THE GOVERNMENT MINUTE

IN RESPONSE TO

THE ANNUAL REPORT OF
THE OMBUDSMAN 2018

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THE GOVERNMENT MINUTE IN RESPONSE TO THE ANNUAL REPORT OF THE OMBUDSMAN 2018

Introduction

The Chief Secretary for Administration presented the Annual Report of The Ombudsman 2018 (the Annual Report) to the Legislative Council at its sitting on 4 July 2018. 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 12 direct investigation and 195 full investigation cases in the Annual Report. This Minute responds to the 10 direct investigation and 83 full investigation cases for which recommendations were made by The Ombudsman. The vast majority of the 209 recommendations made by The Ombudsman were accepted and have been or are being implemented by the government departments and public bodies concerned. The Government will continue to strive for improvement in public services in a positive, professional and proactive manner.

3. In The Ombudsman's Review of the Annual Report, The Ombudsman noted a record high in the number of complaints concluded by mediation and encouraged Government departments and public organisations to embrace this mode of dispute resolution. The Government agrees with The Ombudsman that resolving disputes by way of mediation leads to more amicable and satisfactory outcomes for the parties involved, and will continue to collaborate with her Office (the Office) in this regard.

4. The Ombudsman listed some examples of recent improvements in public administration that could be traced to the Office's recommendations in the past. She also looked forward to legislation for access to information and public records management being next on the list. The Law Reform Commission has recently launched its public consultations on 6 December 2018 following its in-depth studies on local and international practices in the two arenas. The Government will follow up as appropriate upon release of the Commission's final reports after public consultations.

Part II
– Responses to recommendations in full investigation cases

Agriculture, Fisheries and Conservation Department, Drainage Services Department and Environmental Protection Department

Case No. 2017/1437A,B&C – Shirking responsibility in following up a complaint about river odour

Background

5. According to the complainant, a section of a River (the concerned section) adjacent to his housing estate was often emanating odour and posing a nuisance to nearby residents (the odour problem). On 26 February 2017, he lodged a complaint about the odour problem to 1823 (the complaint). The case was followed up by the Drainage Services Department (DSD), Environmental Protection Department (EPD), and Agriculture, Fisheries and Conservation Department (AFCD).

6. On 27 February, DSD informed the complainant that the odour problem might be caused by the illegal discharge of pig manure from the pig farms in a village at the upstream of the River (illegal discharge problem), and the department had referred the case to EPD. On 21 March, EPD replied that the odour problem was not necessarily caused by the illegal discharge problem, EPD would closely inspect the pig farms at the upstream of the River and would work with AFCD to handle the problem. On 1 April, AFCD replied to the complainant by email that AFCD had already visited the site and found no illegal discharge problem. However, the odour problem persisted.

7. The complainant accused DSD, EPD and AFCD of shirking responsibility in handling the odour problem.

The Ombudsman's observations

8. As revealed from the information and explanations provided by DSD, EPD and AFCD, there was indeed illegal discharge of pollutants from livestock farms at the upstream of the River and the pollutants accumulated on riverbed sediment at the downstream, which caused the odour problem. Since the sediment at the River was a common roosting and feeding ground for birds, large scale dredging work was not feasible or it would adversely affect the ecological environment of the River. Nevertheless, DSD, EPD and AFCD have made every effort within their respective purviews to handle the odour problem.

9. As such, The Ombudsman considered the complaint unsubstantiated.

10. However, given that the odour of the River affects the daily lives of the residents, The Ombudsman recommended that –

(a) DSD should clean up the River in a timely manner. While conserving a balanced ecology, effort needs to be made to minimise the odour problem.

(b) EPD and AFCD should keep monitoring the River and the livestock farms nearby. When illegal discharge problem is found, EPD should strictly enforce the law while AFCD should cancel the Livestock Keeping Licence of the offender in accordance with the regulations.

Government's response

DSD

11. DSD accepted The Ombudsman's recommendation and will continue to conduct regular inspections, cleansing and desilting works at the River. It will enhance the frequency of the works in a timely manner to keep the River clean and hygienic. In conserving a balanced ecology, DSD will also try to reduce the odour problem.

EPD

12. EPD accepted The Ombudsman's recommendation, and will continue to closely monitor the River and its nearby livestock farms. It has successfully collected evidence on the illegal discharge of livestock waste into the watercourse and pursued prosecutions against the offenders.

AFCD

13. AFCD accepted The Ombudsman's recommendation, and will continue to monitor the River and its nearby livestock farms. If a farm has been successfully prosecuted by EPD for illegal discharge of livestock waste for three times within 18 months, AFCD will consider cancelling its Livestock Keeping Licence.

Buildings Department

Case No. 2017/0264 – (1) Delay in issuing removal orders; and (2) Unreasonably issuing a removal order against a rooftop fresh water tank already in use for years

Background

14. The Buildings Department (BD) issued statutory notices for mandatory building inspection and mandatory window inspection in 2013 requiring the owners of the building concerned to arrange inspections of the common parts, external wall, etc. of the building as well as windows of individual units, and to carry out repair works if found necessary within a specified time. The repair works of the building were completed on 31 December 2016 and the scaffolding at the external walls was then dismantled.

15. On 12 January 2017, BD issued orders (the 2017 orders) requiring some owners of the building to remove drying racks and abandoned supporting frames for air-conditioners at the external walls, wire-mesh at the rear yard and a potable water tank on the roof.

16. The Mutual Aid Committee (MAC) of the subject building accused BD of –

(a) issuing the 2017 orders after the scaffolding was dismantled, which caused disturbance to the building owners; and

(b) unreasonably requiring in 2017 the removal of the rooftop potable water tank which had been in use for more than 20 years.

The Ombudsman's observations

Allegation (a)

17. Owners have the responsibility to ensure that their premises are free of unauthorised building works (UBWs). Building owners should proactively arrange the removal of UBWs. Upon receipt of removal orders issued by BD, building owners should remove the UBWs within

the specified period of time accordingly.

18. Some of the UBWs related to the 2017 orders had already been identified in 2014 by the Registered Inspector appointed by the building owners. Besides, staff of BD's engaged consultant had also told the MAC about the actionable UBWs in August 2016. The 2017 orders were not issued without advance warning. In fact, BD notified the MAC and the owners beforehand in November 2013 that the subject building had been selected as a target building for a large scale operation to remove UBWs. Hence, BD would issue removal orders if UBWs were found. Aware of the fact that BD would issue removal orders against the remaining UBWs, the MAC still decided to dismantle the scaffolding at the external walls. It therefore could not blame BD for causing inconvenience or adverse effect to the external walls arising from the re-erection of scaffolding for the removal of UBWs.

19. It is however observed that BD took more than 18 months to endorse the survey report submitted by the consultant. Notwithstanding redeployment of staff and change of case officer during the period, BD had taken too long to process the survey report, causing delay to the work of the consultant and the large scale UBWs removal action.

20. The Ombudsman therefore considered allegation (a) unsubstantiated but other inadequacies were found.

Allegation (b)

21. With regard to the required removal of the rooftop potable water tank which had been in use for more than 20 years, it is the duty of BD to issue order and require removal of UBWs regardless how long the UBW has existed. There was no reason to retain the supporting frame and the water tank when they had been confirmed as UBWs. Hence, The Ombudsman considered allegation (b) unsubstantiated.

22. The Ombudsman urged BD to learn lesson from this case and regularly review follow-up actions so as to avoid leaving cases with no progress for a long period of time.

Government's response

23. BD accepted The Ombudsman's recommendation and has shared the lesson learnt at a relevant internal management meeting. BD has also reminded staff to closely monitor and review the progress of follow-up actions, and avoid any delay in handling cases.

Buildings Department

Case No. 2017/1529 – (1) Delay in enforcing the statutory orders against two unauthorised doorways; and (2) Unreasonably accepting the owner's alteration of one of the doorways by installing a wooden door

Background

24. The complainant lodged a complaint to The Ombudsman on 18 November 2016 that the suspected unauthorised doorways (subject unauthorised building works (UBWs)) were formed at the cocklofts (Cockloft A and Cockloft B) of two units on G/F leading to the staircase of the building, causing inconvenience and danger to the occupants including the complainant. Starting from 2015, he reported to BD repeatedly, but the subject UBWs were not removed. BD eventually issued statutory orders in March 2016 (the 2016 Orders) to the relevant owners requiring rectification of the unauthorised doorways. The complainant lodged again the complaint to The Ombudsman on 25 April 2017 alleging that the unauthorised doorway at Cockloft A still existed, while the unauthorised doorway at Cockloft B was only altered by installing a wooden door which was accepted by BD. The complainant criticised BD for the delay in the enforcement of the 2016 Orders.

The Ombudsman's observations

25. BD had duly taken enforcement actions against the subject UBWs and conducted inspection upon expiry (two months) of the 2016 Orders to check the compliance status and to issue compliance letter or warning letter to the owners based on the inspection findings. Although BD's action was not prompt, there was no serious delay.

26. BD had also explained the reason for accepting the fire door installed by the owner of Cockloft B. The Ombudsman believed that BD would accept the fire door to be installed at Cockloft A if it met the relevant fire resisting requirements. The Ombudsman considered BD's explanation reasonable and the complaint's complaint against BD unsubstantiated.

27. The Ombudsman urged BD to closely follow up the progress of rectification works for Cockloft A. If the UBW problem persisted, BD should take further enforcement action decisively and instigate prosecution against the owner as a deterrent.

Government's response

28. BD accepted The Ombudsman's recommendation and initiated prosecution proceeding against the non-compliance of the owner of Cockloft A with the statutory order in September 2017. In January 2018, inspection by BD revealed that rectification works for Cockloft A had been completed with a new fire door installed. BD withdrew the statutory order on 19 January 2018.

Buildings Department

Case No. 2017/2633 – (1) Ineffective action in following up the problems of ceiling concrete spalling and water seepage in a flat; and (2) Delay in removing an unauthorised rooftop structure

Background

29. In January 2017, the complainant found problems of ceiling concrete spalling and water seepage (the defects) in her rented unit (the Unit). She suspected that the defects were caused by an unauthorised rooftop structure (the subject rooftop structure) located above the Unit and thus she lodged a complaint to 1823. Subsequently, the Buildings Department (BD) replied to her that enforcement action had been taken against the subject rooftop structure. In June 2017, the complainant found that the defects were deteriorating and cracks appeared in the Unit. She reported the case to 1823 again. BD conducted inspection in the Unit and the subject rooftop structure on 12 July 2017. The inspection revealed that the defects (including cracks) were related to the external walls and waterproofing membrane of the building. Staff of BD also observed that a beam of the Unit was found deflected and repair works were required. However, the staff did not advise how the problem of the subject rooftop structure would be followed up.

30. The complainant accused BD of –

(a) ineffective action in following up the defects of the Unit; and

(b) delay in removing the subject rooftop structure.

The Ombudsman's observations

Allegation (a)

31. Staff of BD conducted site inspection on the day of receiving the complaint and carried out several follow-up investigations afterwards. BD consequently obtained the warrant from the court to enter the Unit to complete the urgent propping works. It was evident that BD had actively followed up on the defects. The Ombudsman considered allegation (a) unsubstantiated.

Allegation (b)

32. With regard to the delay in removing the subject rooftop structure, The Ombudsman understood that the numbers of unauthorised building works (UBWs) are substantial in Hong Kong. With limited resources of the Government, enforcement action against UBWs should be taken in an orderly manner. However, in this case, BD issued the removal order against the subject rooftop structure in 2007 requiring the owner to remove the structure within a specified period of time. The public would reasonably expect BD to enforce the order diligently and remove the UBWs accordingly. While BD had continuously followed up the concerned removal order, The Ombudsman considered it unacceptable for BD to have taken nine years to instigate prosecution against the owner's non-compliance with the order. The Ombudsman considered that the time taken to comply with the order could have been shortened had BD stepped up its actions earlier. Hence, allegation (b) was substantiated.

33. Overall speaking, The Ombudsman considered this complaint partially substantiated.

34. The Ombudsman urged BD to closely monitor the progress of follow up action on removal orders and to timely instigate prosecution against non-compliant owners, so as to enhance the effectiveness and deterrent effect of its enforcement action.

Government's response

35. BD accepted The Ombudsman's recommendation.

36. To enhance the monitoring of execution progress and follow-up on removal orders issued, BD had revamped the Building Condition Information System (BCIS) in May 2017. The BCIS now provides comprehensive functions for recording and retrieving information related to UBWs, removal orders and progress of cases, including the generation of list of outstanding removal orders at regular intervals. The enhanced functions of BCIS can facilitate case officers to take priority enforcement action against UBWs which pose serious hazard to life or property and cases pending prosecution proceedings, etc. Thus, prosecution can be instigated in a timely manner to enhance the effectiveness and deterrent effect of enforcement action. With these management statistics,

supervisory staff at all levels can closely monitor the progress of relevant cases.

Buildings Department

Case No. 2017/3072 – Unreasonable delay in recovering the cost for removal works from the complainant

Background

37. The complainant was dissatisfied that until after more than a year, the Buildings Department (BD) has not notified her of the Department's removal of a section of a window frame allegedly fallen from her flat onto a tree and sought recovery from her of the cost incurred. Such unreasonable delay had deprived her of the chance to prove her innocence regarding the fallen window frame section, as she no longer had the evidence.

The Ombudsman's observations

38. BD usually issues such notification letters within two months of the removal works. The Department explained that the delay in this case was due to staff turnover. BD apologised to the complainant and subsequently enhanced its Building Condition Information System to facilitate regular monitoring of cost recovery action and timely issuance of notification letters.

39. The Office of The Ombudsman found it unsatisfactory that BD had taken much longer time than usual to notify the complainant of the Department's removal of the window frame section and of her liability to pay for the cost of the removal. Worse still, BD did not bother to apologise to the complainant until after she had lodged a complaint.

40. The Ombudsman considered this complaint substantiated, and recommended that BD take reference from this case and impress upon its staff the need for timely apology to people who have suffered from its action, delay or inaction.

Government's response

41. BD accepted The Ombudsman's recommendation. It has issued a reminder to its staff on this matter and updated the relevant internal instruction accordingly.

Buildings Department

Case No. 2017/3308 – Failing to take effective enforcement action against an unauthorised building works (UBW) item on the rooftop of a building

Case No. 2017/3734 – Delay in taking enforcement action against an UBW item on the rooftop of a building

Background

42. Mr A, a resident of a building, and the Owners' Corporation of the building (OC) had complained separately to the Office of The Ombudsman (the Office) against the Buildings Department (BD) for its delay in taking enforcement action against a UBW item on the rooftop of the building, which had been included as a target of the large-scale operation against UBW items in 2007. As a result of BD's prosecution against the owners of five UBW items on the rooftop of the building, four of them had been removed. The owner of the remaining UBW item (Owner X), though convicted and fined by the court, refused to remove it.

43. Mr A and the OC considered that BD should have promptly removed the remaining UBW item for Owner X and then recovered the cost from her, to enable the OC to carry out waterproofing works on the roof and to resolve a seepage problem affecting Mr A's flat.

BD's Explanation

44. BD explained that in the court hearing, Owner X had indicated her willingness to remove the UBW item, but afterwards, she claimed that she had financial difficulties and emotional problems. As the UBW item posed no obvious danger, BD considered it inappropriate to remove the UBW item for Owner X then. The Department suspended enforcement action and instead arranged a social worker to follow up on the case, with a view to helping Owner X to comply with the removal order. In May 2017, BD resumed prosecution action against Owner X. In November 2017, BD issued a letter to warn Owner X that if she still failed to comply with the removal order, BD would engage a contractor to carry out the removal works and recover the cost from her afterwards.

The Ombudsman's observations

45. The Office's investigation revealed that an arrest warrant had in fact been issued against Owner X for her failure to attend a court hearing. As Owner X had also claimed to have financial difficulties, there were clear signs that the UBW problem could hardly be resolved just by means of prosecution. BD was being much too conservative in not considering the engagement of a contractor to remove the UBW item on Owner X's behalf when it resumed the prosecution process.

46. More than ten years had elapsed since the large-scale operation in 2007 and BD had still failed to remove all the UBW items on the rooftop of the building. As repeated advice and prosecutions had been ineffective, BD should have taken decisive action to remove the UBW item, otherwise its resources would just be further wasted. In sum, The Ombudsman considered this complaint partially substantiated.

47. The Ombudsman recommended BD to –

(a) keep a close watch on the progress and ruling of the court case against Owner X, and actively proceed to remove the UBW item; and

(b) take reference from this case and seriously consider engaging a contractor to remove the UBW item on behalf of any owner who adamantly refuses to comply with a removal order and recovering the cost from the owner.

Government's response

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

(a) BD has arranged a government contractor to remove the UBW item in the owner's default. Upon completion of the removal works, the cost of works plus supervision charge and surcharge will be recovered from the concerned owner. BD will continue to closely monitor the progress of the removal works.

(b) BD has uploaded the lesson learnt from these cases onto its Knowledge Hub on the intranet for staff's reference.

Buildings Department and Fire Services Department

Case No. 2017/3325 & 2017/2868 – Wrongly sending letters addressed to someone else to the complainant's residential address

Background

49. The complainant filed a complaint to the Office of The Ombudsman (the Office) against the Judiciary Administration (JA), the Fire Services Department (FSD) and the Buildings Department (BD).

50. The complainant alleged that since two to three years ago, she had been receiving letters sent by JA to her residential address to two addressees who did not reside at that address. Although the complainant had written "no such person" on the envelopes of the letters and returned the letters time and again, she still received such letters from time to time. Extremely annoyed, the complainant opened a letter and called JA as advised therein to inform its staff member of the situation. The staff member told her that she could simply ignore and return the letters. However, the complainant still received such letters from time to time thereafter. The complainant was dissatisfied that JA continued to send letters to her residential address wrongly, causing nuisance to her. In April 2017, police constables visited her residence twice in attempts to contact the two addressees. It was then that the complainant learnt that the letters were about contraventions of the Fire Services Ordinance.

51. On 22 August 2017, the complainant emailed the Office, stating that she had received letters sent by BD and addressed to the two addressees. The complainant said that she did not understand why she kept receiving letters which were sent by different departments and addressed to the two addressees. In this connection, the complainant filed a complaint to the Office against BD with a view to finding out the truth and resolving the matter thoroughly.

The Ombudsman's observations

52. The Office considered that the incident arose from the use of the complainant's residential address by the two addressees as their correspondence address in the owners' records kept by the Land Registry (LR). In addition, as FSD and BD issued summonses and letters

according to the relevant correspondence record, letters addressed to the two addressees were delivered to the complainant's residence time after time, and subsequently police constables visited the complainant's residence twice in attempts to contact the two addressees. The Office agreed that the incident had caused nuisance to the complainant to a certain extent.

JA

53. JA served summonses on the two defendants according to the current court procedures for the service of summonses and the correspondence addresses provided by the prosecution department (i.e. FSD). However, the failure on the part of the JA's staff members to exercise due care led to unnecessary efforts of its staff serving summonses to the complainant's residence and leaving letters there twice, thereby causing delay to the Police's takeover of the summons serving work and making it necessary for FSD to file another application to the court for the Police to serve the summonses. It had caused not only further delay to the hearing date of the case involving the two defendants, but also inconvenience and nuisance to the complainant. Nevertheless, the Office understood that the inadequacy was caused by the fault of individual staff member. The complaint against JA is considered partially substantiated.

54. In this regard, the Office considered that JA should remind relevant staff member to be vigilant and exercise due care in handling instruments submitted by prosecution departments. Close attention should be paid to their application requests in respect of the service of summonses so as to prevent the occurrence of similar incidents.

FSD and BD

55. The two departments had issued summonses and letters to the correspondence address (i.e. the address of the complainant) of the two addressees according to LR's records.

56. FSD has elaborated on its arrangements for the service of summonses and the reasons for its repeated requests made to the Magistrates' Court for arranging the service of summonses to the complainant's residential address time and again. Learning that the staff members of JA tried in vain to serve the summonses in the evening, FSD had applied to the court in a timely manner for the service of summonses by the Police instead. The Office considered that FSD, in handling the

matter, had taken every appropriate means to prevent the defendants from deliberately avoiding the service of summonses on the one hand, and to acquire the defendants' correct correspondence addresses through the Police as soon as practicable on the other. The complaint against FSD and BD is thus considered unsubstantiated. The Office was glad to learn that the summonses were successfully delivered by the Police on 8 April 2017.

57. Upon receipt of the letters returned by the post office and the intervention of the Office, BD immediately took corresponding follow-up actions to update its internal information system, and pledged that it would not have the letters addressed to the two addressees sent to the complainant's residential address again in future.

58. However, the Office considered that besides FSD and BD, other Government departments or organisations might also search for the addressees' correspondence addresses registered in the LR's owners' records. In other words, if the complainant's residential address continues to appear in LR's owners' records as the correspondence address of the two addressees, it is possible that the complainant may keep receiving letters that are addressed to the two addressees but sent to her residential address in future.

59. The Ombudsman recommended that FSD and BD should discuss with LR the addition of appropriate remarks in LR's internal record, stating that the complainant's residential address is not the correspondence address of the two addressees, so as to avoid the recurrence of similar problems should other Government departments need to request the correspondence address of the two addressees from LR in future.

Government's response

60. With respect to the recommendation made by The Ombudsman, FSD and BD have discussed with LR.

61. At the requests of Government departments, LR compiles reports-on-title based on its records for departments' internal reference. According to LR, there is no provision under the Land Registration Ordinance (Cap.128) which requires LR to keep or update the correspondence addresses of property owners. LR therefore does not keep a register of such.

62. When LR provides reports-on-title to Government departments, it will, at the request of the departments, provide an owner's address as extracted from a registered instrument of the property concerned for the department's internal reference. Regarding the subject full investigation case, LR had in fact made a note in its reports-on-title to the Government departments concerned that the address of the owners was extracted from a registered instrument and it might not be up-to-date. In view of The Ombudsman's suggestion, LR has further revised the note to remind the Government departments clearly that the owners' address so provided is extracted from a registered instrument and it may not be the latest correspondence address of the owners, such that the departments may consider whether and how to make use of the information.

63. After considering LR's response, The Ombudsman agreed that the relevant arrangement could serve the purpose of the Office's recommendation.

Buildings Department
and Food and Environmental Hygiene Department

Case No. 2017/0411A&B – Delay in taking substantive actions in investigating the cause of a seepage nuisance

Background

64. On 2 February 2017, two complainants lodged a complaint with the Office of The Ombudsman (the Office) against the Buildings Department (BD) and the Joint Office for Investigation of Water Seepage Complaints (JO) set up by the Food and Environmental Hygiene Department (FEHD) and BD.

65. According to the complainants, their residence (Flat A) had been suffering from water seepage nuisance since December 2013. Repeated complaints were made to JO, but the progress of its follow-up work was slow. The complainants alleged that there had been long periods of inaction by JO in solving the water seepage problem (Allegation (a)). In addition, the complainants made a number of enquiries to JO about the investigation progress but received no reply (Allegation (b)).

66. The complainants also reported to BD in 2014 that the premises above Flat A (Flat B) were subdivided into two flats namely Flat B1 and Flat B2 with separate entrance, and Flat B2 was further subdivided into six cubicles viz. Units I to VI. They were of the view that the building works associated with the subdivision of Flat B caused seepage at Flat A. However, a BD officer told them that the owners/occupiers of Flat B were uncooperative and therefore the investigation of the source of seepage had yet to complete. Since it could not be verified that Flat B was the source of seepage, BD could not take any action against the sub-divided flats of Flat B. The complainants accused BD and JO of shirking their responsibilities to each other (Allegation (c)).

The Ombudsman's observations

Allegation (a): Slow and ineffective actions

67. The Ombudsman agreed that more time was required to handle the seepage case if sub-divided flats with different occupiers were involved. Nevertheless, The Ombudsman considered that the follow-up work of JO has the following deficiencies –

(i) It could be seen from the layout plan that the seepage areas of Flat A in the first seepage report were not only underneath Flat B1 but also underneath Units IV and V of Flat B2. It was unreasonable of JO not pursuing the access into the two sub-divided units of Flat B2 after earlier unsuccessful attempts.

JO explained that since the seepage was suspected to be due to rain water penetration through a defective external wall and JO did not regard rain water seepage as hygiene nuisance, JO had no ground to follow up the case. The Ombudsman did not accept the explanation because despite the defective external wall might have caused water seepage, JO could not rule out that the sub-divided units of Flat B2 might also be the source of seepage.

(ii) JO had contacted the representative of the owner of Flat B2 for over 12 times but in vain; the representative also failed to fulfill his agreement to arrange JO officers to enter Flat B2 for 13 times. Under the circumstances, JO just issued the "Notice of Appointment" twice and did not issue the "Notice of Intention to Apply for Warrant of Entry" which would have more deterrent effect. The Ombudsman considered that JO should take action with more deterrent effect if the owner suspected to have caused nuisance only expressed the will to cooperate but did not take actual cooperative actions.

In the light of the above, The Ombudsman was of the view that the actions taken by JO to handle the seepage complaint of Flat A were slow and ineffective. Allegation (a) was therefore substantiated.

Allegation (b): Unresponsive to enquiries

68. According to JO's explanation, it had contacted the complainants directly or through a consultant to keep them informed of the progress of the case. The Ombudsman considered Allegation (b) unsubstantiated.

Allegation (c) : Shirking of responsibilities

69. Since there was no evidence showing that the flat sub-division works at Flat B had caused building safety problem and JO had not concluded that the said works had caused seepage and related environmental hygiene nuisance, The Ombudsman opined that it was not unreasonable for BD not to take any enforcement action against the sub-divided units of Flat B according to its established policy. Therefore, The Ombudsman considered Allegation (c) unsubstantiated.

70. In all, The Ombudsman considered that the complaint was partially substantiated and urged JO to –

(a) advise its staff to take timely and effective actions to follow up each water seepage complaint, and to avoid procrastination; and

(b) closely follow up the case of Flat A and take further actions immediately after identifying the source of water seepage.

Government's response

71. JO accepted The Ombudsman's recommendations and has advised its staff to take timely and effective actions to follow up each water seepage complaint.

72. JO had completed the investigation of seepage at Flat A and advised the complainants of the investigation result accordingly. "Nuisance Notice" was issued to Flat B on 31 October 2017 requiring the owner to repair the floor slab of bathroom so as to abate the nuisance. Since the seepage persisted after completion of the repair works, the consultant conducted confirmatory test at Flat B on 15 March 2018 and the test results did not reveal seepage through the floor slab of the bathroom of Flat B. Subsequently, the staff of JO conducted moisture content monitoring during both sunny and rainy days. It was suspected that the source of seepage was originated from the external walls of the building. As water seepage originated from the penetration of rainwater

through external walls of a building will not cause any public health nuisance, JO did not contemplate any enforcement action under the Public Health and Municipal Services Ordinance. JO issued a letter on 30 May 2018 advising the Incorporated Owners of the building to inspect or carry out the necessary repair to the external walls. A reply letter was also issued on the same date notifying the complainants of the investigation result.

73. The Office has replied by a letter of 8 June 2018 that it has noted that JO had implemented the recommendations made in the investigation report. Therefore, The Ombudsman's follow-up actions in respect of the case have been completed.

Drainage Services Department

Case No. 2017/4030A – Unreasonable delay in carrying out a village sewerage project, thereby affecting the environmental hygiene of a village

Background

74. According to the complainant, Lands Department (LandsD) resumed the land required (the lot) for the implementation of the "Village Sewerage System at Certain Village" (the works) in 2010. The works commenced in February 2012 and were substantially completed in March 2017. However, owing to the objection of a villager, some sewerage works (the remaining works) could not commence. The complainant was aware that the Drainage Services Department (DSD) had not set a schedule for the remaining works.

75. The complainant alleged that DSD had unreasonably delayed the remaining works, thus affecting the environmental hygiene of the Village.

The Ombudsman's observations

76. The Ombudsman noted from DSD's response that the remaining works could not commence because some villagers of the Village raised objection, and had been dragged on for more than four years. The main reason was that "the objectors" had been making vigorous objections. Despite having sought assistance from the Police on two occasions, the Contractor still failed to enter the Village to carry out the works.

77. The Ombudsman has inspected relevant records which indicated that DSD had indeed met and discussed with "the objectors" many times. However, their attitude was all along tough and persistent. During the period, DSD proposed to enter the Village via other accesses for the works but the proposal was likewise objected by the villagers. DSD studied the case repeatedly and concluded that the existing sewerage alignment was technically the only feasible option. Therefore, there were no other alternatives at the moment.

78. In other words, DSD could not be held liable for the long delay in commencing the remaining works. Based on the above analysis, The Ombudsman considered the allegation unsubstantiated.

79. The remaining works could only commence smoothly when villagers with different views have reached a consensus. As such, The Ombudsman urged DSD to continue to seek assistance from the District Office, District Council Members and local community with a view to proceeding with the works through co-ordination.

Government's response

80. DSD accepted the recommendation of The Ombudsman.

81. DSD has included the remaining works in another works contract which is expected to be awarded in late 2018. DSD will continue to take a proactive and serious attitude, with assistance from the District Office, District Council Members and local community, to conduct consultations again in a timely and appropriate manner with a view to soliciting consensus of villagers of different views for the smooth implementation of the remaining works.

Electrical and Mechanical Services Department

Case No. 2016/3937 – Failing to make a fair assessment of the complainant's products and giving misleading technical comments

Background

82. The complainant responded to the invitation for tenders and submitted to the Hospital Authority (HA) two separate proposals about the use of hydrocarbon refrigerant freezers in two hospitals (Hospital A and Hospital B) respectively. The complainant alleged that the Electrical and Mechanical Services Department (EMSD) made some misleading comments when it was requested by HA to give technical advice on the products.

The Ombudsman's observations

83. As HA's engineering consultant, EMSD provides professional advice on specifications of products. In this case, EMSD did not recommend the use of the freezer in the complainant's proposal for Hospital A after vetting the specification because the freezer was using highly flammable refrigerant. Although the complainant submitted supplementary information, EMSD maintained its stance on the grounds that the population in public hospitals was high in number and density. Moreover, alternatives using non-inflammable refrigerant were available in the market.

84. Regarding the complainant's proposal for Hospital B, EMSD also recommended against the use of the freezer that was using as refrigerant a purportedly nonflammable mixture of two substances. In its reply to HA, EMSD indicated that one of the substances in the mixture was flammable and only allowed to be used in household appliances. Later, having reviewed a laboratory test report from the complainant which showed that the mixture was non-flammable, EMSD informed HA that it had no objection to the use of the freezer proposed.

85. EMSD considered its assessments fair and unbiased as all the technical information received from HA had been evaluated and the relevant international standard checked against. The Department, however, admitted that the use of flammable refrigerants was not

forbidden in hospitals and should be considered on a case-by-case basis. Hence, its remarks that such refrigerants are only allowed in household appliances might not adequately reflect the actual situation.

86. In the view of the Office of The Ombudsman (the Office), it is EMSD's duty to properly and adequately advise HA on *inter alia* the refrigerants, in particular their flammability. As the complainant's proposal for Hospital A involved the use of a highly flammable refrigerant, the Office considered EMSD to have given due consideration to relevant factors in giving advice to HA, and hence the Office found no inadequacy on the part of the Department.

87. Nevertheless, in Hospital B's case, what HA wanted to know was whether the mixture was, as purported, non-flammable. It was, therefore, pointless to advise HA that one of the substances in the mixture was flammable. Besides, EMSD's remarks that flammable refrigerants were restricted to use in household appliances was inaccurate. While the Office accepted that it would be difficult for EMSD to confirm the flammability without further information, the Office considered that the Department should have advised HA accordingly (namely, that the flammability of the mixture could not be confirmed based on the information in hand) and let the latter decide whether to seek further information. Hence, the Office found that EMSD had been inadequate in its advice to HA regarding Hospital B's case.

88. The Ombudsman considered this complaint partially substantiated and recommended that EMSD consider providing suitable guidance to staff in providing professional advice on freezers in the light of this case.

Government's response

89. EMSD accepts The Ombudsman's recommendation. EMSD has refined relevant guidance to staff so that clear professional advice would be given to public bodies in procuring freezers. The Department has also conducted staff briefing and sharing of the relevant Ombudsman case to enhance staff awareness of the need to provide clear professional advice.

Environmental Protection Department

Case No. 2017/2136 – Unnecessarily photographing the complainant's identity card and keeping the photograph as record while taking enforcement action

Background

90. According to the complainant, he was caught on the spot for dumping waste illegally in public place on 26 April 2017 and was issued a fixed penalty notice by the staff of the Environmental Protection Department (EPD). One of the EPD's staff used his camera to take a photo of his identity card before issuing the notice. His wife who was also on the spot questioned the purpose of such photo taking, and another EPD staff answered that the photo was taken for record purpose. The two staff had not responded whether they would delete the photo before departure.

91. The complainant alleged that the staff had taken and collected the photo of his identity card unnecessarily and it violated relevant enforcement guidelines.

The Ombudsman's observations

92. The Ombudsman was satisfied that the EPD staff concerned were only discharging their enforcement duties in this case. Given the dim lighting at the scene and to avoid error in recording, they took, without any improper intention, a photo of the complainant's identity card. The Ombudsman also recognised the efforts of EPD on the enforcement actions against illegal dumping of waste.

93. However, The Ombudsman considered that not only was the taking of photo of the complainant's identity card a non-compliance with EPD's internal enforcement guidelines, it also unnecessarily collected the personal data of the complainant not related to the enforcement action, such as the date of birth of the complainant, his photo, the identity card issue date, and some codes of the identity card. It violated the principle of collecting personal data on a need-to-know basis. The improper collection of personal data did happen, and the photo was only deleted after the complainant had lodged a complaint to the Privacy

Commissioner for Personal Data. The complainant was indignant and The Ombudsman shared this view.

94. Based on the findings above, The Ombudsman concluded that the complaint was substantiated.

95. Nevertheless, The Ombudsman was glad to learn that EPD had reviewed the case and taken remedial measures including the deletion of the complainant's identity card photo image and implemented measures such as reminding all enforcement staff in Regional Offices on the updated enforcement guidelines to prevent recurrence of similar incidents.

96. Regarding the unnecessary collection of personal data in the identity card that caused the complainant's uneasiness, The Ombudsman recommended EPD to apologise to the complainant in writing.

Government's response

97. EPD accepted The Ombudsman's recommendation and issued an apology letter to the complainant in January 2018.

98. EPD had responded to The Ombudsman that the complainant's wife at that time did not inquire when the identity card photo image would be deleted by EPD.

99. In addition, EPD has issued a notice to remind enforcement officers of the Regional Offices to act in accordance with the guidelines issued by the Privacy Commissioner when carrying out their duties, in particular not to take a photo or make copy of the identity card. EPD has also updated its internal guidelines to spell out this restriction. Moreover, EPD has been enhancing the knowledge of its enforcement staff in this respect through internal training.

Environmental Protection Department

Case No. 2017/3013 – Failing to properly handle the noise nuisance caused by a shop in loading/unloading goods in the small hours of the morning and using loudspeakers to attract customers

Background

100. According to the complainant, there was a shop on the ground floor selling fruits and vegetables (Shop X) opposite to the building where he lived. Loudspeakers were used to attract customers during business hours and goods were unloaded in early morning, generating noise nuisance (hereinafter referred to as loudspeaker noise problem and loading and unloading noise problem). Residents of the building complained to the Environmental Protection Department (EPD) about the concerned problems. However, the staff of EPD refused to conduct an investigation during the period from 5 pm to 7 pm, when the loudspeaker noise problem was the most serious. No instrument was used to measure whether the noise exceeded the standard. The noise problem persisted, but EPD said that they could not handle and told the residents of the building to call the Police.

101. The complainant accused EPD of not properly handling the two noise problems generated by Shop X.

The Ombudsman's observations

102. The Office of The Ombudsman (the Office) reviewed the relevant inspection reports of EPD and confirmed that EPD staff did conduct a number of inspections to assess the loudspeaker noise problem. EPD had considered various factors and adopted measures to make the assessment more objective. EPD had also explained why the assessment was not done by measurement with a noise meter, but by a "reasonable person" approach. As the assessment involved professional judgement and staff of the Office was not present at the time of inspections, the Office had difficulty in judging whether the said assessment made by EPD that the noise did not constitute an annoyance was clearly inconsistent with the "reasonable person" approach to the extent that would enable The Ombudsman to overturn EPD's assessment results. In addition, EPD had properly dealt with the loading and unloading noise

problem, and received no further complaints against Shop X concerning loading and unloading noise during early morning.

103. The Ombudsman considered that EPD had properly dealt with the noise problems from an administrative point of view. The complainant's complaint against EPD is unsubstantiated.

104. However, shops using loudspeakers to continually repeat the broadcast for attracting business were found in many districts. The business interests of shops were important, but if the noise so generated affected the daily lives of residents nearby, it was unfair to the latter. The Ombudsman was of the view that the EPD should examine whether the enforcement of the Noise Control Ordinance was effective in achieving the legislative intent of protecting the public from noise nuisance.

105. The Office understood that noise assessment conducted by EPD enforcement staff had to be prudent and objective as far as possible. Otherwise, there would be a lack of consistency in assessment or even excessively harsh enforcement. However, the Office considered, in determining whether the noise was an annoyance, EPD should consider the noise nuisance suffered by the nearby residents for months and years would be more serious than that experienced on-site by the EPD officers over a short duration. This factor should be seriously taken into account.

106. The Ombudsman urged EPD to examine the implementation of the guidelines and, based upon The Ombudsman's analysis, to review the guidelines to ensure that the public's rights under the Ordinance are properly protected.

Government's response

107. In February 2018, EPD completed the review on the enforcement guidelines in handling noise generated from the use of loudspeakers by shops to further enhance the enforcement procedures for handling such complaints and to provide clearer professional guidance to help frontline staff in conducting noise assessment. EPD would also continue to strengthen training to increase the ability and consistency of frontline staff in conducting on-site noise assessments in accordance with the updated guidelines. EPD had also examined the existing

enforcement situation and would continue to flexibly deploy manpower to bolster communication and collaboration with the relevant police districts, including conducting joint operations with the Police as and when necessary to more effectively enforce the Noise Control Ordinance.

Environmental Protection Department

Case No. 2017/3496A – Failing to properly follow up the nuisance caused by gas and odour emitted from the chimney of a factory

Background

108. According to the complainant, she and her family members had lodged multiple complaints to the Environmental Protection Department (EPD) since 2016, alleging that the chimney of the rotary dryer drum for handling aggregate in an asphalt plant of a quarry had emitted strong odour from burning chemicals every morning, afternoon and night. After follow-up investigations, EPD staff replied to her confirming her observations, and expressed that the chimney did not comply with EPD's standards. However, since she refused to testify in court, EPD did not take enforcement actions against the offender eventually.

109. The complainant accused EPD of not properly following up her complaints, including not taking enforcement actions against the offender only because she was not willing to testify in court.

The Ombudsman's observations

110. After receipt of the complaints, EPD had sent staff to inspect the asphalt plant many times (including surprise inspections), carried out odour assessments at the location provided by the complainant, verified with the Civil Engineering and Development Department and the contractor, and invited them to EPD for interviews and statement taking. Overall, the follow up work of EPD was rather proactive and timely. Since EPD did not find any evidence that the asphalt plant had violated the Air Pollution Control Ordinance during its investigation, it was not unreasonable that EPD did not take further enforcement actions.

111. On whether EPD staff had expressed to the complainant that EPD would not take enforcement actions against the offender because the complainant was not willing to testify in court, The Ombudsman was unable to make a ruling in the absence of independent evidence. Nevertheless, EPD had explained its standard procedures in following up complaints, and had clarified that as long as there was sufficient evidence, EPD would prosecute the offenders, and it was not always necessary for the complainant to testify in court.

112. Furthermore, according to the information provided by EPD, EPD did not stop investigating the case as a result of the complainant's refusal to attend interview and give statement to EPD.

113. As such, The Ombudsman concluded that overall speaking, EPD had properly followed up the complaint. The complainant's complaint against EPD is unsubstantiated.

114. The Ombudsman recommended that EPD should continue to monitor the operation of the asphalt plant, in particular during spring and summer, and should take enforcement actions if offences are found.

Government's response

115. EPD informed The Ombudsman in June 2018 that follow up actions had been taken in accordance with the recommendations in the investigation report. Details are given in the following paragraphs.

116. EPD had scrutinised the data in two quarterly monitoring reports of the asphalt plant (October to December 2017 and January to March 2018). The operation and monitoring data of the plant were found to be in compliance with the requirements of the Specified Process Licence (SPL) including the opacity of the chimney emission, temperature of the bitumen storage tanks, dust filtering equipment etc., and the emission of air pollutants. In addition, EPD staff had carried out 11 surprise inspections to the asphalt plant since October 2017, and no violation of the requirements of the SPL was found.

117. As to the odour of the asphalt plant, EPD had carried out seven odour assessments during different time periods near the location provided by the complainant since October 2017, and investigated two odour complaints in March and May 2018 respectively, but found no violation of the requirements of the SPL.

Environmental Protection Department

Case No. 2017/4150 – (1) Unreasonably relying on roadside remote sensing equipment to assess that a vehicle had emitted excessive exhaust, and requiring the owner to arrange for a vehicle emission test; and (2) Refusing to refund the vehicle emission test fees despite proof that the vehicle was not emitting excessive exhaust

Background

118. According to the complainant, on 26 September 2017, the Environmental Protection Department (EPD) issued an "Emission Testing Notice To Require A Vehicle To Be Tested At A Vehicle Emission Testing Centre" ("ETN"), requiring him to send his private car (the vehicle concerned) to a vehicle emission testing centre (VETC) designated by EPD for a test before 16 October as the vehicle concerned was reported to have emitted excessively at Wong Nai Chung Road (near the Stands of Jockey Club) (the location concerned) at 5:05 p.m. on 18 September.

119. On 13 October, he enquired EPD by phone and learnt that EPD's roadside remote sensing devices had detected excessive emissions from the vehicle concerned. On the same day, he sent the vehicle concerned to a VETC for the test and paid a test fee of $620. The test results showed that the vehicle concerned met the relevant emission standards.

120. The complainant alleged that EPD –

(a) deployed the remote sensing devices (RSDs) at roadside with heavy vehicular traffic to assess the amount of emissions of a particular vehicle, rendering the test results doubtful. Assessing the vehicle concerned to have emitted excessively by relying on RSDs alone and requiring him to pay for the emission test were not well justified; and

(b) unreasonably refused to refund the emission test fee to him despite the proof that the vehicle concerned had no excessive emissions.

The Ombudsman's observations

121. The RSDs currently used by EPD were manufactured in conformity with the California standards of the United States which are commonly adopted worldwide. To ensure the reliability and accuracy of the RSDs, EPD has adopted the following measures –

(a) Before the launch of the strengthened emission control of petrol and LPG vehicles programme by using RSDs and chassis dynamometer, EPD had compared the emission data between RSDs and chassis dynamometer test. The results indicated that RSDs were very reliable in monitoring vehicles emitting excessively.

(b) EPD had consulted and obtained endorsement from an expert panel, which was composed of local experts, academics and relevant government departments, on the roadside remote sensing technique, comparison of emission data between RSDs and chassis dynamometer, and the application methods.

(c) The accuracy of RSDs is checked using standard gases at two-hour intervals during operation periods. If the accuracy of the device is in doubt, the remote sensing system will alert the operator immediately and a flag will be marked on the emission record of the vehicles monitored subsequently, in order to avoid accepting these data.

(d) When measuring a vehicle's emissions, the RSD automatically subtracts the emission concentrations detected before the vehicle reaches the RSD from those detected after the vehicle passes the RSD, to ensure that the readings would not be affected by the residual emissions from the vehicles ahead.

(e) EPD concurrently places two sets of RSDs separated by about 10 metres longitudinally at the same location.

(f) EPD issues an "ETN" only when both RSDs show excessive emissions from a vehicle at a location where vehicles are running normally.

122. When EPD issues an “ETN” to the vehicle owner, it will attach a "Notes to Vehicle Owner" which states that –

(a) Vehicle owner shall have the vehicle’s excessive emission problem fixed by a competent vehicle mechanic and then take the vehicle to a VETC for testing.

(b) If the vehicle owner has strong ground against the “ETN” and would like to apply for cancellation of the “ETN”…… Please do not arrange the test with a VETC.

(c) Applications for “ETN” deadline deferment, “ETN” cancellation, permission for licence transaction, etc. will be processed if EPD receives a written request with relevant supporting documents before the deadline stipulated in the “ETN”. Any request received after the deadline will not be considered.

123. If the owner can provide sufficient justifications to show that the reporting of the vehicle is questionable (e.g. the owner can prove that the vehicle’s exhaust system has been thoroughly maintained with supporting exhaust emission data (e.g. results of dynamometer emission test) within a short period before the vehicle was detected by RSDs or the vehicle is relatively new and still under manufacturer’s warranty), EPD will arrange the vehicle concerned to have a free emission test at a VETC under the supervision of EPD’s staff.

124. EPD cannot waive or refund the test fee owing to the major reasons below –

(a) EPD issues an “ETN” because the vehicle as referred to in the “ETN” has been found to have excessive emissions by the RSDs.

(b) EPD has adopted measures to ensure the reliability and accuracy of the RSDs.

(c) The purpose of the emission test at the VETC is to ascertain the rectification of the excessive emission problem and compliance of emission standards. The test is not to verify if the vehicle concerned has emitted excessively.

