Set Out Clear Guidelines for Lifeguards Who Can Only Perform Light Duties (Lifeguards on Light Duties)

1150. Lifeguards on light duties usually refers to cases where after medical assessment, the staff concerned are recommended to perform only light duties. The Office's investigation reveals that the number of lifeguards on light duties, though relatively stable, is slightly on the rise. The Office considers that notwithstanding the small number of such cases, the operation of individual swimming pools and beaches would still be affected to a certain extent. LCSD should, therefore, come up with a definition of "lifeguards on light duties" and set out clearer guidelines on the kind of duties they can take up so that officers-in-charge of venues can deploy manpower as appropriate. For instance, while a lifeguard on light duties cannot perform weight-lifting duties (such as lifesaving), he can still assume other duties such as patrol or maintenance of order, etc. Prolonged cases of light duties would be subject to LCSD's regular review, and seasonal lifeguards would be recruited to perform the original duties of the lifeguards involved during the swimming season should there be operational needs. Nonetheless, the Office considers that sufficient manpower must also be maintained at major positions at swimming pools and beaches even during the non-swimming season. If individual lifeguards have to be on light duties for a time long enough to affect the basic operation of a swimming venue, it is imperative that LCSD consider deploying more regular lifeguards. In other words, LCSD should set out clear guidelines on the work arrangements for lifeguards on light duties. This can facilitate fair and reasonable allocation of duties by officers-in-charge of venues and avoid imposing extra workload on the other lifeguards on duty.

Deducting Time-off in Lieu to Offset Lateness for Work Not Appropriate

1151. While the frequency that lifeguards reported late for work might not be very high (about 0.8 time per month for each lifeguard on average), it might still be high enough to cause delays in opening swimming pools and beaches to the public fully and on time. Records showed that more than 20% of late cases involved lifeguards being late for work for more than 15 minutes, and 70% of the late cases would not be regarded as time-off once the lifeguards' time-off in lieu had been deducted in recompense. The Office considers that the LCSD management should be held responsible for having acquiesced in such inappropriate practice. They should take stringent monitoring measures to correct the lifeguards' bad habit of being late, properly handle the time-off in lieu arrangements and conscientiously discharge supervision duties.

Failure to Establish Clear Induction Training Requirements for Lifeguards Affecting Manpower Deployment

1152. A lifeguards' union indicated to us that many newly recruited lifeguards failed to complete the three-stage induction training, including diving lessons, which is required to be completed in three years after recruitment. Those lifeguards were, however, still given passage over probation and continued to perform lifesaving duties. The Office's investigation report revealed that, of the three-stage training programme that all newly recruited lifeguards are required to complete, each had at least several dozens of the newly recruited lifeguards who have yet to participate in the programme. Between 2012/13 and 2014/15, as many as 87 lifeguards had still to take part in the rescue diving course. Some of them had not even attended the introductory practical training of the first stage. Besides, not all of those who had taken part in the courses could attain a pass. For example, the average passing rate of the diving courses was just 87%.

1153. On this issue, LCSD indicated that upon appointment, lifeguards already possess the professional qualifications necessary for carrying out lifesaving duties. On-the-job drills will also be arranged. As such, even if some lifeguards have failed in their induction training programme, manpower deployment would not be adversely affected. For newly recruited lifeguards who cannot complete the three-stage induction training programme during the first three years of service, LCSD's Training Section will arrange for them to participate in the remaining part of the training in the following year.

1154. The Office considers that LCSD's explanations cannot stand. On the one hand, it maintained that those courses are not compulsory. Yet on the other hand, the Department would continue to arrange for those who did not pass or participate in those courses to complete the remaining part of the training, implying that those courses are actually compulsory in nature. This also shows that LCSD's policy is confusing. In fact, if certain lifeguards cannot provide the most suitable lifesaving service because they have yet to complete or even participate in the relevant training courses, rescue action would be delayed even if other colleagues could render help. This would not only damage the professional image of lifeguards but, most importantly, also affect the safety of swimmers. LCSD must not take the training of lifeguards lightly.

Arrangements to Close Swimming Pools

1155. LCSD issues press releases to announce complete closure but not partial closure of swimming pools. Members of the public are informed of partial closures only by a notice put up at a prominent place near the entrance of the swimming pools or through the 1823 hotline. The Office considers that the public will be affected even when a swimming pool is only partially closed (e.g. if all the swimmers are using the only available lanes, their enjoyment would be dampened by the crowds). LCSD should at least put up a notice on its website so that members of the public can decide for themselves whether they still want to go to the venue concerned for swimming.

Inadequate Communication with Lifeguards' Unions

1156. Although LCSD has conducted regular reviews on manpower and recruited more lifeguards accordingly, and has invited staff and union representatives to join the working group on manpower review, lifeguards still took industrial action occasionally, resulting in service suspension of swimming pools and beaches. This indicates that the working group has not been effective in helping the management and staff to reach consensus. Specifically, there are substantial differences in the perspectives and points of view between LCSD management and lifeguards' unions on a number of basic issues pertaining to the operation of swimming pools and beaches. LCSD has to further enhance its actual communication with the lifeguards' unions to facilitate mutual understanding and consensus, in order not to dampen lifeguards' morale and affect the operation of swimming pools and beaches.