(d) The "Notes to Vehicle Owner" has stated: If the vehicle owner has strong ground against the "ETN", the owner should not arrange the test with a VETC.

(e) It violates the intent of the test if exemption or refund of test fee is given to a vehicle which passed the test. In fact, most of the vehicle owners had the vehicles repaired after receiving the ETNs, and then took the vehicles to the VETCs for emission testing. The majority of the vehicles passed the test.

(f) The VETC is not a government department. Under the user-pay principle, the user of the test service has to pay the test fee. EPD has no power to waive or refund the test fee.

125. Regarding allegation (a), as mentioned above, EPD did have appropriate measures to ensure the reliability of remote sensing devices. The Ombudsman has examined relevant records and confirmed that the two remote sensing devices set up by EPD at the location concerned did detect excessive emissions from the vehicle concerned on 18 September 2017. At that time, vehicles at the location concerned were running normally and the two remote sensing devices also functioned properly, and EPD hence issued the "ETN" to the complainant. The Ombudsman was of the view that EPD had carried out its duties reasonably in accordance with the established procedures. Allegation (a) is not substantiated.

126. Regarding allegation (b), EPD had explained the mechanism of objecting to the "ETN" and why EPD could not refund the test fee to the complainant. The Ombudsman opined that the explanation was not unreasonable. If the complainant did not agree with the content of the "ETN", he should have provided justifications to EPD immediately and requested extension of the test period. He did not do so but chose to send the vehicle concerned to the VETC for the test. In that case, he should pay the relevant fee.

127. As to why the vehicle concerned was detected by the remote sensing devices to have emitted excessively while the test conducted by the "VETC" indicated otherwise, The Ombudsman was not able to determine whether it was owing to the aging vehicle engine with sporadic excessive emissions as explained by EPD or other reasons. Allegation (b) is not substantiated.

128. However, The Ombudsman noticed that the "ETN" issued by EPD to the vehicle owner had only emphasized requiring the owner to send the vehicle for a test without clearly explaining the purpose of the test. This might have given the vehicle owner an impression that passing the test would prove that the vehicle had no excessive emission problem and there would then be no need to send the vehicle for repair. Although EPD has reminded vehicle owners through the "Notes to Vehicle Owners" attached to the "ETN" that they should have their vehicles repaired before sending them for a test and should not send the vehicles for a test in case they have objection to the "ETN", such information is not sufficient to enable the vehicle owners to fully understand that, upon receipt the "ETN", they have to arrange the vehicles to be repaired immediately and that the vehicles should be sent for a test only after proper repair.

129. The Ombudsman recommends that EPD should revise the wording of the "ETN", or specify its requirements in the "ETN" and "Notes to Vehicle Owners".

Government's response

130. EPD accepted The Ombudsman's recommendation to revise the "ETN" and "Notes to Vehicle Owners". New "ETN" and "Notes to Vehicle Owners" have been issued to the vehicle owners in new excessive emission cases since June 2018 to advise them of the purposes and requirements of the emission test required by EPD.

Environmental Protection Department
and Food and Environmental Hygiene Department

Case No. 2016/4178A&B – Failing to take effective measures to thoroughly resolve the problem of accumulation of refuse at a location

Background

131. The complainant claimed that she had since November 2015 lodged complaints with 1823 repeatedly about the frequent accumulation of considerable amount of waste (including furniture and construction waste) at a vehicle lay-by near the junction of two roads (the location). The accumulated waste had even occupied one of the traffic lanes and adversely affected traffic safety. From February to June 2016, the Food and Environmental Hygiene Department (FEHD), the Highways Department (HyD) and the Environmental Protection Department (EPD) had informed the complainant via 1823 of the follow-up actions they have respectively taken. Such actions included the deployment of staff by FEHD and EPD respectively to remove the domestic waste and construction waste at the location, and the issue of a Fixed Penalty Notice by EPD to a person who was found to have deposited construction waste illegally during its inspection.

132. On 1 September 2016, the complainant provided to 1823 a photo showing a vehicle illegally dumping waste at the location (the vehicle registration mark of the vehicle was visible) and requested the departments concerned to follow up. However, she did not receive any reply. Meanwhile, the problem of accumulation of waste at the location persisted.

133. The complainant alleged that FEHD, EPD and HyD had failed to take effective measures to resolve the problem of refuse accumulation at the location.

The Ombudsman's observations

134. The respective responses of FEHD, EPD and HyD indicated that although the departments had yet to thoroughly resolve the problem, they had indeed responded to the complaints lodged by the complainant and other members of the public, and endeavoured to take follow-up actions under their respective purviews. Such actions included conducting a number of individual/joint inspections at the location, clearing the waste and/or instituting prosecutions against offenders. In view of the above, The Ombudsman considered the complaint lodged by the complainant against FEHD, EPD and HyD unsubstantiated.

135. Nevertheless, the problem of waste accumulation at the location persisted. The Ombudsman opined that as the existing way of handling the issue failed to resolve the problem, the departments concerned should explore other measures.

136. The Ombudsman noted that the frequent accumulation of considerable amount of waste at the lay-by has in fact rendered it unusable. Even worse, the waste often occupied a traffic lane which affected traffic safety and posed a risk to both drivers and pedestrians. To effectively tackle the waste problem at the location, the government departments concerned might consider removing the lay-by and taking other measures (such as growing plants, posting publicity and warning notices at the location, etc.) to stop offenders from depositing waste at the location.

137. In that connection, the Office has liaised with the Home Affairs Department (HAD) which has agreed to facilitate referral of the Office's recommendation to the department(s) concerned. Subject to concurrence of the department(s) concerned, HAD will assist to carry out the necessary consultation with the community and brief the affected resident associations about the proposed measures.

138. In the meantime, The Ombudsman recommended that FEHD and EPD should continue to monitor the situation of the location closely and step up inspections, as well as proactively consider installing surveillance cameras at the location.

Government's response

FEHD

139. FEHD has stepped up inspections at the location and arranged a contractor to remove the waste deposited there in order to maintain environmental hygiene. FEHD has also arranged officers to conduct a number of routine and blitz enforcement actions at the location at different times of the day (including at night).

EPD

140. EPD has installed a surveillance camera at the location with a warning banner to assist in the enforcement work and successfully prosecuted a number of offenders who deposited waste illegally. The concerned vehicle lay-by was eventually fenced off through the co-ordinated efforts of the concerned departments. The waste dumping situation at the concerned location has significantly improved.

Food and Environmental Hygiene Department

Case No. 2016/3796 – Failing to take effective enforcement action against illegal hawking activities

Background

141. According to the complainant, unlicensed hawkers congregated and illegally hawked on a street in a certain district (the location) every night, causing nuisance to residents nearby. The complainant lodged complaints with the Food and Environmental Hygiene Department (FEHD) since March 2016, but so far no improvement was seen.

142. The complainant also pointed out that when officers of FEHD Hawker Control Team (HCT) arrived at the scene, the unlicensed hawkers would cover their goods with a piece of cloth and guard them by the side. After the officers left, the unlicensed hawkers would resume the hawking activities. In addition, the complainant was dissatisfied that the HCT often arrived half an hour after receiving the complaint, hence missing the opportunity for taking enforcement actions. By and large, the complainant alleged that FEHD had failed to take effective enforcement actions.

The Ombudsman's observations

143. To understand better the unlicensed hawking at the location, the staff of the Office of The Ombudsman (the Office) conducted a site visit in the evening on 28 March 2017. The Office found that unlicensed hawking was common at the location. The hawkers included the elderly, women and middle-aged persons, and the goods sold included pianos, bedsteads, compact discs and books. The Office's staff purchased an item from one of the hawkers. During the visit, the Office's staff noticed that FEHD staff gave advice to the unlicensed hawkers. Some of the hawkers then covered their goods with canvas, while others simply ignored the advice.

144. The information provided by FEHD showed that it had followed up the complainant's case. However, the enforcement actions taken were ineffective.

145. The information provided by the complainant and the site visit conducted by the Office revealed that the number of unlicensed hawkers at the location was increasing, and the problem had a growing tendency to take root or even spread. FEHD should step up law enforcement in accordance with its enforcement strategy. In addition, contrary to what FEHD stated, hawkers at the location included not only the elderly, but also middle-aged persons. This indicated that the situation was deteriorating. The Office was of the view that the long-standing and worsening problem of unlicensed hawkers must be addressed.

146. The Office understood that the community generally had sympathy for aged hawkers, and that FEHD had to take into account various factors (e.g. the safety of law enforcement officers) when taking enforcement actions. Nevertheless, it could be seen from this case that the unlicensed hawkers completely disregarded FEHD's enforcement actions and continued to hawk at the location as usual. It reflected that the existing enforcement strategy of "warning before enforcement" was too lenient and might even be subject to abuse. Hence, the Office considered the complaint substantiated.

147. The Ombudsman urged FEHD to –

(a) step up enforcement actions against unlicensed hawkers at the location; and

(b) actively work with other Government departments (such as the District Office of the district concerned and the Police) to explore effective means to tackle the unlicensed hawkers issue in the district.

Government's response

148. The illegal hawking activities involving unlicensed hawkers at the location and in the neighbouring streets mainly took place during afternoon and night-time. To prevent the problem from taking root or spreading to the periphery, it was necessary to step up patrols and enforcement at the location. To this end, FEHD started to take special measures in mid-April 2017. More law enforcement officers (including additional manpower from HCT of the District Environmental Hygiene Office of the district concerned) were deployed to conduct static patrol at the location and in the neighbouring streets during afternoon and

night-time. Where appropriate, officers from the Hawker Control Task Force were deployed to station at and patrol the location and nearby with a view to ensuring sufficient manpower for curbing illegal hawking activities and carrying out enforcement actions.

149. FEHD also maintained close liaison with the Police and stepped up joint operations according to circumstances to combat illegal hawking activities with the use of vehicles in the vicinity. Banners were displayed at conspicuous places at the location to remind the public not to patronise unlicensed hawkers.

150. After the implementation of the above measures, the unlicensed hawkers problem at the location was relieved. On 12 May 2017, FEHD reported the arrangement and enforcement strategy for tackling the above problem to the District Management Committee of the District Council concerned and received support from the Committee. The chairman and members thanked the relevant departments for their efforts in addressing the problem. They understood that the problem was complex and hoped that departments would continue with the strengthened measures.

151. To further address the problem of unlicensed hawkers and other offences at the location, FEHD conducted several joint operations with other relevant Government departments (including the Police, the Immigration Department and the Customs and Excise Department) in May and June 2018 to combat offences under their respective purviews. During the operations, prosecutions were instituted for offences such as unlicensed hawking and street obstruction, and goods left by hawkers were seized. Besides, FEHD has stepped up its cooperation and enforcement efforts with the Police since June 2018. Joint operations targeting unlicensed hawkers at the location were conducted around five nights a week. Details of such operations and enforcement results have already been reported to the District Council concerned.

152. FEHD will continue to closely monitor the streets concerned and flexibly deploy resources according to actual circumstances so as to address the unlicensed hawkers problem in an appropriate manner. The arrangements concerned will be reviewed in due course.

Food and Environmental Hygiene Department

Case No. 2016/3985 – Judging that a Nuisance Notice had been complied with before entering the unit suspected to be the source of water dripping and turning on its air-conditioner for water dripping test

Background

153. According to the complainant, water dripping from the air-conditioner of the flat above his residence (the flat) caused nuisance to him (the water dripping problem). It was suspected to be caused by the flat owner's alteration of the air-conditioner's drainage pipe. The complainant lodged a complaint with the Food and Environmental Hygiene Department (FEHD) in July 2016. After a site inspection, the concerned District Environmental Hygiene Office (DEHO) of FEHD confirmed that the water dripping problem was caused by the air-conditioner of the flat and a Nuisance Notice (NN) was issued to the flat owner. Follow-up inspection by the DEHO staff was conducted through observation from the outside of the flat without entering the flat. Subsequently, the flat stopped using the air-conditioner as the weather turned cooler. The complainant also said that the water dripping problem had stopped and hence DEHO considered that the NN had been complied with. The complainant considered it unreasonable for DEHO to conclude that the NN had been complied with without entering the flat and conducting the water dripping test by turning on the air-conditioner.

The Ombudsman's observations

154. Having considered the information and explanations provided by FEHD, the Office of The Ombudsman (the Office) did not agree that it was unnecessary for FEHD to enter the flat and conduct water dripping test on the air-conditioner. The FEHD staff has witnessed water dripping from the air-conditioner of the flat and issued an NN on 1 September 2016, which was also affixed onto the door of the flat and served in its mailbox on 13 September 2016. The NN required the flat owner to abate the nuisance (i.e. dripping from air-conditioner) within three days from the date of service of the NN. To comply with the requirements of the NN, the window-type air-conditioner of the flat should be properly repaired to cease water dripping from it. Between 26

and 28 September 2016, the complainant complained that the water dripping problem persisted. As the rainfall of October 2016 was greater than the average in the past, and the weather turned cooler from mid-October and November, the FEHD staff did not observe water dripping from the air-conditioner of the flat during inspection. Besides, the complainant also said the water dripping problem had stopped. Most probably it was due to the fact that the air-conditioner of the flat was not switched on under the rainy and cool weather, rather than the air-conditioner had been properly fixed. Even if the monthly average temperature in September and October was 27.9°C and 26.8°C respectively as alleged by FEHD, there was inadequate justification to assume that the air-conditioner of the flat must have been switched on. In the Office's view, it was improper for FEHD staff to conclude that the NN had been complied with (i.e. the dripping air-conditioner had been properly fixed) merely based on their observations from the outside of the flat. It was possible that the air-conditioner of the flat had not been fixed properly, but was merely not in use temporarily. The water dripping problem would occur again in the ensuing summer. The DEHO staff failed to observe the relevant operational guidelines of FEHD as they had not entered the flat to conduct investigation. No enforcement action could be taken in respect of the NN because it was regarded as having been compiled with. If the water dripping problem occurred again in the next summer, FEHD would need to start the investigation afresh and the complainant would have to tolerate the water dripping nuisance for a longer time.

155. Based on the above analysis, The Ombudsman considered the complaint substantiated and urged FEHD to learn from this case and require its staff to conduct test on the air-conditioner under similar circumstances (particularly when autumn approaches) to ensure that the air-conditioner concerned is properly fixed. If the occupant does not respond after a Notice of Appointment is issued for the purpose of confirming whether the NN had been complied with, the FEHD staff should issue a Notice of Intention to Apply for Warrant of Entry. If the staff still fails to gain access into the premises, they should consider applying to the Court for a Warrant of Entry to conduct a test on the air-conditioner.

Government's response

156. In FEHD's circular memorandum to DEHO dated 12 July 2017, its staff have been clearly reminded to conduct on-site inspections and tests when handling air-conditioner dripping cases, so as to confirm the problem of dripping air-conditioner had stopped and would not recur in the near future. Furthermore, a circular memorandum was issued on 24 July 2015 to remind the staff handling cases of dripping air-conditioner to conduct on-site test on the air-conditioner to confirm the nuisance has been abated. In case that staff cannot gain entry into the premises for inspection after Notice of Appointment has been issued, FEHD has promulgated clear guidelines to remind staff that they may apply to the Court for a Warrant of Entry under section 126 of the Public Health and Municipal Services Ordinance to expedite the processing of a complaint. The case at issue was also brought out for examination and comment in the Direct Investigation Report on "Government Departments' Handling of the Problem of Air-conditioner Dripping" released by the Office in April 2018. In response to the recommendations made in the Direct Investigation Report, FEHD issued circular memorandum on 3 July 2018 again to remind the staff that during investigation/follow-up inspection of cases of dripping air-conditioner (including cases in which a NN has been issued), they must enter the premises concerned to conduct a test on the air-conditioner unless water dripping from air-conditioner can be clearly observed from the outside of the premises concerned. They should also issue the Notice of Intended Entry to the owner/occupier of the flat or even apply to the Court for a Warrant of Entry when necessary.

Food and Environmental Hygiene Department

Case No. 2016/4625 – Failing to stop some market stalls from being used for storage or subletting

Background

157. According to the complainant, there were nine stalls (the stalls concerned) in a market under the Food and Environmental Hygiene Department (FEHD) (the market concerned) which had allegedly breached the tenancy terms. He opined that FEHD should terminate the tenancy agreements, re-enter and put the stalls concerned up for other interested parties to bid.

158. The complainant pointed out the major breaches as follows –

(a) two stalls selling rehabilitation products (Stalls I and II) were used for storing goods;

(b) five stalls (Stalls III, IV, V, VI and VII) were allegedly sublet and used for storage;

(c) one stall (Stall VIII) was allegedly sublet and used for overnight stay; and

(d) one stall (Stall IX), of which the tenant had passed away, was used only for storage without any operation between 2015 and 2016.

159. The complainant criticised FEHD for delay in recovering the stalls concerned, which prevented other people from leasing those stalls.

The Ombudsman's observations

160. The staff of the Office of The Ombudsman (the Office) conducted an inspection at the market concerned at about 4:00 p.m. on 6 December 2016. Observations were as follows –

(a) There were neither shelves nor goods in Stall I. Only an empty handcart and some sundry items were found. About three retractable cane-like items were hung on the upper part of the stall with a walking aid placed aside. No one was selling goods in the stall or in the vicinity, and no price tags were displayed inside the stall.

(b) For Stall II, a number of plastic buckets of various shapes, some empty and some covered, were found. About four retractable cane-like items were hung on the upper part of the stall. No one was selling goods in the stall or in the vicinity. No price tags were displayed inside the stall.

(c) The roller shutters of Stalls VI and VII were closed. A fairly large number of female clothes, some of which with price tags, were hung on the roller shutters and in front of the stalls. No one was selling goods in the vicinity.

(d) The roller shutters of Stalls IV, V and VIII were closed. A number of carton boxes and large loaded plastic bags were placed in front of Stalls IV and V. No one was selling goods in the vicinity. Some female clothes were hung in front of Stall VIII.

(e) The roller shutter of Stall IX was closed. Two large locked wooden cabinets and some sundry items were placed in front of the stall.

161. The complaints lodged by the complainant against the relevant stalls mainly concerned these stalls being used for storage instead of selling goods and being sublet. Both problems breached the tenancy terms.

162. According to the photos provided by FEHD/the contractor and the complainant and the observations of the Office, the roller shutters of all the stalls concerned were closed except those of Stalls I and II. Therefore, it was difficult to confirm the use of the stalls concerned and whether goods were stored inside. Nevertheless, it was an indisputable fact that many stalls (including the stalls concerned) on the first floor in the north wing of the market concerned had not been in operation for a long time. These stalls had definitely breached the tenancy terms. It was highly undesirable that FEHD had been turning a blind eye to the breach.

163. The prolonged non-operation of stalls in the market concerned had not only reduced consumers' choices but also weakened competition among stalls. FEHD should strictly monitor the compliance with tenancy terms to prevent any stall from prolonged non-operation which would reduce the interest of consumers in shopping at the market concerned. Fortunately, after the Office stepped in, FEHD had taken a more active approach to investigating and regulating the prolonged non-operation of stalls.

164. From the photos provided by FEHD/the contractor and the complainant, it could be seen that Stalls I and II were used for storage without any sale of rehabilitation products. This also constituted a breach of tenancy terms. However, FEHD mistakenly issued warnings to the stall operators for unauthorised sale of preserved vegetables, and as a result the breach was not properly rectified.

165. Regarding the problem of subletting, the Office noticed that FEHD had followed up the situation of the stalls concerned. There was no sufficient evidence to prove that any subletting problem existed. Besides, FEHD had reported its follow-up actions on the use of Stall VIII for overnight stay and the succession issue of the tenant of Stall IX.

166. The Ombudsman considered the complaint partially substantiated and urged FEHD to strictly control the stalls not in operation for a long time and used for storage only in the market concerned. FEHD was also asked to strengthen enforcement against offending stall operators.

Government's response

167. In order to address the problems of prolonged non-operation of the stalls concerned and their sole use for storage, FEHD had stepped up its enforcement of the relevant tenancy terms. Letters were sent to offending stall operators to remind them that prolonged non-operation of their stalls constituted a breach of the tenancy terms. Moreover, the relevant tenancy terms were strictly enforced in accordance with the established warning letter system. From January to June 2018, a total of 103 verbal warnings and 111 warning letters were issued under the system to stall tenants whose stalls had not been in operation for a long time or were used for storage only. During the above period, six stall tenants whose stalls were not actively in operation or were used for storage terminated their tenancy agreements with FEHD and returned the

stalls to FEHD. FEHD will continue to actively follow up the relevant breaches of tenancy agreement and enforce tenancy terms.

Food and Environmental Hygiene Department

Case No. 2017/0391 – (1) Unreasonably issuing a court summons without having first re-issue a fixed penalty notice after amending the place of offence; and (2) Delaying the issuance of a letter amending the place of offence

Background

168. The complainant claimed that an Food and Environmental Hygiene Department (FEHD) officer suspected him of committing the cleanliness offence for depositing waste and issued him with a Notice of Particulars of Alleged Fixed Penalty Public Cleanliness Offence (Form 1) when he was feeding birds at a certain location (the place) on 14 July 2016. Subsequently, he received a Notice Demanding Payment of Fixed Penalty (Form 2) issued by FEHD on 11 August. As he found that the place of offence was wrongly written as another location in both Form 1 and Form 2, he wrote to FEHD to raise a dispute on 15 August (the letter of dispute).

169. On 18 August, FEHD replied him in writing that the Department had received his dispute and would apply to the court for a hearing of his case, and that he would receive a court summons later. On 26 October, FEHD wrote (the letter dated 26 October) to inform the complainant that a letter was sent to him by registered post on 19 August (the letter dated 19 August) to notify him of the amendment of the place of offence. However, he did not receive the letter dated 19 August until 5 November.

170. The complainant opined that as FEHD had admitted the mistake about the place of offence in Form 1 and Form 2, it should have first withdrawn both forms and then re-issued them, stating the correct place, rather than correcting the mistake merely by the letters. In view of the above, the complainant alleged that FEHD had –

(a) complicated a simple matter by failing to re-issue to him Form 1 and Form 2 but serving him with a court summons, thus wasting his time to appear in the court for the hearing and causing him inconvenience (Complaint (a)); and

(b) delayed the issue of the letter dated 19 August to him (Complaint (b)).

The Ombudsman's observations

171. Regarding Complaint (a), FEHD had explained that the mistake was not a scenario covered by the Department's operational guidelines (the guidelines) under which Form 1 could be withdrawn. The District Environmental Hygiene Office (DEHO) concerned had written to inform the complainant that the place of offence had been amended according to the guidelines. Moreover, as the Fixed Penalty (Public Cleanliness and Obstruction) Ordinance (the Ordinance) provided that Form 1 shall be given personally to the offender, it would be difficult for FEHD to comply with the statutory provision of "given personally" if the notice was re-issued. The Ombudsman considered the explanation given by FEHD reasonable.

172. It was clearly stated in Form 2 that if the offender does not pay the fixed penalty or notify the Director of Food and Environmental Hygiene that he wishes to dispute liability in accordance with the notice, an application will be made to a magistrate for an order; the matter will be determined by a magistrate on complaint in accordance with the Ordinance and the offender will be served with a summons in due course.

173. Having found the mistake about the place of offence in Form 1 and Form 2, the complainant neither paid the fixed penalty as required in Form 2 nor informed FEHD of the mistake. He simply sent FEHD the letter of dispute on 15 August with no particulars provided. By doing so, he could not expect FEHD to understand that he did not intend to pay the fixed penalty because the place of offence stated by the Department was incorrect.

174. After receiving the letter dated 26 October, the complainant should have known that FEHD had already amended the place of offence and he was liable to pay the fixed penalty as required in Form 2 promptly so as to avoid being served with a court summons.

175. As the complainant had not paid the fixed penalty until 2 November, it was not inappropriate for FEHD to follow the established procedures and handed over the case to the court. Based on the above analysis, The Ombudsman considered Complaint (a) unsubstantiated.

176. As for Complaint (b), DEHO had already clarified that the complainant received the letter dated 19 August after 2 November mainly because he did not collect the letter from the post office, and FEHD should not be blamed. The Ombudsman thus considered Complaint (b) unsubstantiated.

177. The Ombudsman recommended that in order to avoid similar complaints in future, FEHD should consider whether an important letter should be resent to the recipient by ordinary post immediately if it has been sent by registered post but returned by the Hong Kong Post as "Unclaimed".

Government's response

178. To avoid similar complaints in future, FEHD will resend a letter to the recipient by ordinary post if it has been sent by registered post but returned as "Unclaimed".

Food and Environmental Hygiene Department

Case No. 2017/1224 – Ineffective enforcement action against the problem of garbage and objects dumped on a vehicular access

Background

179. The complainant claimed that some shops (the shops) in a certain street always placed fresh vegetables, vegetable baskets and a large amount of garbage on the kerb by the vehicular access (the location), causing environmental hygiene nuisances (objects problem) to residents nearby. In 2015, the complainant lodged a complaint with FEHD via 1823 about the objects problem. Nevertheless, there had been no improvement. The complainant alleged that FEHD had been ineffective in taking enforcement actions against the objects problem.

The Ombudsman's observations

180. At around 4:00 p.m. one day in mid-August 2017, staff of the Office of The Ombudsman (the Office) conducted an on-site inspection at the location, and found that the shops had placed a large quantity of goods and cratings on the road outside. Foul water and garbage were found dumped on the kerbside of the road. The condition was largely the same as that observed by the complainant.

181. According to FEHD's relevant records (including photos), the shops kept placing a large quantity of objects (which included many highly stacked polystyrene foam boxes and plastic vegetable baskets) on the kerb by the road when FEHD's contractor was providing street cleansing service. As a result, the cleansing workers could only clean the gaps among those articles rather than thoroughly clean the kerbside of the road. The Office had reasons to believe that those articles did cause obstruction to the scavenging operations.

182. It gave no cause for criticism that FEHD, which regarded placing articles on the kerbside of the road as traffic obstruction, referred the case to the Police for follow-up actions. But FEHD was also obstructed by the articles in its scavenging operations and should have invoked the "provision on obstructions to scavenging operations" to take enforcement actions, rather than waiting for other department(s) to

address the problem. The fact that FEHD has never invoked that provision to take actions showed that FEHD was inadequate in its enforcement efforts.

183. According to the observations of the complainant and the Office, the location was often piled with garbage and the hygiene conditions were poor. Although FEHD has taken other actions to follow up on the objects problem, the effect was limited.

184. The Ombudsman considered the complaints partially substantiated and recommended FEHD to –

(a) step up inspection of the location, take strict enforcement actions against those who violate environmental hygiene laws, and proactively invoke the "provision on obstructions to scavenging operations" to address the obstruction to scavenging operations caused by the articles placed in public places (including kerbside of the road) by the shops; and

(b) supervise the contractor in stepping up clearance of the garbage on the street at the location and further intensify rodent and pest control work so as to enhance environmental hygiene.

Government's response

185. FEHD has increased the frequency and manpower of special operations to step up inspection of the location. It has also instructed in-house staff to take strict enforcement actions against those who violate environmental hygiene laws, having regard to the actual circumstances and evidence collected and to handle the articles placed on the kerbside of the road and causing obstruction to scavenging operations according to law. 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. To further rectify the objects problem at the location, FEHD will continue to take enforcement actions and conduct special cleansing operations in the periphery of the location, which include mounting joint operations with the Kowloon City District Office and the Police.

186. FEHD has urged its contractor to enhance street cleansing efforts at the location. FEHD will also step up prosecutions against littering offenders and further intensify rodent and pest control work at the location to maintain environmental hygiene.

187. FEHD will continue to closely keep in view the situation of the location and take appropriate actions so as to maintain environmental hygiene.

Food and Environmental Hygiene Department

Case No. 2017/2390 – Failing to properly resolve the problem of unlicensed hawkers outside a market

Background

188. The complainant was a stall tenant of a market in a particular district. According to the complainant, since 2013 there had been hawkers selling goods (including uncooked food) without a licence from time to time at places (including near the staircase, pavement and motorcycle parking spaces) outside the market facing the entrance to a public housing estate. The hawking activities had caused not only obstruction to passageways but also hygiene and food safety issues (the hawker problem). Despite repeated complaints lodged by the complainant and other market stall tenants, the Food and Environmental Hygiene Department (FEHD) had not taken any enforcement action on the grounds that the site concerned was within a private property. The complainant was dissatisfied that FEHD had failed to handle the hawker problem properly.

The Ombudsman's observations

189. From the photos and video footage provided to the Office of The Ombudsman (the Office) by the complainant and site visits conducted by the Office in the evening of 11 September 2017 and the morning of 16 September 2017, the Office observed the following –

(a) The hawker situation along the pavement, driveway and motorcycle parking spaces outside the market facing the entrance to the housing estate was similar to the observation of FEHD. A few hawkers were seen selling dry goods, but the situation was not severe.

(b) A few elderly people were sometimes found selling dry goods in the morning until noon in the area between the staircase and pavement outside the market facing the entrance to the housing estate (the market area). One of them was found selling uncooked salmon at the above location at around 10:30 a.m. on 2 October 2017.

190. As regards the hawker problem outside the market area, FEHD had carried out on-site investigations upon receipt of complaints and found that the site was within a private property. Considering that the hawker problem was not severe, FEHD informed the management of the property to take follow-up actions. The Office did not see it objectionable for FEHD to follow its established policy in handling the matter.

191. The Office understood that the hawker problem at the site may affect the business of the market stall tenants who are selling the same kinds of goods. However, as the responsibility of managing a private property lied with its owners and management company, both parties were obliged to handle the hawker problem within the property. To optimise the use of public resources, FEHD would put more efforts on resolving the hawker problem on public streets. However, when necessary, for example when the hawker problem becomes rampant and seriously affects public hygiene or food safety, FEHD would offer advice and assistance to property owners and the management company, or even intervene by taking enforcement actions as appropriate. The Office considered such practice reasonable.

192. As regards the illegal hawking problem in the market area concerned, FEHD adopted a series of initiatives to deal with the situation. The Office was of the view that FEHD had taken a reasonable approach to following up the problem.

193. The Ombudsman considered the complaint against FEHD unsubstantiated but urged it to keep close monitoring of the hawking problem in the market area concerned. The Ombudsman recommended that –

(a) further assistance to the management concerned should be considered when the hawker problem outside the market concerned becomes rampant; and

(b) strict enforcement actions should be taken if hawking (especially selling uncooked food) is found within the market area.

Government's response

194. For recommendation (a), FEHD continued to discuss the hawker problem at regular meetings with the management of the private property concerned. However, no request for assistance has been received so far from the management company concerned. Since April 2018, FEHD has no longer received any complaint against hawking at or outside the market.

195. As regards recommendation (b), FEHD has instructed its staff to, during daily inspection, guard against and stop hawkers who intend to enter the market to carry out unauthorised hawking activities. In addition, blitz prosecution actions are conducted from time to time, during which prosecutions are instituted against unauthorized business operation at the market. Between 2016 and June 2018, FEHD instituted 36 prosecutions and did not find any sale of uncooked food during inspection. Since June 2018, FEHD has deployed an additional guard to stand guard at the entrance to the market during peak hours in the daytime to keep the market area free of obstruction. FEHD officers would continue to monitor the situation and take actions as appropriate.

Food and Environmental Hygiene Department

Case No. 2017/2614A – Failing to properly follow up the problem caused by on-street barbers at a site

Background

196. According to the complainant, there was a person providing fee-charging hair-cutting service next to an off-course betting branch of the Hong Kong Jockey Club on a road (the site) between 8:00 a.m. and 12:00 noon every day, which caused nuisance to passers-by and affected environmental hygiene (the on-street barber problem). Since March 2017, the complainant has lodged several complaints against the on-street barber problem with Food and Environmental Hygiene Department (FEHD). FEHD replied that follow-up actions would be taken jointly with the Lands Department (LandsD). However, the situation had not improved so far. The complainant alleged that FEHD and LandsD failed to follow up the on-street barber problem properly.

The Ombudsman's observations

197. On 4 August 2017, staff of the Office of The Ombudsman (the Office) conducted two inspections at the site. The findings were as follows –

At 9:10 a.m.

(a) The staff did not find any person providing hair-cutting service, nor did they find any seat or hair-cutting tool. However, there were two women standing by the railings of the adjoining pavement. A passer-by approached one of the women and asked her whether there was any hair-cutting service. The women replied that she provided hair-cutting service starting from 7:30 a.m. every day. She then took out a folding stool for the passer-by to sit on and started cutting his hair. Meanwhile, the other woman stood on the pavement and acted as a lookout.

At 10:30 a.m.

(b) The staff did not find any person providing hair-cutting service, nor did they find any seat or hair-cutting tool. However, there was hair scattered around.

198. According to FEHD's record, it has deployed staff to the site to conduct inspection and institute prosecution against the person(s) who offered unauthorised hair-cutting service. The Office considered that FEHD had, in general, followed up the on-street barber problem properly.

199. As for LandsD, it has not received any complaint about the on-street barber problem. It had no knowledge about the problem and hence did not take any action.

200. The Ombudsman considered the complaint against FEHD and LandsD unsubstantiated. However, the Office's inspection revealed that the on-street barber problem persisted, and offenders would find someone to act as a lookout in order to avoid the FEHD's enforcement actions. The Ombudsman recommended that in order to curb the on-street barber problem more effectively, FEHD should consider deploying plain-clothes officers to conduct inspections to bring the offenders to justice.

Government's response

201. FEHD has implemented the recommendation made in the investigation report by deploying plain-clothes officers to conduct inspections and perform enforcement actions at the site. On 25 August 2017, two persons were arrested for providing unauthorised hair-cutting service in a public place. FEHD conducted a number of follow-up visits and observations at the site subsequently, and no more unauthorised activities were found. FEHD will continue to closely monitor the site and take actions as appropriate.

Food and Environmental Hygiene Department

Case No. 2017/2753 – Failing to tackle effectively illegal extension of business area by cooked food stalls

Background

202. The complainant had complained many times to FEHD against some stalls in a cooked food market for causing obstruction by placing tables, chairs and commodities on pedestrian passageways. Yet, the situation had not improved. He queried whether FEHD had conducted inspections or instituted prosecutions to curb the irregularities.

The Ombudsman's observations

203. FEHD stated that within two years, its staff had conducted a total of 30 surprise inspections, with verbal warnings and warning letters issued to the cooked food stalls concerned. The Department had also taken back two stalls in the past.

204. The site visits conducted by the Office of The Ombudsman (the Office), nevertheless, revealed that the irregularities of the cooked food stalls had persisted, and the problem was particularly serious during night time.

205. The Office also noted that FEHD's surprise inspections had been rather infrequent. Some of its inspections were conducted at intervals of two to three months or even six months, and it seldom conducted surprise inspections at night.

206. The Ombudsman found that FEHD had failed to conduct its inspections rigorously, and such inadequate inspections hardly had any deterrent effect. This complaint was partially substantiated. The Ombudsman urged FEHD to step up its inspections of the cooked food stalls concerned and exercise stricter control.

Government's response

207. FEHD has adopted a multi-pronged approach and implemented targeted measures to tackle effectively illegal extension of business area by the cooked food stalls concerned. The measures include stepping up inspections at different times of the day (including at night-time). Besides FEHD's district staff, a market squad is deployed to step up enforcement actions. Between January and June 2018, a total of 116 surprise inspections (including 103 night-time inspections) were conducted with two verbal warnings issued. The situation of illegal extension of business area by the cooked food stalls concerned has obviously improved.

Food and Environmental Hygiene Department

Case No. 2017/3084A – Failing to take effective enforcement action against street obstruction by shops and illegal occupation of an alley by restaurants

Background

208. The complainant claimed that the following irregularities (the irregularities) by the shops and restaurants at the location had existed for over a decade –

(a) Shops placed their commodities beyond the business areas within certain limits as permitted by the Food and Environmental Hygiene Department (FEHD) (5 feet from the shop front and 3 feet from the side walls) (the extended area) (Irregularity I);

(b) Restaurants used an alley for kitchen purposes, including cooking, washing utensils and placing refrigerators (Irregularity II);

(c) A restaurant (Restaurant A) leased its adjacent government land to others for selling fruits and vegetables (Irregularity III).

209. The complainant complained that FEHD and the Lands Department (LandsD) failed to take effective enforcement actions to curb the irregularities.

The Ombudsman's observations

FEHD

210. Since early 2003, the Government has been implementing an ad hoc measure. After discussions with the relevant government departments and local District Council members, the shops were allowed to conduct business activities within the tolerated area (i.e. the extended area) on the condition that pedestrians and emergency vehicles should be unimpeded. Local District Management Committee (DMC) will review this ad hoc measure every year.

211. Staff of the Office of The Ombudsman (the Office) conducted a site inspection at the location at around 11:00 a.m. on a day in mid-November 2017. It was found that –

(a) Most shops and restaurants put their commodities, tables, chairs and utensils outside their shops. It appeared that some commodities were placed beyond the extended area, causing slight obstruction to the passageway.

(b) A large amount of cardboard boxes were placed in the alley where there were also trolleys, chairs, refrigerators and other miscellaneous stuff.

(c) The stall adjacent to Restaurant A selling vegetables and fruits (Stall B) appeared to be the extension of a fruit shop (Fruit Shop C) at the corner of Restaurant A. Separately, Stall B appeared to have exceeded the 3-feet extended area of Restaurant A.

On Irregularity I

212. According to the information provided by FEHD and the observation of the Office, Irregularity I was common and serious. Shops extending their business areas to the public passageways were already against the rules. Yet, though they have been tolerated to extend their business areas lightly, they were further extending their business areas beyond the tolerated extended areas, and causing obstruction to passageways. It was incumbent upon FEHD to take strict enforcement action. Clearly, FEHD's strategy of "warning before prosecution" was too lenient to curb Irregularity I effectively.

On Irregularity II

213. The Office understood that FEHD had resource constraints. However, this was not a sufficient reason for its failure to curb Irregularity II effectively. On the one hand, FEHD expressed concern over the situation of the alley at the location. On the other hand, no actions were taken to strictly combat the non-compliance. It was clearly insufficient that only 54 prosecutions were instituted against 30 restaurants over two years (on average less than one prosecution per restaurant each year).

On Irregularity III

214. The Office considered that the measure of extended area should only allow each shop/restaurant to operate its own business in front of or adjacent to its premises.

215. During its inspection, the Office discovered that an area of more than three feet next to Restaurant A was used for operating a fruit stall (i.e. Stall B), which was clearly irrelevant to the business of Restaurant A. To enable wider public passageways, shops/restaurants should not use the extended area if it is unnecessary to do so, and the extended area should not be treated as a private property and let to other shops/restaurants.

216. The Office had reasons to believe that Fruit Shop C actually used the extended area of Restaurant A. The Office considered that such situation was contrary to the objective of the extended area measure, at which District Environmental Hygiene Offices should never connive.

217. The Ombudsman considered the complaint against FEHD substantiated and recommended that –

(a) strict enforcement actions be taken against Irregularity I and Irregularity II (including immediate prosecution without prior warning) to serve as meaningful deterrent;

(b) the boundary of the extended area be clearly and distinctively marked to facilitate enforcement actions by staff;

(c) enforcement actions be taken against Irregularity III.

LandsD

218. Although the Land (Miscellaneous Provisions) Ordinance does not expressly deal only with illegal structures occupying the land, and the irregularities in this case could be regarded as long-term occupation of government land without approval, the Office agreed that the illegal land occupation and hawking problem in this case was basically under the purview of FEHD and it would be more appropriate to be managed by FEHD. Hence, The Ombudsman considered the complainant's complaint against LandsD unsubstantiated.

Government's response

219. FEHD agreed that for Irregularity I, repeated offenders should be prosecuted immediately. Enforcement strategies have been revised to combat shop irregularities strictly. From January to June 2018, FEHD issued 74 fixed penalty notices for shops operating business beyond their extended areas at the location and instituted 30 prosecutions against food premises causing obstruction beyond their confines. Four prosecutions were instituted against unlicensed hawkers, with eight seizures of hawkers' commodities.

220. FEHD did not agree with the need to mark the boundary of the extended area clearly and distinctively to facilitate enforcement actions. There were three reasons for this. Firstly, the extended area was only an ad hoc measure subject to review every year. Secondly, identifying an extended area by marking its boundary was not a usual practice for government departments to handle extended areas in public places. Thirdly, the current practice of FEHD with visual assessment of the size of commodities placed by shop before measuring the exact area with a measuring tape has been effective.

221. The Office did not agree with the reasons held by FEHD for not marking the extended area clearly and distinctively, and made the following further recommendations to FEHD –

(a) to continue taking strict enforcement actions against Irregularity I and Irregularity II, including immediate prosecutions of repeated offenders;

(b) to reconsider marking the boundary of extended area clearly and distinctively to facilitate enforcement actions by staff;

(c) to thoroughly investigate Irregularity III; if it is confirmed that Stall B is not operated by Restaurant A, it should be proscribed.

222. Subsequently, the Office had a meeting with FEHD staff on 11 June 2018. FEHD reiterated that it was not authorised to mark the boundary of extended area but could only adhere to the enforcement standard on whether the commodities were placed beyond the extended area. Whether the shop was operating its own business in the area would not be considered. The entire plan of extended area was devised after discussion with the DMC.

223. Given FEHD's representation, the Office wrote to request the Home Affairs Department to raise the issue for discussion by the local DMC. The Office indicated on 10 July that its follow-up actions on this case had been completed.

Food and Environmental Hygiene Department

Case No. 2017/3134(I) – (1) Failing to take enforcement action against a newspaper stall for breaching licensing conditions; (2) Failing to properly handle the complainant's request for relocating the stall; and (3) Failing to provide the complainant with the information requested

Background

224. Allegedly, a newspaper stall (the Stall), licensed by the Food and Environmental Hygiene Department (FEHD), operating on the pavement (Location A) outside one of the complainant's shops (the Shop) on a road was blocking access to certain fire services facilities of the Shop. Moreover, the licensee of the Stall might have breached FEHD's licensing conditions by extending its business area beyond the approved boundary and by allowing some other person to operate the Stall. The complainant thus lodged a complaint with FEHD in July 2016, and requested FEHD to relocate the Stall and to provide the complainant with a copy of the licence and information on "the approved exact location and size of the said stall" (collectively the Information). On 27 December 2016, without having consulted the complainant, the Stall moved slightly sideway (Location B), but was still outside the Shop. It no longer blocked access to the fire services facilities, but blocked the Shop's frontage, thereby affecting the Shop's operation.

225. In sum, the complainant complained against FEHD for having failed to –

(a) take enforcement action against the Stall for breaching the licensing conditions;

(b) properly handle the complainant's request for relocating the Stall; and

(c) provide the complainant with the Information.

The Ombudsman's observations

Allegation (a): Lack of enforcement action against the Stall

226. Given FEHD's established policy and its inspection findings, the Department had no grounds for taking enforcement action against the Stall. The Ombudsman considers Allegation (a) unsubstantiated.

Allegation (b): Failure to handle the relocation request properly

227. FEHD has contended that it was not slow in moving the Stall temporarily as the licensee relocated the Stall immediately after the Department interviewed him. As regards the permanent relocation, FEHD has explained that the selection of a suitable new site and consultation with locals had inevitably taken time.

228. The Ombudsman did not accept FEHD's explanation. FEHD had in fact taken an inordinately long time to handle the complainant's request. Its delays were as follows –

(a) The Stall's obstruction of access to fire services facilities posed a fire safety concern. FEHD should have sought the Fire Services Department (FSD)'s clarification much sooner.

(b) FEHD was slow in initiating interviews with the licensee and securing his agreement to move away temporarily from the fire services facilities. Since there was no other option for temporary relocation of the Stall, FEHD could have pointed this out much earlier to the licensee of the stall and got the temporary relocation done much sooner.

(c) FEHD was also inefficient in its prolonged consultation with the licensee from January to April 2017 regarding permanent relocation of the Stall.

(d) The consultation exercise with Government departments, which was simply to seek their views on the three possible sites, could also have commenced much sooner and even before the licensee's indication of his site preference.

229. The Ombudsman considered Allegation (b) substantiated.

Allegation (c): Failure to provide the Information to the Complainant

230. The Ombudsman found that FEHD had not fully complied with the Code on Access to Information (the Code) –

(a) It failed to explain the reasons for turning down the complainant's request for information.

(b) It did not provide information on the avenue of review.

(c) A document containing some personal data was not a valid reason for not providing the document altogether. FEHD could have tried to seek consent from the data subject for disclosing his personal data or obliterated the personal data from the copy of the licence to be given to the complainant.

(d) FEHD provided the complainant with some information items only after The Ombudsman's intervention, which was some five months after receipt of the information request.

(e) Moreover, those information items were only part of the information that could be found in the licence. The licence in fact contained such other information as the licence number, the validity period of the licence, the types of commodities allowed for sale and the number of registered assistants. As the Code requires that information should be provided in its original form as far as possible, FEHD's failure to provide a copy of the licence had denied the complainant's access to the other information that was on the licence but not provided in the Department's letter of 7 December 2017.

231. FEHD did not have a location plan. As the Code does not oblige Government department to create records which do not exist, it was not unreasonable of FEHD not providing a location plan to the complainant.

232. The Ombudsman considered Allegation (c) partially substantiated.

233. The Ombudsman urged FEHD to enhance staff training concerning application of the Code.

Government's response

234. FEHD has monitored the stall closely and no undue obstruction and other irregularities were observed. FEHD has also reminded hawker casework staff concerned to process all justified cases of relocation requests for fixed pitch hawker stalls expeditiously.

235. The Constitutional and Mainland Affairs Bureau held two seminars on 3 November and 5 December 2017 respectively to brief FEHD staff, with a view to enhancing their awareness and knowledge of the Code. FEHD will conduct similar seminars on a regular basis to equip staff with the knowledge on the application of the Code.

Food and Environmental Hygiene Department

Case No. 2017/3283 – Impropriety in dealing with the complainant's query about why he should be held responsible for a mistake in urn grave number not made by him

Background

236. According to the complainant, his mother was buried in an urn grave space in a public cemetery. In April 2017, he was notified by the Food and Environmental Hygiene Department (FEHD) that the serial number of his mother's grave had been mixed up with that of another grave, and he was required to complete certain formalities for rectification at FEHD's office. When the complainant met an FEHD officer on 15 August 2017, the officer told him that he had to pay some $6,000 to rectify the serial numbers of the graves involved, otherwise maintenance and clearance works for his mother's grave space could not be carried out. The complainant found this unreasonable and refused to pay the fee.

237. The complainant was dissatisfied with FEHD in the following respects –

(a) He had asked an FEHD officer why the serial numbers of the graves had been mixed up, and why the mistake was not discovered until 30 years after the burial. The officer only said that "the assignment of serial numbers was done manually in the past", and no further elaboration was given.

(b) Although it was not his fault for mixing up the serial numbers of the graves, FEHD demanded him to pay the rectification fee, and it did not give any details on how the some $6,000 fee was calculated.

The Ombudsman's observations

238. In July 2016, FEHD received an application from a member of the public (the applicant) for permission to repair the headstone of his father's urn grave space in the same cemetery. When an FEHD officer checked the relevant information according to the established procedures, it was discovered that the name of the deceased person inscribed on the headstone did not match the record kept by FEHD. According to the Department's record, both the complainant and the applicant were allotted spaces in the same urn grave section to bury the deceased persons. As it was initially suspected that the deceased persons might have been buried in the wrong spaces, FEHD's staff contacted the complainant for further investigation.

239. FEHD officers then met the complainant and the applicant separately. The complainant claimed that his mother was actually buried in the allotted urn grave space. The applicant also declared on oath that his father was buried in the other urn grave space involved. Since the remains of the complainant's mother and the applicant's father were exhumed and reburied in the respective urn grave spaces on the same day, FEHD suspected that the urn grave spaces of the two deceased persons might have been mixed up. As the exhumed remains of the two deceased persons were buried by the same stone mason on the same day in the same urn grave section, it was likely that the two spaces were muddled up. The matter did not involve illegal burial in or unlawful occupation of any urn grave spaces. Since the burials took place around 30 years ago, and the mason involved was no longer in business, FEHD could not find out what had actually happened.

240. Regarding complaint (a), FEHD discovered the mistake only when it checked the relevant information after receiving the application for repairing the headstone of an urn grave space from the applicant. As it involved the urn grave space of the complainant's mother, the complainant was invited to assist in the investigation.

241. Regarding complaint (b), FEHD stated that if a burial took place in a public cemetery without prior application, it might institute prosecution against the offender, and recover from him the unpaid fee of $6,305 for burial in an urn grave space.

242. During the early stage of investigation, an FEHD officer mentioned to the complainant that if the remains of his mother were found occupying an urn grave space illegally, the Department would recover the unpaid burial fee from him. FEHD recognised that it might be too early for the officer concerned to talk about the circumstances under which a fee recovery would be made. Instead, before he contacted the complainant, the officer concerned should check the relevant burial and application records to ascertain whether there was any burial without application. If the officer had done so, the misunderstanding on the part of the complainant about FEHD's demand for his payment of burial fee would have been avoided. FEHD apologised to the complainant for this matter.

243. FEHD planned to contact the complainant and the applicant after completing the investigation, in order to rectify the relevant records kept by the Department.

244. Since the matter was caused by the information shown on the urn grave of the complainant's mother not matching the Department's record, FEHD was obliged to take follow-up actions on the matter in order to find out the truth.

245. As for the lack of explanation from the FEHD officer, the Office of The Ombudsman opined that as follow-up actions were underway at the time, it was not unreasonable for the officer to defer an explanation until the follow-up actions were completed. Furthermore, the officer concerned only told the complainant the circumstances under which a fee would be recovered but did not ask the complainant to pay the fee.

246. Based on the above, The Ombudsman considered the complaint unsubstantiated. Notwithstanding, it was undesirable that the officer concerned mentioned the possibility of recovering the fee before ascertaining the facts. The Ombudsman urged FEHD to instruct its staff to be careful about their words.

Government's response

247. FEHD has instructed the officer concerned to articulate his message with care so as to avoid causing any unnecessary misunderstanding.

Food and Environmental Hygiene Department

Case No. 2017/3508A – Failing to effectively tackle the problem of garbage dumping in an open space

Background

248. The complainant claimed that bulky domestic waste and construction waste were frequently dumped at an open space (the open space) beside a refuse collection point (the RCP) by vehicles, which affected residents nearby (the garbage problem). In January 2017, the complainant lodged a complaint with the Food and Environmental Hygiene Department (FEHD) against the garbage problem. FEHD had removed the garbage at the open space but the garbage problem recurred shortly afterwards.

249. In February of the same year, the complainant reported to FEHD the suspected person who caused the garbage problem via the Littering from Vehicle - Report Form. The complainant also provided FEHD with the registration mark of the vehicle and the video footage of garbage dumping at the open space by the vehicle. However, FEHD indicated that the evidence was insufficient for FEHD to institute prosecution.

250. The complainant suggested that FEHD fence off the open space in order to curb the garbage problem (the fence-off suggestion). FEHD replied that the open space was under the purview of the Lands Department (LandsD). The complainant thus lodged a complaint with LandsD against the garbage problem. LandsD indicated that the garbage problem should be followed up by FEHD and referred the case to FEHD. Subsequently, FEHD replied to the complainant that it would continue stepping up garbage removal, but reiterated that the fence-off suggestion should be followed up by LandsD.

251. The complainant criticised both FEHD and LandsD for shirking the responsibility over the garbage problem to each other.

The Ombudsman's observations

FEHD

252. According to FEHD, the relevant District Environmental Hygiene Office (DEHO) had taken the following actions in response to the complaints lodged by the complainant from January to August 2017 –

(a) deploying staff to the open space for inspections;

(b) arranging a contractor to remove the waste;

(c) erecting warning signs and displaying banners to remind members of the public not to litter;

(d) obtaining information from the Transport Department and the complainant upon receipt of the complainant's report of littering from vehicle; and

(e) arranging "plain-clothes" officers to inspect the open space and institute prosecutions against offenders.

253. FEHD had also explained the reason why DEHO could not rely on the video footage provided by the complainant to institute prosecution against the vehicle owner.

254. That said, when following up the complaint lodged by the complainant in February 2017, DEHO did fail to adhere to the established procedures for ascertaining with the vehicle owner before deciding not to institute prosecution. Although FEHD noticed the inadequacy after The Ombudsman's intervention, it could no longer reconsider instituting prosecution since the six-month actionable period had already lapsed.

255. The Ombudsman considered the complainant's complaint against FEHD partially substantiated and recommended that FEHD should –

(a) remind its frontline officers to adhere strictly to established procedures for collecting evidence from informers and offenders when following up reported cases; they should also review the actionable period to avoid missing opportunities for prosecution due to delay;

(b) implement the RCP upgrading works as soon as possible; and

(c) closely monitor the utilisation of the RCP. If the garbage problem persists, FEHD should further step up enforcement to bring offenders to justice.

LandsD

256. The Ombudsman considered that the responsibility of handling the garbage problem at the open space mainly rested with FEHD. LandsD has taken actions under their purview such as conducting site inspection and erecting warning signs to remind the public not to dispose waste on government land. Therefore, The Ombudsman considered the complainant's complaint against LandsD unsubstantiated.

Government's response

257. FEHD accepted the recommendations of The Ombudsman and has taken the following follow-up actions –

(a) FEHD has reminded its frontline officers to adhere strictly to established procedures for collecting evidence from informers and offenders when following up reported cases, and also to review the actionable period to avoid missing opportunities for prosecution due to delay.

(b) The tendering exercise of the RCP upgrading works (installation of an aluminium RCP of bigger capacity to replace the Fibreglass RCP; and provision of solar lighting system) has completed, and the works have commenced in August 2018.

(c) FEHD will continue to closely monitor the utilisation of the RCP and will deploy dedicated enforcement teams to step up enforcement when necessary. From January to June 2018, FEHD has conducted a total of three blitz inspections in the vicinity of the RCP where no illegal dumping of garbage was found.

Food and Environmental Hygiene Department

Case No. 2017/3527 – Failing to take effective enforcement action against street obstruction by a newspaper stall

Background

258. According to the complainant, there was a newspaper stall (the stall) in front of the entrance of a shopping mall (Shopping Mall A) managed by the complainant's company. The stall placed its goods on the pavement, which caused obstruction to the tenants of Shopping Mall A, its visitors and passers-by (the obstruction problem). The complainant had been lodging complaints with the Food and Environmental Hygiene Department (FEHD) about the obstruction problem since December 2016. Although FEHD instituted prosecutions against the stall, the obstruction problem persisted. The complainant requested FEHD to cancel the licence of the stall or relocate the stall to another place, but to no avail.

259. The complainant accused FEHD of failing to take effective regulatory action to solve the obstruction problem.

The Ombudsman's observations

260. The stall was given discretion by FEHD to display its goods outside the approved area during business hours. However it still further extended its business area. Although the malpractice was not so serious as to cause obstruction to passers-by, it blocked the access to Shopping Mall A for the tenants and visitors alike. The Office of The Ombudsman (the Office) opined that FEHD should take stringent enforcement action to combat the malpractice. Otherwise, it would fail to achieve what it claimed as "to strike a balance between allowing legal hawking activities on the one hand and … protecting the public from undesirable effect on the other".

261. FEHD had taken action to regulate the malpractice of the stall, but the enforcement efforts were obviously inadequate and the situation persisted. The Ombudsman thus considered the complaint partially substantiated.

262. In the course of investigation, the Office suggested that FEHD consider relocating the stall to a suitable place nearby to solve the obstruction problem faced by the tenants of Shopping Mall A and its visitors. Regarding this recommendation, FEHD replied that relocation of the stall would not be contemplated for the time being, as the general practice under the existing operational guidelines was to relocate fixed-pitch stalls only out of consideration of road works, development projects, traffic arrangements, provision of public facilities and works of the Urban Renewal Authority, etc. Based on the conditions of the stall, there was no grounds necessitating its removal. Therefore, FEHD would not consider moving the stall to another location for the time being.

263. The Office did not agree with FEHD's decision for the following reasons –

(a) FEHD had repeatedly prosecuted the licensee of the stall, but the obstruction problem persisted. However, FEHD did not consider it appropriate to pursue the problem by cancelling the licence of the stall. As a result, the licensee would regard the fines as part of the operating costs and continue to display goods outside the approved area during business hours. The tenants of Shopping Mall A and its visitors would continue to suffer inconvenience caused by the obstruction problem.

(b) Relocating the stall to a suitable place in the vicinity (if available), whereby to avoid the adverse effects on Shopping Mall A, could completely solve the obstruction problem without affecting the business of the stall. This could be a win-win solution to the problem.

(c) Nonetheless, FEHD imposed restrictions on itself by not considering this option, the reason being that the conditions of the stall did not constitute a ground necessitating its removal under the existing operational guidelines.

(d) FEHD should not allow the obstruction problem to persist without taking all reasonable steps to solve the problem.

264. Based on the above findings and analysis, The Ombudsman recommended that FEHD should –

(a) step up enforcement to combat the malpractice of the stall;

(b) consider relocating the stall to a suitable place in the vicinity (if available) to solve the obstruction problem faced by the tenants of Shopping Mall A and its visitors, and revising its operational guidelines to meet the need if necessary.

Government's response

Recommendation (a)

265. FEHD accepted the recommendation. FEHD has stepped up enforcement by instituting more prosecutions against the stall, from about five times a month when The Ombudsman first referred the case to FEHD to seven to 10 times in early June. With the continuous and stringent enforcement actions of FEHD, the malpractice of the stall has been brought under control. The pavement narrowing problem has further improved. The stall no longer displays goods on both sides blocking the entrance of Shopping Mall A for its tenants and visitors.

Recommendation (b)

266. FEHD did not accept the recommendation. The stall has shown significant improvement following ongoing and more stringent enforcement actions of FEHD. Goods are no longer displayed on both sides of the stall blocking the access of the tenants and visitors to Shopping Mall A. Moreover, the factors that necessitate relocation of fixed-pitch stalls under the established policy are not present in the case of the stall. There is also no suitable place in the vicinity for relocating the stall. Therefore, FEHD will not consider relocating the stall and revising its operational guidelines for the time being. FEHD will continue to conduct law enforcement actions against the stall to ensure free access to Shopping Mall A for its tenants and visitors.

267. The above stance has been conveyed to The Ombudsman by FEHD's letter on 5 June 2018. The Ombudsman has replied to FEHD on 4 July 2018 confirming that FEHD has implemented the recommendation. Notwithstanding, the Office requested FEHD to keep monitoring the stall. Enforcement action should be taken if the

malpractice of the stall occurs again.

Food and Environmental Hygiene Department

Case No. 2017/3572(I) – Refusing to provide the minutes and audio records of two meetings of the Liquor Licensing Board

Background

268. According to the complainant, on 17 August 2017 he requested the Food and Environmental Hygiene Department (FEHD) under the Code on Access to Information (the Code) to provide the minutes and audio records of the meetings of the Liquor Licensing Board (LLB) [Note] held on 7 June 2016 and 16 May 2017 in relation to its deliberations and approval of the liquor licence applications of a restaurant (Restaurant A) (collectively referred to as "the information concerned"). As the wife of one of the members of LLB (Mr. A) was the proprietor of the company holding Restaurant A, the complainant wished to check Mr. A's attendance at the above two meetings, whether he had declared interest and participated in the deliberation process, etc. On 1 September, FEHD replied to the complainant in writing that as the information concerned was third party information and the third party refused to disclose the information concerned, his request for information was refused by FEHD for the reason stated in paragraph 2.14(a) in Part 2 of the Code. The complainant believed that the "third party" to which FEHD referred was Restaurant A.

269. The complainant considered that FEHD's decision to refuse to disclose the information concerned was unreasonable. The reasons were as follows –

(a) Restaurant A had been prosecuted for illegal selling of liquor. After that, it applied to LLB for a liquor licence and approval was granted. Public interest was involved in vetting and approving liquor licence applications by LLB. The public had the right to know the rationale behind LLB's decision to approve a liquor licence application during either an "internal meeting" or a "public hearing", and also the vetting process. Such would

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Note The Liquor Licensing Board is a statutory body and FEHD is responsible for providing secretariat support to the Board. LLB itself is not an organisation subject to the investigation of the Office of The Ombudsman under The Ombudsman Ordinance.

ensure that sufficient measures were taken to avoid conflicts of interest during the processing of applications and that the vetting process was fair, just and open.

(b) According to the procedures for assessing liquor licence applications, LLB could either directly assess an application at an "internal meeting" or decide to deliberate a contentious one at a "public hearing". Hence, the applicant should understand that if his application was contentious or was objected by the public, LLB might conduct a public hearing in which LLB's deliberations and the particulars of the restaurant would be disclosed for public inspection.

(c) Restaurant A was held by a listed company and the business particulars of such restaurant had already been fully disclosed.

The Ombudsman's observations

270. The complainant's request for the information concerned stemmed from his doubt that Mr. A might have taken part in the deliberations on the two liquor licence applications of Restaurant A, and the potential conflict of interest which might arise. The Office of The Ombudsman (the Office) had read the minutes and listened to the audio records of the LLB meetings concerned in relation to the assessment of the liquor licence applications of Restaurant A. It was satisfied that Mr. A was not present during the deliberations. Hence, the complainant's concern about whether Mr. A had declared interest was addressed.

271. FEHD had sought LLB's view on the request for information made by the complainant in accordance with the Code, and considered from the perspective of public interest whether the information concerned could be disclosed after LLB had indicated its objection to the disclosure.

272. According to paragraph 2.2.4 of the *Code on Access to Information: Guidelines on Interpretation and Application*, the Part 2 provisions of the Code containing reference to harm or prejudice may be set aside in circumstances where there is a clear public interest in disclosure of the information sought and this public interest outweighs the harm or prejudice that may result to the Government or to any other person.

273. As for this case, the Office noted that the liquor licence applications of Restaurant A were deliberated by LLB in accordance with the relevant legislation and established procedures. The applicant and the objectors were notified in writing of LLB's decisions and the reasons for the decisions. Under such circumstances, the Office was not convinced that the public interest in the complainant's request for information substantially outweighed the harm or prejudice that such disclosure might cause. Therefore, it was not unjustifiable for FEHD to turn down the complainant's request for access to the information concerned. The Ombudsman considered this complaint unsubstantiated.

274. Notwithstanding that, in the light of rising public aspiration for accountability and transparency of government departments and public organisations, the Office was of the view that government departments and public organisations should, in support of the spirit of disclosure, allow the public to know more about their policies, services and decisions for the purpose of monitoring their operations.

275. Therefore, although the prevailing Code did not apply to LLB, LLB as a statutory public body should make public as far as possible its deliberations and decisions on liquor licence applications and the reasons for the decisions, so as to enhance its transparency and accountability. It might draw on the practice of the Town Planning Board (TPB), which was also a statutory public body. After hearing the comments of different parties on an application at an open meeting, TPB would hold discussion on the application behind closed doors. The minutes of the meeting (without revealing who said what) would be uploaded to the Board's website afterwards for public inspection. LLB might make reference to TPB's practice if it was concerned that making its minutes public would inhibit its members' free expression of views. The Ombudsman urged FEHD to pass on to LLB this recommendation for improvement, which aimed to make LLB more open and accountable.

Government's response

276. LLB is an independent statutory body responsible for assessing liquor licence applications, while FEHD is its executive arm which handles matters relating to the granting of liquor licences according to LLB's decisions. In response to the investigation report on the complaint, FEHD has conducted a study on the recommendation therein, and reported to LLB the Office's recommendation and FEHD's study.

Upon thorough discussion and careful consideration in detail of the Office's recommendation, having regard to the purposes and purviews of LLB and the type of information involved at its hearings, and the availability of public access to sufficient information on liquor licence applications and to appeal, LLB was of the view that the existing mechanism has already maintained a fine balance between confidentiality of the applications and public expectation. It would not be appropriate to disclose the notes of LLB meetings at this stage. FEHD has conveyed LLB's views and response to the Ombudsman on 26 October 2018.

Food and Environmental Hygiene Department

Case No. 2017/3833 – Failing to prosecute two provisional restaurants for their alleged illegal extension of business area

Background

277. From 26 September 2017 to 4 January 2018, a member of the public (the complainant) lodged complaints with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD), the Buildings Department (BD), the Lands Department (LandsD) and the Fire Services Department (FSD). According to the allegation of the complainant, he complained to a District Environmental Hygiene Office (DEHO) of FEHD on 11 September 2017 against two restaurants (Restaurant A and Restaurant B) operating business on the common passageway outside their premises at the "food lane" on the second floor of a shopping mall (the mall) and suspected to have breached the Food Business Regulation (FBR). Later, a DEHO officer replied to him confirming that the two restaurants were in contravention of FBR. However, both restaurants were issued with a provisional licence and the irregularity was not regulated by FBR. DEHO could only institute prosecutions against the two restaurants for the breach of FBR if they have been issued with full restaurant licences. The complainant considered DEHO's reply unreasonable.

278. The complainant was also dissatisfied with BD, LandsD and FSD for not taking enforcement actions against the owner of the mall/the two restaurants for the suspected breach of the approved usage of the mall, the land lease clauses and the blocking of fire escape routes.

The Ombudsman's observations

279. On 7 January 2018, staff of the Office visited the mall and had the following observations –

(a) The "food lane" in the mall was placed with tables and chairs (communal seats) along the common passageway for customers to use. The tables were marked with stickers indicating them as common areas of the mall. Some restaurants there required customers to make payment when placing orders and pick up the food by themselves. As the communal seats were provided on

the passageway outside the food premises and connected to their seating areas (even the design of some communal seats were same as the tables and chairs inside the food premises), customers would naturally dine on these seats after they have purchased food. The communal seating area thus turned into the extended business areas of the food premises.

(b) The common passageway of the mall was largely unobstructed. Generally speaking, the communal seats did not cause any obstruction to passers-by.

(c) Both Restaurant A and Restaurant B were in operation. Some customers of the two restaurants would use the communal seats after paying for food in the premises.

(d) During the observation, staff of Restaurant B was not seen delivering meals to customers occupying the communal seats.

(e) Staff wearing uniforms printed with the name of Restaurant A (the restaurant had already obtained a Provisional Light Refreshment Restaurant Licence on the day of inspection) delivered meals to customers occupying the communal seats and provided cleaning service for them.

(f) There were communal seats outside other food premises along the common passageway on the same floor. Some restaurant staff delivered meals to customers occupying the communal seats and provided cleaning service for them.

(g) Restaurant A and Restaurant B provided customers with non-disposable tableware commonly used for consumption on the premises.

280. FEHD had stated the reason why Restaurant A and Restaurant B could not be prosecuted under section 34C of FBR at the time of receipt of the complainant's complaint. The Ombudsman considered FEHD's explanation justified. Moreover, FEHD had prosecuted Restaurant A under other legislations for unlicensed food business operation and sought legal advice as to whether prosecution should be instituted against Restaurant B. The Ombudsman opined that FEHD had properly dealt with the complaint and replied to the complainant. The complaint was therefore considered unsubstantiated.

281. However, as observed by The Ombudsman, staff of other restaurants on the same floor with Restaurant A also delivered food to customers sitting outside their premises and provided cleaning service for them. The Ombudsman opined that FEHD could step up evidence collection. If substantive evidence on extension of business area by concerned food premises was available, FEHD should consider prosecuting the concerned food premises under section 34C of FRB (for restaurants holding full restaurant licence) or issue warnings in accordance with the requirement of relevant licensing conditions (for restaurants holding provisional restaurant licence).

282. The operation mode of the "food lane" in this case is factually resembling "food court" in many other shopping malls. As there is no specific legislation regulating food courts, food court operation does not require the issue of any licence. Therefore, the owner or management company of a shopping mall can use the common passageway outside food premises or other places of the mall to provide communal seats for customers. The restaurants can then extend their business areas without undergoing the procedures to apply for FEHD's approval. Due to the difficulty of collecting evidence, restaurants may evade prosecution or punishment if they extend their business areas in this manner.

283. The licensing requirements and the handling procedures for processing restaurant licence applications (including approving the plans, delineating the licence area, setting the seating capacity and seeking the views of relevant departments like BD and FSD) specifically serve the purpose of protecting public interest. As the major department regulating the operation of food premises, FEHD has the obligation to review whether the above situation would be prejudicial to public interest. The Ombudsman is of the view that FEHD has made a commendable move in seeking legal advice as to whether prosecution should be instituted against restaurant B. Apart from this, FEHD should comprehensively review the existing food business licensing regime and consider introducing regulatory control on food courts in shopping malls.

284. With regard to the complaints against BD, LandsD and FSD, as the setting of communal seats on the common passageway of the mall has not contravened the approved usage of the mall, the lease conditions and the relevant requirements of FSD nor affected the building structure safety or obstructed the fire escape routes, it is not unreasonable that these three departments have not taken any enforcement actions. Therefore, the Ombudsman considered the complainant's complaints

against the three departments unsubstantiated.

285. The Ombudsman recommended that FEHD should –

(a) review the regulation of food courts to plug the loopholes. It seemed that FEHD failed to regulate the following activities which were virtually illegal extension of business area by food premises in food courts –

(i) provision of a communal seating area outside food premises in a mall for all customers to use (i.e. even if seats were not designated for use by patrons of any specific food premises);

(ii) meal delivery and cleaning service performed by restaurant staff for customers in the communal seating area outside food premises.

The Ombudsman urged FEHD to look into the above issues.

(b) step up efforts in collecting evidence and seeking legal advice according to the situation of the mall, and take stringent enforcement action if illegal extension of business area by the food premises in the mall were confirmed.

Government's response

286. Regarding recommendation (a), FEHD is mindful of licensed food premises carrying on food business beyond the confines of the licensed area as delineated in the approved plan. FEHD considers that the existing licensing regime and measures are adequate for the regulation of food premises operating as food courts in shopping malls. There is no need to review the regulation system at this stage. In initiating prosecution against illegal extension of business area by food premises, FEHD officers have to prove that a licensed restaurant carries on business beyond the confines of the licensed area as delineated in the approved plan. If the staff of a licensed restaurant in a shopping mall is found providing services (such as meal delivery and cleaning of tables and chairs) for customers in the common seating area outside the food premises, which shows that the restaurant is conducting food business beyond the confines of the licensed area as delineated in the approved plan, FEHD will take enforcement action as deemed appropriate based on

the evidence gathered. Legal advice will also be sought if necessary. To combat illegal extension of business area by food premises more effectively, FEHD has expedited the process of licence suspension and cancellation under the Demerit Points System. If an appeal is made by a recalcitrant offender, FEHD will not suspend the execution of licence suspension or cancellation decision pending the decision of the Licensing Appeals Board or the Municipal Services Appeals Board.

287. Regarding recommendation (b), DEHO has stepped up efforts to collect evidence on the situation of the mall. During their visits to the mall from end of March to early June 2018, DEHO officers found a food establishment issued with a General Restaurant Licence operating beyond the confines of the licensed premises as delineated in the approved plan. The licensee of the food establishment was immediately prosecuted for the irregularity. During the visits, DEHO officers also saw the staff of three unlicensed restaurants delivering meals to customers sitting outside the food premises and cleaning tables and chairs for them. The operators of these restaurants were immediately prosecuted under section 31(1)(b) of FBR for carrying on unlicensed food business. DEHO will provide supplementary evidence (including the areas of the seating areas within and outside the unlicensed restaurants) for the court to mete out appropriate punishment to the unlicensed restaurants. In prosecuting the unlicensed restaurants, DEHO has also applied to the court for heavier penalties with the imposition of daily fines. From the end of March to early June, DEHO officers has instituted eight prosecutions against the three said food premises for their illegal activities. DEHO will continue to monitor illegal extension of business area by food establishments of the mall and take stringent enforcement action against the malpractice. The Ombudsman was informed of the above enforcement situation by FEHD on 26 June 2018.

Food and Environmental Hygiene Department

Case No. 2017/4576 – Failing to take enforcement action against illegal extension of business area by shops along a street

Background

288. The complainant claimed that she has complained to Food and Environmental Hygiene Department (FEHD) about the street obstruction problem caused by shops along the street. However, her complaint was not properly dealt with, and the street obstruction problem persisted with no improvement.

The Ombudsman's observations

289. The Ombudsman deployed staff to conduct inspection of the street between 9:30 a.m. and 10:00 a.m. on 10 January 2018. Nearly all shops were found having shop-front extensions to different extent, occupying one-third to half of the pavement. Some shops not only occupied their shop-front areas, but also displayed goods on folding tables placed on the pavement about three to four feet off their shops, leaving less room for pedestrians using the pavement.

290. The Ombudsman was of the opinion that although FEHD has taken actions against the street obstruction problem caused by shops along the street, only about 320 punitive actions were taken against those dozens of shops within a year (ie. just several actions against each shop on average) before The Ombudsman's intervention, which was insufficient to achieve deterrent effect. As a result, the street obstruction problem caused by shops along the street remained a daily occurrence and was extremely extensive.

291. The Ombudsman considered the complaint partially substantiated and urged FEHD to step up enforcement actions to ensure the genuine improvement of the street obstruction situation caused by shops along the street.

Government's response

292. FEHD accepted The Ombudsman's recommendation and has taken follow-up actions as set out below.

293. In order to combat street obstruction by goods placed by shops along the street more effectively, FEHD has adopted a series of stringent enforcement measures to stop shops placing articles at their shopfronts. Such measures include taking regular joint prosecution actions with the Police; strengthening static patrols and blitz prosecution actions; issuing fixed penalty notices (FPNs) and summons, as well as taking arrest actions against the persons-in-charge of the offending shops. From January to June 2018, FEHD mounted a total of 153 blitz enforcement actions at the street, including 26 joint operations with the Police. During the enforcement actions, FEHD instituted a total of 259 prosecutions (including nine arrest actions, 131 FPNs and 119 summonses) against the persons-in-charge of the offending shops along the street. Following a series of stringent combating actions, the situation of shops along the street placing goods at their shopfronts has shown apparent restraint. The problem of street obstruction caused by shops has improved substantially.

294. FEHD will continue to closely monitor the situation of street obstruction by goods placed by shops along the street and take stringent enforcement actions. In order to combat the illegal act of obstructing the street by shops in a more effective manner, FEHD will continue to closely work with other departments concerned and mount joint operations as appropriate.

Food and Environmental Hygiene Department and Lands Department

Case No. 2017/2443A (Food and Environmental Hygiene Department) – Failing to properly resolve a problem of dumping of large amounts of waste at a public place

Case No. 2017/2443B (Lands Department) – Failing to properly tackle the problem of waste dumping on Government land

Background

295. In the village where the complainant lived, an elderly woman (Ms A) habitually deposited piles of waste at a public place (the Site), causing a serious environmental hygiene problem (the Problem). The situation has persisted for ten years. Despite repeated complaints from the complainant and other villagers, the Food and Environmental Hygiene Department (FEHD) had not resolved the Problem properly.

296. Ms A often gathered and deposited garbage and miscellaneous stuff at the Site. Whenever FEHD took action to clear the Site, she would strongly protest and fiercely resist the clearance action, claiming that those garbage and miscellaneous stuff were her valuable possessions. Ms A would also threaten to hurt herself, or even attack FEHD staff and the police officers providing assistance at the scene. To tackle the Problem, FEHD had carried out a dozen joint operations with the local District Lands Office and District Office, the Social Welfare Department and the Police. In each joint operation, more than ten tonnes of garbage and miscellaneous stuff were removed from the Site. Thinking that Ms A was a waste picker and taking into account her old age and emotional problems, FEHD had never taken any enforcement action against her.

297. The complainant criticised FEHD and the Lands Department (LandsD) for not fully discharging their responsibilities to solve the Problem.

The Ombudsman's observations

FEHD

298. In fact, most of the objects placed at the Site by Ms A were waste neither fit for personal use nor having any resale value. The Office of The Ombudsman (the Office) do not think that Ms A was making a living as a waste picker. By gathering and dumping large amounts of waste at the public place, Ms A had indeed committed littering offences. FEHD should have enforced the laws on public cleansing and prevention of hygiene nuisances.

299. Although FEHD had carried out joint operations with other Government departments, it had merely removed the garbage, but had never instituted any prosecution for imposition of a fine on Ms A. FEHD's actions could not tackle the core of the Problem, which was unfair to the other villagers because the persistent nuisances that they suffered over the past ten years had not been addressed. The Ombudsman therefore considered the complaint against FEHD partially substantiated.

300. The Ombudsman recommended that FEHD should not only step up clearance of the garbage at the Site, but also enhance monitoring of Ms A's illegal acts and take decisive enforcement actions, including issuing fixed penalty notices to her. Hopefully, this would induce the cooperation of her family members to restrict her odd behaviour.

LandsD

301. The Office accepted LandsD's explanation. The Problem is indeed mainly concerned with environmental hygiene; taking enforcement actions by invoking the provision on unlawful occupation of land is not the most appropriate solution and may not be very effective. LandsD did try its best to follow up the Problem within its purview.

302. The Ombudsman considered the complaint lodged by the complainant against LandsD unsubstantiated. However, she recommended LandsD to continue monitoring the location; if building debris is found unlawfully dumped on government land, follow-up actions should be taken promptly, including invoking the provision on unlawful occupation of land to clear the building debris and referring the case to the Environmental Protection Department so that the latter can conduct follow-up investigations, and identify and prosecute the offender under the Waste Disposal Ordinance (Cap. 354).

Government's response

FEHD

303. FEHD accepted The Ombudsman's recommendations and has taken follow-up actions as follows –

(a) FEHD has instructed the street cleansing service contractor (the contractor) in the concerned district to step up scavenging of the public places in the vicinity of the site and clearance of garbage and miscellaneous stuff accumulated. Generally speaking, the current daily routine scavenging and clearance operations go smoothly. Moreover, FEHD will continue to conduct inter-departmental clearance operations with the relevant departments at the Site. The latest one was conducted in August 2018.

(b) FEHD staff have given Ms A verbal warning that the act of depositing garbage in public places contravenes the Public Cleansing and Prevention of Nuisances Regulation (Cap. 132 sub. leg.), and that FEHD may issue her with a fixed penalty notice of $1,500 under the Fixed Penalty (Public Cleanliness and Obstruction) Ordinance. FEHD subsequently conducted a number of inspections at the Site and found no littering in the public places. On 28 March 2018 however, Ms A was found to have placed furniture, electrical appliances and miscellaneous stuff at the Site, and was suspected to have contravened section 22(1)(a) of the Public Health and Municipal Services Ordinance for causing obstruction to FEHD's scavenging operation. A prosecution was instituted against her. FEHD will continue to keep in view the situation of the Site and take action as appropriate.

LandsD

304. LandsD accepted The Ombudsman's recommendation and has been monitoring the Site. Site inspection conducted by LandsD's staff on 9 March 2018 found neither building debris on the Site nor damage to the fence erected by LandsD to enclose the government land concerned. Household refuse, however, was found on-site and the case was thus referred to FEHD for follow-up action. LandsD will continue to monitor the Site.

Government Property Agency
and Rating and Valuation Department

Case No. 2016/2666A(I) and 2016/2666B(I) – Refusing to provide the complainant with the information requested concerning the assessment mechanism for determining the renewal licence fee of a Government leased site, and rejecting any opportunity of communication

Background

305. The complainant acted on behalf of its client in liaising with the Government Property Agency (GPA) on the proposed renewal licence fee of a government leased site. The complainant had repeatedly requested to meet with GPA and the Government rental advisor (namely, the Rating and Valuation Department (RVD)) to understand how the renewal licence fee was assessed and the relevant comparables taken into consideration in determining the renewal fee (the requested information). However, GPA rejected its requests by explaining that the proposed renewal fee was charged on the open market rent (OMR) basis without providing to the complainant/its client any information in support of the "open market" assessment.

306. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against GPA for failing to provide it with the requested information and rejecting any opportunity for communication. With the complainant's consent, the Office added RVD as one of the departments under complaint.

The Ombudsman's observations

307. GPA referred the complainant's request for the provision of comparables to RVD for consideration. GPA then relayed RVD's advice that all rental information had been collected by RVD from third parties on the understanding that it would not be disclosed.

308. RVD held the view that the information requested by the complainant was supplied by third parties under the Rating Ordinance (Cap. 116) and the Government Rent (Assessment and Collection)

Ordinance (Cap. 515). The information obtained can only be disclosed under circumstances as expressly prescribed by section 5(1A) of Cap. 116 and section 31(1A) of Cap. 515. Since the complainant was not a "specified person" defined in section 5(1B) of Cap. 116 and section 31(1B) of Cap. 515, the disclosure of the requested information to the complainant would contravene the relevant Ordinances. RVD believed that it was not able to disclose the requested information to the complainant due to the possible breach of confidence. Hence its attendance of any meeting would not assist the negotiation. It was therefore not unreasonable for RVD to decline attending a joint meeting with the complainant and GPA.

309. GPA considered that the entire discussion on the renewal licence fee was a commercial negotiation between a landlord (the Government in this case) and a prospective tenant. It should not be regarded as a member of the public seeking information from a Government department about policy issues or decisions that affect individuals and the community. Hence, GPA did not consider it appropriate to handle the request for providing comparables in the context of the Code on Access to Information (the Code). That said, GPA had clearly informed the complainant of the reasons why its request could not be entertained as per RVD's advice. In addition, GPA had explained to the complainant the valuation basis, methodology and types of comparables selected in two of its letters to the complainant.

310. GPA considered the complainant's allegation that GPA/RVD had refused to communicate with it unfounded. GPA had sent seven letters to the complainant in response to its questions between October 2015 and January 2016. Since the complainant had not provided any relevant evidence to substantiate its view that the proposed renewal licence fee was excessive and GPA had relayed RVD's advice on the valuation basis and its reason of not being able to provide comparables to the complainant, GPA considered that a meeting with the complainant at that stage would not be fruitful.

311. The Office was of the view that the information requested by the complainant was comparable rentals on which RVD based in arriving at its assessment for the proposed fee. That was clearly a request for information, albeit not made with specific reference to the Code. According to the Guidelines on Interpretation and Application related to the Code (the Guidelines), such non-Code requests should be considered on the same basis as requests made under the Code. The Guidelines

make it clear that commercially sensitive information does not render the Code inapplicable. GPA/RVD's argument that a request for information made by a party to a commercial negotiation could be refused purely on the ground of the party's status was untenable, as it would result in a ridiculous situation where the party could obtain the information through another person making the same request.

312. The Office accepted that disclosure of the detailed rental information might be refused based on paragraphs 2.16 (protection for the commercial, etc. interests of parties) and 2.18 (contravention of any law) of the Code. However, the Office did not consider it reasonable for GPA and RVD to refuse to provide any information relating to the comparables based merely on their second-guess of what the complainant actually wanted; and did not agree that merely providing a summary of the details of comparables would necessarily expose RVD to the risk of contravening Cap. 116 or Cap. 515. Notably, statistical summaries could not be regarded as information prohibited from disclosure.

313. The Office considered it unreasonable for GPA/RVD to refuse to meet with the complainant. In her view, having a meeting to clarify the demands and positions of both sides would be meaningful and productive.

314. The Ombudsman considered the complaint against both GPA and RVD substantiated. She recommended the two Government departments to –

(a) reconsider the complainant's request for information in accordance with the Code, including the option of providing a summary of the relevant records in line with paragraph 1.13 of the Code and paragraph 1.13.1 of the Guidelines;

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

(c) strengthen staff's understanding of the requirements of the Code by providing appropriate training to them.

Government's response

315. GPA and RVD accepted The Ombudsman's recommendations and had taken the following actions –

(a) GPA had written to the complainant stating that GPA and RVD were prepared to meet and discuss the information request with a view to reconsidering the request in accordance with the Code. The complainant then clarified the specific information it wished to obtain. In light of the complainant's clarification, GPA and RVD had duly reconsidered the information request in accordance with the Code and provided a summary of the relevant records to the complainant in a consolidated reply on 9 August 2017;

(b) a meeting of the complainant, its client, GPA and RVD was held on 31 January 2018 at which GPA and RVD explained the valuation basis, methodology and comparables selected for the valuation of the proposed renewal licence fee in respect of the subject site;

(c) as an established arrangement, GPA provides staff with briefing materials on the Code to facilitate their understanding of the requirements of the Code. To further enhance staff's understanding of the application and requirements of the Code and the Guidelines, GPA has refined briefing materials for circulation to staff. GPA also recirculates the briefing materials, the Code and the Guidelines periodically to remind staff of the prevailing requirements and provide updates if any; and

(d) on 25 May 2017, a representative of the Constitutional and Mainland Affairs Bureau conducted a training session in RVD to enhance staff's understanding of the requirements and application of the Code.

Government Secretariat – Education Bureau

Case No. 2017/1539 – Unreasonably refusing to transfer the copyright and intellectual property rights of the project materials created by the complainant in a project

Background

316. The complainant had obtained a grant from the Quality Education Fund (QEF) to carry out a project from 1 May 2015 to 30 April 2016 (the Project). According to an agreement (the Agreement) made between the complainant and the Permanent Secretary for Education Incorporated (PSEI), all project materials shall be and remain the exclusive property of the Grantor (i.e. PSEI) and shall vest in the Grantor at the time of their creation and that the Grantor may decide the usage of the materials at his sole discretion.

317. After completion of the Project, the complainant wrote to the QEF Secretariat (the Secretariat) on 9 September 2016, requesting QEF to lift those terms of the Agreement and transfer the copyright and intellectual property rights of the project materials to the complainant (the Request). The Secretariat rejected the Request on 27 September 2016.

318. The complainant considered it unreasonable of the Secretariat to have rejected the Request.

The Ombudsman's observations

319. The Education Bureau (EDB) explained that QEF is administered under trust with PSEI as the trustee (the Trustee) who approves grants for worthwhile projects and signs with each grantee an agreement setting out the terms and conditions of the grant.

320. A Steering Committee (the Committee) was set up under QEF to advise the Trustee on the policies and procedures governing the operation of QEF and on the assessment of applications for funding.

321. The Secretariat, which is staffed by EDB, has overall management responsibility of QEF and provides secretariat support to the Committee. It carries out functions such as processing applications, monitoring projects, disseminating good practices and experience of projects.

322. It is QEF's policy to disseminate extensively products of QEF projects for sharing and promotion among stakeholders. To that end, QEF's policy on copyright and intellectual property rights is enshrined in Clause 6 of the Agreement, which provides that:

> "the copyright and other intellectual property rights in the Project and the records, databases and materials developed shall be and shall remain the exclusive property of the Grantor and shall vest in the Grantor at the time they are created."

323. EDB has also pointed out that the aforesaid policy had been deliberated thoroughly by the Committee and endorsed by the Trustee. Unless there is a very good reason, requests for waiver of copyright or other intellectual property rights would be rejected outright by the Secretariat without any need to put up to the Committee or the Trustee for consideration.

324. Furthermore, PSEI, as the Trustee of QEF, has delegated the authority to two directorate officers of EDB to approve and sign product licence agreements under a certain amount to disseminate products of QEF projects to the public.

325. EDB has further indicated that in the complainant's letter dated 9 September 2016 to the Secretariat, the complainant only stated that he/she was writing then to request that QEF waive the copyright and intellectual property rights and agree for them to be transferred to the complainant. After the Secretariat's rejection of the Request, the complainant mentioned in its letter dated 7 October 2016 to the Secretariat that some schools (users of the product of the Project) had requested that the complainant continue to maintain the website (the product of the Project). However, that was cited merely as a reason for the complainant's delay in submitting the Project deliverables to EDB. In the circumstances, the Secretariat did not see any ground for putting up the Request to the Committee or the Trustee for consideration.

326. Given that QEF has clear policies on copyright, intellectual property rights, and dissemination and promotion of QEF products, there was no reason for the Secretariat to escalate the Request, which was not in line with the prevailing policies and had no substance, to the Committee for consideration.

327. Having considered the above, the Office is satisfied that the Secretariat does have a mandate to process requests such as that made by the complainant and that the Complainant had not come up with a good reason to justify exceptional waiver of copyright and other intellectual property rights.

328. The Ombudsman noted from the information provided by EDB that it is the policy of the Secretariat to put up requests for wavier of copyright or intellectual property rights to the Committee or the Trustee for consideration if the applicant has provided a good reason. The Ombudsman suggested that the Secretariat inform applicants of such policy when handling similar requests in future, so that the applicants can provide information in support of their applications for waiver for the Secretariat's consideration.

Government's response

329. EDB has reservation on taking forward the recommendation and provides further clarifications as set out in the following paragraphs.

330. Since the prevailing QEF policy does not provide for waiving copyright or other intellectual property rights, i.e. the "default" is for the copyright to vest in the Grantor, the Secretariat is not obliged to seek advice/a decision from the Committee or/and the Trustee on whether to reject such a request. Nevertheless, subject to the information provided by the applicant and taking into account the relevant prevailing policies and established practices deliberated by the Committee and endorsed by the Trustee, the Secretariat would consider putting up the request to the Committee or/and the Trustee for consideration as appropriate.

331. Not having provided a good reason for the Request is one of the Secretariat's considerations, but this is NOT the same as having a "policy" of the Secretariat having to put up requests for waiver of copyright or other intellectual property rights to the Committee or the Trustee for consideration if the applicant has provided a good reason.

332. For requests which are not in line with the prevailing QEF policies and procedures, the Secretariat would consider them on a case-by-case basis and put up exceptional cases to the Committee or/and the Trustee for consideration if their advice/decision is considered necessary. This is an internal administrative practice instead of the policy of the QEF on handling requests for waiver of copyright or other intellectual property rights. Moreover, given the clear policy enshrined in Clause 6 of the Agreement, informing applicants requesting for waiver of copyright or other intellectual property rights of such internal administrative practice is contradicting the aforesaid QEF policy and will mislead or confuse the applicants. Nevertheless, the Secretariat will continue to exercise due diligence in handing each and every request from applicants and/or the public.

333. The Ombudsman accepted the explanation of not implementing the recommendation.

Government Secretariat – Transport and Housing Bureau

Case No. 2017/1838 – (1) Delay in responding to the complainant's enquiry; (2) Failing to fully address the complainant's concern in its delayed reply; and (3) Contacting the complainant via telephone, contrary to her wish

Background

334. The complainant filed a complaint against the Independent Checking Unit (ICU) under the Transport and Housing Bureau for failing to handle her enquiry properly.

335. The complainant was an owner of a Home Ownership Scheme flat. She received two letters from ICU in March 2017, one of which informed her that there were unauthorised building works (UBWs) in her flat, while the other (the letter in question) indicated that ICU had received reports from her about UBWs in her flat on many occasions and had given replies to her several times to relay the investigation results.