1157. The Ombudsman recommended LCSD –

Manpower Deployment

(a) to review the adequacy of existing arrangements for buffer manpower, and formulate more specific arrangements for deploying substitute staff (such as drawing up staff secondment duty rosters), and to explore measures to strengthen the capability and flexibility in deploying lifeguards, with a view to maintaining the normal operation of all facilities;

(b) to study ways of strengthening the monitoring of lifeguards taking vacation leave during the peak season (June to August) so as to relieve manpower strain, as well as explore measures to allow lifeguards to take leave in the non-peak season instead;

(c) to formulate measures (such as setting up regular training and awards schemes) to enhance the professional skills of part-time hourly-rated seasonal or voluntary lifeguards, and obtain more precise information on the time slots they are available for carrying out lifeguard duties in order to draw up a more functional duty roster;

(d) to study the feasibility of reintroducing outsourced lifeguard service, including studying the feasibility of setting up a comprehensive monitoring mechanism to ensure swimmers' safety, and consulting the public and trade unions where necessary;

Mechanism for Monitoring Sick Leave

(e) although LCSD has now followed the practice of other departments in invoking CSR 1291 for monitoring suspected abuse of sick leave, LCSD should still regularly examine the effectiveness of its new measures. In particular, officers-in-charge at the venues should be reminded to closely monitor the sick leave taken by staff and take timely action where necessary;

(f) to closely monitor any rising trend in cases of light duties and, if such trend is identified, to review whether potential risks of occupational injury exist in swimming pool and beach facilities and make improvements. The need for stepping up training on occupational safety and health for lifeguards should also be considered;

(g) to issue more reference materials on the definition of light duties and the nature of work assignments for the staff concerned, and regularly examine prolonged cases of light duties. If the situation has a long-term impact on the operation of swimming pools and beaches, deploying more manpower to resolve the problem should be considered;

(h) to rigorously deal with the problem of punctuality among lifeguards and avoid allowing them to take time-off in lieu as compensation for being late; to closely monitor repeated latecomers and take disciplinary action in a timely manner to achieve a deterrent effect;

Arrangement to Close the Pool

(i) in case of temporary partial closure of swimming pool facilities, to consider issuing a press release as in the case of complete closure, or at least making an online announcement so that the public can decide whether they still want to go to the facilities concerned;

Enhancing the Lifeguard Management Regime

(j) to review lifeguards' target timeframe of completing training courses, so as to ensure that they are equipped with basic lifesaving knowledge, and to give them opportunities to acquire new skills thereby improving their lifesaving abilities. This would not only enhance their competence and promote water safety and smooth operation at swimming pools and beaches, but also boost their sense of mission towards the job and their professional image;

(k) to comprehensively review and explore more flexibly ways to overcome the difficulty that LCSD is currently facing when hiring seasonal lifeguards; to step up publicity on the hiring campaign and make advance preparation before the start of swimming season to prevent manpower wastage; and

(l) to enhance its communication with lifeguards' unions and staff, and to reach a consensus and common understanding with them on basic issues pertaining to the daily operation of swimming pools and beaches.

Government's response

1158. LCSD accepts all recommendations and will take the follow-up actions listed below –

Manpower Deployment

(a) continue to review the existing manpower and consider enhancing the capability and flexibility in the deployment of lifeguards with a view to maintaining the normal operation of pool facilities;

(b) consider tightening the control over lifeguards taking vacation leave during the peak season between June and August in order to relieve the manpower strain; and to explore arrangements to allow lifeguards to take leave in the non-peak season instead;

(c) consider strengthening the training for voluntary lifeguards to enhance their understanding of the daily management and operations of LCSD's swimming facilities so that they can assist in providing lifesaving services when necessary;

(d) study the feasibility of reintroducing the outsourcing of lifesaving services and devise a related monitoring mechanism;

Mechanism for Monitoring Sick Leave

(e) in respect of curbing suspected abuses of sick leave, monitor regularly the implementation and effectiveness of the newly introduced sick leave management mechanism;

(f) closely monitor any rising trend in the number of lifeguards on light duties, and consider stepping up the provision of a series of occupational safety and health courses for lifeguards;

(g) provide examples of work assignments suitable for lifeguards on light duties to venue managers for reference in making appropriate arrangements, and continue to regularly examine prolonged cases of light duties;

(h) review the implementation and effectiveness of the new guidelines and requirements on staff punctuality;

Arrangement to Close the Pool

(i) consider issuing a notice on the web page of LCSD to inform members of the public of temporary partial closure of a swimming pool if such a closure is anticipated to last for a reasonably long period;

Enhancing the Lifeguard Management Regime

(j) strictly require lifeguards to take mandatory training course, and continue to provide sufficient training quota to ensure that newly recruited lifeguards will complete all three phases of the induction training programme;

(k) continue to step up publicity and recruitment to attract more people to apply for seasonal lifeguard posts; and

(l) continue to maintain close communication with the lifeguard unions and staff through the existing channels and platforms.