336. The complainant made an enquiry with the Buildings Department (BD) in the latter half of March, which was referred to ICU. Nevertheless, in an email to the complainant, ICU indicated that the referral was from 1823 instead. Apart from casting doubt on the content of the letter in question, the complainant queried why her enquiry was referred to ICU by 1823. No replies had been given to her since. ICU eventually gave a detailed reply to the complainant on 15 May, explaining that her enquiry was referred by BD via 1823 and admitting that it had mistakenly taken the complainant as the informant. However, no explanation had been furnished as to whether there was an informant and whether there was an excessive disclosure of the complainant's personal data to that person. In addition, the complainant had requested ICU to give her a reply by email rather than over the phone, but ICU called her a number of times afterwards.

337. In this connection, she filed a complaint with The Ombudsman against ICU for –

(a) delay in responding to her enquiry in the latter half of March;

(b) providing an incomplete and untruthful account in the reply dated 15 May; and

(c) ignoring her wish by calling her.

The Ombudsman's observations

338. As regards allegation (a), The Ombudsman considered that the ICU staff concerned was grossly careless by mistakenly issuing the letter in question to the complainant. He did not go through the complainant's enquiry email and utterly failed to understand her concerns over the letter in question as well as the referral of her case by 1823. As a result, his replies on numerous occasions were irrelevant to her enquiries, and the email of 12 April even mentioned that he had already replied to her numerous times and that he was not going to repeat what had already been said.

339. In response to the complainant's request on 13 April, the staff concerned referred the case to his supervisor for follow-up actions but failed to give a reply to the complainant in 21 days. Subsequently, after being urged by the complainant many times, the staff concerned indicated that he would be giving her a reply by 8 May. However, he could not honour his promise in the end. Although the staff concerned had told the complainant a number of times the reasons why more time was needed to handle the case, it was inevitable that the complainant would be dissatisfied.

340. Therefore, The Ombudsman considered allegation (a) substantiated.

341. As for allegation (b), The Ombudsman believed that although the complainant, when making the enquiry between March and April, did not directly ask whether there was an informant making reports of UBWs in her flat, it was apparent that she had concern over whether there was such a person. According to ICU's reply letter dated 15 May, the case was identified by the unit itself. However, ICU did not rule out the possibility that the case was identified in the course of investigation after

it had received a report. Notwithstanding that the reply letter had addressed a large part of the complainant's concern, it failed to ease her doubt that there was an informant in this case.

342. Therefore, The Ombudsman considered allegation (b) partially substantiated.

343. As for allegation (c), The Ombudsman agreed that telephone discussions were generally an effective means of communication and that the complainant did not indicate her refusal to have a discussion over the phone. The Ombudsman believed that it was understandable that the staff concerned wished to have a grasp of the complainant's concerns over the phone prior to giving her an email reply as per her request. Yet, if he had sent an email to her beforehand on that date to explain the purpose of calling her and let her know the arrangements, she would be more comfortable about answering the call and would not be dissatisfied with the arrangements. This would also enable the staff concerned to understand the complainant's concerns sooner and give her an appropriate reply.

344. Overall speaking, The Ombudsman considered allegation (c) unsubstantiated.

345. According to the above inquiry findings, The Ombudsman considered the complaint partially substantiated.

346. The Ombudsman recommended ICU to –

(a) review the design and content of "Report/Enquiry Record Form" as soon as practicable to help its staff more easily distinguish the informant and enquirer;

(b) remind the staff concerned to learn from the lesson, handle enquiries seriously and communicate with the public with greater sensitivity.

Government's response

347. ICU accepts recommendation (a). ICU has completed the review of the design and content of the "Report/Enquiry Record Form". An updated version has been issued for use by ICU staff on 10 November 2017.

348. ICU accepts recommendation (b). During a regular team meeting on 12 September 2017, the staff concerned and other members in the same team who may have a chance to handle similar cases were reminded to learn from the lesson to avoid making the same mistake. They were also reminded to handle all cases and communicate with the public in a serious manner. In addition to participating in a workshop and a seminar for handling complaints on 27 June and 25 September 2017 respectively, the staff concerned also attended courses about enhancing communication skills and drafting reply letters in March 2018.

Highways Department

Case No. 2017/0586(I) – Failing to provide the price of fish fry and other information related to the Trial Fish Fry Release in 2014 under the Hong Kong-Zhuhai-Macao Bridge Project

Background

349. The complainant made several enquiries to the Highways Department (HyD) about conservation measures involving fish fry releasing in the Hong Kong-Zhuhai-Macao Bridge Related Hong Kong Projects, which included the dates, locations, types and prices of fish fry, information on a fish fry releasing trial scheme in 2014 (the Trial Scheme) and the preparation underway for tender invitation. However, HyD delayed its replies and provided either different answers to the same questions or incomplete information. He considered that HyD had also wrongly invoked paragraph 2.9(a) of the Code on Access to Information (the Code) when refusing to disclose the prices of fish fry without giving any justification.

The Ombudsman's observations

350. While HyD had at different times provided to the complainant some of the information requested, for the rest of the information requested, HyD expressed that, as the preparation work for fish fry releasing was still underway and the details was still pending, HyD did not have such information to provide. Besides, since the Trial Scheme was just a small-scale pilot project, disclosing the prices of fish fry and the public money involved might mean releasing inaccurate and misleading data, such that the future tender exercise would be affected and the Government's interests would be jeopardised. Therefore, HyD considered that its refusal to disclose such information was in line with paragraph 2.9(a) of the Code, i.e. "the disclosure of which would harm or prejudice negotiations, commercial or contractual activities, or the awarding of discretionary grants and ex-gratia payments by a department".

351. Although HyD had not delayed in replying to the complainant's enquiries, it provided information only bit by bit or even ignored his request for information. It had also failed to provide justification for its refusal to disclose information in accordance with the Code. Even though HyD had later invoked paragraph 2.9(a) of the Code as the reason to refuse disclosure of the prices of fish fry, it did not inform the complainant at the same time of the channels to review its decision or file complaints. Nor had it cited any related paragraph from Part 2 of the Code to account for its refusal to disclose the other information requested. This reflected that HyD staff were unfamiliar with the rules and requirements of the Code.

352. In fact, HyD had provided a Legislative Council Member and the Office of The Ombudsman (the Office) with the date of the Trial Scheme and the name and rank of the directorate officer approving the scheme. It showed that such information was not difficult to obtain. Furthermore, that HyD's preparation for tender invitation was underway did not constitute a valid reason under the Code for withholding information. HyD had not explained to the complainant how disclosure of the fish fry prices in the Trial Scheme would harm "negotiations, commercial or contractual activities… by a department". Considering that the fish fry prices in the Trial Scheme would only be one of the reference information that Government would take into account when estimating the expenses of future fish fry releasing project, the Office did not accept that disclosing such information would affect the tender price in future.

353. Overall, The Ombudsman considered the complaint substantiated and recommended HyD to step up staff training in respect of the provisions of the Code.

Government's response

354. HyD conducted an internal staff training session on the Code on 15 November 2017. The purpose was to enhance staff's understanding of the Code so that they would strictly follow the relevant guidelines and requirements.

355. On the recommendation of The Ombudsman, HyD provided the complainant with the other relevant information on the Trial Scheme.

Highways Department and Labour Department

Case No. 2016/5045A&B – Mishandling a complaint about inadequate safety measures for lifting operations in a Government infrastructure construction site

Background

356. The complainant was an electrician in a construction site (the Site) of a government infrastructure project. In late 2016, he complained about inadequate safety measures at the Site, alleging that the lifting zones there had not been fenced off and no safety officer was assigned to supervise lifting operations. Both the Highways Department (HyD) and the Labour Department (LD) found no irregularities after investigation. The complainant criticized that their investigations were perfunctory and that both departments had not tackled the safety problem at the Site seriously.

357. The preliminary inquiry conducted by the Office of The Ombudsman (the Office) revealed that LD considered that the Site might have contravened the legislation it enforced relating to lifting operations at construction sites. However, HyD found the related safety measures at the Site acceptable. In the light of their vastly different views on the safety issue regarding the same construction site, the Office decided to conduct a full investigation.

358. LD enforces labour legislation regarding employers' responsibility to provide a safe work environment in order to protect the occupational safety and health (OSH) of workers. The Department has also issued various guidelines and publications on the safe use of mobile cranes, stating clearly that lifting zones must be demarcated and fenced off, with clear notices displayed on site. Occupational Safety Officers (OSOs) conduct inspections at construction sites and would urge offenders to adopt improvement measures, or even institute prosecutions.

359. HyD must set up a liaison mechanism with LD at the commencement of every public works project and invite the latter to attend the first Site Safety and Environmental Management Committee (SSEMC) meeting. Regular SSEMC meetings would be held to keep track of the contractor's performance in terms of site safety. Besides,

HyD site staff should accompany LD's OSOs during safety inspections and take note of the Construction Site Inspection Report (Inspection Report) and improvement/ suspension notices issued by the OSOs afterwards to ensure prompt rectification of unsafe practices by the contractor involved. HyD's works contracts also specify contractors' duty to ensure safety during lifting operations.

HyD's Response

360. HyD opined that neither the current legislation nor LD's Code of Practice for Safe Use of Mobile Cranes (the Code for Mobile Cranes) stipulate that lifting zones must be fenced off during lifting operations. Furthermore, LD did not mention in the Inspection Report issued after the site inspection in December 2016 that the contractor had broken the law, but merely made a remark that "the lifting zone must be fenced off properly at the site". That was the first time LD had ever demanded any contractor of this government infrastructure project since its commencement in 2012 to fence off lifting zones.

361. As a matter of fact, it was not until September 2017 when the Code for Mobile Cranes was updated that LD added the requirement to fence off all lifting zones at construction sites as far as reasonably practicable, while stating that in case of space constraints, other effective measures could be taken to prevent unauthorised entry into the zones. The contractor involved in this case had already drawn up safety rules of lifting operations, and deployed signallers and lifting supervisors to provide assistance to guard against unauthorised entry. Such measures were deemed as effective as setting up fences and complied with current legal requirements.

LD's Response

362. LD conducted two surprise inspections at the Site immediately upon receipt of the complainant's complaint and found three mobile cranes there. While no lifting operation was going on, the contractor had not observed construction site safety requirements in the Factories and Industrial Undertakings Ordinance. LD, therefore, issued an Improvement Notice in addition to an Inspection Report, clearly demanding proper safety measures be taken promptly, especially fencing off lifting zones, posting warning notices and separating the cranes and the workers. Two subsequent inspections by LD confirmed that the contractor had complied with these demands.

363. LD explained that space constraints precluding the setting up of fences for lifting zones, as mentioned in the updated Code for Mobile Cranes, mainly applies to temporary lifting operations on roadside where fencing off a large area of road surface is not feasible. The OSOs confirmed during inspections that there was enough space to set up fences to fence off lifting zones at the Site and the contractor had subsequently done so, indicating that fencing off the zones was feasible and practicable. Furthermore, to ask signallers or lifting supervisors to keep watch on work in the lifting zones would incur the risk of human error and was, therefore, unacceptable. In fact, a copy of both the Inspection Report and the Improvement Notice had been sent to HyD, which came up with a different view about the situation because it might have failed to fully grasp LD's safety requirements for lifting zones at construction sites.

The Ombudsman's observations

364. Various publications of LD and the Inspection Report issued to the contractor stated clearly that lifting zones must be fenced off. HyD, however, considered the safety measures at the Site acceptable because LD did not spell out that the Site had broken the law. This indicated that HyD had not taken seriously the opinions of LD as an enforcement authority. Given HyD's duty to oversee all large-scale road works in Hong Kong, it should have close liaison with LD regarding safety at construction sites. The Office was perplexed by its unfamiliarity with the safety requirements for lifting operations.

365. Furthermore, both HyD's site staff and the contractor had participated in the OSOs' safety inspections and should have adequately understood the safety concerns raised by the OSOs. Actually, they had enough time and opportunities to clarify queries and enquire of LD via the existing liaison mechanism. That HyD failed to fully understand LD's Inspection Report reflected a serious lack of communication between the two departments. Despite immediate site inspections upon receipt of the complaint, LD's OSOs failed to convey their concern about the safety problems at the Site during inspections, such that HyD was confused whether the Site had broken the law.

366. Records showed that prior to this incident, LD had demanded other sites of this government project to fence off lifting zones. HyD's argument (see para.5) was hence groundless.

367. In the light of the above, The Ombudsman considered the complaint against HyD substantiated and the complaint against LD unsubstantiated, but there were other inadequacies found.

368. The Office urged HyD to proactively communicate with other enforcement departments in future to prevent misjudging again complaints about safety issues at construction sites. It should also step up training for its management and site staff on legislation about safety of lifting operations. Besides, LD and HyD should review together the SSEMC operation and the current mechanism for monitoring safety at construction sites, examine why the two departments' interpretations of the content of the Inspection Report were so different, and improve the existing communication mechanism to avoid recurrence of similar incidents.

Government's response

369. HyD and LD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

370. HyD has held 21 seminars since the end of March 2018. LD was invited to nominate officers to deliver talks at the seminars organised by HyD and explain to its managers and RSS of its project consultants the relevant legal requirements for safe lifting operations as well as the content of the Code for Mobile Cranes recently revised by LD, with a view to enhancing their knowledge and understanding of the relevant OSH legislation.

371. The Development Bureau, HyD and LD held a meeting on 6 March 2018 to review the existing communication mechanism. Several improvement measures were agreed, including –

(a) As some of the site inspections conducted by LD are of a surprise nature, HyD has requested LD to, as far as possible, notify the RSS of the consultants upon arrival on site, so that the RSS could join the inspections to have a clearer understanding of the advice and requirements of LD and to avoid any possible mis-communication;

(b) When LD's OSOs carry out safety inspections at public works construction sites, they will invite, in addition to the contractors' responsible persons, relevant RSS of the project proponents

(works departments) and/or their project consultants to accompany the inspections. For small-scale construction projects without RSS, OSOs will contact the relevant personnel on the spot by phone and request the immediate deployment of staff to the site before carrying out the inspections. During the inspections, OSOs will clearly point out to the contractors and representatives of works departments/project consultants the unsafe practices or violations of OSH legislation at the sites. At the end of the inspections, they will summarise the site safety performance and the follow-up actions to be taken by LD, and send copy of the site inspection reports, improvement notices and/or suspension notices, to the Departmental Safety and Environmental Advisor(s) for early follow-up;

(c) HyD has all along been requiring contractors to strictly follow the relevant guidelines in the Construction Site Safety Manual. Upon receipt of LD's instructions for improvements after site inspections, the contractors are required to carry out follow-up actions, review the issues at the SSEMC meetings and issue written replies to LD. To enhance supervision, HyD will require the contractors to copy all such written replies to the Departmental Safety and Environmental Advisor(s) and the senior management of the projects; and

(d) To ensure issues of LD's concern are properly handled, HyD will invite LD to offer necessary assistance in following up the instructions for improvement and respond to queries, including attending the monthly SSEMC meetings, etc. LD has committed that its OSOs will increase participation in the SSEMC meetings and respond to questions on OSH raised by the members present in the meetings (including representatives of government works departments, project consultants and contractors' RSS). OSOs will also brief them on the latest OSH legislation and the codes of practice and guidance notes published by LD.

Highways Department and Transport Department

Case No. 2017/1220A&B – Failing to solve the problem of insufficient heat insulation of bus stop shelters at a public transport interchange

Background

372. A complainant complained against the Highways Department (HyD) and the Transport Department (TD) for using inappropriate materials for the bus-stop shelter of a Bus-Bus Interchange (BBI), resulting in inconvenience to waiting passengers. The glass shelter could not effectively block sunlight leaving waiting passengers in exposure to baking heat during summertime. Neither could the design sufficiently shelter passengers against wind and rain. The complainant had sought assistance from a local District Council member but to no avail. Although HyD stated in its written reply of 11 July 2016 that solar reduction film had been installed at the BBI, the complainant considered that the issue had not been resolved.

The Ombudsman's observations

373. The Ombudsman agreed that HyD and TD had designed and constructed the BBI in accordance with the established procedures and had adopted an array of measures attempting to reduce the heat. Nevertheless, the temperature at the BBI was still stifling and beyond endurance, and the effectiveness of installing fans was limited. High temperature thereat was due to strong sunlight and the absence of buildings in the surroundings. Its proximity to the sea also made the BBI even more susceptible to wind and rain. Thus, blocking the sunlight should be the most effective way to reduce heat. While HyD had installed solar reduction film on the shelter, the temperature at the BBI would remain high when the outdoor temperature under the sunlight was over 40°C, as the film was only capable of blocking 50% of the solar radiation and it would still be miserable for the passengers.

374. The Ombudsman opined that in comparison with concrete or other opaque materials, transparent panels might be lighter and better looking but might perform less well in terms of energy efficiency and heat insulation. The Ombudsman urged HyD to take into account Hong Kong's actual environment and geographical location when designing

bus-stops or other similar facilities and consider more from the perspective of passengers so that the designs could better cater for their needs and the use of transparent designs could be reduced. The Ombudsman considered good look and light weight should not outweigh comfort and energy saving.

375. On the whole, The Ombudsman was of the view that the current BBI design and other heat lowering and rain shielding facilities were unable to achieve the objective of HyD and TD to minimise the impact of inclement weather on waiting passengers.

376. The Ombudsman considered the complaint partially substantiated and recommended HyD and TD to –

(a) implement further improvement measures (e.g. provision of heat insulating layer or other materials to block sunlight, provision of water mist system, etc.) to lower the temperature of the BBI as early as possible;

(b) consider erecting wind shield panels at locations facing the sea to reduce the impact of wind and rain on waiting passengers; and

(c) explore more suitable material for roof cover of bus shelters in the long run, taking into account factors such as Hong Kong's environment and passengers' views.

Government's response

377. HyD accepted recommendation (a) and has implemented further mitigation measures by installing metallic panels at some locations of the shelter of the Kowloon-bound BBI so as to assess their heat reduction performance. The testing results showed that the level of solar radiation recorded at high noon at locations installed with metallic panels was much lower than those without metallic panels, and this in turn lowered the human perceived temperature in the air. In view of the results, HyD installed metallic panels at suitable locations for the remaining parts of the BBI (including both Kowloon-bound and Tuen Mun-bound). The works were completed in October 2018.

378. HyD has reservation about recommendation (b). This is because the space of the upper level of Tuen Mun-bound BBI was comparatively smaller. If continuous and impenetrable wind shield

panels were installed at that location, the space available for passengers' circulation and waiting would be reduced. It would also hinder the ventilation of the BBI. As an alternative, HyD proposed to plant some tall vegetation in the planters at that location as an alternative measure to recommendation (b). As the vegetation would be planted in the existing planters, they will create a shield that can alleviate the impact of wind and rain on passengers without sacrificing the waiting and circulation space. The vegetation will also enhance the greening effect and maintain the ventilation of the BBI to a certain extent. HyD had completed the greening design, and the Contractor planted the relevant vegetation in July 2018. The relevant vegetation has been handed over to the Leisure and Cultural Services Department for necessary maintenance. HyD will review the effectiveness of the vegetation in alleviating the impact of wind and rain. Separately, the Kowloon Motor Bus Company (1933) Limited (KMB) plans to provide a customer service kiosk at the south side of the waiting area of the aforesaid location where there is no windshield and planter. The structure will help block wind and rain. The KMB is liaising with the Lands Department about the land lease conditions, and will commence the construction works as soon as the tenancy agreement is signed. The Ombudsman did not raise objection to HyD's reasons of not accepting recommendation (b) and the alternative follow-up measures.

379. HyD and TD accepted recommendation (c). HyD has established an internal Working Group on Cover Design for Walkways and Shelters of which the major duty is to gather views from relevant departments on the current cover designs, and to improve the designs by formulating necessary guidelines concerning the layout and material selection for the covers of public walkways and shelters under HyD. The Working Group has proposed that depending on the surroundings of the bus-top shelters, the Government should suitably avoid using high light-transmitting materials for bus-stop shelters when designing new bus-stops to be maintained by HyD in future, with a view to striking a better balance between energy-saving and provision of comfortable waiting environment. The working group is preparing the relevant design guidelines which are being circulated to relevant departments for comments. Moreover, TD has proposed to revise the chapter on bus shelters in the "Transport Planning and Design Manual" to advise that the selection of materials for the construction of a bus stop shelter should take into account their capability in providing protection against sunlight, heat and rain, so as to provide passengers with a more comfortable waiting environment. TD is seeking views from the relevant government departments on the proposed revisions.

Home Affairs Department

Case No. 2017/1783 – (1) Unreasonably arranging two community halls to undergo maintenance works simultaneously during a festival period; (2) Failing to notify the complainant that the hall it intended to book would undergo maintenance works; and (3) Failing to let the complainant book the hall after cancellation of its maintenance works

Background

380. A Mutual Aid Committee (MAC) of a residential block of a housing estate (the complainant) lodged a complaint with the Office of The Ombudsman (the Office) on 16 May 2017 against the Home Affairs Department (HAD).

381. According to the complainant, a number of MACs of the housing estate (including the complainant) (collectively referred to as Estate MACs) organised activities to celebrate the Buddha Bathing Festival at Community Hall A (CH A) and Community Hall B (CH B) in May in the past years. The celebration is a large-scale district event with lots of participants.

382. In early March 2017, the Estate MACs asked a Residents Service Centre of the housing estate (the Service Centre) to submit an application to the relevant District Office (DO) of HAD for using CH A for Buddha Bathing Festival activities during April to June 2017. Subsequent to the computerised balloting, the Service Centre was accorded priority number two. The Service Centre informed the staff of DO that the Estate MACs would like to book CH A for 2 and 3 May 2017 (Buddha's Birthday was on 3 May). The staff of DO replied that there would be maintenance works in CH A and CH B from 1 to 5 May 2017. Therefore, the Service Centre was unable to book CH A and CH B.

383. In early April, upon learning that DO had cancelled the said maintenance works, the Service Centre made a request to use CH A on 2 and 3 May once again. However, DO replied that other organisations had already booked the time-slots to use CH A on a first-come-first-served basis.

384. The complainant alleged that DO had –

(a) unreasonably arranged CH A and CH B to undergo maintenance works at the same time during the Buddha Bathing Festival;

(b) failed to notify the Service Centre before or when it submitted the application for using CH A that there would be maintenance works from 1 to 5 May 2017; and

(c) failed to allot to the Service Centre the time-slots of CH A of 2 and 3 May 2017 in accordance with the previous balloting result after the said maintenance works had been cancelled.

The Ombudsman's observations

Allegation (a)

385. The Ombudsman accepted the explanation provided by HAD. There were many applications from organisations for use of Community Halls/Community Centres (CHs/CCs) apart from MACs. Entertaining the requests of all organisations to reserve CHs/CCs on some specific dates would make it difficult to arrange for maintenance works which required the collaboration of relevant government departments and their contractors. Such practice is unfair and impracticable.

386. As regards the arrangement for closing the hall and conference room of CH A and the hall of CH B for maintenance on 2 and 3 May 2017 when DO accepted the first round of application for the second quarter of 2017 (i.e. from April to June), HAD explained that it was due to a change in work schedule which was beyond the control of the department. Moreover, owing to other objective and imminent circumstances, postponing either of the maintenance works was considered not viable. Closing two out of the eight CHs/CCs in the district during the same period was the only option.

387. Based on the foregoing, The Ombudsman considered Allegation (a) unsubstantiated.

Allegation (b)

388. DO had announced the maintenance schedule of CH A and CH B prior to the first stage of accepting applications for the second quarter of 2017. There was no need for DO to inform individual organisations (including the Service Centre) of the relevant information.

389. The Ombudsman thus considered Allegation (b) unsubstantiated.

Allegation (c)

390. The Ombudsman considered that the existing mechanism of accepting applications in two stages was very clear. It was reasonable that all applications received in the first stage be treated as completed upon conclusion of that stage.

391. The Ombudsman therefore considered Allegation (c) unsubstantiated.

392. Overall speaking, The Ombudsman considered the complaint unsubstantiated.

393. The Ombudsman observed that at present the "list of bookings" and "information of time-slots available for booking" posted at respective CHs/CCs were not updated to the latest bookings, and the information available on the website was not synchronised. Organisations had to call DO to obtain the latest information.

394. When there were time-slots released for applications, the staff of DO would inform the venue staff at CH/CC concerned by fax and instruct them to revise manually the "list of bookings" displayed. The staff of DO also had to answer telephone enquiries concerning the latest booking situation, leading to heavy workload on administrative duties and greater liability to mistakes.

395. The Ombudsman recommended HAD to consider making better use of information technology to improve workflow and promulgation of information, so that an updated booking position could be made available to district organisations in a more convenient, prompt and accurate manner, and work efficiency may be enhanced.

Government's response

396. HAD has completed the feasibility study (FS) for developing a computerised booking system for CH/CC facilities in September 2018, and is now studying the implementation details for launching the computerised booking system. Prior to the implementation of a computerised booking system, DOs will continue to publish the latest booking position by displaying booking charts on the notice boards at respective CHs/CCs and answer telephone enquiries.

Home Affairs Department

Case No. 2017/3669A – (1) Attaching importance solely to opinions in support of an access road works project, without seriously considering the residents' concerns about the narrowed carriageway; (2) Failing to conduct adequate consultation for the residents of all buildings in the area to learn about the project and give their views; and (3) Failing to provide the results of local consultation

Background

397. According to the complainant, he discovered that the Highways Department was conducting works on the south side of a section of a road (the Road) to narrow the carriageway and widen the footpath in August 2017 (the works). The complainant believed that narrowing the carriageway will affect traffic safety, traffic flow and rescue operations of emergency vehicles. Therefore, he wrote to the Transport Department (TD) and the Central and Western District Office (DO) to object to the works and enquire about their consultation process. Thereafter, the complainant received replies from the two departments and noted that prior to conducting the subject local consultation, the works project had been discussed at the Traffic and Transport Committee under the Central and Western District Council (DC) in April and June 2016.

398. The complainant made the following allegations against TD and DO –

TD

(a) TD only attached importance to the views of District Council members who proposed the works without considering the worries of the affected residents towards the narrowing of the carriageway.

(b) The contents of the consultation documents issued by TD were too simple. They did not provide the justifications for footpath widening or explain why the works was considered "feasible". Thus residents were not allowed to express their views in the light of the background of the works.

(c) Before deciding to commence the works, TD did not consult the Fire Services Department (FSD) on whether the narrowing of the carriageway would affect rescue operations. Also, TD did not respond to the complainant's worries about the narrowing of the carriageway in the reply to him.

DO

(d) DO only attached importance to the views of District Council members who proposed the works without considering the worries of the affected residents towards the narrowing of the carriageway.

(e) It was difficult to locate the consultation documents in DC's website. DO did not distribute the consultation documents to the Owners' Corporation of the affected buildings for posting in conspicuous areas, and hence the affected residents were not able to note the upcoming works and express their views.

(f) The staff of DO did not provide the result of the aforementioned local consultation.

The Ombudsman's observations

399. As noted from TD's explanations, it had already fulfilled its duties in formulating a suitable works project that meets traffic safety after assessing the feasibility of the proposal and consulting relevant Government departments/district personalities with illustration in writing and visual presentations. As to why TD has not consulted FSD on the works proposal, The Ombudsman accepted TD's explanation that the narrowing of the carriageway would not affect the passage of fire engines. Besides, TD, after receipt of the complainant's complaint, had also contacted FSD for advice to ease the complainant's doubts. In fact, FSD did not have objection to the works.

400. The main role of the Home Affairs Department (HAD) is to assist TD in conducting local consultation. To this end, DO had already contacted targeted consultation groups through various channels and relayed the results to TD after completing the local consultation. The Ombudsman noted that the works only involved 25 metres of the footpaths located south of the Road. As TD considered the works would not affect the traffic in the vicinity, it was not unreasonable for DO not to

include all the properties located south of the Road in the scope of consultation. Although there was room to improve the way of disseminating district information for DC and the results of local consultation, DO has provided suitable channels for the public to access related information. In any case, DO has already responded to the complainant's enquiry through written reply and provision of relevant information. DO is also actively looking into the enhancement of information dissemination mechanism in order to make information dissemination more transparent and proactive.

401. Based on the above analysis, The Ombudsman considered the complainant's complaint against TD and HAD unsubstantiated.

402. Regarding the arrangement related to the dissemination of local consultation information, The Ombudsman urged HAD to step up discussions with District Council and actively implement enhancement to District Council's website for the convenience of the public in searching and browsing information.

Government's response

403. To facilitate members of the public to search for information related to local consultations, HAD has agreed with the contractor of District Council's website to add a function of sorting documents by constituency in the website.

404. Besides, in order to improve the mechanism for disseminating information related to Area Committees, starting from 2018 DO has included local consultation reports in the "Reports on the meetings of the Area Committees of the Central and Western District" for DC meetings. Apart from visiting the Central and Western Home Affairs Enquiry Centre in person to view the documents of the Area Committees, members of the public may obtain the relevant documents more conveniently via DC's website. DC has been notified of the arrangement set out above.

Hong Kong Housing Society

Case No. 2017/1480(R) – Refusing to disclose to the complainant the amount of grant deducted from each repair item of a residential building

Background

405. The Owners' Corporation of a tenement building (the complainant) claimed that the Hong Kong Housing Society (HKHS) had approved grant to the building for carrying out repairs and maintenance under the Operation Building Bright (the Operation). Nevertheless, when the project completed, the grant was partially deducted by HKHS because the complainant failed to produce all the necessary documents to prove completion of the works. The complainant then asked HKHS for information about the amount of grant deducted from each repair item (the Information), but was refused on the grounds that the information "may lead to legal proceedings" and was "third-party information".

Response from HKHS

406. HKHS had engaged an independent consultant to assess the project plans submitted by the works consultant and contractor appointed by the complainant, and made an estimate on the project's total cost. In this case, the contractor failed to submit all the necessary documents such that the grant was partially deducted. The works consultant already made it clear that it would chase the contractor for the shortfall. The complainant might also sue the contractor. Citing Section 5(b) of its own Code on Access to Information (HKHS Code), HKHS indicated that releasing the Information might lead to legal proceedings and therefore refused the complainant's request for the Information, which would also help keep the consultancy report independent.

407. HKHS also took the view that, disclosing the Information would mean divulging the calculation logic of its independent consultant to the owners' works consultant and contractor, who could then deduce from the information the rules of grant deduction and apply the knowledge to works tenders for other buildings. In a bid to maximise profits, unscrupulous contractors might even intentionally omit some contractual requirements to save time and manpower, despite a possible deduction of grant by HKHS. To ensure the smooth and efficient execution of the

Operation, HKHS refused to disclose the Information pursuant to Section 5(e) of the HKHS Code.

408. Besides, the Information might lead to misunderstanding or even disputes, given the complainant's lack of expert knowledge. Furthermore, while HKHS was the owner of the consultancy report, the independent consultant had stated specifically that the report be used only as reference for the Operation and calculation of grant. It was, therefore, "third party information", which HKHS could refuse to disclose under Section 5(g) of the HKHS Code.

The Ombudsman's observations

409. The Office of The Ombudsman (the Office) believed the HKHS Code has the Government's Code on Access to Information (the Code) as its blueprint, and the principles of the latter could reasonably be used as the basis in examining how the HKHS Code has been applied. Section 2.6 of the Code was relevant to this case.

410. HKHS failed to elaborate further the rationale behind Section 5(b) of the HKHS Code, or how disclosure of the Information would harm or prejudice the administration of justice, or the conduct or impartial adjudication of legal proceedings (Section 2.6 of the Code). The Office could not see HKHS's refusal to provide the Information well justified by this Section of the HKHS Code.

411. The Office considered that HKHS's worry about disclosing the Information was understandable as the execution of the Operation might be affected. The Office accepted HKHS citing Section 5(e) of its Code in refusing the information request.

412. Nevertheless, it was neither correct nor proper of HKHS to invoke Section 5(g) of the HKHS Code as a reason for non-disclosure. First of all, HKHS admitted itself being the owner of the consultancy report. Besides, its assertion that disclosing the Information might lead to misunderstanding or disputes actually had nothing to do with that provision. Obviously, its staff lacked a good understanding of the HKHS Code and the spirit behind access to information.

413. Overall, The Ombudsman considered the complaint unsubstantiated, but other inadequacies were found on the part of HKHS.

414. The Ombudsman recommended that HKHS step up staff training on the HKHS Code and the concept and principles behind disclosure of information by public organisations. It should remind its staff members that when handling requests for information by the public, they should consider the requests prudently and conscientiously in accordance with those concept and principles.

Government's response

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

(a) A half-day training workshop was arranged for HKHS staff on 2 February 2018. A solicitor and the representative from the Office attended the workshop to explain the HKHS Code and its application, as well as the concept and principles behind disclosure of information by public organisations; and

(b) HKHS will continue to enhance the staff training in this respect and keep on reminding its staff that when handling requests for information by the public, they should consider the requests prudently and conscientiously in accordance with the relevant concept and principles.

Hospital Authority

Case No. 2016/4173A – Delay in handling a request for assessment under the Standardised Care Need Assessment Mechanism for Elderly Services

Background

416. In October 2016, The Ombudsman received a complaint from a patient's daughter (the complainant) against the Hospital Authority (HA) and Social Welfare Department (SWD) for delay in handling the patient's request for assessment under SWD's Standardised Care Need Assessment Mechanism for Elderly Services (SCNAMES).

417. The patient had been transferred to a hospital (hereafter referred to as the Hospital) since 19 July 2016 for rehabilitation after a surgery. In August, he was urged to leave the hospital. The family considered that the patient still needed proper care and treatment as he was still suffering from severe physical disabilities. As an alternative to continued stay in the Hospital, the family considered that the patient should stay in a government subsidised nursing home, and a formal assessment under the SCNAMES would be helpful in finding a suitable nursing home for the patient. On 19 August, the complainant submitted application documents to the Medical Social Worker (MSW) (Staff A) for a SCNAMES assessment. However, Staff A withheld the documents for days and only agreed to submit the application to SWD when urged by the complainant. Subsequently, SWD told the complainant that it could not arrange assessment for in-patients in hospital and that the assessment should be conducted at the Hospital instead. After negotiation with Staff A, an assessment was finally conducted in the Hospital on 6 October. While the complainant was waiting for the results, her father was advised to leave the hospital at the end of October. The family was frustrated by Staff A's unhelpfulness and lack of support and guidance to the patient's family. The complainant considered that there are loopholes in SCNAMES that allow HA and SWD to pass the buck to one another. The complainant requested The Ombudsman to help obtain permission for her father to stay at the Hospital until he was granted admission to government or subsidised nursing home.

The Ombudsman's observations

418. Having gone through all the information provided by the complainant and both SWD and HA, the Office of The Ombudsman considered SWD to have processed the application in accordance with its established procedures and there was no maladministration involved.

419. As for HA, both the complainant and HA confirmed that the patient's family first raised the request for assessment on 17 August 2016. On 19 August, the family provided the duly signed consent form, which was received by Staff A on 22 August. On 23 August, the complainant accused Staff A of delayed handling. In view of the family's strong urge, Staff A submitted the application to the Standardised Care Need Assessment Management Office (Elderly Services) (SCNAMO) on the same day. The Ombudsman was of the view that there was clearly no delay in Staff A's handling of the application.

420. However, The Ombudsman found HA and its staff had misunderstanding of the procedures for arranging elderly services for patients discharged or to be discharged from hospitals. According to the established procedure and division of work between HA and SWD, patients that are discharged should be assessed by Accredited Assessors (AAs) from SWD according to the geographical location of the patient's residence. For hospitalised patients who are stable and suitable for assessment, the assessment should be conducted by AAs from the hospital. In the present case, when Staff A was requested to submit the application on 23 August, the patient already had an imminent discharge date on 3 September 2016. As the Minimum Data Set – Home Care (MDS) assessment process requires communication with the primary care taker and observation of the elderly person in the home environment, The Ombudsman considered it reasonable for Staff A to submit the application to SCNAMO on the assumption that AA from SWD would conduct the assessment after the patient was discharged on 3 September 2016.

421. Yet, when the patient's family rejected discharge of the patient, Staff A should have informed SCNAMO of the change in circumstances. This would avoid the undesirable situation where the complainant had to learn from another SWD's AA that the assessment should actually be conducted by the Hospital and that the application might have to be voided, thus harbouring an impression of buck-passing between HA and SWD. The Ombudsman agreed with HA that Staff A should have duly explained to the complainant about the division of work between SWD and the Hospital from the outset, and why she considered that the

assessment should be conducted by SWD when Staff A submitted the application on 23 August. Nevertheless, The Ombudsman noted that since the Long Term Care Date was fixed to be 23 August 2016, whether the assessment was done by SWD or the Hospital would not actually have any material impact on the patient's position on the Central Waiting List.

422. Moreover, during The Ombudsman's preliminary enquiry, the Hospital replied that under normal circumstances, the assessment would not be conducted while the applicant was still hospitalized, and applications for assessment under SCNAMES would be submitted only after the applicant was to be discharged. This is factually incorrect because there is a clear established mechanism for assessing hospitalised patients. It showed that even the Hospital was not familiar with the established mechanism.

423. The Ombudsman was also concerned about the prolonged procrastination in a patient's discharge plan as reflected in the present case. The hospital is a place for medical treatment, not an elderly care institution. The patient was assessed to be clinically fit for discharge in August 2016 but was still hospitalised with no date for discharge, more than a year since the assessment. Prolonged occupancy by patients who no longer required inpatient treatment would erode the resources in public healthcare services and deprive other patients with genuine needs of hospital service. In the present case, the complainant's family has repeatedly refused to attend case conferences to discuss the discharge plan. They even engaged a solicitor firm to lodge a complaint and request that the patient be allowed to stay in the Hospital until admission to a government subsidised or non-profit-making organisation subsidised elderly home. There seems little the Hospital can do to incentivise the complainant's family to agree to the discharge of the patient. The Ombudsman considered the current system to have a loophole in this aspect. How to plug this loophole is beyond the scope of this investigation but The Ombudsman urged HA to look into the matter and consider measures to improve the situation.

424. In view of the above, The Ombudsman considers the complaint against SWD unsubstantiated, and that against HA partially substantiated.

425. The Ombudsman recommended that HA should introduce specific measures to ensure that their staff are familiarised with the "Manual of Procedures on Registration and Allocation of Long Term Care Services" (the Manual) and the workflow in referring applications for assessment under SCNAMES.

Government's response

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

(a) The Hospital has conducted a review on the case and its MSWs have revisited the relevant operational manual and the workflow in referring applications for assessment under SCNAMES;

(b) HA, at corporate level, has conducted a case sharing session with representatives from the Medical Social Services Units of the hospital clusters at which they were reminded to strictly follow the workflow and referring procedures in accordance with the Manual; and

(c) HA has incorporated briefing on the relevant operational manual into its annual induction course for MSWs.

Hospital Authority

Case No. 2017/1444 – Failing to properly handle the complainant's complaint against a male volunteer who had allegedly sexually assaulted her daughter while they were performing volunteer duties at a hospital

Background

427. The complainant worked at a department (Department X) in a hospital (Hospital) under the Hospital Authority (HA). Allegedly, her daughter (the victim) was indecently assaulted by a male volunteer on 4 July 2016 while she was on volunteer duty at Department X. Two days later, the complainant lodged a complaint with the department's manager (Mr A), but was arranged to meet with the male volunteer and his mother (the Meeting). The complainant then took the matter to the Volunteer Service Department (VS Department) of Hospital and reported to the Police on 14 July. She was informed by the Police on 21 July that Hospital had also reported the incident.

428. The complainant was dissatisfied that –

(a) Hospital had failed to follow HA's Guidelines on Volunteer Services (VS Guidelines) to assign an officer to supervise volunteers, and arranged for her daughter to work with the male volunteer alone inside an enclosed room without supervision;

(b) Hospital had failed to comply with HA's internal guidelines to make urgent report to hospital management when incidents (including indecent assault cases) happened, and its own policy and procedures, which required reporting of serious incidents to hospital management and HA via the Advanced Incident Reporting System (AIRS) within 24 hours of occurrence;

(c) she felt pressured by Mr A, who, in an attempt to prevent her from reporting the incident, had asked her not to disclose it or details of the Meeting to outsiders and to give advance notice before taking any action; and

(d) Hospital only reported the incident to the Police two weeks after learning of it. The complainant believed that since the mother of the male volunteer was a senior staff member of the Hospital, some staff members had intentionally procrastinated in order to cover up the incident.

HA's Response

Allegation (a)

429. The supervisor of the volunteers in Hospital had neither received any complaint from the victim, nor found anything unusual with her. On learning about the incident on 7 July, the VS Department quickly took follow-up actions.

430. HA asserted that instructing or supervising volunteer service did not mean monitoring every single move of volunteers on site. Regarding this case, Department X had assigned an officer to instruct and supervise the work progress of the volunteers involved and reminded them not to close the door while working. Closing the door was entirely the male volunteer's personal behaviour and out of HA's prediction, and HA therefore would not comment on this incident.

Allegation (b)

431. Depending on the nature of an incident, HA staff could use faster and more effective reporting channels (such as by telephone or face-to-face meeting) other than the AIRS to contact HA headquarters (Headquarters) direct. A chief administration manager of the cluster which Hospital belongs (Mr C) received a report on the incident on 11 July and verbally reported it to the hospital management the next day. Hospital management met Headquarters staff on 20 July to discuss the way forward.

432. As the victim had not been available and the account of the incident given by the male volunteer differed from the complainant's, Hospital was unable to judge the nature of the incident. Consequently, it decided to seek the Headquarters' advice first instead of making a report via the AIRS. The staff had reported the incident in an appropriate and timely manner.

Allegation (c)

433. Mr A suggested that the complainant ask the victim for details of the incident first. He asked her to keep the incident secret and notify the hospital before taking any further action lest the incident be distorted. Hospital deemed it reasonable for Mr A, as head of Department X, to take action to learn more about the incident. There was no evidence of him trying to cover up for the male volunteer and put pressure on the complainant, or attempting to prevent her from reporting the incident.

Allegation (d)

434. The management of Hospital had repeatedly advised the complainant to report to the Police but she invariably refused. Hospital stressed that it could not contact the victim to ascertain the nature of the incident. As such, they consulted the Headquarters and eventually decided to report to the Police on 21 July.

The Ombudsman's observations

Allegation (a)

435. The VS Guidelines stated clearly that "volunteer service must be carried out under supervision". Hospital arranged for the victim, a minor, to work with an adult male (the male volunteer) unsupervised, in a room that could be locked but was not fitted with CCTV. These showed that Hospital's awareness of and sensitivity in protecting volunteers, especially under-aged volunteers, were inadequate. The incident should not be viewed as the male volunteer's personal behaviour or an isolated incident, or completely unforeseeable.

436. Therefore, The Ombudsman considered Allegation (a) substantiated.

Allegation (b)

437. The AIRS is set up by HA to ensure that incidents are reported in a timely manner by its hospitals. Such information is very important to subsequent investigation. Other reporting channels are but supplementary. Actually, Hospital has also formulated clear guidelines on incidents reporting. There was no reason for non-compliance.

438. The Office of The Ombudsman (the Office) considered indecent assault a very serious accusation. Guidelines issued by both HA and Hospital stipulate that criminal offences or serious incidents (such as sexual assault) should be reported as soon as possible within 24 hours. Hospital repeatedly advised the complainant to report to the Police, reflecting that they were aware of the nature and seriousness of the incident, and therefore, should have promptly reported it via the AIRS. The hospital management reported to the Headquarters only eight days after learning of it, far exceeding the 24-hour timeframe. Furthermore, there was no written record of Mr C's verbal report, rendering verification of the content impossible. The importance of entering details of incidents into the AIRS could not be more obvious.

439. In sum, the Office did not accept that Hospital had properly reported the incident or had reported it in a timely manner. The Ombudsman considered Allegation (b) substantiated.

Allegation (c)

440. Mr A, as head of Department X and the complainant's supervisor, should be extra careful in handling the incident due to a conflict of roles.

441. Hospital claimed that the complainant had agreed to the Meeting arranged by Mr A. Mr A also explained that he had asked the complainant to keep silent and notify him before taking any action lest the incident be distorted. The complainant, however, asserted that Mr A, as her supervisor, had pressured her into accepting the arrangement, which was tantamount to an attempt to silence her and prevent her from reporting the incident. We appreciated that Mr A had a duty to handle the incident and find out the truth. Nevertheless, it was improper of him to arrange the Meeting and ask the complainant to keep silent about the incident.

442. Given that the mother of the male volunteer was a senior staff member of Hospital, the lack of response from Mr A and others to the complainant's request and the delay in reporting the incident to the hospital management and HA would naturally lead the complainant to think that they intended to cover up the incident to protect the male volunteer. Though the Office found no evidence of such intention, their lack of consideration for the complainant's feelings and worries showed a degree of insensitivity.

443. The Ombudsman considered Allegation (c) partially substantiated.

Allegation (d)

444. After examining the relevant records, the Office believed that Hospital had indeed advised the complainant to report the incident to the Police. However, the complainant wished to protect the victim and refused to do so. The Office considered it proper of Hospital to have respected the complainant's wish on the matter. No delay was intended. As a matter of fact, the complainant, as the mother of the victim, could have reported to the Police herself instead of asking the Hospital to do it for her.

445. Allegation (d) was, therefore, unsubstantiated.

446. Overall, The Ombudsman considered the complaint partially substantiated and recommended that HA should –

(a) review the current VS Guidelines and consider drawing up more detailed guidelines regarding the supervision of volunteers, especially under-aged volunteers;

(b) review the reporting procedures for sudden/serious incidents and step up training to ensure that staff follow guidelines and report incidents to hospital management and HA via the AIRS in a timely manner;

(c) remind staff to keep proper records of all complaints and discussions (including verbal reports);

(d) avoid conflict of roles of staff handling incidents by designating an independent department in the hospital or a staff member of a higher rank to take over and follow up where necessary; and

(e) provide adequate training to heighten the sensitivity of staff in handling serious incidents and strengthen communication with parties involved/reporters of incidents.

Government's response

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

(a) HA, together with its hospital clusters，have conducted a review on the arrangements of voluntary services in particular for under-aged volunteers. The relevant guidelines are expected to be promulgated in the fourth quarter of 2018.

(b) Apart from sentinel events and serious untoward events that must be reported through the AIRS, HA has been encouraging staff to voluntarily report special or serious incidents through AIRS/other reporting mechanism as soon as possible. For cases of criminal nature, the staff should inform the management to decide whether the police or relevant law enforcement agencies should be notified for follow up.

Meanwhile, HA will continue to enhance staff's learning and sharing on the appropriate reporting and handling of various types of incidents. Taking the first half of 2018 as an example, seven staff forums on incidents sharing had been conducted in HA Head Office and hospital clusters. The HA will continue to organise relevant learning and sharing activities.

Regarding the handling of complaints relating to sexual harassment in the workplace, there are specific provisions in the HA's Human Resources Circular No.5/2014 "Prevention of Sexual Harassment" on staff's coping methods, including lodging formal complaints to unit/department head, Hospital Chief Executive (HCE) (if personnel involved is a hospital staff) or Chief Executive (CE) (if personnel involved is a HA Head Office staff) as appropriate. Staff are advised to report to the police for serious cases of criminal nature.

(c) The hospital concerned has reminded supervisors and department heads of The Ombudsman's recommendation to keep proper records of all complaints and discussions (including verbal reports). HA's Human Resources Circular No.5/2014 "Prevention of Sexual Harassment" also has provisions on keeping written records of the incidents and details. The Circular is circulated to all staff on an annual basis to remind compliance.

(d) According to HA's established staff complaint and appeal procedure, a staff member who has cause to complain and who wishes to complain about the treatment he or she has received from other staff or the management should lodge the complaint to the immediate supervisor; the Head of Department; HCE; or the Head of Human Resources (HHR) as appropriate. The recipient of the complaint will then initiate an investigation into the complaint in such a manner as may be justified by the circumstances of each case. If the complaint targets at a department head, the complaint will be decided/handled by his/her supervisor or an independent department. Persons involved in the investigation shall declare any conflict in roles or interests in writing.

If the complaint is still not resolved after the above procedures, the staff member may, in accordance with HA's appeal procedures, appeal to the HCE or HHR. Where the HCE or HHR considers appropriate, a designated officer or a committee may be appointed to handle the appeal.

The Human Resources Circular No.8/2010 on "Staff Complaint and Appeal Procedures" is circulated on an annual basis to enhance staff understanding of the procedures. Staff enquiries can be directed to the Human Resources Department.

(e) Pursuant to item (b) above, in order to raise staff sensitivity in handling incidents of sexual harassment and enhance communication with the personnel involved/reporting the incidents, Human Resources Departments of HA Head Office, clusters and hospitals conducted regular training and refresher courses (at least once a year for the past three years) on the prevention and handling of sexual harassment with the assistance from the Equal Opportunities Commission.

As mentioned in item (c) above, HA's Human Resources Circular No.5/2014 on "Prevention of Sexual Harassment" is circulated annually to enhance the staff's sensitivity concerned.

Housing Department

Case No. 2016/3952 – (1) Failing to honour its verbal promise not to approve the share use of a District Council Member's ward office in a public housing estate; and (2) Inappropriately approving a Legislative Council Member to share the ward office as a joint tenant, thereby allowing an "inheritance" of the office

Background

448. The complainant, an incumbent District Council member, alleged that the Housing Department (HD) had broken its verbal promise by granting approval to a Legislative Council (LegCo) Member to add another LegCo Member to the tenancy of his ward office. That amounted to *de facto* "inheritance" of right to tenancy, which was unfair to him.

449. Applications for leasing ward offices in public housing estates are categorised into four groups according to an order of priority with the elected District Council member having the housing estate within his/her constituency being given the first priority. Where there are more than one applicant from the same group, HD will allocate the premises by ballot.

450. The Hong Kong Housing Authority (HKHA) allows Council members to share tenancy of a ward office for better utilisation of resources. If one of the joint tenants resigns from office or decides to terminate the tenancy, the remaining tenant may continue leasing the ward office until his/her tenure expires if he/she so wishes, provided that the area of the premises does not exceed the prescribed limit. In case the area exceeds the limit, HD may grant approval to the Council member to lease the entire office, or he/she may share the tenancy with another Council member.

451. HD staff had explained to the complainant that the only ward office within the constituency was already leased out to a LegCo Member. If this LegCo Member failed to be re-elected in the upcoming LegCo election, he would have to surrender the ward office. Then, the complainant would be given the first priority to lease the premises because he was the only elected District Council member in that

constituency.

452. Several months before the election, HD approved the aforesaid LegCo Member's application for sharing the ward office with another LegCo Member in accordance with the current policy. While the former failed in his attempt to be re-elected, the latter succeeded and stayed in the ward office with the approval of HD, which subsequently also approved his application for adding yet another LegCo Member to the tenancy.

453. HD noted that the staff concerned had denied making the aforementioned verbal promise to the complainant and they would not have made any promise incompatible with the relevant HKHA policy which they were conversant with. As regards the complainant's allegation that HD's current practice would cause unfair treatment, a review was in progress and HD would consult stakeholders on this issue shortly. Before any new guidelines would be implemented, however, HD had to follow the prevailing guidelines in processing applications.

The Ombudsman's observations

454. In mid-2015, the Office of The Ombudsman (the Office) commented on HD's current practice in handling applications for leasing ward offices and made recommendations for improvement. The Office had pointed out at that time that if a tenant was allowed to add any other joint tenants and then withdraw himself from the tenancy, it might result in *de facto* "inheritance of tenancy", thus creating an impression of underhand transfer of benefits. Therefore, the Office had recommended that HD review the relevant guidelines and code of practice, and place restrictions on such behaviour.

455. As to whether HD staff had allegedly made a verbal promise, the Office could not verify what actually happened in the absence of independent corroboration. This allegation was, therefore, inconclusive.

456. The Office considered it not unreasonable that HD continued to follow the prevailing guidelines on handling of applications for leasing ward offices before the completion of its review and implementation of new guidelines. Hence, this allegation was unsubstantiated. However, subsequent to the Office's recommendations made in 2015, HD had already spent nearly a year on internal discussions and preliminary

proposals. The progress had been very slow and HD had dawdled over the review for nearly two years. Meanwhile, HD formulated no suitable measures during the transition period to end the persistent problem of "inheritance of tenancy". As such, the Office considered that there were other inadequacies on the part of HD.

457. The Ombudsman urged HD to –

(a) expedite the review of guidelines on handling of joint tenancy of ward offices; and

(b) quickly formulate appropriate transitional measures so that the problem of "inheritance of tenancy" created by the loopholes in the prevailing guidelines would not persist.

Government's response

458. HD accepted recommendation (a). Upon consolidation of the views of relevant stakeholders, HD had submitted the proposals to revise the arrangements for letting ward offices under joint-tenancies to Housing Authority's Commercial Properties Committee (CPC) for discussion. CPC endorsed the proposals in August 2018.

459. HD did not accept recommendation (b). In its replies to the draft investigation report and the formal investigation report of the Office, HD has conveyed its stance that in order to ensure the consistency of the relevant policies and the spirit of the contract, it was more appropriate to maintain the existing policy to deal with the leasing applications and arrangements of the ward offices before the implementation of the revised arrangements mentioned above. To facilitate smooth implementation, CPC has endorsed the adoption of a gradual process to implement the proposals. The revised arrangements will be implemented with effect from 1 April 2019, i.e. the new arrangements will apply to applications received on or after 1 April 2019 for new lettings, addition or deletion of joint-tenants or other changes under existing tenancies. Applications received before 1 April 2019 will be processed in accordance with the existing letting arrangements. HD has informed all District Councillors and Legislative Councillors through respective Secretariats and all ward office tenants of the related arrangements. HD has also written to inform The Ombudsman in October 2018 of the above development and arrangements.

Housing Department

Case No. 2016/5017 – Failing to tackle the complainant's noise nuisance complaints against a neighbour

Background

460. The complainant, residing in a public housing estate, alleged to have been disturbed by noise nuisance from the unit below for years. Despite his repeated complaints to the Housing Department (HD) with other households, the problem was not properly addressed. For instance, in the afternoon of 13 August 2016, security guard of the estate management office identified that there was noise coming from the subject unit but the problem was eventually left unresolved. The complainant provided the estate management office with an audio recording as evidence but it was ignored. As a result, HD had not taken any actions under the Marking Scheme for Estate Management Enforcement in Public Housing Estates (Marking Scheme) and the noise nuisance persisted.

The Ombudsman's observations

461. The subject unit was frequently under complaint for noise nuisance. Record of inspections revealed that noise found emanating from the unit occasionally and some residents had even reported to the Police. As such, it was beyond doubt that noise was generated from the unit from time to time.

462. Hong Kong is a densely populated place where a tranquil living environment can only be achieved by good neighbourhood relationship and self-discipline among residents. However, any actions to be taken under the Marking Scheme must be fully justified and taken in accordance with the established procedures.

463. For noise nuisance, HD can only admonish the tenant concerned if the latter has not contravened relevant legislation and HD cannot confirm that the requirements in the tenancy agreement have been violated. In this case, HD has taken appropriate follow-up actions in response to the complaint, including conducting immediate inspections, intensified patrols, surprise checks, issuing advisory letters, posting notices as well as meeting with the household concerned.

464. The Office of The Ombudsman considered that HD's lack of action under the Marking Scheme against the subject unit due to insufficient evidence was not unreasonable. Hence, The Ombudsman considered the complaint unsubstantiated.

465. According to the existing requirements, to trigger off the Marking Scheme for tenancy control, it should be confirmed by "two staff plus two households" at the scene that the noise emanated from the subject unit between 11:00 p.m. and 7:00 a.m. is at a level beyond a reasonable man's forbearance before the noise can be defined as nuisance. Hence, an audio recording or a witness statement could only be taken as reference. In this connection, The Ombudsman recommended that HD should remind its staff to give clear explanation to complainants on the operational requirements for handling complaints about noise nuisance, so as to avoid any misunderstanding by complainants. In the present case, the complainant of this case misunderstood that an audio recording could be used as evidence and hence spent much effort in finding witnesses.

Government's response

466. HD accepted The Ombudsman's recommendation. It has disseminated the information of the case, handling details and The Ombudsman's Investigation Report via its Intranet for staff's reference. HD has also reminded all the frontline staff again to adhere to the guidelines for handling complaints of noise nuisance, and where necessary, give clear explanation to complainants on the requirements for enforcing the Marking Scheme, i.e. noise emanated should be confirmed by two estate management staff plus two households (including the complainant) at the scene that it is beyond a reasonable man's forbearance, and audio recording or witness statement could only be taken as reference instead of evidence.

Housing Department

Case No. 2017/0047 – Failing to properly handle a seepage complaint

Background

467. The complainant complained against the Housing Department (HD) for failing to properly follow up on the repairs of the ceiling and wall in his flat.

468. The subject estate was an estate under the Tenants Purchase Scheme (TPS) of the Hong Kong Housing Authority (HA). An Owners' Corporation (OC) had been formed for the estate. The OC engaged a property management agent (PMA) for estate management, while HA engaged a property services agent (PSA) for the maintenance and tenancy issues of public rental housing (PRH) units.

469. The complainant and his wife lived in a flat purchased under TPS. The flat above was a PRH unit and the flat two storeys above was a TPS flat.

470. In March 2015, the complainant lodged a complaint with HD about paint peeling and water seepage on the ceiling and wall in his flat caused by seepage from the upper floor. HD's contractor carried out repair works in the flat above and paid a home visit to the complainant's flat, but all along it had not given any concrete reply as to whether respective repair works would be carried out for the complainant's flat. HD arranged a loss adjuster to conduct investigation in the complainant's flat in September 2016 only after a member of the District Council (DC) stepped in. The complainant was dissatisfied with HD's delay in following up the case, and pointed out that the problem involved improper handover of case documents from the old PSA engaged by HD to the new one.

The Ombudsman's observations

471. Given that the source of seepage, the areas affected and the responsibility for repairs involve professional judgement rather than general administration, The Ombudsman did not intend to comment on these questions. From the administrative perspective, The Ombudsman considered that there was no impropriety on the part of HD, which had promised to re-apply plaster to and touch up paint on the toilet ceiling of the complainant's flat based on the professional judgement of works staff, and clarified that it had no obligation to repair other areas such as the kitchen ceiling, living room ceiling and the wall.

472. Relevant records also showed that HD had been following up the case. For instance, it conducted inspections on receipt of each complaint or made appropriate referrals based on its judgement. After confirming that paint peeling on the toilet ceiling in the complainant's flat was caused by seepage from the upper floor, it also discussed with the complainant the respective repairs and issued a letter informing him of the relevant arrangements.

473. After inspecting the complainant's flat in March 2016, the current PSA engaged by HA (HA's PSA) referred the case to the current PMA engaged by OC (OC's PMA). At that time, the current HA's PSA mentioned about the findings of the inspection carried out in August 2015 by the former HA's PSA, and provided the loss adjuster with information on the repair works carried out on the upper floor in March 2015 by the former HA's PSA. Therefore, The Ombudsman considered that there was no evidence suggesting that there were problems in the handover of case documents which affected handling of the complainant's case by the current HA's PSA. Nevertheless, the current HA's PSA failed to further discuss or confirm with the complainant the repairs when following up the case. As a result, the complainant felt that his request for repairs was not followed up, and finally sought assistance from a DC member and lodged a complaint with The Ombudsman. This was unsatisfactory.

474. In addition, according to HD's guidelines, a report has to be made to the insurance company whenever potential claims may be involved. Therefore, considering that the case might involve potential claims, HD made a report on receipt of the DC member's letter and referred the case to a loss adjuster for follow-up to facilitate handling of claims. The Ombudsman considered that there was no impropriety on the part of HD in this respect.

475. Looking at how HD handled the seepage problem of the complainant's flat, The Ombudsman was of the view that the outsourced PSA of HA had followed up the case according to established procedures, including replying that repair works with regard to the seepage from the upper floor would be carried out for the complainant's flat. However, the complainant disagreed with the scope of repair works to be taken by HD and the seepage problem in his flat persisted. Against this background, when the complainant had failed to reply to PSA on when he would remove the miscellaneous articles in his flat for inspection and identification of which parties to bear the responsibility, PSA should have followed up the matter as soon as possible or considered appointing a loss adjuster to conduct investigation so as to clarify the issue of responsibility. Besides, The Ombudsman found that the PSA had deficiencies in record keeping, including failure to retain a copy of certain letters for necessary reference. In conclusion, The Ombudsman considered the complaint unsubstantiated, but other inadequacies were found.

476. The Ombudsman recommended HD to –

(a) remind outsourced PSAs, when handling similar incidents or other complaints in future, to follow up the matter as soon as possible to clarify the issue of responsibility if the complainant disagrees on the responsibility for repairs;

(b) remind outsourced PSAs, when handling complaints in future, to keep and properly maintain a more comprehensive and clearer record of the follow-up process for future reference.

Government's response

477. HD accepted The Ombudsman's recommendations. It has issued an email on 8 March 2018 reminding all PSAs responsible for estate management, when handling similar incidents or other complaints in future, to follow up the matter as soon as possible in order to clarify the issue of responsibility if the complainant disagrees on the responsibility for repairs, and to keep and properly maintain comprehensive and clear records of the follow-up process for future reference.

Housing Department

Case No. 2017/1564 – Failing to properly handle the problem of illegal parking in a public housing estate

Background

478. The complainant filed a complaint with The Ombudsman against the Housing Department (HD). The complainant has been complaining to HD via 1823 since June 2016 against an Estate Management Office for failing to effectively resolve the obstruction problem caused by illegal parking in a public housing estate (the Estate). Notwithstanding this, the situation did not improve, nor did the complainant receive any direct reply from HD.

479. The Estate, connected by two major roads with three open accesses, is special in terms of road layout. With the two roads being the main access to the neighbouring estates and areas, many vehicles will go through these two roads, thus causing heavy traffic in the Estate.

480. The car park in the Estate, with more than 70 monthly parking spaces for goods vehicles and private cars at roadside and lay-bys, is wholly owned and operated by a private corporation. Since 1 January 2005, a property services agent (PSA) has been appointed by the Hong Kong Housing Authority (HA) for daily management and repair works of the Estate, including the management, patrol and regulation of estate roads, and the duties to answer and follow up on resident's enquiries, etc. HA is responsible for monitoring its performance.

The Ombudsman's observations

481. Since HD more than doubled the quantity of wheel clamps in February 2017, the number of impounded vehicles had increased significantly. Following The Ombudsman's intervention, HD had further enhanced its regulation, for instance, by deploying four more security guards who were dedicated to road control actions and purchasing five more wheel clamps. Based on the findings from inspections, The Ombudsman agreed that the situation of illegal parking in the Estate had improved, in particular on account of the security guards' diligent execution of road regulation duties.

482. As to the mode of regulation, since drivers were present on most of the illegal parking occasions according to The Ombudsman's observations, giving a warning and urging them to leave would be the most viable solution. For those cases where the drivers could not be spotted, The Ombudsman basically agreed that the regulatory approach of "giving a warning first before impounding vehicles" should continue. However, The Ombudsman considered that for where there was serious road obstruction or parking on emergency vehicular access for example, HD might consider impounding the vehicle immediately and posting notices such as "Illegal parking will be impounded without warning" at the prominent place concerned.

483. Besides, the illegal parking problem in the Estate is to a large extent a result of the open design of the two major roads, which are mainly managed by HD instead of the Police. HD's "warning first and impounding follows" approach would allow a time gap of about half an hour to one hour in-between. The Ombudsman considered that to combat illegal parking, individuals with no genuine need to enter the Estate should be targeted. The Ombudsman urged HD to review the "warning first and impounding follows" strategy and consider shortening the time between giving a warning and impounding the vehicle to enhance deterrent effect.

484. Anticipating possible traffic congestion after installation of drop gates at the three major road junctions, HD did not conduct feasibility study for the proposal. The Ombudsman considered that it was exactly the purpose of a feasibility study in this context to find out whether the installation of drop gates would cause traffic congestion. HD should not jump to conclusions ahead of a study. A proposal would involve studies, consultation and approval seeking. As HD had not proceeded with the feasibility study, the proposal could not be implemented. The Ombudsman noted that it was the current design of the Estate that attracted non-residents and visitors to park their vehicles inside. In light of this, HD should conduct the feasibility study as soon as possible without further delay.

485. On giving the complainant replies, PSA's contractual obligations include the duty to answer and follow up on resident's enquiries. After going through the records, The Ombudsman found that the PSA had replied and taken follow-up action on each of the complainant's complaint. As the PSA acted and replied on behalf of HD, it was not inappropriate for HD not to give the complainant a direct reply.

486. Based on the above analysis, The Ombudsman considered the complaint against HD unsubstantiated but there was room for improvement.

487. The Ombudsman recommended HD to –

(a) consider adopting the strategy of immediate impounding of vehicles in serious cases;

(b) review the "warning first and impounding follows" approach and consider shortening the time between giving a warning and impounding the vehicle; and

(c) conduct a feasibility study on the installation of drop gates as soon as possible.

Government's response

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

489. Since the strict implementation of the regulatory measures by the PSA, the situation of illegal parking has improved. HD will continue to monitor the effectiveness of these measures and oversee the illegal parking situation. The PSA has also been asked to strictly implement the various road regulatory measures and take immediate detention action in serious cases where the road or an emergency access is obstructed. Signs which read "Illegal parking will be impounded without warning" are put up at road junctions by the PSA as a warning to drivers.

490. HD agrees to further shorten the time between giving a warning and impounding the vehicle. It will continue to keep a close watch on the situation of illegal parking on roads for timely review of regulatory measures. The expenditure arising from this measure will be subject to careful consideration in consultation with stakeholders. After taking into account and balancing the interests of stakeholders against local demands and needs, HD will adopt appropriate regulatory measures.

491. The feasibility study and consultation on the installation of drop gates are now under way. Members of the Estate Management Advisory Committee preliminarily had no objection to the proposal, but considered that further study and discussion would be required. The PSA has contacted the schools in the Estate and the private corporation holding the car park and briefed them on the installation proposal. Their initial feedback is positive. Besides, HD has consulted the relevant departments in writing on the same proposal. HD has received replies from some of those departments and will follow up with the outstanding replies from the other departments.

Housing Department

Case No. 2017/2337 – Mishandling a complaint about noise nuisance caused by pumping facilities

Background

492. The complainant filed a complaint against the Housing Department (HD) for failing to properly resolve the noise nuisance generated from the pump room downstairs. The complainant and his family were residing in a public rental housing unit at lower floor. In recent years, noise emitted from the pump room below the complainant's unit frequently in mid-nights, preventing his whole family from sound sleep. Although the complainant had reflected the noise problem repeatedly to HD since December 2016, HD's works staff just kept on replacing the concerned spare parts of the pump room without testing on the effectiveness. As a result, the problem remained unsettled.

The Ombudsman's observations

493. Having reviewed HD's handling of this noise complaint case overall, The Ombudsman considered that HD had followed up immediately upon receipt of the complainant's every complaint, and arranged replacement of spare parts, repair and adjustment to deal with the sound generated by different parts of the pumping system for reducing the noise.

494. The Ombudsman understood that it was not easy for the works staff to identify and verify which part of the pumping system was generating noise, which involved engineering expertise and judgement. As the sources of noise in this case involved variety of sounds, HD's works staff had at the initial stage adopted various improvement measures targeted at different kinds of sound to eliminate the possible sources of noise one by one. After that, they measured the noise levels to determine whether those measures were effective with a view to resolving the problem thoroughly. The Ombudsman considered this a reasonable approach.

495. HD neither collected noise level data immediately after adoption of each improvement measure, nor collected such data in the complainant's unit in the middle of the night, i.e. in the period of time when the complainant claimed that he was suffering from noise nuisance. The reason was that HD had taken into account the operation and time involved in collecting noise level data which would cause nuisance to the complainant's family or even other households and members of the public. The Ombudsman considered it not unreasonable.

496. However, The Ombudsman was of the view that HD had room for improvement in its communication with the complainant when handling the noise complaints. If HD had explained to the complainant what had to be done technically by the works staff, such as identifying the noise source by eliminating the possibilities in order to completely solve the problem, it would enable the complainant to understand the procedures of and justifications for the follow-up measures. That should have addressed the complainant's concern, avoiding any misunderstanding of the complainant about HD not handling the case seriously.

497. The Ombudsman considered the complaint against HD unsubstantiated, but there were other adequacies found.

498. The Ombudsman recommended HD to –

(a) learn from the lesson of this case and remind the works staff to be mindful when communicating with complainants in the future. They should as far as possible elucidate the steps/procedures for following up the cases and the justifications for each step/procedure; and

(b) review the existing technical guidelines on noise control and provide a clearer and more specific guideline on whether and when noise level data should be collected for frontline works staff to follow.

Government's response

499. HD accepted The Ombudsman's recommendations and has reminded frontline works staff that they should be mindful when communicating with residents in the discharge of duties. They should as far as possible explain the steps/procedures and the justifications for following up the cases, so as to keep the residents informed. Separately, HD has completed the review on the guidelines for handling noise complaints. The revised guidelines were issued on 31 August 2018 and have been in implementation since.

Housing Department

Case No. 2017/3359 – Failing to take enforcement action against a person smoking in a public estate's no-smoking area

Background

500. The complainant made a complaint to the Housing Department (HD) alleging that someone had been smoking in the no-smoking area of a public estate (the Estate) but was dissatisfied with HD's reply that it could not take any action because the smoker was not a resident of the Estate.

501. Under the relevant legislation, all indoor public areas of residential buildings and outdoor escalators leading to the shopping centres of the Estate are designated as statutory no-smoking areas. HD's authorised officers can issue fixed penalty tickets to smokers in statutory no smoking areas. If the offender is a tenant of the Estate, he will also be allotted penalty points under HD's Marking Scheme for Estate Management Enforcement (the Marking Scheme).

502. Since April 2007, the Hong Kong Housing Authority (HKHA) has implemented smoking ban in all outdoor common areas (HKHA no-smoking areas) of public estates, except those areas specially designated for smoking. As smoking within the HKHA no-smoking areas is not illegal, HD cannot issue fixed penalty tickets to smokers in those areas. In the circumstances, HD can only take action under the Marking Scheme, which is only applicable to tenants of the concerned estate. If the smoker is not a tenant of the estate, HD staff will ask him to leave.

503. HD explained that since the person as reported by the complainant was smoking within the HKHA no-smoking area and since he was not a tenant of the Estate, HD could not take enforcement action, nor allot any points under the Marking Scheme. In any event, on that day a security guard verbally advised that person not to smoke within no-smoking areas.

The Ombudsman's observations

504. The Office of The Ombudsman (the Office) considered HD to have handled the complainant's complaint within its ambit, but there were inadequacies in its anti-smoking measures. HD's internal guidelines did not provide clear enforcement strategy or procedures on how to regulate the HKHA no-smoking area, such as the number of patrols to be conducted by the estate offices and the complaint handling procedures. As a result, it was difficult for HD to monitor the effectiveness of its regulatory actions.

505. The Office's investigation officers conducted a site inspection in the Estate in September 2017. It was found that within just an hour, there were a number of smokers in the HKHA no-smoking areas. Yet, the Estate management office did not have any case of tenants being allotted penalty point for smoking misdeed between January 2016 and September 2017. The Office also noticed that, on receipt of complaints, the Estate management office often deploy security guards, who were not empowered to allot points under the Marking Scheme, to give verbal advice only, which would have little deterrent effect on the smokers. The Ombudsman, therefore, considered this complaint partially substantiated.

506. The Ombudsman recommended that HD –

(a) review and consider revising its internal guidelines to stipulate clearer procedures for regulating the HKHA no-smoking areas; and

(b) instruct the Estate management office to continue strengthening its anti-smoking actions and monitor their effectiveness.

Government's response

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

508. HD will conduct a review on the Estate Management Division Instructions (EMDIs) for handling the issue of smoking in public housing estates. At present, HD has put in place general implementation guidelines and workflows, which serve as a basis for frontline staff to determine the appropriate actions to be taken under the Marking Scheme. In addition, individual estate management office is required to formulate appropriate enforcement strategy and deployment plan according to its resources. HD will take into account The Ombudsman's recommendations when revising the EMDIs. Clearer guidelines will also be provided to estate management offices on the formulation of enforcement strategy, recording of enforcement actions and review of work effectiveness.

509. HD has also stepped up monitoring of the Estate management office's anti-smoking actions. The management office of the Estate will continue to carry out smoking control actions in a "special squad" approach, and maintain records of the details of actions taken for review and monitoring purpose.

510. In order to help the public be fully aware of the boundaries and managers of different no-smoking areas, the management office of the Estate has not only displayed no-smoking notices/signs at the statutory no-smoking areas and HA no-smoking areas as usual, but also provided the name and contact telephone number of the management office on the notices/signs to facilitate reporting by the public. Meanwhile, the private corporation responsible for the management of the shopping centres, cooked food stalls and parking lots of the Estate has been advised to provide the same corresponding information in the areas within its purview. After review, the private corporation concerned has provided the relevant information in two places.

511. The management office of the Estate maintains regular contact and cooperation with the private corporation concerned on the management of common areas of the Estate. In response to The Ombudsman's recommendation, the management office has organised regular joint enforcement actions with the private corporation to strengthen regulation on such misdeeds as smoking in estate common area.

512. Under the prevailing policy, the setting up of designated smoking areas in a public housing estate requires consultation with the Estate Management Advisory Committee (EMAC) concerned. The management office of the Estate reviewed the existing locations of designated smoking areas with the attending members at the EMAC meeting held in May 2018. After discussion, members unanimously agreed that the existing locations were appropriate and resolved that they should remain unchanged. The management office of the Estate will keep in view the operation of the designated smoking areas and propose revisiting the issue at future EMAC meeting where necessary.

Housing Department and Social Welfare Department

Case No. 2016/3516A (Housing Department) – Delay in handling the complainant's application for flat transfer

Case No. 2016/3516B (Social Welfare Department) – Failure to provide proper assistance in relation to the complainant's application for flat transfer

Background

513. The complainant's family applied for transfer to a public housing flat with layout different from their current flat on the grounds of family situation. Their case was referred by the Housing Department (HD) to an integrated family service centre (IFSC) subvented by the Social Welfare Department (SWD) for assessment. Although the IFSC concluded that the transfer application was justified on social grounds and recommended it, no suitable flat was allocated to them after a long period. The complainant, therefore, complained to the Office of The Ombudsman (the Office).

Response from HD

514. HD indicated that the complainant had refused two housing offers, both involving a flat with direction and floor level different from their current flat. To utilise housing resources in a prudent and fair manner, HD would not easily allocate a flat of different type and larger size unless there were exceptional justifications. As such, HD referred the case to the IFSC again, including a request that it assign a social worker to accompany the complainant's family to visit the proposed flat. The social worker should assess whether the flat could meet the need of the family and then make further recommendations. However, the IFSC did not respond positively to its request.

Response from SWD/IFSC

515. SWD and the IFSC stated that according to the cooperation agreement among SWD, HD and the relevant non-governmental organisations (NGOs), when referring a case HD needed to state clearly the purpose of referral and obtain the clients' written consent, lest the tenants/ applicants would have unrealistic expectations.

516. SWD explained that the IFSC had closed the complainant's case after completing the initial assessment and making recommendations. When HD subsequently referred the case again, it had neither obtained the clients' written consent again, nor stated the purpose of referral. Moreover, the complainant's family did not agree to the arrangement of flat visit. Therefore, before clarifying what kind of service was required by HD, the IFSC would not contact the family and take follow-up action.

The Ombudsman's observations

517. The Office considered that HD had handled this application for transfer according to established housing policy and found no delay in its follow-up action. As regards SWD, its responsibility was to monitor and ensure that the IFSC under its subvention had followed up properly the complainant's case. Judging from HD's referral memorandum, the IFSC should understand that its purpose of referral was to seek the social worker's assistance in providing a more comprehensive assessment, so that HD could decide whether there were sufficient grounds warranting its exercise of discretion to allocate a flat of different type to the complainant's family. In fact, the cooperation agreement has not stipulated that "for the same client on the same subject", HD must still obtain the clients' written consent and state the reason of referral again. SWD should not have insisted that each referral must rigidly follow all the procedural requirements and thereby disregarded the clients' well-being.

518. Moreover, regarding the telephone communication in the course of handling this case, HD and SWD/the IFSC gave different accounts of the event, which bordered on pointing the finger at each other. It was worrying whether the two sides could maintain mutual trust and cooperation in future. The Office urged all three parties to review this case with candour and rebuild their cooperative relations.

519. The Ombudsman considered the complaint against HD unsubstantiated, and the complaint against SWD partially substantiated. The Ombudsman made the following recommendations –

HD and SWD

(a) to review the communication problems revealed in this case with candour and mend their cooperative relations;

(b) to jointly review the cooperation agreement to clarify in what circumstances, when making repeated referrals for the same case, HD needs to obtain written consent from the clients and state the purpose of referral again. The basic premise is to minimise any duplicate administrative procedures;

(c) to consider holding face-to-face discussions promptly in future to clarify issues regarding how to handle those cases on which no consensus can be reached between the two departments; and

SWD

(d) before completion of the abovementioned review, to remind all the IFSCs to actively assist their clients and properly handle the procedural requirements under the referral system according to actual circumstances, so as to prevent delay in providing them with the necessary services.

Government's response

520. HD and SWD accepted The Ombudsman's recommendations.

HD and SWD

521. Before The Ombudsman released the investigation report in October 2017, SWD, HD and representatives of related NGOs had held meetings in June and August 2017 respectively at both the district and headquarters level to review the communication problems in the case concerned. All members agreed that colleagues should communicate closely with each other in handling the case and strive to improve the existing referral mechanism. After the release of the investigation report by The Ombudsman, in response to The Ombudsman's recommendations, HD and SWD have held a number of special meetings to jointly review the existing referral mechanism. At the meetings, HD and SWD have exchanged views on repeated referrals for the same case, clarified relevant issues and reached consensus on the referral procedures and implementation arrangements. Both departments also agreed to modify the existing referral templates so that they could be applied to further referral of the same case.

522. HD and SWD also reached a consensus that irrespective of whether it was a new or a further referral, both departments should issue an acknowledgement receipt and notify the other party of the assessment outcome in accordance with the existing referral mechanism so as to ensure consistency and maintain effective two-way communication. If the parties concerned failed to reach a consensus on how to follow up a case, staff of HD, SWD and NGOs should consider different channels (including face-to-face meeting to clarify the relevant issues) as soon as possible and maintain close liaison. If the specific purpose of the referral was not clearly stated in HD's referral letter or the client's consent had not been obtained, SWD/NGOs should immediately contact HD to ask for the required information. If SWD/NGOs could not provide the specific services stated in the referral letter, they should also explain the reasons to HD in writing so as to facilitate the HD's decision on further action. SWD has forwarded the "Summary of Discussion" of the meeting concerned and the updated referral templates to its staff and the NGOs' relevant staff vide email on 9 April 2018 for their perusal. HD has also incorporated the outcome of the agreement into its referral mechanism and issued relevant guidelines to its frontline staff.

523. HD and SWD will continue to strengthen the communication and conduct in-depth study on individual cases as necessary to foster mutual understanding.

SWD

524. SWD accepted The Ombudsman's recommendation (d). Before completion of the aforementioned review, SWD had reminded all IFSCs through various meetings to properly handle the requirements that written consent should be obtained and the reason(s) of referral be stated clearly according to the actual circumstances of individual cases, so as to prevent delay in providing the necessary services for beneficiaries due to overly rigid adherence to the procedural requirements. The related meetings include –

(i) Director of Social Welfare Round-up Meeting held on 21 November 2017;

(ii) Meeting with Assistant District Social Welfare Officers (ADSWOs) supervising IFSCs held on 24 November 2017; and

(iii) Meeting of the Committee on IFSCs held on 24 November 2017.

525. Besides, SWD sent an email to the ADSWOs supervising IFSCs, NGOs operating IFSCs/Integrated Services Centres as well as the Hong Kong Council of Social Service on 27 November 2017, reminding the related personnel to pay attention to the referral mechanism agreed with HD (i.e. the purpose of referral should be stated clearly in the referral letter and the information in respect of the client's consent should be provided), as well as the appropriate approaches to handling divergent views on cases.

526. Since the case concerned was handled by an NGO of the relevant district, the relevant District Social Welfare Office of SWD had reiterated the referral mechanism and the approaches to handling such cases at the meeting held with various NGOs in the district on 15 December 2017.

Lands Department

Case No. 2016/4917A – Failing to take proper action against illegal occupation of Government land by some structures

Background

527. On 21 November 2016, the complainant complained to The Ombudsman against the Lands Department (LandsD), the Highways Department (HyD) and the Transport Department (TD).

528. Allegedly, since 2013, the complainant had repeatedly requested LandsD, HyD and TD to demolish the mass concrete blocks and steps on the two sides of the footpath of a section between two roads (the Section) (the Structures), which were built on government land (GL) and dangerous to pedestrians. However, those Structures remained.

529. The complainant complained against the three departments for not taking action against the Structures.

The Ombudsman's observations

530. It was in early March 2016 (not 2013 as alleged by the complainant) that LandsD received the complainant's complaint about, among other things, the Structures. LandsD referred the complaint to HyD and TD in the same month.

531. LandsD considered the Structures outside its purview for the following reasons –

(a) No GL in the Section was found unlawfully occupied for exclusive use and the Structures were open and free for public access which, in LandsD's opinion, did not form part of any shop-front extension.

(b) The Structures were modification works to the existing public footpath. They were concerned with the design/traffic engineering, safety, monitoring and maintenance of pubic footpath, which are within the purview of HyD and/or TD.

(c) Even if LandsD were to arrange demolition exceptionally for this case from the perspective of unlawful occupation of government land, it would still look to HyD, being the works department overseeing the construction and maintenance of public footpaths, to remove the Structures and to restore the public footpath of the Section.

532. While mentioning to HyD / TD that it was willing to participate in joint operations led by them to tackle the problem, LandsD repeatedly stated that HyD should take enforcement action to remove the Structures.

533. HyD, on the other hand, considered the issue essentially one of shop-front extension (i.e. occupation of public places by shops in front of or adjacent to their premises for the purpose of conducting or facilitating business activities). Hence, it was more appropriate for LandsD to take land control action pursuant to "the occupation of government land provision" against the Structures. HyD would provide assistance in reinstating the concerned area of the public footpath if necessary.

534. HyD proposed to LandsD / TD to handle the case jointly in a holistic and collaborative manner, similar to a previous joint clearance operation conducted in April 2016, so as to address public concern and avoid further dragging on the issue. In response, LandsD insisted that HyD, being responsible for maintenance of public footpaths/roads, should take enforcement action against the Structure.

535. TD did not consider the Structures dangerous to pedestrians. Nonetheless, while the jurisdiction of handling the Structures was being settled between LandsD and HyD, in response to the complainant's concern about the Structures and other irregularities in the Section, TD proposed in May 2016 to remove the Structures as part of a pedestrian improvement scheme (the Scheme). As objections were received during local consultation on the Scheme, TD eventually refined the proposal to paint some yellow stripe warning markings along the edge of the footpath (including part of the Structures) on the odd number side of the Section for enhancement of road safety.

536. After The Ombudsman's commencement of investigation, at the respective requests of HyD and TD, a joint site meeting and a joint meeting were held among LandsD, HyD and TD in February 2017. The three departments agreed to handle the case jointly in a holistic and collaborative manner with the following broad principles (the Broad Principles) –

(a) In view of the site constraints, in particular the compatibility of abutting premises at the Section, it would be impracticable, if not infeasible, to remove all the unauthorised structures directly fronting the existing premises at ground level. Even if all the unauthorised structures were demolished, there would be still a need to provide modified structures that are similar to those demolished, given the need to overcome site constraints and tally with the environment.

(b) It would be more pragmatic to demolish such parts of the unauthorised structures as deemed necessary and execute rectification/modification works to repair any damage due to fair wear and tear and incidentally to enhance the walking environment/ comfortability thereat.

537. In February 2017, pursuant to "the occupation of GL provision", LandsD posted statutory notices on the two sides of the Section, requiring cessation of unlawful occupation of GL. After expiry of the deadline stated in those notices, HyD completed the demolition and rectification/modification works for the Structures in early March 2017.

538. Since the complainant's complaint about the Structures in March 2016, the matter had been dragging on for months. Enforcement action was taken almost a year later and only after The Ombudsman's commencement of investigation. Such delay in action was far from satisfactory. Fortunately, according to TD's assessment, the Structures did not pose any danger to the pedestrians.

539. Having examined the relevant records (including the correspondence among LandsD, HyD and TD), The Ombudsman noticed that HyD had, as early as May 2016, proposed to tackle the problem in a holistic and collaborative manner, which was precisely what was eventually done. However, LandsD then was not forthcoming and insisted that HyD should be the department held responsible for the enforcement action. While it was true that both LandsD and HyD may take enforcement action against the Structures within their respective

remits, The Ombudsman considered handling a public complaint and resolving a problem in a timely and pragmatic manner to be of essence. The Ombudsman could not agree with LandsD's stance in this case, especially as it had without difficulty taken enforcement action, in collaboration with HyD, against similar irregularities in the Section shortly before.

540. As for TD, The Ombudsman considered it to have duly handled the Structures from the perspective of road safety by carrying out the Scheme.

541. Based on the above, The Ombudsman considered the complaint against LandsD substantiated, and the complaint against HyD and TD unsubstantiated.

542. The Ombudsman recommended that LandsD should take reference from this case and be more flexible in handling complaints, including consideration of adopting a holistic and collaborative approach to speedily resolve problems where appropriate.

Government's response

543. LandsD accepted The Ombudsman's recommendation. LandsD will adopt a holistic and collaborative approach, which includes close liaison and joint operation with other concerned Government departments, to speedily resolve problems where appropriate.

Lands Department

Case No. 2017/1366 – Failing to take enforcement action against illegal occupation of Government land

Background

544. On 13 April 2017, the representatives of a village office (the Village Office) lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD).

545. According to the Village Office, unlawful occupation and fencing-off of government land, slope extension and construction of a large warehouse were found in a certain village. Moreover, villagers' access to grave sweeping sites was fenced off (collectively referred to as the irregularities).

546. Between April 2012 and July 2016, the Village Office, on several occasions, made complaints about the irregularities to a District Lands Office (DLO) of LandsD (the complaint). However, the warehouse continued to expand in the village and aggravated the problem of unlawful occupation of government land. In addition, the person suspected to have committed the irregularities further made an application to the Town Planning Board (TPB) to legalise the irregularities.

547. The Village Office criticised DLO for the long delay in taking enforcement actions against the irregularities. There were five pieces of land involved in this complaint (Land A, B, C, D and E). Land C and Land D are government land (the government land).

The Ombudsman's observations

548. Regarding the complaint, staff were deployed by DLO to conduct inspections in August 2012 and July and October 2013. The passageway to Land A, Land B and the government land intersected other pieces of private land, where either the metal gates were locked or the doors were not answered. Besides, the landowner(s) did not respond to the contact cards left by DLO's staff on the metal gates. Therefore,

DLO's staff was not able to gain entry to Land A, Land B or the government land for site inspections.

549. In November 2013, DLO's staff managed to enter Land A, Land B and the government land to carry out a site inspection. It was found that –

(a) a structure used as a warehouse storing construction materials was erected on Land A and Land B and extended to the government land;

(b) according to the Short Term Waiver (STW I) of the relevant land, the structure on Land A could only be used "for the storage of gloves and as an office". Neither the purpose (as a warehouse storing construction materials) nor the area of the aforesaid structure satisfied the requirements stipulated in STW I. It thus constituted a contravention of the requirements.

(c) the structure on Land B was an unauthorised structure in breach of lease conditions;

(d) the structure on the government land constituted an unlawful occupation of government land.

550. LandsD explained that DLO did not issue a warning letter to the landowner right after identifying an unauthorised structure in breach of the lease on Land B in November 2013 because it took some time for DLO to verify with the Squatter Control Office (SCO), which is also under LandsD, that the structure in question was not a surveyed squatter structure. Subsequently, in December 2013, the landowner sent an application to DLO to amend STW I for regularisation and coverage of all existing structures on Land A and Land B. Furthermore, in December 2015, the landowner informed DLO that an application for planning permission had already been made to TPB. Apart from the aforesaid reasons, given that it was not a serious case with potential environmental and hygiene risks warranting "priority action", DLO withheld enforcement actions against Land A and Land B.

551. As for the irregularities found on Land C and Land D, there had already been some improvement in the occupation of government land since statutory notices were affixed in December 2013, and the rest of the government land occupied did not affect the general public significantly. It was not a relatively urgent case that warranted "priority action". Consequently, no further enforcement actions were taken by DLO.

552. The warehouse in question involved Land E. No related complaints had been received by DLO before. While handling the case on Land A, Land B and the government land, DLO found out that there was a structure in breach of the lease on Land E. For this reason, in July 2014 and June 2017, warning letters were sent to the landowner requiring rectification of the problem before the specified deadline.

553. In June 2017, after obtaining relevant planning permission from TPB, the landowner of Land A and Land B applied to DLO for –

(a) regularising the unauthorised structure on Land A, Land B and Land E by way of an STW (Application I);

(b) regularising the structure that occupied the government land on Land C and Land D by way of a Short Term Tenancy (STT) (Application II).

554. Regarding Application I, it is being processed by DLO according to the established procedure. As for Application II, DLO is also processing it according to the established procedure, including having imposed an administrative fee, an "initial forbearance fee" and a one-off punitive charge equivalent to 12 months' market rent on the landowner.

555. The toilet part, barrier walls and fence on Land C, along with the hoarding on Land D, were not included in Application II, thus constituting an unlawful occupation of the government land. DLO had already affixed statutory notices in August 2017, requiring the occupier(s) to cease occupation before the specified deadline.

556. The Ombudsman noted that the Village Office made a complaint about the irregularities as early as April 2012. Nonetheless, not until November 2013 (one and a half years later) did DLO's staff manage to gain access to Land A, Land B and the government land for site inspection. The progress was rather slow.

557. The Ombudsman pointed out that DLO only sent warning letters requiring the landowner to purge the breach before the prescribed deadline thrice (in November 2013, October 2015 and June 2017 respectively), after identifying the unauthorised structure on Land A and Land B. During the period, DLO permitted the landowner not to make any rectifications on various grounds (including the fact that an application was being made to DLO to amend STW I in relation to the requirements on the use and area of the structure, and an application was being made to TPB for planning permission). As a result, DLO withheld its enforcement actions for a long period of time.

558. Similarly, DLO only affixed statutory notices requiring the occupier(s) to cease occupying the relevant government land before the prescribed deadline for four different times after finding out that the government land had been unlawfully occupied in November 2013. It procrastinated in taking further land control actions.