Marine Department

Case No. DI/334 – Marine Department's Follow-up Mechanism on Recommendations Made in Marine Incident Investigation Reports

Background

1159. In October 2012, a serious marine incident occurred off Lamma Island (the Lamma Incident). After investigation, it was found that one of the vessels involved was not fitted with a watertight door, resulting in water ingress and rapid sinking of the vessel after collision. Subsequently, the media reported that in 2000, a Government vessel under maintenance at a dockyard sank after water had entered its hull because the watertight bulkheads on board were not intact. While the relevant incident investigation report had already recommended that the Marine Department (MD) examine the watertight bulkheads for all vessels of the same type, the occurrence of the Lamma Incident cast doubt on whether MD had fully implemented the recommendations of marine incident investigation reports all along.

1160. In this light, the Office of The Ombudsman (the Office) decided to initiate a direct investigation. Since an Independent Commission on Inquiry has inquired into the Lamma Incident and submitted a report, this direct investigation would not look into the causes of the Lamma Incident and the question of accountability.

Investigation of Marine Incidents

1161. Where a Hong Kong registered ocean-going vessel in any waters, or a certificated local vessel or any other non-local vessel within Hong Kong waters is involved in an accident, the owner/master/proprietor of the vessel or their agent(s) must report the occurrence to the Director of Marine.

1162. The Marine Accident Investigation and Shipping Security Policy Branch (MAI) under MD is responsible for investigating marine incidents reported and preparing a marine incident investigation report (incident report) for such incidents. Where necessary, MAI will make recommendations for improvement.

The Ombudsman's observations

Follow-up Mechanism on Recommendations in Incident Reports

1163. Prior to June 2013, MD had basically adopted a lax approach in following up recommendations made in the incident reports. It would mainly rely on the officers of relevant divisions and the related vessel companies/vessel owners to take voluntary actions to rectify the inadequacies, without any specific records of the follow-up actions or monitoring system. In response to Report No. 59 of the Audit Commission, MD set up a computer system in June 2013 and input into the system all the recommendations made in the incident reports for continued monitoring of the progress of implementation. Furthermore, in December 2014, MD revised its guidelines on marine incident investigation with a new section on following up recommendations made. For ease of discussion below, the operational mechanisms before and after MD's setting up of the above computer system are referred to as "the Old Mechanism" and "the New Mechanism" respectively.

Lax Approach under the Old Mechanism

1164. When the computer system was set up in June 2013, MD did not input into its database information about implementation of recommendations arising from investigation cases concluded before that time. Upon the Office's request, MD retrieved from different divisions its old records and manually searched the relevant information. It then collated and compiled the information related to its follow-up actions on recommendations made in the incident reports. According to the information so obtained, during the period between January 2005 and May 2013, MD concluded 114 marine incident investigations and made 308 recommendations in total.

1165. Regarding MD's follow-up actions on the recommendations made in the above 114 incident reports under the Old Mechanism, the Office has the following observations.

No Follow-up Actions by MD for Years after Completion of Investigation

1166. In five cases, MD had not taken any follow-up actions for years after completing the investigation. For the case with the most serious delay, MD only took "retrospective" action to follow up the recommendations made in the incident report eight years and seven months after completion

of the investigation. In the other three cases, MD only took "retrospective" follow-up actions some seven years after completion of the investigation.

1167. As for the remaining case, MD checked the relevant records once again on receipt of the Office's draft investigation report and found that the recommendations made in the incident report had actually been followed up in a timely manner. Nevertheless, MD could not locate any record about the "follow-up action taken" when it collated and compiled the information upon the Office's request in mid- 2014, and so it took "retrospective" follow-up action again in July 2014. This showed that MD's records were indeed muddled and confusing.

1168. The Office noticed that MD's "retrospective" follow-up actions were all taken after July 2014, subsequent to the Office's request for MD to search and collate its old records. It appeared that had it not been the Office's direct investigation, MD might not have discovered its omissions of follow-up actions in those cases.

Omissions in Following up on Some Recommendations

1169. In following up on 11 cases, MD had omitted its follow-up actions on at least one recommendation in each case, and "retrospective" follow-up actions were only taken years later. In the case which involved the most serious delay, MD completed the investigation in May 2005 and made seven recommendations. Only three of those recommendations were followed up in the same month and in January 2006. For the remaining four recommendations, however, it was not until August 2014 (i.e. more than nine years later) that MD took follow-up actions.

1170. MD only took "retrospective" actions to follow up its recommendations after July 2014. The Office believes that it was upon checking of records at the Office's request that MD discovered the omissions and took retrospective follow-up actions.

Case Information Incomplete and Confusing

1171. According to the records provided by MD during the Office's investigation, a total of 114 incident reports were completed between January 2005 and May 2013. However, the Office found from MD's website that in addition to those 114 incidents, there were another six marine incidents.

1172. Upon receipt of the Office's draft investigation report, MD searched and found the case files of those six incidents. The Department explained that when it first provided us with the case information, those six cases were involved in legal proceedings.

1173. Nevertheless, the Office must point out that during the Office's investigation, MD had provided us with information on a number of marine incident investigations. Many of those cases involved on-going litigations but the six cases just mentioned were not among them. Besides, because MD"s information was confusing, the Office had specifically asked MD in November 2015 to confirm that the information and data provided to this Office in the course of the Office's investigation were accurate. MD replied in December and confirmed their accuracy. This clearly implied that the Department had not been rigorous at all in checking its records, and reflected how incomplete and confusing its records had been.

The New Mechanism Still Inadequate

1174. Between June 2013 and November 2015, MD had completed 77 marine incident investigations and made 215 recommendations in total.