559. Upon reviewing the relevant records, the Office was of the view that in the past few years DLO had been very slack in handling the matters of Land A, Land B and the government land, and not proactive in following up the irregularities. The Office understood that DLO, which had to deal with numerous non-compliant cases/lease breaches/law-breaking cases in the face of resource constraints, prioritised cases and acted according to the order of priority. Having said that, the problem had dragged on for an extended period of more than four years, which in any event was unsatisfactory. This would convey a wrong message to the general public that the government took a lenient approach to tackling non-compliant cases/lease breaches/law-breaking cases and even possibly turned a blind eye to the problems. In addition, whenever a person who committed irregularities claimed that he would submit an application for planning permission to TPB or would regularise the irregularities by some other means, DLO would withhold enforcement actions for a long period of time. The Office considered that this would inevitably encourage acts of non-compliance and was extremely undesirable.

560. Based on the above analysis, The Ombudsman considered the complaint substantiated. She urged LandsD to instruct its staff to handle complaints against unauthorised structures or unlawful occupation of government land promptly, seriously and properly so as to deter similar cases in the future.

Government's response

561. LandsD accepted The Ombudsman's recommendation, and has reminded DLO to take timely and decisive enforcement actions against breach of lease and illegal occupation of government land.

Lands Department

Case No. 2017/2550B – Failing to properly resolve the environmental hygiene nuisance caused by the obsolete facilities of a public toilet

Background

562. The facilities of a public toilet (Toilet A) were outdated and often out of order and in a poor hygiene condition. Toilet A caused not only inconvenience to users but also serious environmental hygiene nuisance to nearby residents (Hygiene Problem). Despite repeated complaints from nearby residents, the Lands Department (LandsD) and the Food and Environmental Hygiene Department (FEHD) had not made a vigorous effort to find a solution.

563. Toilet A was built by the Housing Department in the 1980s to cater to the needs of residents of the nearby squatter areas. In April 2009, LandsD took over the responsibility for essential repairs and maintenance of the basic facilities of squatter areas (including Toilet A) in accordance with the squatter control policy. As squatter huts are merely "tolerated temporary structures", LandsD considered itself having no obligation to redevelop or upgrade Toilet A to today's standards.

564. LandsD and FEHD had contemplated the feasibility of FEHD taking over Toilet A. However, FEHD indicated that it did not intend to take over the toilet and it was already managing another public toilet with modern facilities in the vicinity (Toilet B). Hence, LandsD decided to continue managing Toilet A within the confines of its jurisdiction.

565. FEHD is responsible for routine sanitation and cleaning of Toilet A. Accordingly, it had timely sent staff to follow up any complaints about Toilet A and it had also referred to LandsD any cases involving damaged facilities. FEHD pointed out that the average utilisation of Toilet A was only 5 users per day compared with that of Toilet B – 140 users per day, which showed that the latter could already meet local demand. For effective use of resources, FEHD would not replace Toilet A with a new one.

The Ombudsman's observations

566. The Office of The Ombudsman (the Office) conducted a site inspection and confirmed the Hygiene Problem. In the Office's view, although squatter huts are only "tolerated temporary structures" under the prevailing policy, LandsD has an obligation to ensure that the facilities and hygiene condition of Toilet A are in line with today's public expectation and that the toilet would not cause environmental hygiene nuisance to nearby residents. Even if Toilet A would not be rebuilt as a modern toilet, LandsD should make efforts to upgrade its basic facilities so as to resolve the Hygiene Problem.

567. As for FEHD, it has explained that it would not build a new public toilet because Toilet B could already satisfy the local needs. The Office found that not unreasonable.

568. The Ombudsman considered the complaint against LandsD substantiated, and the complaint against FEHD unsubstantiated. The Ombudsman urged LandsD to resolve the Hygiene Problem as soon as possible.

Government's response

569. LandsD accepted the Ombudsman's recommendation. The subject toilet is the basic facility of a nearby squatter area. Having regard to the circumstances of this particular case, LandsD accepts the interim arrangement of maintaining the subject toilet. The latest position is that LandsD will, amongst other improvement works, convert the existing flushing facilities of the subject toilet to an independent and instantaneous flushing system estimated for completion by end of 2018 taking into account the views of the local residents and the services provided by the nearby toilet which is managed by FEHD.

570. As maintenance of public toilets is not part of the usual duties of LandsD, if the situation so requires in future, LandsD will reassess whether to retain the toilet and consult the FEHD as appropriate.

Lands Department

Case No. 2017/2572 – Ineffective enforcement action against street obstruction caused by a recycling shop

Background

571. On 7 July 2017, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD).

572. According to the complainant, miscellaneous articles (including large refrigerators) were frequently placed on the pavement by a recycling shop (the recycling shop in question). This not only caused obstruction, but also posed danger to passers-by (street obstruction). The complainant lodged multiple complaints to several Government departments, but no improvement has been made so far.

573. As reflected by the complainant, LandsD had allegedly taken ineffective enforcement action against street obstruction.

574. In mid-October 2017, staff of the Office conducted inspections in the vicinity of the recycling shop in question in two consecutive mornings, and made the following observations –

(a) On the first day of inspection, several metal basins, food cabinets and trolleys, one sunshade and some miscellaneous articles were found piling up on the roadside off the shop while one of the metal basins was tied to the pavement railings with a rope. In addition, one refrigerator, two frozen food display cabinets and one washing machine were left on the roadside opposite to the recycling shop.

(b) On the second day of inspection, the refrigerator initially placed on the roadside off the shop was removed, but most of the other objects remained in their original positions.

LandsD's response

575. LandsD had neither received any complaint about street obstruction from the complainant or other members of the public, nor any referral from other Government departments.

576. Subsequent to the preliminary inquiries by the Office, LandsD sent staff to conduct a site inspection in mid-November 2017. Some articles were found in the public place but they were different from those found by the Office's inspections in October 2017. The objects then found by staff of the Office might have been removed or had obviously been shifted. As the complainant indicated that complaints had been lodged with other departments, LandsD neither referred the case to other departments nor took any enforcement action.

577. LandsD opined that it would be impracticable and ineffective for the department to take enforcement action against cases of occupation of government land involving movable articles or temporary occupation merely by invoking the Land (Miscellaneous Provisions) Ordinance (Cap.28) (the Ordinance) due to the following reasons –

(a) The Ordinance is designed to tackle land control problems such as occupation of government land of a more long-term or permanent nature and illegal erection of structures, with a view to deterring improper occupation and use of government land rather than removing obstructions of streets.

(b) The Ordinance requires that at least a 24-hour notice should be given to the person(s) concerned by LandsD prior to its removal of articles occupying government land and does not serve as an effective tool for taking enforcement against temporary occupation by movable objects which are only placed on the ground for a short-period and can be easily removed (such as the recyclables in this case).

(c) According to LandsD's experiences, owners of articles could evade the department's enforcement action against illegal occupation of government land under the Ordinance by removing their articles to another location not subject to the enforcement notice.

578. Since resources are limited, LandsD cannot take enforcement actions against all forms of occupation of government land no matter permanent or temporary or regardless of their nature. Instead, priorities should be set necessarily with trade-offs to focus on tackling unauthorised fixed and standalone structures or more long-term and permanent occupation of unleased government land not managed by other departments. Otherwise, it would be difficult to timely cope with the massive number of cases of unauthorized land occupation, lease breaches and squatter structures that are of public concerns.

The Ombudsman's observations

579. As LandsD had not received any complaint about/referral of street obstruction, it is understandable that the department had not taken any action against the problem. The Ombudsman, therefore, considered the complaint against LandsD unsubstantiated.

580. The Ombudsman, however, could not agree with LandsD's claim about the inappropriateness to tackle street obstruction by invoking the Ordinance.

581. Inspections conducted by both the Office and LandsD observed the accumulation of massive articles on the roadside by the recycling shop in question. Such being the case, the Office had reason to believe that the recycling shop in question had been occupying government land outside the shop for placing its recyclables for a prolonged period.

582. It was indisputable that the recycling shop in question occupied government land for placing its articles. As this was in essence an act of occupying government land regardless of whether the articles were "removable" or not, LandsD should have taken enforcement action. Government land is an invaluable resource. If occupation of government land is tolerated, it is not only unfair to law-abiding persons, but also causes possible inconvenience to nearby residents or even safety hazards.

583. LandsD explained that given the limited resources, priority had to be set for cases related to occupation of government land. Therefore, LandsD would direct efforts to tackle cases involving fixed and standalone structures erected on government land. Nevertheless, the Office noted that LandsD did invoke the Ordinance in other cases to tackle incidents of "removable" objects (e.g. discarded motorcycles, metal racks, water pipes and the like) occupying government land. LandsD should find it hard to justify its claim about the inappropriateness to take action against street obstruction by invoking the Ordinance under the present circumstance.

584. In addition, as revealed by the Office's inspections, the articles put on government land by the recycling shop in question could not be removed instantly.

585. In this regard, the Office considered it appropriate for LandsD to affix on site a notice on street obstruction under the Ordinance to order the recycling shop in question to stop occupying government land. In the event that the order is not complied with upon expiry of the notice (i.e. the articles on government land have yet to be removed), LandsD can perform its duty and remove the articles.

586. On account of the above analysis, The Ombudsman had identified room for improvement in LandsD's enforcement action against unlawful occupation of government land. The Ombudsman, though considered the complaint against LandsD unsubstantiated, observed other inadequacies of the department.

587. The Ombudsman recommended LandsD to take enforcement action against the recycling shop in question by making an attempt to invoke the Ordinance.

Government's response

588. As explained in LandsD's response in the subject case, the Ordinance does not serve as an effective enforcement tool for tackling removable objects placed on the ground (including recyclables in the subject case) for a short duration and can be easily removed and are moved from time to time, given the design of the Ordinance and its requirement that 24-hour notice should be given by LandsD prior to the removal of articles occupying government land. With reference to past

experience, owners of objects could easily evade LandsD's enforcement action against illegal occupation of government land under the Ordinance by moving their articles to another nearby location not subject to the enforcement notice, in which case LandsD would be bound by the Ordinance to issue another 24-hour notice for the illegal occupation of the new location before removing the objects.

589. It is worth pointing out that LandsD is the department responsible for administration of land, including allocation and disposal of land for various uses by government departments and private entities, administering the use of land by private parties in accordance with land lease or short-term tenancies, and controlling government land as resources for such uses. In view of LandsD's role, the Ordinance is designed to enable control of government land against unauthorized structures or illegal occupation targeting fixed and standalone structures and occupation of a more long-term or permanent nature. Thus enforcement actions based on the Ordinance by LandsD aims at deterring improper occupation and use of government land, rather than tackling street management problems such as obstructions on streets, especially when the Ordinance cannot effectively tackle movable objects obstructing public places.

590. In general, apart from the Ordinance, there are other legal provisions for tackling obstruction of streets under different situations, such as Summary Offences Ordinance (Cap. 228) on the obstruction of public places, Public Health and Municipal Services Ordinance (Cap. 132) on obstruction to scavenging operations and illegal hawking. Departments will invoke suitable provisions having regard to circumstances of individual cases. Activities such as obstruction of streets, illegal hawking and illegal parking invariably take place on government land, and different activities happening on government land require handling and regulation by various departments according to their authorities, responsibilities and jurisdiction. If LandsD were to take the lead in handling and enforcing against all activities on government land from the angle of unlawful occupation of government land, LandsD would become de facto an "omnibus" municipal services department responsible for a wider range of street management functions, with a much broader jurisdiction encroaching into the portfolios of other departments. This neither accords with the current ambit and setup of LandsD, nor the current division of responsibilities within the Government among departments in handling street management issues and municipal services in general.

591. LandsD had conveyed the above to The Ombudsman again after the Ombudsman's recommendation was issued. The Ombudsman replied to LandsD in March 2018 that it noted LandsD's position but requested LandsD to review its stance regarding occupation of government land by sizeable removable objects. The Ombudsman also indicated that follow-up on the case had come to an end.

Lands Department

Case No. 2017/2623A – Failing to properly resolve the problem of illegal occupation of roadside metered parking spaces by bamboo poles for construction

Background

592. According to the complainant, between 8 and 10 July 2017 he noticed that piles of bamboo poles for construction use (the bamboo poles) were placed in the on-street metered parking spaces (metered parking spaces) at several locations, hence preventing motorists from parking their vehicles in these metered parking spaces (the problem of occupation of metered parking spaces). He thus made a call to 1823 to complain about the problem. The case was referred by 1823 to the Lands Department (LandsD), which replied to the government hotline that the problem did not fall under its purview and that the case should be followed up by the Highways Department (HyD).

593. To the complainant's dissatisfaction, relevant departments (including the Transport Department (TD), HyD and LandsD) were passing the buck to one another. This led to the persistence of the problem of occupation of metered parking spaces, depriving motorists of the right to park lawfully.

The Ombudsman's observations

Complaint against TD

594. TD has neither power nor responsibility to handle or remove items that occupy metered parking spaces, whereas LandsD can tackle cases involving unlawful occupation of government land under the Land (Miscellaneous Provisions) Ordinance (Cap.28) (the Land Ordinance). It was, therefore, reasonable for TD's contractor to refer the problem of occupation of metered parking spaces to the District Lands Office (DLO). For this reason, The Ombudsman considered the complaint lodged by the complainant against TD unsubstantiated.

595. The Ombudsman urged TD to remind its contractors to fully comply with the contract requirement that when items were found unlawfully occupying metered parking spaces, the DLO concerned should be notified at once.

Complaint against HyD

596. In accordance with Circular Memorandum No. 1/2009 (the Circular Memorandum) issued by the Environment Bureau, HyD is only responsible for clearing construction and demolition waste dumped on public roads.

597. In this complaint, the bamboo poles were not construction and demolition waste dumped, but construction materials temporarily placed at the roadside. It was, therefore, reasonable for HyD to refer the problem of occupation of metered parking spaces to DLO.

598. In addition, upon expiration of the period stipulated on the statutory notices affixed by DLO, HyD did send its staff to provide assistance to DLO.

599. Based on the aforesaid analysis, The Ombudsman considered the complaint lodged by the complainant against HyD unsubstantiated.

Complaint against LandsD

600. LandsD was of the view that cases of metered parking spaces unlawfully occupied as sites for depositing construction and demolition materials (C&D materials) were not simply a problem of occupation of government land but a street management issue. Officers from HyD and the Hong Kong Police Force (HKPF) can remove any obstruction on a road which hinders or endangers any person in accordance with the Road Traffic (Traffic Control) Regulations (the Regulations) (Cap 374G sub. leg. G). The Land Ordinance is not the sole piece of legislation regulating the relevant problem. That said, if HyD requests assistance, the DLO concerned would affix notices on the scene and require the occupier to cease the unlawful occupation of the government land before a specified deadline (not less than one day) under the Ordinance, with a view to facilitating HyD's clearance work.

601. LandsD also considered that the C&D materials referred to in the Circular Memorandum included bamboo poles for scaffolding. Therefore, DLO followed the Circular Memorandum and referred the problem of occupation of metered parking spaces to HyD. Subsequently, acting upon HyD's request, DLO affixed statutory notices on the bamboo poles concerned so that HyD could clear the bamboo poles upon expiration of the period stipulated on the notices.

602. The most appropriate enforcement action against occupation of metered parking spaces is for DLO to invoke the Land Ordinance and affix notices in the place in question so that it itself or HyD could remove and confiscate the bamboo poles still left in the metered parking spaces after expiration of the period stipulated on the notices. As a matter of fact, DLO needs not refer a case to HyD before deploying staff to affix statutory notices at HyD's request. This would only cause delay in tackling the problem of occupation of metered parking spaces.

603. Besides, despite the fact that bamboo poles for scaffolding are generally placed on government land or public roads for a few days, the situation does cause considerable anger among motorists. Yet, upon receipt of HyD's request on 13 July, DLO did not immediately take enforcement actions; only on 18 July did DLO's staff proceed to the scene to affix statutory notices. DLO was not proactive enough in handling this case and did not address citizens' pressing needs.

604. Based on the aforesaid analysis, The Ombudsman considered the complaint lodged by the complainant against LandsD substantiated.

605. The Ombudsman recommended LandsD to –

(a) consider establishing a mechanism under which contractors could apply for temporary occupation of government land for temporary storage of construction materials so as to facilitate the Government to regulate the situation; and

(b) review the existing procedure of handling cases of bamboo poles for scaffolding unlawfully occupying public roads (including metered parking spaces), with a view to taking concrete land control actions promptly upon receipt of reports.

Government's response

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

(a) LandsD is exploring whether there is a need for establishing arrangements to handle construction materials used by construction contractors for or in the course of construction works including their temporary placement on government land.

(b) LandsD has liaised and agreed with HyD on the streamlined arrangement that upon receipt of similar complaint, LandsD would first post notice while HyD would remove the bamboo poles on public roads (including metered parking spaces) after expiry of the notice.

Lands Department

Case No. 2017/2909 – (1) Loosely stating that the premises used by the complainant for application of Fresh Provision Shop Licence was not a village house, resulting in the application being rejected by the Food and Environmental Hygiene Department ("FEHD"); and (2) Failing to give timely reply to FEHD's enquiry, thereby causing delay in the issuance of a Fresh Provision Shop Licence to the complainant

Background

607. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against FEHD and the Lands Department (LandsD) on 15 July 2017.

608. According to the complainant, she applied to FEHD for a fresh provision shop licence (the Licence) in mid-2016 (the Application in 2016). The place of business under application was located on the ground floor (the Premises) of a building (the Building). In early January 2017, FEHD rejected the complainant's application on the grounds that the Premises should not be used for commercial purposes under the relevant zoning plan; and she should first apply to the Town Planning Board (TPB) for planning permission.

609. In early February 2017, the complainant made an application to FEHD for the Licence again (the Application in 2017) and to TPB for planning permission. In early March, TPB replied the complainant, indicating that the Premises could be used for commercial purposes under the zoning plan, and no application for planning permission was required.

610. In early June 2017, the complainant learnt from the Planning Department (PlanD) that it had asked LandsD thrice to provide information about the Building, but had not received any reply.

611. It was not until late June 2017 that the Licence was issued to the complainant by FEHD.

612. The complainant alleged that –

(a) FEHD mistakenly indicated that the Premises should not be used for commercial purposes under the relevant zoning plan, hence rejecting the Application in 2016;

(b) LandsD failed to reply to PlanD's enquiry in a timely manner, resulting in delay in issuing the Licence to the complainant.

The Ombudsman's observations

Complaint against FEHD

613. In handling the Application in 2016 and the Application in 2017, FEHD had indeed strictly followed established procedures to consult the relevant departments, including PlanD and LandsD.

614. FEHD rejected the Application in 2016 mainly because PlanD wrote to FEHD on 11 October 2016, stating that if the premises for operating a fresh provision shop were located on the ground floor of a "village house", TPB's prior permission was not required. However, LandsD told FEHD in its reply of 28 October 2016 that the Building was not a "village house".

615. It was because LandsD had erroneously indicated that the Building was not a "village house" that FEHD advised the complainant to apply to TPB for a planning permission. While it was obviously unnecessary for the complainant to apply for TPB's planning permission, the fault, however, lay not with FEHD's misunderstanding but with LandsD's incorrect information.

616. The Ombudsman, therefore, considered the complainant's complaint against FEHD unsubstantiated.

Complaint against LandsD

617. The Office noted that in LandsD's reply to FEHD on 28 October 2016, LandsD only made broad statements that the Building was not a "village house" and had an unauthorised structure therein. It did not explain that "the Building was a 'village house' and using it for operating a fresh provision shop did not breach any lease conditions;

however, from enforcement point of view, the Building would no longer be regarded as a 'village house' in a strict sense unless the owner removed the unauthorised canopy".

618. If LandsD had provided a clear and timely explanation, it is likely that FEHD would have advised the complainant to remove the unauthorised canopy instead of telling her to apply to TPB for planning permission.

619. In addition, as LandsD identified the unauthorised canopy on 17 October 2016, it should immediately refer the case to the Buildings Department (BD) and, in parallel, issue a warning letter to the lot owner concerned. But it was not until November and December 2017 that LandsD referred the case to BD and issued a warning letter to the lot owner concerned, demonstrating its procrastination in taking action.

620. Information revealed that LandsD responded to PlanD's enquiry made in February on 13 March 2017, and this could not be regarded as a dilatory reply. However, in handling FEHD's enquiry of 9 February 2017, LandsD took more than four months (i.e. until 14 June) to give a reply. That was far from satisfactory.

621. Based on the above analysis, The Ombudsman considered the complainant's complaint against LandsD substantiated.

622. The Ombudsman recommended that LandsD should draw up operational guidelines/a code of practice to require its staff to –

(a) provide information as comprehensive as possible when replying to enquiries made by government departments (including FEHD) on whether or not the buildings/ premises concerned are "village houses", with a view to avoiding misunderstanding;

(b) take timely follow-up actions once unauthorised structures have been identified in "village houses", including referring the case to BD and considering taking lease enforcement actions, in order to uphold law and order;

(c) answer enquiries from government departments in a timely manner.

Government's response

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

(a) LandsD headquarters issued a memo on 12 January 2018 advising all relevant staff in DLOs in the New Territories to follow the following guidelines:

(i) If the building was built as an New Territories Exempted House (NTEH) with a valid Certificate of Exemption and Certificate of Compliance issued, then DLOs should confirm that the type of building is NTEH from LandsD's perspective, unless and until its Certificate of Exemption is revoked.

(ii) If it is known or detected that an NTEH has unauthorised building works (UBWs) or other irregularities that would affect the validity of its Certificate of Exemption, the fact of such irregularities and how they might affect the NTEH status of the building should be stated alongside.

(iii) For any known or detected UBWs of an NTEH, follow up action including referrals to BD should be taken in accordance with the agreed mechanism and procedures for tackling UBWs of NTEHs.

(iv) For any other irregularities that might warrant lease enforcement actions, follow up actions should be taken by DLOs in accordance with the established priorities for lease enforcement concerning NTEHs.

(v) All officers were reminded of the importance of timely handling of enquiries from other departments and follow-up on UBWs in NTEHs in accordance with the established procedures.

(b) The relevant DLO issued an email on 3 January 2018 reminding its staff to refer UBWs in NTEHS according to the existing guidelines of LandsD and reply to the enquiries from other departments in a timely manner according to the existing instructions of LandsD.

(c) The relevant DLO issued an email to its staff on 9 January 2018 to take note of target response time in replying to FEHD's enquiries to facilitate their processing of various types of licences. The above two emails will be re-circulated quarterly to remind relevant staff to observe the procedures.

Lands Department

Case No. 2017/3656A – Delay in removing a collapsed tree

Background

624. On 15 September 2017, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD) and the Leisure and Cultural Services Department (LCSD). According to the complainant, when typhoon Hato hit Hong Kong on 23 August 2017, a large tree (the Tree) on the government land adjoining a housing estate collapsed onto the fence wall and the metal gate near one of the blocks of the housing estate, which might cause the gate to collapse, and posed danger to the residents of the housing estate (the problem of the collapsed tree). That evening, the complainant reported the problem of the collapsed tree to 1823 and asked for action to be taken by government departments as soon as possible. On 11 September, an LCSD staff member, after site inspection, told the complainant that although the case was referred to LCSD by LandsD, management of the tree in fact was not within LCSD's purview. Hence, responsibilities had to be clarified among relevant departments before the collapsed tree could be dealt with. On 20 September, LandsD sent its staff to take photos on site. But they said that they were only trying to figure out which department should follow up the problem of the collapsed tree.

625. The complainant criticised LandsD and LCSD for procrastination in taking concrete action to tackle the problem of the collapsed tree.

The Ombudsman's observations

626. According to the relevant works technical circular of the Development Bureau, the demarcation of responsibilities for removing collapsed trees among government departments depends on the location of the trees. Therefore, upon receipt of requests for clearing collapsed trees, a government department should ascertain the location of the trees first. Case referrals to relevant departments should be made only after confirming that the department itself is not responsible for clearing the collapsed trees in question.

627. LandsD explained that as its Vegetation Contract Management Team (the Management Team) had received a huge amount of collapsed tree reports. In order to avoid piling up of cases, it relied only on the information provided by 1823 to assess the location of the trees. Based on 1823's information, the collapsed tree was identified as located near an incense burner of the housing estate. But the burner was not a fixed structure. In other words, the location of the collapsed tree was not clear at that time. Information from the Geospatial Information Hub revealed that many places in the housing estate were more than 10 metres away from a certain road. Under this circumstance, if the Management Team did not contact the complainant or pay a site visit, it would be difficult to determine the location of the collapsed tree and assess which department was responsible for clearing it. It was regrettable that the Management Team simply referred the case to LCSD without having done the above, hence failing to have tackled the problem of the collapsed tree earlier. The Office opined that the Management Team was rather sloppy in handling the case, inevitably giving the impression of shirking responsibility.

628. The Ombudsman considered the complaint against LandsD substantiated and recommended LandsD to –

(a) brief staff and contractors and issue operational guidelines to remind them that upon receiving reports of collapsed trees in future, they should carefully ascertain the location of incident before determining how to follow up or whether referrals should be made;

(b) explore, in collaboration with other relevant departments responsible for integrated tree management and with 1823, how to improve the mechanism for handing collapsed tree reports to enhance the efficiency of follow-up action.

629. As regards the complaint against LCSD, The Ombudsman accepted that the department had appropriately conducted site inspection after receipt of the complaint via 1823, and clarified that the responsibility of maintenance of the Tree did not belong to LCSD. Thus, The Ombudsman considered the complaint against LCSD unsubstantiated.

Government's response

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

(a) A Land and Vegetation Contract Management Section Office General Instruction was issued to remind all staff that whenever a complaint/referral is received, whether from members of the public or other departments, 1823, etc., due care should be exercised to ascertain the substance of the complaint/referral, exact location and maintenance responsibility for the subject matter in deciding how the case should be handled or referred to relevant departments or parties if it falls outside the purview of LandsD. Advice from senior officer(s) should be sought if difficulties are encountered when determining the way forward; and

(b) Close liaison is maintained with the 1823 Call Centre and relevant departments on continual improvement to the mechanism of transmitting /handling of tree complaints with a view to enhancing the efficiency of follow-up work. Subject to availability of resources, LandsD would explore if it could develop a computer system to facilitate identification of the location of the subject complaint/referral or if it could collaborate with other relevant bureaux/departments in developing such a system.

Lands Department

Case No. 2017/4332 – Failing to take enforcement action against an unauthorised platform of a shop

Background

631. On 31 October 2017, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against a District Lands Office (DLO) of the Lands Department (LandsD).

632. According to the complainant, an unauthorised platform was erected in front of a shop on the site in question (Shop A). Part of a pavement was occupied by the unauthorised platform, thereby obstructing residents' access (the issue of unauthorised platform). In February 2017, the complainant approached DLO to complain about the issue of unauthorised platform.

633. In late June 2017, DLO replied to the complainant that it planned to include the unauthorised platform in the "District-led Actions Scheme 2018/19" (the Scheme) of the district concerned, so that joint operations would be conducted by a number of relevant departments. As such, DLO would not take any enforcement action against the unauthorised platform on its own for the time being.

634. The complainant considered that DLO seemed to have shirked its responsibilities as it could have taken enforcement action on its own.

The Ombudsman's observations

635. On 8 and 24 March 2017, DLO sent its staff for site inspections regarding the issue of unauthorised platform under complaint. The findings were as follows –

(a) Apart from the platform in front of Shop A, concrete or galvanised iron platforms were also erected in front of some shops adjacent to Shop A and along a section of the pavement opposite to and off the adjacent lane (the area under complaint).

(b) Problems such as illegal hawking, obstruction to scavenging operations (within the purview of the Food and Environmental Hygiene Department) and unauthorised structures (within the purview of the Buildings Department (BD)) were also detected in the above-mentioned shops.

(c) Given the rather wide pavement, unauthorised shop-front extensions by the shops did not cause serious obstruction to passers-by.

636. In the morning of 31 March 2017, the District Management Committee (DMC) concerned reached a decision on the action locations for 2017-18. As no District Council (DC) members proposed addressing the unauthorised shop-front extensions of the shops in the area under complaint, DMC did not include the area among the action locations.

637. After deliberation, DLO was of the view that the unauthorised platform under complaint did not fall under the category of cases that warrant priority enforcement actions. Having said that, apart from putting the irregularities on record, DLO also referred the case to the District Office (DO) in the evening of 31 March 2017 for consideration of including the case in the Scheme or co-ordinating an one-off joint operation, so that action could be taken by relevant departments concurrently under their respective statutory powers to improve the condition of the whole street in a thorough manner.

638. DO clarified in its reply to DLO on 18 April 2017 the operation of the Scheme, and pointed out that the area under complaint could not be included among the action locations for 2017-18 as the locations had already been finalised and endorsed by DMC. Given the simple nature of the case in which only Shop A was involved, DO advised DLO to take enforcement action on its own.

639. In June, DLO's staff briefed the complainant on the progress of the case. On 14 September 2017, DLO served a written reply on the complainant.

640. DLO explained further to DO in November 2017 and January 2018 respectively that the complaint involved not only the unauthorised platform of Shop A, but also other unauthorised structures in Shop A, as well as similar irregularities in some other shops along the whole street in the area under complaint. DLO urged DO to consider co-ordinating an one-off inter-departmental joint operation.

641. In its reply on 30 January 2018, DO advised DLO to conduct a joint operation with BD under its existing mechanism.

642. As advised by LandsD, after site inspections and deliberation, DLO considered that although the complaint against the issue of unauthorised platform was substantiated, the complaint did not fall under the category of cases that warrant priority enforcement actions according to its working guidelines. DLO therefore decided to put the irregularities on record only, instead of taking immediate enforcement action against Shop A.

643. Furthermore, as similar irregularities were detected in some other shops in the area under complaint and the irregularities needed to be dealt with under the jurisdiction of other departments, DLO considered it more appropriate to take enforcement action by way of a joint operation under the Scheme. DLO repeatedly referred the case to DO for its consideration of including the area under complaint among the action locations under the Scheme, or co-ordinating an one-off inter-departmental joint operation.

644. The Home Affairs Department informed the Office that the area under complaint was not covered by the action locations finalised by DC/DMC, and that DO no longer conducted one-off inter-departmental joint operations other than those under the Scheme ever since joint operations under the Scheme had become a regular practice. Therefore, DO declined DLO's request for a joint operation and advised DLO to join hands with BD to take action if necessary.

645. It is indisputable that DLO itself has the authority and responsibility to take enforcement action against illegal occupation of government land. However, it is understandable for DLO to prioritise cases in accordance with the working guidelines of LandsD in view of the limited resources. Shop A did erect an unauthorised platform on the government land in its shop front, but that did not amount to serious obstruction to passers-by. It is not unreasonable for DLO not to include

the case of Shop A under the category of cases that warrant priority enforcement actions. In addition, as similar cases of small-scale occupation of government land were detected in most of the other shops in the area under complaint, it would be even more difficult to justify if DLO had taken targeted enforcement action against Shop A only.

646. Therefore, The Ombudsman considered the complaint against LandsD unsubstantiated.

647. The Ombudsman recommended DLO to continue closely monitoring Shop A and the area under complaint, and to take enforcement action as soon as possible when resources are available.

648. The complainant certainly can also consider proposing the inclusion of the area under complaint as an action location for 2018-19 via a DC member for the deliberation of DC/DMC.

Government's response

649. LandsD accepted The Ombudsman's recommendation. As the situation of the area under complaint has not improved, DLO has requested the DO concerned to include the area under complaint into the "District-led Actions Scheme" in 2018-19 as one of the action locations. After deliberation, the said proposal was endorsed by the DC/DMC. The first two inter-departmental joint clearance operations under the Scheme have been carried out at the area under complaint on 31 July and 24 August 2018 respectively and the government departments concerned will continue to take appropriate enforcement action.

Lands Department

Case No. 2017/4436 – Ineffective action in following through the alleged breach of short-term waiver conditions by a riding school and the problem of horse fouling along its visitor access

Background

650. On 8 November 2017, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD).

651. According to the complainant, a riding school is governed by a short-term waiver (the STW) granted by LandsD. The STW contains the following requirements –

(a) The riding school shall provide a pedestrian access between a certain highway ("the highway') and a kite-flying site and its adjacent areas via the school (Requirement I);

(b) Two parking spaces may be provided inside the riding school for exclusive parking and loading/unloading (Requirement II).

652. However, the complainant observed the following breaches/ management issues (collectively referred to as the issues) regarding the riding school –

(a) The pedestrian access inside the school (the access in question) leading to the kite-flying site was fenced off, which hindered public use of the access and constituted contravention of Requirement I;

(b) More than two vehicles were allowed to be parked inside the school, which constituted contravention of Requirement II; and

(c) The access in question was not properly managed, resulting in frequent horse fouling.

653. Since 2016, the complainant had repeatedly complained to a District Lands Office (DLO) of LandsD about the issues, but the situation remained the same. The complainant criticised DLO for failing to properly follow up the issues.

The Ombudsman's observations

LandsD's response

On Issue (a)

654. The riding school has installed a gate at its main entrance, primarily for the prevention of horses running away from the school area beyond control, and for the restriction of entry to the school by outside vehicles. To comply with Requirement I, the school has provided pedestrians with an unfenced entrance/exit near the gate, through which the public may use the access in question. DLO's multiple inspections have confirmed that the entrance/exit is open and free from obstruction. In addition, the school has also displayed signage in front of the gate to notify the public that the access in question is open for use.

On Issue (b)

655. During the four site inspections (one of which was on a Saturday) conducted by DLO, the riding school was found to have breached Requirement II once (on a Friday) when more than two vehicles were found parked within the school area.

656. Despite infrequent breaches, DLO had, upon receipt of complaint from the complainant, advised/reminded the riding school to comply with Requirement II, and asked the school to take measures to rectify/prevent non-compliance with the requirement. Every time the riding school replied to DLO in a timely manner and reported the measures taken. In gist, the measures taken by the riding school include –

(a) Visitors are consistently reminded that no parking is allowed inside the school (including the provision of such information on its website);

(b) A notice has been displayed at the school's entrance explaining that no public parking space is provided inside the school;

(c) The locations of the two parking spaces have been clearly indicated inside the school;

(d) Staff are assigned to man the school entrance when necessary (particularly on weekends and holidays) to prevent visitors or hikers from parking inside the school; and

(e) Shuttle bus service has been provided for visitors commuting to and from the highway on weekends and holidays, and visitors are encouraged to make use of the service.

657. LandsD advised that DLO would continue monitoring the situation and following up with the riding school on the implementation of the improvement measures. If the school is found to be in persistent breach of relevant requirements stipulated in the STW, DLO will consider taking appropriate actions.

On Issue (c)

658. Although DLO's inspections detected no horse fouling on the access in question, letters were sent to remind the riding school to clear any dung on the access to keep it clean and tidy.

659. The Office conducted site inspections twice, one on the morning of a weekday in November 2017 and the other on the morning of a Sunday in March 2018. Major findings were as follows –

On Issue (a)

(i) The entrance near the school gate is barrier-free and staff of the Office can use the access in question without interference.

(ii) The words on the signage, which was placed in front of the gate to inform the general public that they might get to the kite-flying site via the access in question, had faded and could not be viewed clearly.

On Issue (b)

(iii) The first inspection detected two vehicles parked inside the school. The Office noticed that school staff had parked their private cars on the roadside outside the school, instead of inside the school.

(iv) The second inspection detected four vehicles parked inside the school. During the inspection, vehicles were found parked all over the roadside outside the school and at the lay-bys along the highway. Moreover, vehicles kept pulling over outside the school entrance. As observed, school staff assisted in directing the traffic and advising motorists not to park their vehicles outside the school entrance or on the highway.

On Issue (c)

(v) During the two inspections by staff of the Office, negligible horse fouling was observed on the access in question and no environmental hygiene nuisance was detected.

660. Neither Issue (a) nor Issue (c) relating to the riding school was detected during LandsD's investigation and the Office's inspections. According to the information, except for the complaint lodged in October 2016, the complainant did not pursue Issue (a) or Issue (c) further in his subsequent complaints to DLO.

661. As for Issue (b), DLO's investigation confirmed that the riding school had breached Requirement II since more than two vehicles were found parked inside the school area. Upon DLO's request, the riding school adopted reasonable measures to rectify the problem. Having said that, occasional breaches of Requirement II were detected in the riding school according to the information provided by the complainant and the Office's observation. However, information showed that DLO had taken the initiative to follow up continuously on the progress of the riding school in implementing the improvement measures, along with site inspections to keep track of the situation. The Office opined that DLO had taken reasonable actions to follow up on Issue (b).

662. Based on the above observations, The Ombudsman considered the complaint lodged by the complainant against LandsD unsubstantiated. With a view to further improving the situation, The Ombudsman recommended LandsD to –

(a) keep a close watch on the riding school and urge for the strict compliance with Requirement II;

(b) ask the riding school to replace the fading signage in front of its gate so as to keep the general public well informed that they may

get to the kite-flying site via the access in question.

Government's response

663. LandsD accepted The Ombudsman's recommendations and has taken follow-up actions as set out below.

664. On 27 April 2018, DLO issued a letter to the waiveree of the STW (i.e. the person in charge of the riding school), requesting the waiveree to immediately follow up the above two recommendations and report the progress to LandsD in two weeks.

665. The riding school mailed and emailed on 10 and 15 May 2018 respectively, reporting that they had taken a series of actions to ensure that the car-parking requirement in the STW had been complied with. For example, staff was arranged to monitor and manage the traffic conditions, and shuttle bus service was provided on weekends if necessary. The school had also renewed the signage informing the public about the access route to the kite-flying site, with photos attached for DLO's reference.

666. DLO conducted site visit on 18 May 2018. No cars were found parking within the area of the riding school, and the said signage was found renewed.

667. In addition, DLO reminded the riding school on 4 June 2018 by email that compliance with the STW conditions should continue or enforcement actions may be considered, including termination of the STW.

Lands Department
and Leisure and Cultural Services Department

Case No. 2017/2351A (Lands Department) – (1) Failing to properly protect and preserve some trees near a redevelopment site; and (2) Failing to respond to the complainant's request

Case No. 2017/2351B (Leisure and Cultural Services Department) – Failing to properly protect and preserve some trees near a redevelopment site

Background

668. On 21 June 2017, the complainant complained to the Office of The Ombudsman (the Office) against the Leisure and Cultural Services Department (LCSD) and the Lands Department (LandsD).

669. Allegedly, in the summer of 2014, the complainant found that the redevelopment works (the Works) of a school (School A) would likely affect some fully-grown trees (the Trees) along the pavement outside the school. In August 2014, he called 1823 and requested relevant Government department(s) to ensure that the Trees would not be adversely affected by the Works (the August 2014 Request). In September 2014, LCSD replied to the complainant that it would ensure the well-being of the Trees.

670. In 2016, the complainant observed that some of the Trees had been pruned. In early April 2017, he noticed that some of the Trees were further pruned (the Problem). On 15 April 2017, he called 1823 and sought to converse with LCSD about the Problem (the April 2017 Request). On 5 May 2017, LCSD replied to the complainant that it had already referred his concern to LandsD. In late May 2017, an officer of LandsD called the complainant giving him a preliminary explanation about the Problem. On 5 June 2017, the complainant asked to talk in a week's time to a surveyor of LandsD (Officer X), who was responsible for tree management on Government land, for more details about the Problem (the June 2017 Request). However, he did not hear further from LandsD, while the Works continued. Some of the Trees were felled and some young trees were planted, presumably as replacements for the felled trees.

671. The complainant complained that –

(a) LCSD and LandsD had failed to ensure the protection and preservation of the Trees during the Works; and

(b) LandsD had not responded to the June 2017 Request.

The Ombudsman's observations

Complaint Point (a)

LCSD

672. The Agriculture, Fisheries and Conservation Department (AFCD) is responsible for the enforcement of the Forests and Countryside Ordinance (the Ordinance), which prohibits unauthorised tree felling.

673. LCSD is responsible for maintaining trees grown along non-expressway public roads other than in country parks. The Department should report to AFCD any unauthorised tree felling or illegal activities affecting trees under LCSD's maintenance.

674. After receiving the complainant's first report in 2014, LCSD conducted an investigation and found that nine trees under its maintenance were being affected by the hoarding of the Works. LCSD noticed that the Buildings Department (BD) had issued a hoarding permit for the Works. It, therefore, made an enquiry. BD replied that while the holder of a hoarding permit has a duty to ensure that trees would not be affected by the hoarding, it is not a breach of the hoarding permit conditions if any tree is felled or pruned without prior approval from the relevant departments.

675. In October 2014, LCSD discussed with the contractor for the Works with a view to finding remedies. In December 2014, LCSD notified AFCD of the problem, by copy of a letter addressed to BD.

676. In late 2014, the contractor submitted an application to LandsD for felling three trees and transplanting one tree (the Application). LandsD sought LCSD's comments on the Application. LCSD considered it and gave no objection. Accordingly, LandsD approved the Application.

677. LCSD conducted an inspection in May 2017 and found that three of the nine trees had been felled, one transplanted and five retained. Meanwhile, there were three newly planted trees as approved by LandsD. LCSD undertook to ensure that the three compensatory trees satisfied the requirements in terms of species, size and condition when the Works were completed.

678. Instead of informing AFCD according to the usual procedures when it found the affected trees in 2014, LCSD wasted time on enquiring of BD just because the latter had issued the hoarding permit. After learning that BD could not take enforcement action, LCSD still did not contact AFCD direct. It just copied to AFCD its letter to BD. The Office believed that had LCSD alerted AFCD promptly to the problem of the Trees, the latter would have conducted an investigation and might even have instituted prosecution.

679. However, it was not unreasonable of LCSD to give no objection to the Application, as it had duly considered the transplant and compensatory replanting of the Trees. In sum, The Ombudsman considered Complaint Point (a) against LCSD partially substantiated.

680. The Ombudsman urged LCSD to ensure that in future, suspected illegal activities concerning trees under its maintenance would be promptly referred to AFCD for investigation.

LandsD

681. Since the Trees were outside leased land, the tree preservation clause stipulated in the lease conditions governing School A was not applicable. LandsD, therefore, was not in a position to take enforcement action against School A.

682. As both the maintenance responsibility for the Trees and the authority for felling them rest with LCSD, the District Lands Office (DLO) of LandsD circulated the Application for LCSD's consideration. LCSD had no objection to the Application.

683. DLO had also enquired of AFCD, which confirmed that there was no reported incident or referral of suspected illegal tree damage on the unleased government land in question.

684. Based on the replies from LCSD and AFCD, LandsD wrote to School A to state no objection to the Application.

685. The Office views that trees should be properly maintained and protected from unnecessary damage. In case of suspected unauthorised activities affecting trees, it is essential for the department(s) concerned to conduct investigation as quickly as practicable and institute prosecution where appropriate.

686. In the present case, the investigation by the Office revealed that the maintenance responsibility of the Trees fell on LCSD, not LandsD. LandsD had explained why it was not in a position to take enforcement action against School A. Its explanation was reasonable.

687. LandsD was responsible for handling the Application, but indeed it had to seek and rely on LCSD and AFCD's comments, because LCSD was responsible for maintaining the Trees and AFCD for enforcement of relevant legislation.

688. In the light of above, The Ombudsman found Complaint Point (a) against LandsD unsubstantiated.

Complaint Point (b)

LandsD

689. Records revealed that DLO was fully aware of the June 2017 Request. While The Ombudsman appreciated that owing to his heavy workload, Officer X might not be able to reply to the complainant within a matter of days, The Ombudsman however considered it unsatisfactory that he had taken more than a month to call the complainant and only after receiving 1823's reminders. He issued no interim reply or explanation in-between.

690. The Ombudsman found Complaint Point (b) substantiated.

691. The Ombudsman urged LandsD to take reference from this case and ensure that in future public enquiries would be properly handled and responded to in a timely manner.

Government's response

692. LCSD accepted The Ombudsman's recommendation. LCSD will refer any suspected illegal activities concerning trees which are under its maintenance and located on unleased and unallocated government land to AFCD promptly for investigation.

693. LandsD accepted The Ombudsman's recommendation. All staff handling enquiries/complaints are reminded to issue an interim reply if longer time is required before giving a substantive reply, and to ensure that public enquiries/complaints are properly handled and responded to in a timely manner.

Leisure and Cultural Services Department

Case No. 2017/0079 – Delay in handling the Kwai Chung Park development project

Background

694. The complainant complained against the Leisure and Cultural Services Department (LCSD) concerning its delay in handling the "Kwai Chung Park Development".

695. The Audit Commission Report issued on 28 March 2013 pointed out that since the taking over by LCSD of the former landfill site at Gin Drinkers' Bay in Kwai Chung in 2000 for the implementation of the "Kwai Chung Park Development", there had been little progress over the past 13 years. Only a BMX cycling ground of about 4 hectare (ha.) was completed in 2009, leaving the remaining 23 ha. of land undeveloped.

696. According to the newspaper report, LCSD had elaborated in the Audit Report that different development options had been explored between 2003 and 2009 but the project cost of all options exceeded the funding ceiling of the Minor Building Works vote under the Architectural Services Department (ArchSD) and therefore the options could not be pursued.

697. Based on the government press release, the Secretary for Home Affairs subsequently replied to Legislative Councillors on 26 February 2014 that LCSD would request ArchSD to conduct technical feasibility study (TFS) for construction of the proposed facilities in the landfill site. LCSD would further consult the Kwai Tsing District Council (KwTDC) and the locals when there was concrete development plan.

698. However, up to January 2017, the TFS had yet to be completed.

699. The complainant opined that several years had lapsed after the issuance of the Audit Report, but there was still no timetable for the "Kwai Chung Park Development". The crux of the matter was believed to be unreasonable delay by LCSD. As a resident in the district, he felt aggrieved and hence lodged a complaint to The Ombudsman in January 2017.

The Ombudsman's observations

700. The Ombudsman was of the view that although LCSD was the lead department for the "Kwai Chung Park Development", implementation of the project involved many steps and was subject to the views of government departments, KwTDC and the Legislative Council. Moreover, there were constraints in development of the project site in Kwai Chung Park. Under the circumstances, progress of the project implementation was not solely controlled by LCSD.

701. At the outset, LCSD had spent quite some time in identifying funding for the Landfill Gas Hazard Assessment (LGHA) but in vain. Nevertheless, even if LGHA could be conducted earlier, there was no way to expedite the implementation of the "Kwai Chung Park Development" as it was not a priority project and there was no clear timeline for securing funding for commencing construction works. In fact, it was only after the project had been included in the Policy Address in January 2017 for implementation under the Five-Year Plan, a concrete timetable for the implementation of the project was knocked out.

702. It could be seen from the planning processes of the "Kwai Chung Park Development" that LCSD had all along maintained communication with government departments and KwTDC for carrying out essential preparatory work before commencement of construction. Overall speaking, there was no evidence to substantiate that dilatory action of LCSD led to the delay of the project.

703. However, it was only until notification was given by ArchSD that LCSD became aware of the need to conduct LGHA for the landfill site. This indicated that there were inadequacies on the part of LCSD. As a matter of fact, Gin Drinkers' Bay was not the first restored landfill for development for other uses. The government should have internal guidelines on how to develop such landfill sites and on points to note, including procedures for conducting LGHA. If LCSD had thorough

communication with ArchSD and other relevant government departments in advance, there should not be a situation where no funding had been identified for LGHA after issuing the Project Definition Statement (PDS) to ArchSD.

704. Given the above, The Ombudsman considered that the complaint was unsubstantiated, but other inadequacies of LCSD were found.

705. The Ombudsman recommended LCSD to discuss with ArchSD and other relevant government departments to determine the planning procedures to be followed regarding the development of parks or other recreational and sports facilities in restored landfill sites in future, including arrangement for conducting LGHA. If necessary, clear departmental guidelines should be issued.

Government's response

706. LCSD accepted the recommendation and will follow the Government's established procedures for planning and implementation of capital works projects for recreational and sports facilities. During the process, LCSD will from time to time consult works departments concerned such as ArchSD wherever necessary. If restored landfills are involved, the views of Environmental Protection Department (EPD) will also be sought.

707. Upon further enquiry by LCSD, EPD and ArchSD clarified that LGHA could be conducted in two stages. A preliminary LGHA should normally be carried out after confirmation of the proposed project scope or issuance of PDS and during the stage of TFS for completion of the Technical Feasibility Statement. The detailed LGHA could be carried out at the detailed design stage. The arrangement is specified in the "Landfill Gas Hazard Assessment Guidance Note" prepared by EPD.

708. The Kwai Chung Park project was included under the Five-Year Plan for Sports and Recreation Facilities as announced in the 2017 Policy Address and resources have been reserved. HAB has issued the revised PDS on 18 May 2018. ArchSD will conduct TFS and conduct the preliminary LGHA during TFS stage. LCSD will continue to follow the Government's established procedures to implement the Kwai Chung Park project.

Leisure and Cultural Services Department

Case No. 2017/2064(I) – (1) Delay in handling the request for CCTV footage recorded in a public library; and (2) Unreasonably refusing to provide the CCTV footage

Background

709. While using the computer facilities at a public library under LCSD, the complainant slung onto the ground the bag of another reader, Mr A, who then made a report to the Police. A quarrel broke out between the complainant and Mr A, with the two parties using their mobile phones to take pictures of each other. Several library staff came over and tried to talk them out of it. Subsequently, police officers arrived at the library. They told Mr A that the Police would not press charges against the complainant because no damage was done to the contents of his bag, but he could decide whether to file a civil lawsuit against the complainant for compensation.

710. About two weeks later, the complainant complained to LCSD against one of the library staff for use of unnecessary force on her that day. In its reply to the complainant, LCSD explained the situation of that day, but the complainant disagreed and requested the library to provide the closed circuit television (CCTV) video footage recording the incident.

711. LCSD refused the complainant's information request by invoking paragraph 2.6(c) of the Code on Access to Information (the Code). The paragraph stipulates that a department may refuse to disclose information if the information requested "relates to proceedings which have been completed, terminated or stayed, or which relates to investigations which resulted in or may have resulted in proceedings, whether any such proceedings are criminal or civil". The complainant considered LCSD's refusal unreasonable.

Response from LCSD

712. LCSD explained that the complainant might have committed an offence for damaging the property of others and taking pictures and quarrelling in the library, and Mr A might file a civil lawsuit against her. Therefore, even though the Police decided not to press charges after investigation or Mr A would not file any civil lawsuit for compensation, paragraph 2.6(c) would still apply.

713. Moreover, the CCTV system was installed for venue management and security purposes and the video images recorded should be kept confidential in all circumstances. In case of investigation of any incident, the video footage should only be retrieved and viewed with proper authorisation given.

The Ombudsman's observations

Information Relating to Legal Proceedings – paragraph 2.6(c) of the Code

714. The Code stipulates that a department may refuse to disclose information that falls into the categories set out in Part 2 of the Code. Nevertheless, the Guidelines on Interpretation and Application of the Code clearly state that even the information requested falls within the areas listed in Part 2 of the Code, it does not necessarily imply that access to it should be refused. Hence, it is not a must for the Government to refuse access to all information falling within the areas of paragraph 2.6(c) of the Code. Rather, it should take into account whether disclosure of such information will prejudice any person or investigation, as well as the possibility and magnitude of such prejudice.

715. In this case, LCSD had not mentioned whether disclosure of the information requested would prejudice any person or investigation, or provided the reason why such information should be kept confidential. Therefore, the Office of The Ombudsman (the Office) considered that LCSD had not given sufficient reasons for its refusal to provide the video footage concerned under paragraph 2.6(c) of the Code.

Information Relating to Privacy of the Individual – paragraph 2.15 of the Code

716. On the other hand, the Office noticed that Mr A and a number of library staff were recorded in the video footage concerned and their appearances were their personal data. According to paragraph 2.15 of the Code, if the information requested is about personal data of others, the request may be refused unless disclosure of the information is consistent with the purposes for which the information was collected, the subject of the information has given consent, disclosure is authorised by law, or the public interest in disclosure outweighs any harm or prejudice that would result.

717. In this case, it is hardly justifiable to say that providing the information to the complainant was in line with the purpose of management and security of the library. There was also no information to indicate that consent of the subjects had been obtained. If LCSD had provided the video footage in question to others, it might have somewhat infringed the privacy of those subjects. Besides, the Office did not see any public interest in disclosure outweighing any harm or prejudice that would result. Furthermore, disclosing the information could violate the provisions of the Personal Data (Privacy) Ordinance.

718. In view of the above, the Office considered that paragraph 2.15 of the Code could be a ground for LCSD to refuse to provide the said video footage.

719. Overall, The Ombudsman considered the complaint unsubstantiated, but found other inadequacies in LCSD's application of the Code. The Ombudsman, therefore, recommended that LCSD enhance its staff training.

Government's response

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

(a) LCSD re-circulates the related circulars on a half yearly basis to remind all staff of the procedures and guidelines to be followed in handling requests for information from members of the public and to highlight the salient features of the Code as well as the special areas for attention. The circulars were last circulated in early June 2018. Staff members were particularly reminded to handle requests within the timeframe as stipulated in the Code. Moreover, requests from the members of the public will be

referred to officers of higher rank when necessary for timely handling of such cases.

(b) LCSD regularly conducts briefing sessions on the Code to enhance staff's knowledge of the Code and its Guidelines. The latest briefing session was conducted on 30 May 2018. LCSD will continue providing training to its staff.

Leisure and Cultural Services Department

Case No. 2017/2481(I) – Unreasonably refusing the complainant's request under the Code on Access to Information for obtaining a copy of all documents relating to his complaint case

Background

721. The complainant lodged a complaint against the Leisure and Cultural Services Department (LCSD), alleging that it had unreasonably refused to provide him with information relating to another complaint he made against the Department.

722. On 30 April 2017, the complainant made a request to LCSD for a copy of all the documents relating to an earlier complaint he had made against certain staff members of LCSD.

723. In its reply to the complainant on 5 June 2017, LCSD indicated that by virtue of paragraph 2.15 of the Code on Access to Information (the Code), it could not provide him with individual reports prepared by the staff members in question. It also stated that the information given in the annexes to the reply already covered the contents of the reports. Paragraphs 2.15(a) and (b) of the Code quoted by LCSD are as follows –

> *"Information about any person (including a deceased person) other than to the subject of the information, or other appropriate person, unless:*
>
> *(a) such disclosure is consistent with the purposes for which the information was collected; or*
>
> *(b) the subject of the information, or other appropriate person, has given consent to its disclosure. "*

724. On 9 June 2017, the complainant disagreed with LCSD's explanation and asked the Department to review his request.

725. On 29 June 2017, LCSD made another reply to the complainant explaining the reasons for its refusal to provide the individual reports of the staff members. The reasons are as follows –

> *"Paragraphs 2.15(a) and (b) of Part 2 of the Code on Access to Information refer to 'information about any person (including a deceased person) other than to the subject of the information, or other appropriate person, unless: (a) such disclosure is consistent with the purposes for which the information was collected, or (b) the subject of the information, or other appropriate person, has given consent to its disclosure'. In our letter of 5 June and the annexes thereto, we have already set out an account of the events of the case as well as the handling and review by our staff. Considering that the provision of individual reports prepared by the staff members in question is not in line with paragraphs 2.15(a) and (b) of Part 2 of the Code mentioned above, we are unable to disclose the requested information to you. As for paragraph 1.13 of the Code that you mentioned, it states that: 'If the original record contains information falling within Part 2 of the Code, and it is decided that such information should not be disclosed, such information should be obliterated from the copy of the document to be provided to the requestor'. Nevertheless, according to paragraph 1.13.1 of the Code, 'if the extent of obliteration is such that the original document becomes meaningless or misleading, consideration should be given to providing an intelligible summary of the record'. As we have already furnished you with a summary of the records as per the guidelines of the Code, we conclude after reviewing your request that no additional information can be provided on the case."*

726. The complainant considered that LCSD had wrongly interpreted the Code and unreasonably refused his request for information. He then lodged a complaint to The Ombudsman on 30 June 2017.

The Ombudsman's observations

727. According to the Guidelines on Interpretation and Application of the Code, unless there is good reason to withhold disclosure under the provisions of Part 2 of the Code, departments should disclose information as requested. If a department decides to refuse a request for information, the applicant concerned must be informed of the reasons for refusal

quoting all the relevant paragraph(s) in Part 2 of the Code on which the refusal is based with appropriate elaboration to justify invoking the relevant paragraph(s) in Part 2 of the Code.

Paragraph 2.15 of the Code

728. Although LCSD reiterated time and again that advice had been sought from the Department of Justice and LCSD's action was guided by such legal advice, The Ombudsman did not approve of LCSD's citation of paragraph 2.15 of the Code as the basis for refusing the request for information.

729. The Ombudsman believed that the staff statements in this case were largely accounts of the incident, with only the staff members' names and ranks being personal data. Therefore, The Ombudsman considered that, save for the names and ranks of the staff members concerned, the contents of the statements had nothing to do with their privacy.

730. From the perspective of privacy, the staff statements actually contained personal data relating to the complainant as well. When the complainant made a request for a copy of the statements from LCSD, the department was bound to consider whether a copy of the statements or parts thereof should be provided under the Personal Data (Privacy) Ordinance.

Paragraph 2.9(c) of the Code

731. If LCSD were not compelled by other laws to disclose the contents of the staff statements, The Ombudsman would have accepted LCSD's views in the investigation report justifying its refusal to release a copy of the statements to the complainant, but the reason cited would have to be the one set out in paragraph 2.9(c), i.e. "information the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of a department".

732. The Ombudsman considered it a mistake that LCSD had quoted paragraph 2.15 but not paragraph 2.9(c) as the reason for refusing the complainant's request for information when it informed the complainant of the reason for refusal.

733. The Ombudsman recommended that LCSD review whether staff statements constitute the personal data of the staff members concerned.

If necessary, LCSD should consult the Office of the Privacy Commissioner for Personal Data and enhance training to strengthen staff awareness of the Code.

Government's response

734. LCSD has consulted the Office of the Privacy Commissioner for Personal Data (PCPD) on the recommendation. According to PCPD's reply, whether a staff statement would constitute that staff member's "personal data" depends on the circumstances of individual cases. Generally speaking, if it is practicable for any person to directly or indirectly ascertain a staff member's identity from his/her statement alone, the statement would be regarded as that staff member's personal data under the Personal Data (Privacy) Ordinance (the Ordinance). In view of the foregoing, data users should comply with the requirements under the Ordinance when handling staff statements.

735. In the present case, the statements prepared by the two staff members were mainly accounts of the communication between staff members, and that between staff members and the complainant in the incident. Such accounts included information such as the name of the venue, date and time of the incident, duties of staff, as well as the work relationship between the two staff members. With both staff members still working at the same venue with the same duties after the incident, it was practicable for one to eventually ascertain their identities from the statements alone, even if their names and posts could be obliterated. It follows that the statements should be regarded as the "personal data" of the two staff members under the Ordinance. Having said that, in handling future requests from members of the public for copies of staff statements under the Code, LCSD will consider the circumstances of individual cases and cite provisions of the Code as appropriate (such as quoting paragraph 2.9(c) of the Code as justification), unless there are other laws compelling the provision of copies of such statements.

736. The Training Section of LCSD has included the Code in its training courses for staff, such as the induction programmes for the Leisure Services Manager and Amenities Assistant grades, as appropriate. Representatives from the Constitutional and Mainland Affairs Bureau have been invited to brief LCSD staff on the Code to strengthen staff awareness and application of the Code. LCSD has organised training programme and briefing session for new recruits and serving staff members respectively during January to June 2018. The Training

Section will continue to organise such training programmes and briefing sessions for LCSD staff in the future.

737. On top of that, the General Administration Section of LCSD has arranged for re-circulation of the Department's Administrative Circular No. 3/2009 on "Code on Access to Information" and General Circular No. 2/2010 on "Code on Access to Information" every six and 12 months respectively, for reference of the entire staff. The circulars were both last re-circulated in June 2018. The Ombudsman has concluded the present case in October 2018 and LCSD will feature the incident as a case study for sharing with staff of relevant sections, with an aim to further raise staff awareness on the Code.

Leisure and Cultural Services Department

Case No. 2017/2675 – (1) Selective enforcement regarding unauthorised entry with a dog to a beach; and (2) Abrasive staff attitude

Background

738. The complainant and her husband took their dog to the refreshment kiosk of a beach managed by the Leisure and Cultural Services Department (LCSD) on a certain day. An LCSD staff (Staff A) told them that dogs were not allowed in beaches and that they should leave. Staff A, however, did not take enforcement action against an expatriate woman who was also entering the beach with her dog. That gave an impression of biased enforcement. Afterwards, the complainant encountered Staff A again when the latter was driving away. Allegedly, Staff A lowered his side window and said something rude in a threatening manner.

739. LCSD indicated that according to Staff A, the complainant's husband had queried why he did not take enforcement action against the expatriate woman, but later he did advise the woman to leave with her dog. LCSD had enquired of those lifeguards and the kiosk operator who were present at the scene on that day and they all confirmed what Staff A said was true. LCSD explained that part of the beach in question was not within its purview and so its staff had no authority to take enforcement action. Besides, Staff A's view might have been blocked such that he was not aware of the said unauthorized entry. That could explain why the complainant found Staff A failing to properly perform his duties earlier on. LCSD apologised for the complainant's bad experience.

740. Moreover, Staff A denied having said anything rude to the complainant and her husband. He also asserted that he was already off duty and away from the beach area and that it was then his personal time. If the complainant felt she had been threatened, she should have called the Police. While LCSD could not verify what actually happened, it had reminded its staff to maintain a proper attitude expected of good civil servants.

The Ombudsman's observations

741. Staff A claimed that he had advised the expatriate woman to leave the beach area and his account was supported by the lifeguards and kiosk operator. However, the Office of The Ombudsman (the Office) considered that their statements were not entirely independent or objective as they all knew Staff A. On the other hand, Staff A did advise the complainant to leave the beach with her dog. It showed that Staff A did take enforcement action in this aspect. Overall, the Office found it more likely that Staff A did advise that expatriate woman to leave before he was off duty. Nevertheless, had Staff A told the complainant's husband that he would follow it up, misunderstanding could have been avoided. The Ombudsman considered the allegation about biased enforcement unsubstantiated.

742. As to whether Staff A's manner was abrasive, Staff A only denied having said anything rude without providing further information or giving any details of the conversation between him and the other party. On the other hand, the complainant had provided a clearer and more specific version which the Office considered more reliable. Moreover, Staff A had questioned the Office's authority to investigate what happened during his personal time when he was off duty. This is more reason for the Office to believe that Staff A had been abrasive after work because Staff A thought his action after work was beyond LCSD's supervision. Therefore, The Ombudsman considered the allegation about abrasive staff attitude substantiated.

743. Overall, The Ombudsman considered the complaint partially substantiated.

744. Staff A had just had a confrontation with the complainant when he was on duty that day. If he had really said something rude after work, such behavior would be gravely at odds with what the community would reasonably expect from public officers and it might damage the Government's reputation and cause embarrassment to LCSD.

745. The Ombudsman urged LCSD to instruct the staff in question to proactively take enforcement action, respond to complainant and maintain the proper manner expected of good civil servants at all times.

Government's response

746. LCSD accepted the recommendation. The relevant staff was reminded on 26 March 2018 that he should comply with the "Civil Service Regulations" and Departmental "Guidelines on Conduct and Discipline", and should respond positively to the public's report of irregularities. The Department also reiterated the importance of maintaining civil servants' positive attitudes irrespective of whether he was on duty or at his workplace.

Leisure and Cultural Services Department and Social Welfare Department

Case No. 2017/0635A&B – Ineffective action in handling street sleeper problems

Background

747. On 25 November 2016, the complainant called 1823 to complain about the prolonged occupation of the sitting-out area under the flyover on a road (the sitting-out area) by a street sleeper, who accumulated refuse, smoked, urinated and defecated in the area, causing an environmental nuisance. Subsequently, the Leisure and Cultural Services Department (LCSD), the Food and Environmental Hygiene Department (FEHD) and the Social Welfare Department (SWD) all stated that follow-up actions would be taken, but actually the problem persisted without being properly addressed.

The Ombudsman's observations

748. According to the explanations of the departments involved, they have endeavoured to handle the street sleeper issue at the sitting-out area within their purview. LCSD has followed up the environmental hygiene problem there as appropriate; SWD has been rendering support to the street sleeper through a service team in the hope of helping him quit street sleeping; and FEHD has conducted multiple inspections to keep the periphery of the sitting-out area clean.

749. The Ombudsman is of the view that street sleeping is a complex social problem, which cannot be solved simply through forced expulsion of the street sleepers by government departments. Moreover, street sleepers belong to one of the disadvantaged groups, and it is understandable that the relevant government departments treat them more leniently. The Ombudsman considered it more desirable to advise them to quit street sleeping and receive welfare services, although it is really hard to achieve visible results immediately.

750. In view of the above, The Ombudsman considered the complaint unsubstantiated since the departments had indeed performed their duties despite the persistence of the street sleeper problem at the sitting-out area.

751. The Ombudsman hoped that SWD would continue to work jointly with the service team in providing appropriate assistance for the street sleeper concerned, and actively advising him to receive services and quit street sleeping as soon as possible. LCSD should also continue to clean the sitting-out area frequently so as to minimise the sanitary nuisance to local residents.

Government's response

752. LCSD accepted The Ombudsman's recommendation and will continue to clean the sitting-out area regularly so as to keep it clean and minimise the sanitary nuisance to local residents.

753. SWD also accepted The Ombudsman's recommendation. It will continue to follow up on the situation of the street sleeper concerned through an integrated service team for street sleepers which has not only actively advised the street sleeper to maintain environmental hygiene and receive welfare services, but also referred the case to an integrated community centre for mental wellness for assessment and joint follow-up actions.

Office of the Communications Authority

Case No. 2016/4460A – Unreasonably stating that it could not revoke the approval granted to some mobile network operators to install radio base stations on the rooftop of a village house

Background

754. Some mobile network operators (MNOs) had obtained the approval from the Office of the Communications Authority (OFCA) for use of radio base stations (RBS) on the rooftop of a village house in Sai Kung. A group of local residents, represented by the complainant complained to OFCA that the RBS concerned were in contravention of the land lease and there were unauthorised building works associated with the RBS. They asked OFCA to revoke the approval already granted.

755. OFCA explained to the complainant, inter alia, that (a) the RBS shall meet the requirements of OFCA and other relevant government departments including Buildings Department (BD) and Lands Department (LandsD); (b) OFCA's approval is restricted to telecommunications matters and does not absolve MNOs of their duty to comply with Government lease conditions and any other statutory requirements; and (c) as the RBS comply with the technical requirements in respect of electromagnetic compatibility and non-ionising radiation safety (NIR safety), OFCA cannot revoke its approval.

756. The complainant considered OFCA unreasonable in saying that it could not revoke the approval of the RBS and lodged a complaint with the Office of The Ombudsman (the Office) against OFCA.

The Ombudsman's observations

757. The Ombudsman noted that the Government has adopted a "One-stop Application Procedure for Installation of Radio Base Stations by Mobile Services Operators" (OSAP). When submitting an application, an MNO shall declare compliance of its RBS with requirements of BD and LandsD, in addition to the telecommunications requirements on electromagnetic compatibility and NIR safety. For any case where all the telecommunications requirements have been met but a

wavier of the land use restriction for the land lease is required for the installation of RBS, the Communications Authority (CA) may, prior to LandsD's approval of the wavier, approve MNO's application to install RBS subject to the conditions, *inter alia*, that the MNO concerned makes declarations for compliance of its RBS with the requirements of other relevant departments (such as LandsD and BD). Under the OSAP, CA can revoke an approval of RBS if there is any false declaration, or if a waiver application is eventually not approved by LandsD.

758. The Office agreed that without having approached BD and LandsD, OFCA at the moment of replying to the complainant could not have foreseen the outcomes of the two departments' actions (if any) on the complaints. However, the complainant's query was premised on his understanding that there was a breach of BD's and LandsD's statutory requirements, while OFCA's reply was premised on the assumption that there was no breach. Although its assumption was under challenge, OFCA had not checked with BD and LandsD on the status of their actions (if any) on the complaint before replying to the complainant. OFCA, therefore, could not be sure that there was little or no likelihood of the two departments' discovery of false declaration(s) or LandsD's disapproval of the waiver applications. A more prudent course of action for OFCA to take, upon receipt of the complaint, would have been to ask BD and LandsD for the status of their follow-up actions, and to inform the complainant under what circumstances OFCA could revoke its approval of the RBS.

759. The Ombudsman recommends that in future OFCA check with BD and LandsD when it receives any public complaint or query about non-compliance of RBS with the statutory requirements of the two departments.

Government's response

760. OFCA accepts the Ombudsman's recommendation. Actions have already been taken by OFCA to check with BD and/or LandsD, as the case may be, when it receives public complaint or query about non-compliance of RBS with the statutory requirements of the two departments.

Registration and Electoral Office

Case No. 2016/3878(I) – Refusing to provide the complainant with certain statistics in relation to the 2016 Legislative Council Election

Background

761. The complainant requested the Registration and Electoral Office (REO) to provide statistics on the 2016 Legislative Council Election (the Election), including –

(a) the number of invalid ballot papers and the reason for their being regarded as invalid;

(b) the number of complaints about voter impersonation;

(c) the cumulative voter turnout at polling stations each hour; and

(d) the number of votes and invalid ballot papers that election agents were notified of at the venues.

762. As required by the law, REO would investigate matters relating to the Election. The Electoral Affairs Commission (EAC) would then submit a report (the Report) to the Chief Executive before making it public. Some of the information that the complainant requested would be published in the Report.

763. According to REO, the statistics requested related to the data of around a thousand election documents and of nearly 600 polling stations. Since REO had not yet finished collating and verifying the information, it would have to deploy a lot of manpower and other resources for such compilation just to provide some scattered statistics to the complainant before completion of the Report. Besides, disclosure of incomplete statistics and piecemeal information before publishing the Report would not show a full picture and could be misleading. Premature disclosure of information would also deprive EAC of its priority to make a report and recommendations to the Chief Executive. Therefore, REO refused to provide the statistics requested by the complainant before the Report was published on the grounds stated in paragraphs 2.9(d) ("unreasonable diversion of a department's resources") and 2.13(a) ("information relating to incomplete analysis, research or statistics, where disclosure could be

misleading or deprive the department or any other person of priority of publication") of the Code on Access to Information ("the Code").

The Ombudsman's observations

Allegations on items (a) and (b)

764. REO stated that disclosure of such information could be misleading. The Office of The Ombudsman, Hong Kong ("the Office") found its statement not adequately grounded, as it had failed to explain how such disclosure would cause misunderstanding and what kind of misunderstanding might be caused. The Office did not agree that REO could refuse to provide the information on the grounds that "disclosure could be misleading" citing paragraph 2.13(a) of the Code.

765. Nevertheless, the Office found it not unreasonable for REO to estimate that it would have to deploy a lot of manpower to provide the information as that would involve the statistical analysis and classification of a large number of ballot papers and complaints. Given that such information had not yet been made public, providing the complainant with such information in advance would deprive EAC of its priority to provide information to the Chief Executive. The Office considered that REO's decision to refuse disclosure of such information on the grounds of "unreasonable diversion of a department's resources" citing paragraph 2.9(d) and that disclosure would "deprive the department or any other person of priority of publication" citing paragraph 2.13(a) of the Code was not unjustified.

Allegations on items (c) and (d)

766. The Office considered that disclosure of such information would not cause any misunderstanding. Moreover, any possibility of misunderstanding could be eliminated by the way of adding an explanatory note. Therefore, the Office did not accept REO's invoking paragraph 2.13(a) of the Code ("disclosure could be misleading") as a reason for withholding information.

767. Furthermore, as those data had already been released on the day of the Election, it would not cost REO much manpower to provide the information to the complainant. Besides, when EAC subsequently submitted the Report to the Chief Executive, there would no longer be a question of priority of publication as far as those data were concerned, as

they had already been released on the day of the Election. In this regard, the Office considered that both paragraphs 2.9(d) ("unreasonable diversion of a department's resources") and 2.13(a) (disclosure could "deprive the department or any other person of priority of publication") of the Code were not applicable.

768. In the course of the Office's investigation, REO had provided the requested information to the complainant.

769. The Ombudsman considered the complaint partially substantiated, and urged REO to implement the following recommendations when handling requests for information in future –

(a) to carefully consider each request on the basis that the requested information will eventually be disclosed and provide the requested information as far as possible, instead of casually withholding the requested information under the provisions of Part 2 of the Code; and

(b) if it is decided that the requested information will not be released or cannot be released for the time being, REO should state it clearly and set out in detail in its reply the grounds, item by item, for not being able to provide the requested information.

Government's response

770. REO accepted the two recommendations of the Office and has adopted the following measures –

(a) the staff concerned have been reminded that in handling similar requests for information in future, they should continue to give careful consideration to each request and provide the requester with the requested information as far as possible in a practicable way; and

(b) the staff concerned have also been reminded that, in case it is decided that the requested information will not be released (or cannot be released for the time being) under the provisions in Part 2 of the Code, they must state the decision clearly with justifications in the reply.

Registration and Electoral Office

Case No. 2016/4977(I) – Refusing to provide the complainant with the names of subscribers of the candidates for certain subsectors in the 2016 Election Committee Subsector Ordinary Elections

Background

771. On 21 December 2016, the complainant lodged a complaint to the Office of The Ombudsman (the Office) against the Registration and Electoral Office (REO).

772. According to the complainant, he made a request to REO on 6 December 2016 under the Code on Access to Information (the Code) for access to the names of subscribers of 12 uncontested subsectors/ sub-subsectors of the 2016 Election Committee Subsector Ordinary Elections. On 15 December 2016, REO replied in writing to the complainant that the requested information involved personal data provided by third parties for election-related purposes. If such information were to be disclosed to the complainant, it would entail significant resources for contacting all the persons concerned and obtaining their consent. Therefore, REO refused to provide the requested information on the grounds set out in paragraphs 2.9(d) and 2.14(a) of the Code.

773. The complainant considered REO's decision to reject his request unreasonable and made the following two points –

(a) It is stated in "Table 1", "Table 2" and Note 21(b) of the Nomination Form for the Election Committee Subsector Ordinary Elections ("nomination form") that "Particulars of subscribers/nomination form will be made available for public inspection". Hence, the subscribers, when completing the nomination forms, should have been informed that the information contained therein (including their names) will be made public. Therefore, there is no need for REO to deploy resources for obtaining the consent of subscribers again on the disclosure of the information.

(b) According to relevant legislation, the nomination forms should be made available for public inspection until the Returning Officer (RO) has declared the candidates as elected. As the information contained in the nomination forms has been made public and the specified period for public inspection is meant for administrative convenience only, there is no reason why the information should be withheld from disclosure after the public inspection period.

The Ombudsman's observations

774. The Code stipulates that government departments should disclose information in their possession as far as possible, unless it is justified to refuse disclosure of information under the provisions in Part 2 of the Code. In this case, REO has quoted paragraphs 2.9(d), 2.14(a), 2.15 and 2.18(a) of the Code, paragraph 2.15.2 of the Code on Access to Information - Guidelines on Interpretation and Application (the Guidelines) and Data Protection Principle 3 of Schedule 1 to the Personal Data (Privacy) Ordinance (PD(P)O).

775. REO has indicated to the Office that under PD(P)O, the names of the subscribers (or authorised representatives/responsible persons of corporate voters) of the candidates of the 12 uncontested subsectors requested by the complainant are regarded as "personal data", and the collection and use of the information are subject to the relevant provisions of PD(P)O.

776. According to Data Protection Principle 3 of PD(P)O, personal data shall not, without the prescribed consent of the data subject, be used for a new purpose. As stated in Note 21(a) of the nomination form regarding the collection of personal data, the relevant data and other related information will be "used by the Electoral Affairs Commission (EAC), REO, relevant RO and other related government departments and organisations for election-related purposes." REO claimed that as the data collector and the party designing the nomination form, it was in the most appropriate position to explain what it meant by the term "election-related purposes" in the nomination form. REO said that the term actually referred to "purposes related to the conduct of the election". Therefore, the remarks in the nomination form "Particulars of subscribers/ the nomination form will be made available for public inspection" should be taken to mean that such information would only be made available for public inspection during the period specified by the

Electoral Affairs Commission (Electoral Procedure)(Election Committee) Regulation (the EAC Regulation).

777. Furthermore, as a data user, the purpose of the collection of personal data by the Government has to be in line with the functions of the relevant departments. As the main function of REO is to ensure that elections are conducted in accordance with the electoral laws and the relevant guidelines, the use of personal data collected by REO should only be limited to this purpose. Upon RO's announcement of the result of a subsector election, the electoral procedure will come to a close. After that, any request for access to information contained in the nomination form made by members of the public will have nothing to do with the conduct of the election, and hence should not be regarded as the original purpose of data collection of the nomination form.

778. REO also stated that the complainant made the request for access to the personal data of subscribers in the nomination forms only after the close of the statutory public inspection period and the completion of the elections. If REO rashly disclosed the personal data to the public, it would defeat the original purpose of data collection stated in the nomination form, which amounted to a breach of the Data Protection Principle 3 of PD(P)O. When signing the nomination form, the candidates and subscribers only gave consent to the use of their personal data for the above-mentioned purposes but not the disclosure of their personal data after the public inspection period. Based on the principle of privacy protection, if REO still intended to disclose the said personal data, it must seek the prior consent from the data subjects formally.

779. REO further pointed out that there were a total of 282 validly nominated candidates in the 12 uncontested subsectors/ sub-subsectors concerned and that each candidate would require the nomination of at least five subscribers, with the total number of valid subscribers at 2 733. Even if some of the subscribers were repeated, the actual number of subscribers was believed to be large. REO was required to contact each and every one of them to seek their consent for the disclosure of their personal data. It was also expected that REO would need to deploy considerable resources and staff from different sections for extracting and consolidating the data beforehand, drafting and sending letters for seeking consent by mail, answering enquiries from subscriber recipients, as well as verifying, consolidating and following up on the information.

780. Therefore, in its reply to the complainant dated 15 December 2016, REO rejected the complainant's request for the relevant information on the grounds set out in paragraphs 2.9(d) and 2.14(a) of the Code. In addition, REO must reject the complainant's request for access to the information under Data Protection Principle 3 of PD(P)O and paragraphs 2.15 and 2.18(a) of the Code.

781. Regarding the two points made by the complainant, REO had the following response –

(a) The remarks in Table 1 and Table 2 of the nomination form which read "Particulars of subscribers will be made available for public inspection" as well as that in Note 21(b) of the nomination form which reads "The nomination form will be made available for public inspection", serve to remind candidates and subscribers that the nomination form will be made available for public inspection during the public inspection period in accordance with the EAC Regulation.

(b) REO does not agree that the information in the nomination form, once disclosed for public inspection, would become accessible to the public any time thereafter. Such an arrangement would defeat the original intention of the EAC Regulation in specifying a statutory public inspection period for the nomination form.

(c) The public inspection period was specified by EAC under the Electoral Affairs Commission Ordinance through the enactment of the EAC Regulation. Since all the statutory processes of the election were closely linked, the establishment of the public inspection period was not meant for the administrative convenience of REO. REO had no authority to make separate arrangements regarding inspection of the nomination form by the public beyond the public inspection period.

(d) The fact that the personal data is available or was once available in the public domain does not mean that REO can use it for other purposes. As stated in paragraph 2.15.2 of the Guidelines, as far as personal data is concerned, whether it is in the public domain or not is irrelevant to the consideration of release. Therefore, even if the information in question is in the public domain during the public inspection period, it does not imply that the Government may continue to disclose it after that period.

782. The Office did not agree with REO, details of which are set out in the following paragraphs.

783. What the complainant requested was information on the names of subscribers of some candidates rather than a copy of the nomination forms or all information contained therein, though such information was also regarded as the personal data of a third party.

784. Note 21(a) of the nomination form has clearly stated the purpose of personal data collection, specifying that the personal data collected will be used by government departments and organisations concerned for "election-related purposes", rather than solely "for purposes related to the conduct of the election" as claimed by REO. Neither the Note nor any other part of the nomination form has indicated to subscribers signing the nomination form that their personal data will only be made available for public inspection during the public inspection period stipulated under Section 10 of the EAC Regulation. In other words, the subscribers should have known, when signing the nomination form, that their personal data will be collected by REO for any "election-related purposes", which certainly includes, but not limited to, answering public enquiries on the election during or after the election. This is deemed to be the most natural and plain interpretation for Note 21(a).

785. As for Note 21(b) of the nomination form with regard to the collection of personal data and the reminder for subscribers in the nomination form which reads "Particulars of subscribers/nomination form will be made available for public inspection", they can at best serve as a special reminder for the subscribers that the information provided (including their signature) will eventually and at least be made available to the public in this way. The Office does not agree that Note 21(b) and the reminder which read the same can be regarded as the sole purpose for collecting the information.

786. The fact that the complainant would like to know the names of subscribers was obviously related to election. Therefore, the release of the information to the complainant should not be regarded as using the information for a new purpose.

787. REO has claimed that the purpose of data collection by the department shall be in line with its function, which is mainly to ensure that elections are conducted in accordance with the electoral laws and the relevant guidelines. Therefore, REO may not use the personal data collected for purposes other than its primary function. The Office does not accept this view.

788. In the welcome message on REO's website, the Chief Electoral Officer has stated explicitly that "Our primary role is to ensure that elections in Hong Kong are conducted openly, fairly and honestly. With this objective in mind, my colleagues and I oversee the effective conduct of elections and strive for continuous improvement to better serve the community". Ensuring that elections are conducted openly, honestly and fairly is one of the statutory responsibilities of REO, and answering public enquiries on election-related matters will only make the elections more open and honest.

789. Apart from conducting elections in accordance with the relevant electoral laws and guidelines, REO also has the responsibility to comply with the general policies and rules of the Government, including the Code on Access to Information.

790. In light of the above, the Office considers that REO's provision of the requested information to the complainant is related to elections, and is in line with the functions of REO and the purpose stated during data collection.

791. Since the information is not used for a new purpose, there is no need for REO to seek consent from the data subjects before disclosing it. On the other hand, as the subscribers were well aware that the information provided would eventually and at least be made available for public viewing for a certain period of time, and that the information would be used for election-related purposes, the Office considers it quite reasonable to believe that the subscribers clearly understood that REO would disclose their personal data for answering enquiries related to the relevant elections when they signed the nomination form. At least, the subscribers have no reasonable grounds to claim that they are under an explicit or implicit understanding that the REO will not further disclose their personal data. Neither do they have reasonable grounds to claim that they have explicitly or implicitly indicated to REO that it must not further disclose their personal data. In other words, no agreement or consensus has been reached regarding the confidentiality of the information between REO and the subscribers.

792. Based on the above analysis, neither paragraph 2.14(a) nor paragraph 2.15 of the Code can provide the grounds for withholding the requested information. Another important factor which REO should consider is the disclosure of the information on the grounds of public interest. In this case, while the disclosure of the information will cause no potential harm or prejudice to the public or subscribers, its importance in ensuring public interest through upholding fair and honest elections speaks for itself.

793. Since it is not required to seek consent from the data subjects, the provision under paragraph 2.9(d) of the Code, i.e. the unreasonable diversion of a department's resources, is not applicable.

794. Under the statutory requirement, REO is required to make available copies of the nomination forms for public inspection at the specified offices within a specified period. The Office agreed that it does not imply the public may inspect the information, which has once been publicly released, any time after the public inspection period. Making the information (including the signatures of relevant persons in the nomination forms) available for public inspection would enable the public to personally examine the verification conducted by REO, which is an integral part of an open and honest election. After the completion of the electoral procedure, it is reasonable that the law does not require REO to deploy additional resources for further implementing this special arrangement.

795. That said, the Office considers that REO has the responsibility to provide a positive response to general enquiries and requests for access to information in accordance with the Code. In fact, there is no prohibition under the electoral laws regarding the release of information by REO in any form for legitimate purposes.

796. The Office considers that, given that REO has once made the relevant information available in the public domain for the legitimate purpose of making the election open and honest, it may disclose the relevant information for the same reason thereafter. If REO has concerns that providing replies to requests for information indefinitely will create a burden to the department, it may consider proactively publishing the relevant information as a routine arrangement as suggested in paragraphs 1.4 and 1.5 of the Code .

797. Regarding REO's quoting of Data Protection Principle 3 of Schedule 1 to PD(P)O and paragraph 2.18(a) of the Code, as the Office has already explained the meaning of the provision of paragraph 2.15 of the Code relating to the disclosure of personal data, it will not repeat here. PD(P)O is under the purview of the Privacy Commissioner for Personal Data. While the Office will not make further comments, it would like to draw attention to the parallel between the Data Protection Principles and the requirements of the Guidelines in certain aspects.

798. An open and transparent electoral procedure may assure people that elections are conducted fairly and honestly. This is the core value embraced by the community and where the spirit of electoral legislation lies. Nevertheless, REO limits its own function and considers it only necessary and permissible to make the nomination forms available for public inspection within the public inspection period, making it difficult for members of the public to obtain the information in the nomination forms again after the public inspection period. The narrow-mindedness of REO is disappointing.

799. The Chief Executive Election is a major milestone in Hong Kong's political development. How can the Government permanently seal the information relating to the electoral procedure (including the names of candidates and subscribers of the Election Committee) after the Election?

800. The Ombudsman considered the complaint against REO substantiated and recommended that –

(a) REO should disclose the requested information to the complainant if there is no other ground to withhold such disclosure under the provisions of Part 2 of the Code; and

(b) REO should review the current practice of making the nomination forms available for public inspection during the public inspection period only, and seek the advice of EAC if necessary.

Government's response

801. With regard to recommendation (a) made by the Office, REO maintains the view that, without the express consent of the candidates or the subscribers concerned (including the authorised representatives/ responsible persons of corporate voters), it is prohibited by law for REO to provide members of the public with the personal data of the candidates and their subscribers beyond the public inspection period. The Office of the Privacy Commissioner for Personal Data also shares REO's view.

802. Regarding this particular case, REO considered that the remark "The nomination form will be made available for public inspection" in Notes 21(b) of the nomination form should be read in conjunction with the public inspection arrangement stipulated under the EAC Regulation. Therefore, the signing of a nomination form by candidates and subscribers (i.e. the data subjects) does not imply that they have given their express consent to the disclosure of their personal data to the public beyond the public inspection period. In the absence of express and unequivocal consent of the data subjects to the disclosure of their personal data beyond the public inspection period, REO considered that it should not provide members of the public with the personal data of the candidates and their subscribers. As such, REO withheld disclosure of the relevant information to the complainant under paragraphs 2.9(d) and 2.14(a) of the Code.

803. With regard to recommendation (b) made by the Office, REO and the relevant RO must strictly handle the nomination forms for the elections and the arrangement of the public inspection period in accordance with the relevant electoral legislation and the relevant provisions of PD(P)O. It is the statutory function of EAC to conduct and supervise public elections and to make arrangements and take steps as it considers appropriate, including making regulations, in accordance with the power and functions conferred to it by law, so as to ensure that elections are conducted in an open, honest and fair manner. REO will continue to arrange the nomination forms for public inspection strictly in accordance with the EAC Regulation and the decision of EAC.

804. In response to the investigation report of the Office, REO provided its comments to the Office in writing on 30 June 2017 and 22 September 2017 respectively.

805. A reply was given by the Office to REO on 24 November 2017. In its reply, the Office further elaborated its views in the investigation report, though noting that as the actions of EAC are not subject to the Office's investigation, it will not intervene in whether and how EAC will conduct a review on the matter.

Transport Department

Case No. 2016/2304 – Delay in re-opening the metered parking spaces when the road construction work was completed ahead of schedule

Case No. 2016/2982A – Delay in re-opening the metered parking spaces when there was no construction work in progress

Background

806. Two complainants lodged their complaints separately with this Office against TD. They alleged that some metered parking spaces at different locations were temporarily closed by utility companies (UCs) with TD's approval for carrying out road works, but then the road works were not commenced as scheduled, or the parking spaces were not re-opened promptly despite early completion of the road works. The complainants criticized TD for allowing unnecessary closure of parking spaces, causing inconvenience to drivers and wastage of public resources.

TD's Monitoring Measures

807. TD will issue approval letters to UCs with specified Approval Conditions for temporary closure of parking spaces. The approval letter, copied also to its contractor for managing metered parking spaces (the contractor), stipulates the start and end dates of suspension. The Approval Conditions require UCs to submit site photos regularly to TD when the road works are in progress. Meanwhile, the contractor will inspect the affected parking spaces at intervals of not more than four days to monitor the work progress and report to TD's Traffic Engineering Division of any irregularities. UCs are required to seek TD's approval at least three working days in advance if they need to extend the suspension period due to delay in road works. Where early completion of road works is expected, UCs should notify TD at least five working days in advance, so that TD can instruct the contractor to effect the re-opening of parking spaces as soon as possible.

Response from TD

808. TD admitted that the two complaint cases reflected its deficiencies in monitoring the contractor. TD explained that the cases cited by the two complainants involved non-compliance with the Approval Conditions by UCs, including failure to notify TD in a timely manner after rescheduling or early completion of the road works, and failure to submit site photos. In some cases, the UCs continued to occupy the parking spaces with trucks and construction materials even though they had notified TD of completion of the road works. As a result, the contractor could not re-open the parking spaces earlier.

809. TD also found that in some cases the contractor had made unauthorised alteration to the dates specified in the suspension notices when it discovered that construction materials had been left at the closed parking spaces despite expiry of the suspension period. TD already reminded the contractor to contact the UC direct in case the site was not properly vacated, and not to alter any information in the suspension notices without first confirming with TD. TD pledged to step up monitoring of the contractor's performance, including random checking of the notices and the re-opening of parking spaces.

The Ombudsman's observations

810. This Office had published in 2012 a direct investigation report on the administrative arrangements for temporary closure of metered parking spaces, and TD had implemented the improvement measures recommended in the report. However, from the complaints lodged by the two complainants, it appeared that UCs' non-compliance with the Approval Conditions still occurred from time to time and TD failed to urge the UCs to submit the site photos or make enquiries about their work progress. TD explained that its Traffic Engineering Division had other matters of higher priority to handle. The Office considered that if the problems revealed in the cases were not single incidents and concerned resource constraints, it was all the more important that TD should explore feasible solutions, such as delegating to the contractor such tasks of liaising and issuing reminders.

811. The above cases also revealed that the contractor had failed to follow proper procedures, leading to prolonged suspension of parking spaces without the knowledge of TD. It was necessary for TD to monitor more rigorously the contractor's performance. Meanwhile, TD's guidelines on re-opening of parking spaces had only set the timeframes for UCs and the contractor to comply regarding their duties but not any timeframes for TD staff regarding their follow-up action to be taken. In one case involving delay, after receiving the contractor's report on early completion of the road works, TD took 12 working days to follow up and arrange for re-opening of the parking spaces. The Department obviously failed to take the urgency to meet the public's needs seriously.