1175. The New Mechanism requires that in addition to informing the related agencies and parties of its recommendations made in the incident report, MD should also enter those recommendations into its computer system, so that timely reminders will be issued to the responsible officers for follow-up actions while senior management can monitor progress until all the recommendations are implemented.

Inadequate Follow-up Actions on Recommendations Regarding Vessels Not Registered in Hong Kong or Not Certificated Locally

1176. In effect, the New Mechanism is only applicable to vessels registered in Hong Kong or certificated locally. For recommendations relating to vessels not registered in Hong Kong, MD would basically follow the Old Mechanism. The Office considered that the Department should at least attempt to know whether improvements have been made to the vessels in question so that it could assess the possible marine safety hazards should those vessels enter Hong Kong waters again.

Failure to Follow up Each Case Rigorously

1177. In most cases where the New Mechanism was applicable, follow-up actions would come to an end once MD received replies from the related agencies indicating that the recommendations had been, or were about to be, implemented. No further verification on the implementation process would then be made.

1178. The Office considers that MD should rigorously follow up each and every recommendation to ensure their full implementation. For example, MD should wrap up its follow-up actions only after it has received documentary proofs from the related agencies, or after its officers have conducted inspections to confirm implementation of all the recommendations.

MD Not Applying the New Mechanism to Old Case

1179. According to MD, it has completed its follow-up actions on 308 recommendations made under the Old Mechanism. In response to the Office's enquiries, MD clarified that if the New Mechanism were to apply to the aforesaid 308 recommendations, then 20 cases involving 22 recommendations would require continued follow-up actions. However, because of manpower and resource constraints, and because its review on the 20 cases mentioned above had confirmed absence of similar incidents recurring in the same vessels, MD did not see any need to apply the New Mechanism to follow up those 22 recommendations.

1180. The Office finds MD's decision not to apply the New Mechanism to follow up those 22 recommendations on such grounds unacceptable, as this may put the Hong Kong's marine safety at risk.

1181. The Ombudsman urges MD to –

(a) actively verify whether all the recommendations in incident reports are implemented, instead of relying on reports by the agencies or parties concerned, and to include this procedure in the regular routines for following up implementation of recommendations;

(b) take appropriate follow-up actions on implementation of recommendations regarding cases involving vessels not registered in Hong Kong or not certificated locally;

(c) reconsider applying the New Mechanism to follow up on those 22 recommendations under the Old Mechanism, with a view to ensuring marine safety;

(d) consider reviewing the information on cases under the Old Mechanism to prevent the problem of confusing records, and to ensure that appropriate actions will be taken to follow up on recommendations made in the incident reports; and

(e) review regularly the follow-up actions on all recommendations made in incident reports under the New Mechanism and ensure the achievement of expected results.

Government's response

1182. MD accepted all of The Ombudsman's recommendations, and has taken the follow-up actions set out below –

(a) MD has instituted a new mechanism for following up on marine accident investigation and revised the relevant procedures of "Marine Accident Investigation Guidance Notes" (Guidance Notes). All the 78 cases involving 216 recommendations listed in the incident reports since June 2013 were reviewed in accordance with the revised Guidance Notes. Documentary evidence has confirmed that all recommendations had been implemented;

(b) MD has completed follow-up actions on the 13 cases (i.e. 19 recommendations listed in the incident reports) involving vessels not registered in Hong Kong or not certificated locally. All recommendations for these 13 cases had been implemented. The new mechanism (i.e. obtaining evidence of implementation) on follow-up actions for these vessels have also been set out in the revised Guidance Notes;

(c) In the course of The Ombudsman's investigation, 22 recommendations (involving 20 cases) were identified as typical examples of not being properly followed up, i.e. relying on the agencies or parties concerned to follow up. MD has followed up on these cases in accordance with the revised Guidance Notes and requested the vessels' operators to submit objective evidence showing implementation of the

recommendations. For ships or operators that are no longer in operation, the cases and lessons learnt have been shared with the shipping industry at the annual marine safety seminar;

(d) MD has reviewed the old records of 114 cases from 1 January 2005 to 1 June 2013. All the records are in order. Since January 2017, MD has started the second round of assessment of these cases individually to ensure they comply with the revised Guidance Notes. Of the 114 cases, 54 recommendations (involving 47 cases) were identified for follow-up in accordance with the revised Guidance Notes. 42 recommendations had been implemented with the remaining 12 recommendations (involving 10 cases) being followed up; and

(e) MD reviews the progress of implementation of the recommendations made in the incident reports in monthly Marine Accident Investigation Section meetings and bi-monthly Multi-lateral Policy Division meetings to ensure diligent follow-up and effective outcome. The review arrangement is now part of the incident report management process.

Transport Department and Labour and Welfare Department

Case No. DI/360 – Government Regulation of Special Transport Services for Persons with Mobility Difficulties

Background

1183. According to Government statistics published in 2014, there were about 320,500 persons with restriction in body movement (i.e. about 4.5% of the total population) in Hong Kong in 2013.

1184. The last time the Rehabilitation Advisory Committee formulated a rehabilitation policy concerning transport services for person with disabilities was in 2007. The Hong Kong Rehabilitation Programme Plan (the Plan) published in that year set out the policy objectives to facilitate the integration of persons with disabilities into the community. The Plan included a proposal for the Government to build a barrier-free environment on access to facilities and transportation for persons with disabilities, and to provide special transport (ST) services to those who cannot use public transport. Nevertheless, because of excess demand, quite a number of persons with disabilities who cannot use public transport had no access to legitimate ST services, and could only resort to transport services provided by some rehabilitation vehicles illegally converted from private cars or light goods vans (unlicensed rehabilitation vehicles, or URVs). However, whether the facilities and installations on such vehicles meet the standard requirements and whether the safety of passengers with disabilities can be assured and their rights and interests protected remain questionable.

1185. In this connection, pursuant to The Ombudsman Ordinance, The Ombudsman declared on 20 November 2014 a direct investigation to examine the implementation of the policy on ST services by the Labour and Welfare Bureau (LWB) and the Transport Department (TD), the progress in encouraging the introduction of barrier-free taxis and Government measures against the operation of URVs.

The Ombudsman's observations

1186. The Office of The Ombudsman (the Office)'s investigation reveals that existing ST services are plagued with problems and the Government has not been proactive enough in implementing the Plan.

Serious Undersupply of Rehabus Services

1187. There were more than 10,000 unsuccessful requests for the Rehabus scheduled route and dial-a-ride services every year between 2011 and 2014. There were nearly 10,000 unsuccessful requests in 2015, and over 20,000 withdrawals of bookings were recorded. The number of withdrawals of bookings showed a drop in 2012 and 2013, only to climb again in 2014 and soared to more than 30,000 in 2015. The Office's case studies and stakeholders' views indicated that quite a number of Rehabus services applicants simply withdrew from or did not even apply for the services because of the exceedingly long time needed for booking the said services. They unanimously pointed out that bookings for Rehabus services often took several months or even a year in advance, yet provision of the services requested was not guaranteed. For instance, their return trips could not be arranged, or the requested number of vehicles was not available, etc. More regrettably, over half of the unsuccessful bookings for Rehabus services involved patients who needed to attend follow-up consultations or receive medical treatment. This reflected that Rehabus services were so unacceptably inadequate that the basic needs of persons with disabilities to seek medical consultation had been affected. Since Rehabus is the only prevalent mode of ST services, the Office finds it unacceptable that its services should have been so gravely inadequate.

Government's Failure to Seriously Assess Demand for ST Services and Set Targets for Service Provision

1188. LWB indicated that the Social Welfare Department (SWD) has been providing vehicles for rehabilitation centres (centre vehicles) under nongovernmental organisations (NGOs) based on their operational needs. Those centre vehicles provide transport service to users between the rehabilitation centres and their homes, or when they need to attend follow-up consultations or join outdoor activities. Yet, SWD does not require those NGOs to submit data on their number of users and user-trips. As such, LWB does not maintain any relevant information. On the other hand, TD stated that it is not responsible for the regulation and monitoring of centre vehicles operated by NGOs, nor Accessible Hire Cars of the Hong Kong Society for Rehabilitation (HKSR). So, it has

never assessed the overall demand for ST services. In a nutshell, the Government has never seriously assessed the overall demand for ST services. At present, the only information it has at hand is that about Rehabus services, including the number of unsuccessful bookings and withdrawals of bookings.

1189. The Office's view is that the Government's inability to understand the overall demand for ST services makes it impossible to assess the effectiveness of implementing the proposed measures in the Plan, let alone encourage social participation and integration of persons with disabilities into the community.

Government's Failure to Fully Coordinate the Effective Utilisation of ST Services

1190. Statistics show that the fleet of Rehabus increased to 156 vehicles by the end of 2016, with more than 800,000 user-trips annually. Meanwhile, the number of centre buses operated by the 34 NGOs subvented by SWD was set to increase from 199 to 272 in 2016-17, far exceeding the number of Rehabus operated by HKSR, but the numbers of users and user-trips remain unknown. It is questionable how many user-trips of ST services have actually been arranged by those rehabilitation centres, and whether the resources have been fully and effectively utilised.

1191. Moreover, according to information from TD, around 30% of the users of the Rehabus scheduled route service are students travelling to and from schools. Their demand has put pressure on Rehabus services. To enhance the availability of Rehabus services for other needy persons with disabilities, LWB should consider liaising with the Education Bureau (EDB) to study the feasibility of allocating educational resources for schools to arrange ST services for students with such needs in order to ease the shortage of Rehabus services.

1192. Besides, TD indicated that most non-organisation users of the Rehabus dial-a-ride service would reserve a whole vehicle for their exclusive use. Yet, a Rehabus fitted with five to six wheelchair spaces should not be regarded as a personalised transport vehicle. TD will suggest HKSR implement the mandatory requirement for users of the dial-a-ride service to share a vehicle, so that more persons with disabilities can have access to the services they need.

1193. In sum, LWB is duty bound to coordinate and review the existing mechanism, collect relevant data and conduct analysis, so as to ensure that all resources allocated for ST services are adequately and effectively utilised.

Government's Inadequate Efforts in Combating the Problem of URVs

1194. URVs pose a safety threat to users with disabilities. Nevertheless, both LWB and TD asserted that the duties of combating the problem of URVs fell outside their purviews. The fact that the Police has conducted very few decoy operations in the past years reflects that because of the lack of attention from LWB/TD, the Police may not accord proper priority to enforcement action against those vehicles offering unauthorised transport services. To ensure the safety of passengers with disabilities, LWB and TD should discuss with the Hong Kong Police Force on stepping up enforcement action against such unauthorized activities, such as increasing the number of decoy operations to catch offenders and produce a deterrent effect.

Government Should Further Promote Introduction of Wheelchair Accessible Taxis and Minibuses

1195. The number of wheelchair accessible taxis introduced by the taxi trade since 2007 was few. It was not until 2015 that their number has increased at a faster rate. The Office has written to some relevant government departments in mainland China and overseas to enquire about how they have introduced wheelchair accessible taxis. From the information they provided, the Office can see that the governments in many countries and areas have actively provided incentives and subsidies to encourage the introduction of wheelchair accessible taxis to facilitate mobility of persons with disabilities. Hong Kong, by contrast, has lagged behind those countries and areas in this regard. The Office considers that in the long term the Government should explore feasible ways of actively encouraging the trade to import wheelchair accessible taxi models, and speed up the progress of introduction. At the same time, TD should review the role played by taxis as a point-to-point barrier-free transport option and set the target of supply, so as to study how to resolve the persistent shortage of the Rehabus services.

1196. As for low-floor minibus, TD is now studying with the trade the feasibility of introducing such models. We urge TD to consider offering incentives for the trade to introduce those new models, especially for those routes serving hospitals, in order to meet the demand for ST services.

No Specific Timeframe Set by LWB for Implementing "Transport for All" Policy

1197. As the policy bureau tasked with safeguarding the welfare of persons with disabilities, LWB has an unshirkable responsibility for implementing the "Transport for All" policy. However, it has never set a specific timeframe for its implementation. Since its formulation, the Plan has been in place for eight to nine years, but the provision of ST services remains unsatisfactory, and the public have no way to monitor whether the Government has reviewed the progress of various measures stated in the Plan, and how it would conduct such reviews, in a timely manner.

LWB and TD Treating "Transport for All" Policy as a Concept

1198. It is clearly stated in the Plan that implementing "Transport for All" is a policy, but LWB and TD, in their responses to the Office's investigation, both explained "Transport for All" as a concept. We consider that if the Government deliberately gives less importance to the "Transport for All" policy, as originally said in the Plan, and treats it as a mere concept, achievement of the targets under the Plan will be even more distant and remote. Such mentality is undesirable. It is essential for the Government to set quantifiable target levels of basic transport services provided to meet the needs of persons with disabilities. It should also draw up a specific timeframe for achieving those targets so that it can monitor the progress of implementation and demonstrate its determination to implement the measures. Otherwise, "Transport for All" will probably be just empty talks and remain at the stage of a "concept" for a long time.

TD's Failure to Proactively Give Professional Support to HKSR Earlier and Enhance Rehabus Services

1199. Many of the service users we interviewed during the Office's investigation expressed that the manual scheduling of Rehabus services has led to underutilization of resources and caused inconvenience to service users. TD and HKSR have different explanations as to why the Rehabus management system was not computerised earlier. Regardless of

whose explanations are true, it should be indisputable that the Rehabus management system has not kept pace with the times. If only TD had proactively offered its professional advice on transport earlier to help HKSR solve the problems, the operational efficiency of Rehabus services would have long been enhanced.

1200. Moreover, since the Plan was formulated in 2007, the demand for Rehabus services has clearly exceeded supply over the years. What is most worrying is that the needs of persons with disabilities to attend medical appointments have not been met. Nevertheless, TD only started to urge for more Rehabus routes serving hospitals two years ago. TD has admitted that some routes serving hospitals were cancelled after their trial periods because of insufficient publicity. After generating more publicity, some of those routes have resumed and the numbers of passengers have increased. Considering the figures of unsuccessful bookings of Rehabus services in the past years, perhaps TD should have urged for these improvement measures much earlier.

TD Should Adjust Its Mentality about Demand for ST Services

1201. TD has argued that increasing the supply of ST services would bring greater demand, and that there is no causal relationship between the supply of ST services and the URVs. TD also stressed that even increasing the supply of ST services would not reduce the number of users waiting for Rehabus services to zero. We have great reservations about such mentality of TD. In the Office's view, to boost demand by supplying more services is exactly in line with the Plan's target of encouraging the integration of persons with disabilities into the community. If there is adequate supply of legitimate ST services in the market, no one would choose to hire the URVs and put their own lives at risk. And URVs would naturally fade out. More importantly, if the Government sticks to such mentality when planning for the provision of ST services, it will be difficult to obtain the necessary resources.

More Efforts on Publicity and Education Needed

1202. One of the proposals in the Plan is to strengthen publicity and public education to enhance public understanding of "Transport for All". Nevertheless, the cases cited in the Office's investigation report show that persons with disabilities are being ignored or even discriminated against to various extents when using public transport. On the other hand, operators of wheelchair accessible taxis have indicated that many people

do not even know that their taxis serve both able-bodied passengers and persons with disabilities, resulting in their reluctance (avoidance) to hire their taxis and thus affecting the operators' businesses. Meanwhile, the Office's investigation report reveals that Rehabus had previously offered trial shuttle bus services to and from hospitals, but many of those routes were suspended because there were not enough passengers.

1203. We consider it necessary for the Government to put more efforts on public education so as to enhance public understanding of "Transport for All". It would foster the public's empathy for and voluntary assistance to persons with disabilities so that social integration of the able-bodied and persons with disabilities could be achieved. The Government should also step up the publicity of hospital shuttle bus services to let potential users know about these services so that the operation of those routes would be sustained.

1204. In the light of the above, The Ombudsman makes 11 improvement recommendations to the Government –

(a) LWB and the departments concerned should conduct a comprehensive assessment of the demand for ST services. That should include requesting SWD to collect data regularly from NGOs, service users and self-help groups, and considering inviting academics or advisers to conduct studies to investigate the actual demand for ST services in order to re-allocate resources in a better way;

(b) LWB and TD should urge HKSR to speed up the consultancy study so that Rehabus services could be enhanced as soon as possible and resources better utilised to meet the demand;

(c) LWB should coordinate the utilisation of resources for ST services and consider more comprehensive arrangements, which include liaison with those departments concerned and HKSR to facilitate more flexible resources allocation such that more people with such needs can use ST services and that public money can be used wisely;

(d) LWB should continue its discussion with EDB to examine the feasibility of deploying educational resources for assisting schools to arrange ST services for students with such needs;

(e) LWB and TD should discuss with the Hong Kong Police Force

about stepping up actions to combat illegal activities such as the operation of URVs and institute prosecutions against those offenders as a deterrent. Meanwhile, LWB and TD should also assist the Police, social welfare organisations and persons with disabilities to maintain communication and exchange information with one another so that the Police can step up its enforcement actions;

(f) TD should consider drawing up a code of safety for facilities on rehabilitation vehicles (i.e. wheelchair accessible vehicles, but excluding non-emergency ambulances of the Hospital Authority) and the required training for drivers;

(g) apart from requiring operators of the proposed Quality Taxi Services to provide more wheelchair accessible taxis, TD should also make reference to practices of foreign governments in introducing such taxis to the market, and actively consider providing incentives for the taxi trade to purchase appropriate models;

(h) TD should study the feasibility of introducing low-floor minibus models and provide incentives for the trade (especially operators offering routes serving hospitals) to do so;

(i) LWB should, in implementing the proposals in the Plan and the "Transport for All" policy, set quantifiable target levels of basic transport services for persons with disabilities as well as work out the schedules for meeting this objective;

(j) LWB should strengthen public education on "Transport for All" to facilitate the implementation of ST services so that social integration of the able-bodied and persons with disabilities can be achieved; and

(k) the Government should step up the publicity of hospital shuttle bus services to let potential users know about these services, in particular those routes of low patronage, in order to sustain the continued operation of those routes.

Government's response

1205. The Government accepts The Ombudsman's recommendations and has taken follow-up actions as set out below.

(a) LWB and TD have been monitoring closely the change in demand for Rehabus services. Additional resources have been allocated to HKSR through the annual Resource Allocation Exercise according to the actual service needs to enhance Rehabus services and to provide new services, as well as to ensure effective utilisation of the resources for Rehabus.

HKSR collects information on the demand for ST services regularly through Rehabus' User Liaison Group, which is consisted of members from NGOs, service users and self-help groups, etc. Moreover, under the steer of LWB and TD, HKSR is reviewing and updating the estimated demand for ST services of persons with disabilities, including a study on the new developments (e.g. implementation of the Public Transport Fare Concession Scheme for the Elderly and Eligible Persons with Disabilities, introduction of more wheelchair-accessible taxis and increase in the number of rehabilitation centre buses operated by NGOs) which have impacts on such demand, and will estimate the service demand in accordance with their long-term, mid-term and short-term implications.

Taking into account the implications of the improvement measures for Rehabus services to be adopted in future (which include implementation of the shared-use of the dial-a-ride service and introduction of an integrated customer service and operation system with application of effective communication and information technology) on the handling of service demand, and with integration of the aforesaid estimation, HKSR will project the number of additional vehicles required in the coming ten years.

(b) Phases I and II of the consultancy study on Rehabus services have been completed. The scope of study of Phase I covered the setting up of priorities for Rehabus services, the strategy for deployment of vehicles and drivers, the application of communication and information technology as well as the development strategy for depots and parking facilities. LWB and TD are assisting HKSR in implementing the improvement

recommendations of Phase I of the study, such as implementation of the shared-use of the dial-a-ride service, according priority to those using the dial-a-ride service for attending medical appointments at hospitals, introduction of dedicated recreational routes during non-peak hours or holidays and streamlining the telephone booking procedures, as well as providing additional channels for making bookings, etc. Phase II involved a study on upgrading the existing communication and application system. The system specifications have been finalised, now pending the result of the funding application.

(c) Apart from the provision of Rehabus services by HKSR for persons with disabilities in general, SWD also provides rehabilitation centre buses for the integrated support service for persons with severe physical disabilities, special child care centres and sheltered workshops, etc, so as to provide ST service for the centre service users who are persons with disabilities, such as transporting them to and from specific locations including medical institutions, etc. In response to the recommendations of The Ombudsman, LWB has already asked SWD to collect utilisation data in respect of the rehabilitation centre buses from NGOs, service users and self-help groups, etc. Data covering the period from January to June 2017 revealed that the number of passenger trips had exceeded 500 000. LWB will continue to monitor the utilisation of resources concerning rehabilitation centre buses.

(d) LWB held a briefing jointly with EDB, SWD and TD at the end of August 2017 for principals of special schools and their staff, to explain to them the procedures of applying to the Lotteries Fund for procuring school buses. The brief also explained the points-to-note regarding the issue of licences by TD, and elaborated on the financial assistance provided by EDB for special schools. The aim was to encourage them to procure school buses to cater for the special transport needs of their students with a view to helping them rely less on the scheduled route service of the Rehabus. The response of the representatives of special schools at the meeting was positive in general. Some of them indicated that they would submit / had already submitted funding applications to the Lotteries Fund for procuring school buses.

(e) From time to time, TD will make use of meetings with persons

with disabilities to remind them to refrain from taking unlicensed rehabilitation vehicles, and to report to TD and the Police any suspected cases of illegal carriage of passengers for reward. To facilitate the provision of information in this respect, TD, in consultation with the Police, has designed a report form. TD distributed the report form to representatives of organisations of persons with disabilities at the meeting of the Working Group on Access to Public Transport by People with Disabilities held on 23 June 2017, and explained to them the contents of the report form and ways to submit it. The form is now available for downloading from TD's website by those who wish to make a report.

(f) Currently, vehicles designed to carry wheelchair users and their wheelchairs are statutorily required to be so equipped that wheelchairs can be properly secured in the vehicle compartments. Such vehicles are subject to TD's approval prior to their registration and licensing. When granting approval to vehicles designed to carry wheelchair users and their wheelchairs, TD will strictly ensure that the wheelchair boarding/ alighting device, wheelchair tie-down systems and occupant restraint systems conform to the relevant standards, and that user guides on the equipment/ device are made available on board the vehicles for the reference of drivers and other operators. Moreover, TD has issued the guidelines for reference of vehicle owners and operators in end-2017, reminding them to get familiarised with the operation of such device/ systems and to provide clear and legible user guide on board the vehicles at all times.

(g) The Government has all along supported the introduction of wheelchair-accessible taxis. To relevant department's understanding, a major supplier in the market has planned to introduce in mid-2018 a new model of wheelchair-accessible taxi which complies with the laws and regulations of Hong Kong. The trade claimed that the new wheelchair-accessible taxi model is expected to become the mainstream model adopted by the trade in the coming few years. The Government will closely keep in view the use of this model by the public and the trade in future, and further consider ways to encourage the trade to adopt it.

(h) With TD's encouragement, the light bus trade has identified a new low-floor wheelchair-accessible light bus model suitable for

use in Hong Kong. These models will be introduced for trial at three hospital routes (operating via Queen Mary Hospital, Prince of Wales Hospital and St. Teresa's Hospital) starting from early 2018 to ascertain whether deploying this type of light bus in these routes is feasible and desirable. TD will, in collaboration with the operators, review the operational effectiveness of these vehicles, including the feasibility of technical operation, maintenance and passengers' feedback, etc. If the trial scheme is proven to be effective after the review, TD will discuss with the trade further promoting low-floor light buses.

(i) Under the steer of LWB and TD, HKSR is reviewing and updating the estimated demand for ST services of persons with disabilities, including a study on the new developments (e.g. the implementation of the Public Transport Fare Concession Scheme for the Elderly and Eligible Persons with Disabilities, introduction of more wheelchair-accessible taxis and increase in the number of rehabilitation centre buses operated by NGOs) which have impacts on such demand, and will estimate the service demand in accordance with their long-term, mid-term and short-term implications. Taking into account the implications of the improvement measures for Rehabus services to be adopted in future (which include implementation of the shared-use of dial-a-ride service and introduction of an integrated customer service and operation system with application of effective communication and information technology) on the handling of service demand, and with integration of the aforesaid estimation, HKSR will project the number of additional vehicles required in the coming ten years.

(j) LWB has already incorporated the theme of "enhancing public understanding of transport for all" into the 2017-18 public education on rehabilitation programmes, and formed a working group to co-ordinate the related publicity activities with a view to encouraging members of the public and operators of public transport to give more thoughts to the needs of persons with disabilities, and to offer them appropriate assistance and services. Furthermore, HKSR has planned to carry out publicity and education work from end of 2017 to early 2018 to promote the message that sharing of resources (including shared-use of the dial-a-ride service) can enable more people to be benefited.

(k) In recent years, the Government has allocated additional funding

to HKSR for operating more hospital shuttle bus services in order to meet the transport needs of those using the dial-a-ride service for attending medical appointments at hospitals. At present, there are a total of eight feeder routes with stops at 16 hospitals and eight rehabilitation centres/ nursing homes/ polyclinics. Under the steer of TD, HKSR is going to introduce the ninth hospital feeder route to serve the Tuen Mun Hospital in the first quarter of 2018 and plans to operate more shuttle bus routes covering six other hospitals in the coming one to two years.

Also under the steer of TD, HKSR has stepped up the publicity of hospital shuttle bus services, including distribution of publicity leaflets to users of the dial-a-ride service along the routes, occupants of public housing estates and residential care homes for the elderly; release of the latest information on hospital shuttle bus services at HKSR's website; display of publicity banners at the hospitals concerned and along the footpaths leading to the waiting areas; as well as introduction of the new services to organisations of persons with disabilities through meetings of the Working Group on Access to Public Transport by People with Disabilities, etc.