812. While TD stated that its statistics showed effectiveness in the current administration of temporary closure of parking spaces, the above cases revealed that UCs or the contractor might not have truthfully reported the completion dates. As a result, TD might not be aware of any delay in re-opening of the parking spaces. The Office, therefore, questioned the accuracy of TD's statistics.

813. In the light of the above, The Ombudsman considered the two complaints substantiated. The Ombudsman made a number of recommendations to TD, including –

(a) to adopt more effective measures against UCs' non-compliance with the Approval Conditions, particularly any failure to report work progress and submit site photos in a timely manner, and to be more proactive in issuing reminders to UCs;

(b) to consider including in the Approval Conditions a new requirement that UCs should properly clear all items from the parking spaces upon completion of road works;

(c) to monitor more rigorously the contractor's performance, review and consider revising the contractor's service agreement to delegate some of the work currently handled by the Traffic Engineering Division to the contractor;

(d) to require the contractor to contact the UCs direct to check work progress if no activities are found at the closed parking spaces during inspections and report to TD in parallel;

(e) to draw up detailed guidelines and specify the timeframes for follow-up actions to be taken by TD staff;

(f) to review the classification of relevant cases so that TD's statistics can accurately reflect whether parking spaces are re-opened in a timely manner; and

(g) to consider requiring the contractor to take photos for records in every inspection.

Government's response

814. TD accepted all the recommendations of The Ombudsman and has taken the following follow-up actions.

Recommendation (a)

815. At the meeting of the Joint Utilities Policy Group on 19 May 2017, TD urged the management of the UCs and works departments (e.g. Drainage Services Department, Water Supplies Department and Highways Department) to remind their works contractors to comply with the Approval Conditions in relation to suspension of parking spaces, closely monitor the site conditions, and keep TD informed of the latest works progress at appropriate time. Where early completion of the works or extension of the suspension period due to delay in completion of the works is anticipated, they should inform TD as early as possible and within the specified working days in the Approval Conditions.

816. At the above mentioned meeting, TD also emphasised that according to the existing mechanism, if the applicants were found to have committed serious non-compliance of the terms in relation to suspension of parking spaces, TD might withdraw the approval for the temporary suspension of parking spaces as well as the approval for relevant temporary traffic arrangement, rendering the applicants unable to continue with the works and requiring them to re-open the parking spaces expeditiously. Apart from the temporary traffic arrangement related to the parking spaces, TD might also withdraw the approval for temporary traffic arrangements in the vicinity of the parking spaces. The applicants would have to submit a new application if further suspension of parking spaces is required.

817. To address the non-compliance with the requirements on submission of notification of works completion, TD has instructed the Traffic Engineering team responsible for vetting applications for temporary traffic arrangements (the engineering team) to remind the UCs/works departments and their works contractors at the meeting of the Traffic Management Liaison Group to strictly comply with the Approval Conditions if such applications involve temporary suspension of parking spaces. Moreover, the engineering team should take follow-up actions within two working days after the expiry of deadline for submission of site photos by the applicants. In case the applicants fail to submit site photos or there are problems with the photos, the engineering team should urge the applicants to re-submit the photos and request them to clarify the works progress.

Recommendation (b)

818. After consulting the UCs and works departments, TD revised the Approval Conditions and put them into effect in December 2017. The newly-added terms include the following -

(i) The applicants should immediately remove all items from the parking spaces upon works completion. If the applicants fail to remove all items from the parking spaces or complete the reinstatement works of the parking spaces after two working days subsequent to TD's issue of reminder by email or at the time specified by TD, TD will consider relaying the situation to relevant government departments and demanding follow-up actions, with the emphasis that relevant government departments may take actions against any non-compliance with the Approval Conditions.

(ii) The applicants should deploy staff to the site on the day of re-opening of parking spaces to liaise with the contractor managing the parking spaces and provide assistance as necessary to ensure that the parking spaces can be re-opened as scheduled.

Recommendations (c)

819. TD has stepped up monitoring of the contractor's performance in respect of the suspension and re-opening of metered parking spaces. Measures taken include random checks on the notices of suspension of metered parking spaces put up by the contractor and whether the parking spaces were re-opened as scheduled, etc. Monitoring results indicated that the contractor has so far followed the established procedures in handling the temporary closure and re-opening of metered parking spaces. TD will continue to closely monitor the contractor's performance.

820. Having reviewed the terms of the existing "management, operation and maintenance" (MOM) agreement with the contractor, TD plans to include additional terms in the new agreement to be awarded in January 2019, which require the contractor to take photo records, contact the works contractor direct to confirm the latest works progress, and submit the relevant information (including photo records) to the engineering team by email for appropriate follow-up when any of the following problems are spotted during inspection (at an interval of not more than four days) or arrangements for re-opening of the parking spaces –

(i) The works contractor fails to complete the works within the approved timeframe and/or remove the construction materials occupying the temporarily suspended parking spaces; or

(ii) There are no works being carried out within or near the suspended parking spaces.

Recommendations (d)

821. The existing MOM agreement signed between TD and the contractor does not contain any terms requiring the contractor to contact the applicants or their works contractors direct for the issues relating to the suspension and re-opening of metered parking spaces. Nonetheless, upon discussion, the operator has agreed that if it finds during inspection that there is no fencing or machinery at the suspended parking space, or if construction materials are found occupying the parking space when re-opening of the parking space is being arranged, it will contact the works contractors to check the works progress, or remind them to remove the items upon completion of the works. It will also inform the engineering team by email with site photos enclosed for follow-up actions. The contractor has implemented the procedures since December 2016.

TD plans to include the relevant terms in the new MOM agreement to be awarded in January 2019 which would require the contractor to contact the applicants or their works contractor direct for issues relating to the suspension and re-opening of metered parking spaces.

Recommendation (e)

822. TD has instructed the engineering team to take follow-up actions within two working days after receiving the report from the contractor or site photos from the applicants. As for processing applications from the applicants for early re-opening of the parking spaces or extension of the closure of parking spaces, TD and the contractor normally take about five working days and four working days respectively, and the timeframes have been reflected in the existing Approval Conditions.

Recommendation (f)

823. TD agrees that the compilation and classification of data in the past relied on the information submitted by the applicants or the contractor. TD has instructed the engineering team in every district to conduct random checks of the temporarily suspended parking spaces every month. The random checks should cover at least one case in which temporary suspension of parking spaces has just started (if any), at least one case of re-opening of parking spaces (if any), and at least two cases of works in progress (if any).

Recommendation (g)

824. Since December 2016, the operator had pursued the practice of taking site photos for filing when irregularities were spotted during inspection according to the requirements of the MOM agreement signed with TD. As for cases in which no irregularities are found during inspection, the existing agreement does not require the operator to take photos for filing. Nonetheless, upon discussion, the operator has agreed to take photos for records in every inspection starting from July 2017. Moreover, TD plans to include new terms in the new MOM agreement to be awarded in January 2019 which would require the operator to take site photos for filing also for cases where no irregularities are found during inspection.

Part III
– Responses to recommendations in direct investigation cases

Environmental Protection Department and Planning Department

Case No. DI/410 – Government's Control over Fly-tipping of Construction Waste and Landfilling Activities on Private Land

Background

825. In recent years, there have been frequent occurrences of fly-tipping of construction waste (i.e. dumping of any substance, matter or thing generated as a result of construction work) or landfilling activities on private land in the rural areas of the New Territories. These activities have aroused public concerns about issues such as environmental hygiene, land use and conservation.

826. The Office of The Ombudsman (the Office) considers that disposal of construction waste and landfilling activities, while being inevitable in city development, should meet the requirements in the relevant legislation and must not have an adverse impact on the environment. Strict control by the Government departments concerned over these activities is, therefore, of paramount importance.

The Ombudsman's observations

827. Fly-tipping of construction waste and landfilling activities on private land are subject mainly to regulatory and enforcement actions by the Environmental Protection Department (EPD) and the Planning Department (PlanD) in accordance with the relevant legislation. The Office's investigation revealed the following inadequacies in the control by EPD and PlanD over such activities.

EPD Should Have Conducted More Comprehensive and Proactive Inspections

828. Pursuant to the Waste Disposal Ordinance, it is an offence to deposit construction waste without the consent of the landowners.

829. EPD's inspections were mostly conducted during office hours on weekdays. In the 22 months between January 2016 and October 2017, inspections during weekends, holidays and non-office hours accounted for only about 6% of the total number of inspections. Furthermore, the number of prosecution cases was small (only 18 cases or less than one case per month on average).

830. Some members of the public have pointed out that those engaged in fly-tipping of construction waste could easily evade EPD's inspections by simply carrying out their activities during weekends, holidays or non-office hours. The Office considered that EPD should take into account this view and conduct more inspections during weekends, holidays and non-office hours to increase its chance of successful enforcement.

831. In its Circular Memorandum of 2009, the Environment Bureau (ENB) asked Government departments to proactively conduct regular inspections in the rural areas of the New Territories and on various black spots so as to detect illegal or unauthorised dumping of construction waste or landfilling. However, EPD had yet to work out an action plan for such proactive inspections. EPD usually acted only on reports from the public, referrals from other departments or media reports.

EPD Has Yet to Implement the Use of Global Positioning System Despite Years of Study

832. In October 2015, the Government launched a trial scheme of mandatory use of Global Positioning System (GPS) technology on vehicles collecting construction waste. It showed that GPS technology was already well developed. The Office considered that EPD should make more efforts to push forward with the necessary legislative amendments for implementing the scheme, thereby facilitating the prevention of illegal disposal of construction waste.

PlanD Takes Too Long to Enforce Reinstatement Notices

833. Where landfilling activities on private land constitute

unauthorised development under the Town Planning Ordinance, PlanD may issue a Reinstatement Notice (RN) requiring the RN recipient to reinstate the land, by the date specified, to its original state, or to such other condition more favourable to the RN recipient, as the Department considers satisfactory.

834. Of those cases in which PlanD had issued RNs in the past 12 years, less than 10% were able to complete reinstatement of the land within the three-month period specified in the RNs. When following up those cases, PlanD often did not manage to confirm that the RN requirements had been complied with until nine months or longer after expiry of the three-month period. In some cases, the RN requirements were only complied with after three years or longer. For those outstanding cases, PlanD had to use substantial resources to conduct repeat inspections and take follow-up actions over a prolonged period. The overall effectiveness of its enforcement actions was thus suffered.

PlanD's Prosecution Actions Have Little Deterrent Effect

835. In the past 12 years, the average number of successful prosecution cases brought by PlanD against non-compliance with RNs was only 11 per year, with the average fine per case being $45,000. Although both figures were on the rise in recent two years, noncompliance cases still occurred from time to time. The deterrent effect of PlanD's prosecution actions remained questionable.

PlanD Requires Pond Filling Offenders to Merely Grass the Land

836. In some pond filling cases, PlanD accepted the RN recipients to merely grass the land as a means of reinstatement. While PlanD had provided justifications for those cases, the Office pointed out that grassing the land is not the same as reinstating the fish ponds. Given the distinctive ecological value of fish ponds, merely grassing the land without reinstating the fish ponds would lead to diminution in their number, and thus the associated ecological habitats would gradually vanish. The Office considered that in drawing up RNs, PlanD should attach more weight to conservation of natural habitats and avoid creating an impression of slanting in favour of the RN recipients.

Inter-departmental Coordination Could Have Been More Proactive

837. According to ENB's 2009 Circular Memorandum, EPD will convene inter-departmental meetings with the relevant Government

departments as and when necessary; special urgent meetings will also be called to discuss those cases that have aroused wide public concern, with a view to arranging the necessary joint operations. The Office noticed, however, that in the past, interdepartmental meetings were convened only about once a year. The saving grace is that, in response to mounting public concern about illegal dumping/landfilling activities, EPD has started to convene two such meetings a year since 2017.

838. The Ombudsman made the following recommendations to EPD and PlanD –

EPD

(a) to reallocate or augment resources to step up inspections and enforcement actions outside office hours and on weekends and holidays as necessary;

(b) to draw up proactive inspection plans for stronger actions against fly-tipping activities;

(c) to take greater initiative to coordinate with other Government departments, enhance communication through inter-departmental meetings and arrange joint enforcement operations as and when necessary;

(d) to expedite the study on the operational details of the mandatory use of GPS technology on construction waste collection vehicles, and push forward with the necessary amendments to the relevant legislation without delay.

PlanD

(e) to review the enforcement procedures to avoid unnecessary repeat inspections, and to take resolute further enforcement actions against offenders who delay their compliance with RNs;

(f) to alert the court to the seriousness of the problem in cases of a serious nature, and seek more severe penalties in terms of heavier fines for stronger deterrent effect; and

(g) to review the factors to be considered in drawing up RNs; where sites of ecological/conservation value are involved, to require the RN recipients as far as possible to fully reinstate the sites to their original state in order to achieve the purpose of conservation.

Government's response

EPD

839. EPD accepted all of the recommendations and has taken the following actions –

Recommendation (a)

840. Regarding the suggestion of stepping up inspections and enforcement actions outside office hours, EPD will deploy manpower resources flexibly to increase the number of inspections within and outside office hours as well as on holidays according to specific needs so as to strengthen monitoring and enforcement actions.

841. On enhancing the monitoring of illegal deposition of construction waste during non-office hours, weekends and holidays, EPD has installed surveillance camera systems in appropriate locations according to the needs for round-the-clock monitoring of the situation of black spots, in order to enhance deterrent effect and assist enforcement.

Recommendation (b)

842. EPD will continue to flexibly deploy staff according to the manpower resources, work priorities and actual conditions in the districts, and adjust the strategies or conduct more inspections according to specific needs so as to enhance the effectiveness of monitoring and enforcement.

843. During January to June 2018, proactive inspections and ambush operations accounted for over 60% of the total number of inspections against land filling activities.

Recommendation (c)

844. To continue to strengthen collaboration with other relevant departments to jointly carry out monitoring and enforcement work, EPD has arranged meetings with the relevant departments more frequently to further enhance communication and monitoring of working progress, including review of improvements in relevant black spots. During January to June 2018, two inter-departmental meetings were held among EPD and relevant departments, including Agriculture, Fisheries and

Conservation Department, Buildings Department, Civil Engineering and Development Department (CEDD), Drainage Services Department, Food and Environmental Hygiene Department, Home Affairs Department, Highways Department, Lands Department and PlanD.

Recommendation (d)

845. GPS may help track and log the activities of construction waste collection vehicles, which may in turn help narrow down the scope of investigation, enhance enforcement effectiveness, as well as strengthen the prevention and combat against illegal dumping of construction waste. EPD has, jointly with CEDD, engaged a consultant to carry out a study and a trial, which has affirmed that GPS technology is technically mature and reliable. There are readily available and affordable applications in the market, and the use of GPS in fleet management in the trade has become increasingly common.

846. After careful consideration, EPD is of the view that GPS is useful in facilitating enforcement, and its operation and technological development (including the technical specifications of the tracking devices, and the principles over data collection and use) are pretty mature. Notwithstanding this, some members of the trade expressed concerns about the compliance cost and the detailed operational arrangements, as well as the confidentiality and protection of the data collected. To further ascertain the necessary arrangements for the adoption of GPS devices in the actual operating environment and to address the trade's concerns, the Government will take the lead, and plans to adopt the practice of requiring its contractors to install GPS tracking devices in their construction waste collection vehicles in public works contracts of relatively large scale. Taking into account the experience gained and the overall effectiveness in facilitating monitoring and enforcement actions, EPD will review and consider how to implement the initiative widely in the construction industry.

847. EPD has reported the abovementioned development to members of the Panel on Environmental Affairs of the Legislative Council at its meeting held on 26 March 2018.

PlanD

848. PlanD accepted all the recommendations of The Ombudsman and has taken the following actions –

Recommendation (e)

849. The Central Enforcement and Prosecution Section (CEPS) of PlanD undertakes enforcement and prosecution actions against unauthorised developments in accordance with the Town Planning Ordinance and established working procedure to prevent damage to the environment of rural areas.

850. PlanD has reviewed the enforcement procedure, including shortening the inspection period for monitoring site condition, taking proactive follow-up actions specifically against unauthorised developments within zones of ecological and conservation value, reducing repeat inspections, and taking resolute actions based on the nature and evidence of each case. To expedite and step up enforcement and prosecution actions against unauthorised developments, PlanD has allocated more resources and manpower (10 officers) to CEPS in 2016 and 2017. Additional manpower will be deployed for such work in 2018-19.

851. PlanD has also stepped up prosecution. During the four months from November 2017 to February 2018, PlanD successfully prosecuted the offenders in 10 cases of non-compliance with RNs. PlanD will continue to take resolute prosecution actions against offenders who delay their compliance with RNs.

Recommendation (f)

852. Regarding cases of non-compliance with RNs, PlanD has always provided the court with relevant information for sentencing reference, including the fines imposed on similar cases in the past, the offenders' conviction records and the impact of the unauthorised developments. Regarding recommendation (f), PlanD will continue to provide the court with the background and information about each case for the court's consideration in sentencing. In addition, more information on the planning intention of zones with ecological and conservation value and on the work and time the offenders need to comply with the requirements of RNs will be provided.

853. During the four months from November 2017 to February 2018, the average fine per case of non-compliance with RN was $102,000, more than double the average fine of $45,000 in the past as mentioned in

the Direct Investigation Report. PlanD will continue to proactively reflect to the court the nature and severity of each case for the court's consideration in sentencing.

Recommendation (g)

854. PlanD will continue to regard conservation as an important factor for consideration when drawing up requirements of RNs in respect of unauthorised developments within zones of ecological and conservation value. During the four months from November 2017 to February 2018, there was only one case of unauthorised pond filling within zones of ecological and conservation value (the land involved is zoned "Conservation Area"). The Planning Authority issued a RN to the person concerned, requiring removal of the filling materials and reinstatement of the pond.

855. At the request of The Ombudsman, PlanD provided The Ombudsman with a report on the progress in implementing the above recommendations on 24 April 2018. In her reply on 4 July 2018, The Ombudsman acknowledged that PlanD had implemented the three recommendations above. The Ombudsman urged PlanD to consistently and persistently implement the measures so as to strengthen control against fly-tipping of construction waste or landfilling activities on private land. The Ombudsman's follow-up with PlanD on this direct investigation case has come to an end.

Food and Environmental Hygiene Department

Case No. DI/393 – Food and Environmental Hygiene Department's System of Safety Control for Imported Fruits and Vegetables

Background

856. This direct investigation aimed to identify inadequacies in the Food and Environmental Hygiene Department (FEHD)'s system of safety control for imported fruits and vegetables, particularly its gatekeeping efforts at the point of arrival of imported fruits and vegetables in Hong Kong.

The Ombudsman's observations

The System

Safety Control for Imported Fruits and Vegetables

857. According to FEHD's risk assessments, fruits and vegetables are not considered high-risk foods. Hence, its prior permission is not required for importing them into the territory.

858. FEHD's Centre for Food Safety (CFS) adopts a risk-based principle in determining the types of food samples to be collected for checking, the frequency of sampling, the number of samples, and the types of laboratory analysis to be conducted. Sampling checks on fruits and vegetables upon arrival in Hong Kong are conducted by CFS at Kwai Chung Food Control Checkpoint (Kwai Chung Checkpoint, for those imported by sea), Man Kam To Food Control Office (Man Kam To Office, for those imported by land), and the Airport Office (for those imported by air). Samples taken by CFS officers at the above locations are sent to the Government Laboratory (GovtLab) or CFS's own Man Kam To Food Laboratory (exclusively for samples taken at Man Kam To Office) for laboratory tests.

Relevant Legislation

859. Regarding food safety standards, Schedule 1 to the Pesticide Residues in Food Regulation (PRFR) specifies the "maximum residue limits" (MRLs) for over 7,000 pesticide-food pairs. A supplier of food that contains pesticide residue exceeding the MRL specified in Schedule 1 commits an offence and may be prosecuted by FEHD.

860. The Government also has in place the Food Adulteration (Metallic Contamination) Regulations to regulate the levels of metals present in food.

861. The Office of The Ombudsman (the Office) had found the following inadequacies with regard to FEHD's regulation and surveillance of imported fruits and vegetables.

(a) Inspection and Enforcement Management

Inspection of fruits at Man Kam To Office too lax; and sampling checks on vegetables ineffective

862. There is a heavy flow of lorries driving through Man Kam To Office, importing vegetables by land. To minimize the duration of stay of the lorries at the Office for inspection, FEHD's outsourced workers would just take vegetables from close to the door of each lorry's storage compartment for inspection. Worse still, few lorries importing fruits would enter Man Kam To Office to allow the fruits to be inspected.

No routine checks on fruits and vegetables imported by sea and surveillance inadequate

863. FEHD did not conduct any routine checks at Kwai Chung Checkpoint on the grounds that fruits and vegetables were not considered high-risk foods, and that most imported fruits and vegetables must be kept refrigerated. Rather, FEHD chiefly took samples at wholesale and retail outlets for testing. However, such samples actually covered fruits and vegetables imported by sea, land and air. In other words, there was no surveillance targeted at fruits and vegetables imported by sea. Most of such fruits and vegetables simply entered the market without any inspection.

864. After the Office's commencement of investigation, FEHD has started a trial scheme to conduct more sampling checks of fruits and vegetables imported by sea at the importers' warehouses/cold storages. The Office hopes that FEHD will develop the trial scheme into a regular mechanism in order to strengthen its surveillance of such fruits and vegetables at the point of their arrival in the territory.

865. Moreover, many of the fruits and vegetables imported by sea are actually not difficult to distinguish, for example, those that are cheaper, bulkier and imported from Southeast Asian countries. When collecting samples at wholesale outlets, FEHD may try to focus on such fruits and vegetables to further remedy the lack of routine checks at Kwai Chung Checkpoint.

Lengthy process from sending samples to GovtLab to completion of laboratory tests

866. Test results of samples taken by CFS at Man Kam To or those collected in case of emergencies or food incidents at other locations can be made available within two working days. However, for samples not taken at Man Kam To or not for emergency cases, it generally took 19 working days from sending samples to GovtLab to the release of test results. Meanwhile, many fruits and vegetables from the same batch might have been sold in the market.

(b) Statutory Standards

Absence of clear regulatory standards for some vegetables commonly consumed in Hong Kong

867. The Office also found that lotus roots and bean sprouts, two commonly consumed vegetables in Hong Kong, were not listed in the relevant regulation with specified MRLs of pesticides. They were instead regulated by means of risk assessments based on some safety reference values, such as "acceptable daily intake" or "acute reference dose". Nevertheless, compared with the statutory MRLs, the results of risk assessments carry more uncertainties because various factors, such as the public's consumption habits, have to be considered in the assessment process. It is difficult for the public and the industry to discern from the assessment results the legally permitted limits and the levels of pesticides that are safe for consumption.

Lax and seriously outdated statutory standards for food safety

868. The regulation on metallic contamination in food was enacted in 1997, and for 20 years had not been updated to keep up with the times. In particular, the regulation had set the maximum limit of "lead" in leafy vegetables at 6 mg per kg, which was 20 times more lenient than the international standards.

869. The saving grace is that the Government has recently proposed legislative amendments in accordance with the international standards. Hopefully, there will be more stringent regulation of the content of "lead" in leafy vegetables.

870. In the light of the above inadequacies, The Ombudsman has made a number of recommendations to FEHD, including –

(a) on the inspection front, to conduct more stringent checks of imported fruits and vegetables at their point of arrival, namely, to collect more samples of fruits for testing, to strengthen surveillance of fruits and vegetables imported by sea, and to discuss with GovtLab the possibility of putting more resources to speed up laboratory tests on food samples; and

(b) on the legislation front, to amend the relevant regulation as soon as possible to include lotus roots and bean sprouts and specify their applicable MRLs of pesticides, and to adopt the existing international standards for the content of "lead" in leafy vegetables, for better safeguard of public health in Hong Kong.

Government's response

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

(a) CFS has arranged to increase the number of fruit samples taken at Man Kam To Office.

(b) CFS has, since early 2018, formulated and adopted guidelines for frontline staff to take samples of fruits and vegetables in storage compartments of lorries (including the inner parts), for the effective implementation of the new sampling check procedures and at the same time ensuring the occupational safety

of its frontline staff.

(c) CFS has stepped up and regularised sampling checks on fruits at importers' warehouses/cold storages.

(d) CFS has enhanced sampling from wholesale outlets of those fruits and vegetables believed to be imported by sea, and will continue to increase the sampling size. In addition, CFS has started sampling of fruits and vegetables at Kwai Chung Checkpoint.

(e) CFS and GovtLab will continue to maintain close contact and make flexible arrangements (such as strengthening logistic support to meet the mutually agreed schedule for delivery of samples) to minimise the time for dispatching and testing samples of fruits and vegetables.

(f) Having consulted the Expert Committee on Food Safety, CFS has adopted Codex's classification with effect from 1 November 2018 to group "Mungbean Sprouts" and "Soya Bean Sprouts" under "Leafy Vegetables (including Brassica leafy vegetables)" and "Lotus Tuber" under "Root and Tuber Vegetables", and use the relevant maximum residue limits specified in Schedule 1 to the PRFR as the basis to determine whether any pesticide residues identified in these types of vegetables meet the statutory requirements.

(g) The Legislative Council completed scrutinising the Food Adulteration (Metallic Contamination) (Amendment) Regulation 2018 ("Amendment Regulation") in October 2018. The Amendment Regulation has tightened the maximum level of "lead" in leafy vegetables to Codex's standard of 0.3 mg/kg. The Amendment Regulation will come into effect gradually from 1 November 2019.

(h) CFS will continue to keep in view international development, including the food safety standards established by Codex and other economies, the dietary habit of Hong Kong people as well as other relevant factors, so as to review the relevant food safety legislation and regulatory regimes as and when appropriate.

872. FEHD issued a letter to The Ombudsman on 1 June 2018 to report progress. In its reply letter to FEHD on 13 July 2018, The

Ombudsman indicated that all recommendations were deemed to have been implemented and that its follow-up to this investigation had come to an end.

Food and Environmental Hygiene Department and Lands Department

Case No. DI/405 – Government's Regulation of Factory Canteens

Background

873. The rapid development of industries in Hong Kong during the 1950s and 1960s had fostered the emergence of factory canteens that provided meals for factory workers in industrial buildings. It has been the Government's requirement since 1 August 1980 that all factory canteens must obtain a factory canteen licence before opening for business. If operating a factory canteen is against the land lease conditions of the industrial building, the land owner must also apply to the Government for a waiver/modification of the lease conditions.

874. The Food and Environmental Hygiene Department (FEHD) is responsible for approving and issuing factory canteen licences. The licence requires that a factory canteen can only serve factory employees who work in that same building, and such employees must hold an employee card signed and issued by their employer. Besides, the standards specified in a factory canteen licence for food room and lavatory are lower compared with those of a general restaurant licence.

875. The Lands Department (LandsD) is responsible for processing applications by factory canteen operators for lifting the land use restrictions in the land lease. It would issue a "waiver letter to permit a canteen within an industrial building" (Waiver) to the owner of the industrial unit. Having obtained a Waiver, the factory canteen operator need not pay an additional premium to the Government to make up for the difference in rateable value of the premises resulting from waiving the land lease conditions (waiver of additional premium). Nevertheless, the factory canteen must observe the following conditions –

(a) It can only serve factory employees working in the same building.

(b) It should not have a separate entrance/exit, or one (except fire escape) that directly leads to a public road, street or land.

(c) It should not display promotional materials such as signs, notices or posters, or use transparent or semi-transparent materials for its external walls, such that passers-by would be aware of its existence.

876. In recent years, however, many factory canteens, in blatant violation of the licensing requirements and lease conditions, serve public customers in a high-profile manner. This begs concern whether the facilities for fire safety and food hygiene of those canteens are suitable for serving public customers. In this light, The Ombudsman conducted a direct investigation to examine the Government's regulation of factory canteens.

The Ombudsman's observations

Wrongful Activities of Factory Canteens Very Common

877. FEHD's records showed that as at July 2016, there were 471 licensed factory canteens in Hong Kong. The number of factory canteens has risen instead of fallen, despite dwindling factory jobs over the years.

878. Evidence suggesting that factory canteens are apparently serving public customers includes –

(a) newspaper columns and food magazines from time to time recommending certain factory canteens to the general readers;

(b) websites and dedicated pages in social media networks set up by factory canteens for promotion; and

(c) the personal experience of the investigation officers of the Office of The Ombudsman (the Office) patronising factory canteens many times and not having been asked whether they were factory employees.

879. Activities of factory canteens that violate the lease conditions include –

(a) factory canteens located on the ground level using the means of escape leading to the public streets as an entrance/exit for customers; and

(b) factory canteens enjoying a Waiver but using transparent materials for external walls, putting up signs and displaying menus and other promotional materials to attract customers.

Adverse Consequences and Impact of Factory Canteens' Breach of Licence/Lease Conditions

880. Where factory canteens breach the licence and lease conditions by serving public customers, the following adverse consequences and impact may arise –

(a) The Fire Services Department (FSD) has reminded factory canteens that members of the public may not be familiar with the internal setting of the industrial building, and so public customers would have to face higher risks in case of a fire outbreak.

(b) The standards of food room and lavatory in a factory canteen may not be able to cope with a heavy flow of public customers. Food safety and hygiene may thus be compromised, posing hazards to the customers.

(c) Factory canteens can operate at lower costs compared with general restaurants. This will constitute an unfair competitive advantage if they are open to public customers.

(d) Factory canteens in violation of the Waiver should not be granted a "waiver of additional premium". Allowing them to serve public customers would mean a loss of revenue to the Government.

Out-dated Licensing Policy on Factory Canteens

881. The policy relating to licensing of factory canteens continues to allow the total area of factory canteens (irrespective of their number) in an industrial building to be as much as 10% of the gross floor area of the building, even though the real demand for factory canteens has greatly dropped over the years with factory jobs dwindling. For the past 40 years, the Government has not conducted any comprehensive review of the licensing policy, nor plugged the loopholes in the system. Consequently, many operators have exploited the loopholes, obtained factory canteen licences, and are able to enjoy the lower costs of operating food establishments in industrial buildings that serve public customers.

Lack of Rigorous Control by Both Departments in Approving Applications

882. FEHD adopted a lax attitude towards the kind of cuisines and food that factory canteens can serve. It failed to consider whether the standard of food room in factory canteens could cope with the sumptuous cuisines and banquets that were being offered. On the pretext of "business competition", the Department had instead allowed factory canteens to provide a wide variety of services or even sell alcoholic drinks, offer children's meals and organise cooking classes. This had deviated significantly from the original purpose of setting up a factory canteen, i.e. to serve factory employees working in the same industrial building.

883. Similarly, LandsD failed to consider and assess prudently whether each application is fully justified before granting a Waiver. Information shows that around 60% of factory canteens are on the ground level of industrial buildings, with quite a number of them located in the now commercialised districts, such as Kwun Tong. Given the large number of Waivers granted, the amounts of additional premiums thus waived were obviously rather substantial.

FEHD Turning a Blind Eye in Routine Inspections

884. FEHD in the past seldom took enforcement action against factory canteens which served public customers in breach of the licence conditions. Between 2012 and 2015, FEHD issued only one verbal warning against one such canteen. The Office found that FEHD officers did not ask the canteen operators to check the employee cards of customers, nor did they conduct any decoy operations during routine inspections of factory canteens.

LandsD's Inadequate Enforcement Actions against Violation of Lease Conditions

885. LandsD's enforcement actions against violation of lease conditions by factory canteens were extremely inadequate. In one case, LandsD was only concerned about the interests of the owners of a certain industrial building and failed to take lease enforcement action against a factory canteen in breach of the lease conditions for some 30 years. Some other cases showed that the Department only took enforcement action against violation of the lease conditions by the factory canteens concerned in a superficial manner. Consequently, the canteens only covered up their shop signs and put up directional signs for entrance/exit. They continued to serve public customers and use the means of escape for access by customers.

Lack of Coordination Weakening Enforcement Efforts

886. One case showed that FEHD and LandsD had shirked their enforcement responsibilities to each other. As a result, the factory canteen continued to operate in breach of the lease conditions. FEHD also failed to refer some cases of violation of the lease conditions by factory canteens in a timely manner to LandsD for follow-up. The above reflects deficiencies in the referral and coordination mechanism between the two departments.

887. The Ombudsman recommended the two departments to –

LandsD

(a) tighten up the system for granting the Waiver, so as to ensure that in all cases there is a genuine need to set up a factory canteen in the industrial building concerned;

(b) take rigorous lease enforcement actions against those factory canteens violating the lease conditions;

FEHD

(c) conduct a comprehensive and in-depth review of the policy on licensing factory canteen, jointly with relevant policy bureaux and Government departments, so as to ensure that a factory canteen licence will only be issued where the industrial building/factory concerned really needs a canteen;

(d) draw up clear and specific inspection guidelines, enhance training and supervision of frontline officers, and conduct more decoy operations; and

LandsD and FEHD

(e) set up a coordination and mutual referral mechanism for effective regulation of factory canteens, and clearly set out the powers and responsibilities of the two departments.

Government's response

888. LandsD and FEHD accepted The Ombudsman's recommendations, and have taken follow-up actions as set out below –

LandsD

(a) LandsD grants Waivers in accordance with FEHD's policy on licensing factory canteens. While FEHD is still conducting a review of the policy on licensing factory canteens, LandsD is exploring with FEHD ways to facilitate policy implementation, and is drafting internal guidelines accordingly. This will be conducive to the implementation of new measures once FEHD has completed its review.

(b) As to taking rigorous lease enforcement actions against those factory canteens in breach of the lease conditions, since 29 August 2016 LandsD has taken risk-based enforcement actions against lease breaches involving the change of uses (lease breaches) in industrial buildings. Specifically, lease breaches matching the following two considerations, namely the uses in

breach of the lease attract the flow of people and there are other premises in the same industrial building currently issued with Licences for Manufacture and/or Storage of Dangerous Goods (DGLs) by FSD, will be targeted for enforcement actions. LandsD will issue a warning letter to the concerned owner of the industrial building unit, requiring rectification of the breach of uses within a specified period, or else procedures to re-enter the unit will be initiated. As for other categories of lease breaches in industrial buildings (including cases with breaches of uses not attracting the flow of people and cases involving industrial building premises to which members of the public are attracted but without DGLs issued by FSD at other premises in the same industrial building), LandsD will continue with the current arrangement. Generally speaking, the District Lands Office (DLO) concerned will issue a warning letter to the owner, requiring rectification of the breach of uses within a specified period. If the breach is not rectified upon expiry of the warning period, the DLO will register the warning letter at the Land Registry (i.e. commonly known as "imposing an encumbrance") and reserves the right to take further lease enforcement actions. In strict compliance with the existing procedures, LandsD will continue to take the above risk-based enforcement actions.

FEHD

(c) FEHD has reviewed the policy on licensing factory canteens with the relevant policy bureau and Government departments. It is studying the feasibility of implementing the following new measures –

(i) requesting the applicant for a Factory Canteen License to provide in the application for licence information on at least one factory known to be operating in the industrial building, which will be referred to the Labour Department for verification; and

(ii) reducing the maximum percentage of floor space within an industrial building that can be used for canteen purposes from 10% to 1% of the gross floor area of the building.

(d) In mid-February 2018, FEHD issued a revised letter of licensing requirements and conditions to all licensed factory canteens, requiring licensees to display additional notice reading

"FACTORY EMPLOYEES OF THIS BUILDING ONLY" at conspicuous places of the seating accommodation and cashier counter (if provided) of factory canteens. Only customers with employee cards signed and issued by their employers or other acceptable documentary proof can use the factory canteens. Licensees should also take corresponding measures to ensure that a factory canteen only serves factory employees who work in the same building.

(e) From February 2017 to June 2018, FEHD issued 40 warnings and instituted 57 prosecutions against factory canteens which infringed the licensing conditions by serving outsiders. These prosecutions were initiated based on the evidence gathered from decoy operations. During this period, four factory canteens had their licences suspended by FEHD under the Demerit Points System for operating other types of unlicensed business in the premises.

LandsD and FEHD

(f) FEHD and LandsD have looked into the issue concerning setting up a coordination and mutual referral mechanism, and clearly set out the powers and responsibilities of the two departments. A list of contact persons of the district offices of FEHD and LandsD has also been drawn up to strengthen communication and liaison between the two departments.

Food and Health Bureau and Department of Health

Case No. DI/369 – The Mechanism of the Food and Health Bureau and the Department of Health for Handling Smoking Offences

Background

889. This direct investigation aimed to examine the effectiveness of the enforcement mechanism of the Food and Health Bureau (FHB) and the Tobacco Control Office (TCO) under the Department of Health (DH) for handling smoking offences, and whether their coordination with other statutory authorities in tobacco control had been adequate, as well as to identify areas for improvement.

The Ombudsman's observations

890. The Office of The Ombudsman (the Office) considered that FHB and TCO had nine inadequacies in three areas.

Inadequacies in Enforcement Mechanism

(a) Insufficient Inspections at Night

891. In each of the past four years, the number of fixed penalty tickets issued by TCO during night shifts was only one-fourth to one-third of those issued during daytime. This suggested that TCO had not deployed any officers to conduct surprise inspections during certain peak hours of smoking offences at places such as bars and restaurants, thus missing the opportune time for enforcement.

(b) Insufficient Manpower and High Turnover Rate

892. TCO had an actual headcount of only 79 officers, and the turnover rate of Tobacco Control Inspectors (TCIs) had remained high (at 16.3% in 2015/16). If DH could not find ways to reduce the turnover rate, the effectiveness of its enforcement actions would suffer in the long run.

(c) Antiquated Guidelines on Complaints Follow-up

893. TCO's internal guidelines stipulate that TCIs should conduct the first inspection within 21 days upon receipt of complaint. TCO should actively seek to shorten the time needed to conduct the first inspection and consider setting priorities for different spots.

894. In addition, TCO should enhance communication with complainants and arrange inspection times with reference to the information collected, so as to avoid wasting its already strained manpower resources.

(d) Cooperation with Prime Witnesses (Other than CIs) Should Be Strengthened

895. Smoking is a momentary behaviour, making it difficult to catch offenders red-handed. Nevertheless, if members of the public are willing to provide statements and testify in court, the chance of successful prosecution will greatly increase. DH can step up publicity so that more people are willing to come forward and testify against smoking offenders.

(e) Enhance Enforcement Actions by Plain-clothes Officers

896. TCO can enhance the role of plain-clothes officers in enforcement, especially in the provision of evidence. For instance, they can act as eye-witnesses, survey the site, or even take video footage of the smoking offences on the scene. Their efforts can complement those of uniformed officers to achieve more effective enforcement.

Inadequacies in Coordination Mechanism

(f) FHB and DH Failing to Properly Coordinate Enforcement of Tobacco Control

897. The Food and Environmental Hygiene Department (FEHD), the Leisure and Cultural Services Department (LCSD), and the Housing Department are empowered to institute prosecutions against smoking offenders in venues under their management. Nevertheless, in the past four years, about a fifth of TCO's list of "locations requiring intensive inspections" were venues under the management of FEHD and LCSD, while these two departments merely brought several dozen prosecutions every year.

898. The Office considered that FHB should proactively coordinate and support the tobacco control measures of all enforcement departments, instead of passively relying on individual departments to take enforcement actions within their own ambit.

(g) Government Departments Failing to Set Examples in Performing Duties of Venue Managers

899. Some Government departments could not even properly handle the illegal smoking problems in their own offices. The Office considered that Government departments and public bodies should set a good example and diligently perform their duties as venue managers.

Inadequacies in Legislation

(h) No Penalty for Venue Managers Who Fail to Comply with Tobacco Control Provisions

900. The laws of many developed countries (including the UK, Canada, Australia, New Zealand and Singapore) contain relevant provisions imposing penalties on venue managers who condone illegal smoking. However, there is no such provision in the current legislation in Hong Kong.

901. In many illegal smoking cases, the smokers are employees of the organisation concerned. Being their employers or supervisors, the venue managers surely have the ability and responsibility to prevent illegal smoking of their own employees.

(i) Imposing Anti-smoking Licensing Conditions on Places of Entertainment

902. Many places of entertainment, including billiard saloons, mahjong-tin kau premises and amusement game centres, are prone to serious problems of illegal smoking. The Government should study whether the licensing authorities and departments concerned can be authorized to introduce tobacco control requirements in the licensing conditions of such premises.

903. In the light of the above, The Ombudsman made 11 improvement recommendations to the Government –

Improving Enforcement Efficiency

(a) to step up night-time enforcement actions (especially before, after and during public holidays);

(b) to review its need to beef up the existing manpower of TCO, and examine the reasons behind the high turnover rate;

(c) to strengthen communication with complainants to obtain more details about the smoking offences, so as to avoid wasting manpower resources;

(d) to review and tighten up the timeframe for the first inspection;

(e) to set inspection priorities for different locations;

(f) to strengthen publicity and encourage eye-witnesses to come forward and testify against smoking offenders;

(g) to enhance the role of plain-clothes officers in taking enforcement actions;

Establishing an Effective Coordination Mechanism

(h) to establish an effective mechanism for coordinating at a higher level tobacco control measures of different departments and policy bureaux;

(i) to formulate strategies for monitoring and encouraging venue managers (especially for those "locations requiring intensive inspections") to perform their tobacco control duties;

Remedying Inadequate Legislation

(j) to take reference from overseas experience and consider reviewing the existing legislation, thereby imposing criminal liabilities on those venue managers who acquiesce to or condone illegal smoking on their premises (especially regarding cases of illegal smoking by employees); and

(k) to discuss with various licensing authorities and the Department of Justice how to introduce licensing conditions under different legislation to mandate performance of tobacco control duties by venue managers.

Government's response

904. The Government accepted the recommendations of The Ombudsman and has taken the following follow-up actions –

(a) In December 2017, TCO set up a task force with retired police officers to strengthen enforcement action at night time and on public holidays, as well as in no smoking areas under the list of "locations requiring enhanced inspections". With the injected resources strengthening the manpower for enforcement, the number of night operations has increased from 442 in 2016 to 542 in 2017, and further to 578 in the first 6 months of 2018. Besides, TCO will recruit 30 additional part-time TCIs by end 2018/early 2019, so as to further step up the enforcement work.

DH will continue to review the manpower of TCO regularly and seek new resources through the existing mechanisms when needed.

(b) TCO has implemented measures to alleviate the possible shortage of manpower arising from wastage. For example, TCO recruited 7 contract TCIs and 35 part-time TCIs in 2017-2018 (as of end March 2018). Besides, as mentioned above, TCO will recruit 30 additional part-time TCIs by end 2018/early 2019 so as to further step up the enforcement work.

DH will continue to review the manpower of TCO regularly and seek new resources through the existing mechanisms when needed. The task force as mentioned above is one of the measures to tackle manpower shortage. Apart from seeking additional resources, TCO also maintains regular communication with front-line staff including regular internal meetings for reviewing their work conditions. In addition, police officers seconded to TCO provide regular training to front-line staff, which not only improves the routine enforcement techniques, but also better equips front-line staff so that they can discharge their duties in a safer and more effective manner. In fact, the manpower wastage rate has decreased from 26.3% in 2014-15 to 12.7% in 2016-17, and further to 7.5% in 2017-18.

(c) TCO all along arranges inspection according to case details. TCO has reminded TCIs to strengthen communication with the public and arrange inspection time based on case details as far as practicable according to the internal guidelines.

(d) TCO conducted a review in early 2018, which showed that 99% of the first inspections were arranged within 21 days and on average within 8 days upon receipt of smoking complaint.

Nevertheless, the first inspection time of a smoking complaint is affected by many factors such as the time needed to obtain more details from the complainant, complexity of the complaint, the remoteness of the venue in question, and manpower situation. Based on the result of the review, TCO has adopted a risk-based approach to determine the timeframe of first inspections. That is, priority and a tighter timeframe would be applied to inspections of venues of higher risk including no smoking areas listed as "locations requiring enhanced inspections" and those in busy areas. TCO will update relevant internal guidelines in due course.

(e) TCO has adopted a risk-based approach to determine the timeframe of first inspections. Priority and a tighter timeframe would be applied to inspections of venues of higher risk including no smoking areas listed as "locations requiring enhanced inspections" and those in busy areas. TCO will update relevant internal guidelines in due course.

(f) On prosecution, witness evidence and identification of the alleged smoking offender are keys to successful prosecution. In most cases, the general public is unable to identify the smoking offender. Notwithstanding such limitation, TCO will continue to encourage witnesses to provide sufficient evidence against offenders in order to facilitate the prosecution work. TCO has instructed TCIs to follow the relevant arrangement at regular internal meetings.

(g) TCIs wear uniform to conduct inspections for clear identification by the public. It is also a necessary safety measure to protect TCIs. To this end, TCO requests TCIs to wear uniforms while on duty. Nevertheless, TCO understands the special functions of plain-clothes officers under some unique circumstances. In this connection, TCIs are deployed to carry out enforcement duties in plain clothes under appropriate circumstances (including conducting reconnaissance and serving as case witnesses). In the first 6 months of 2018, there were 59 operations involving plain-clothes officers.

TCO will continue to arrange plain-clothes officers to assist TCIs in uniforms in the enforcement actions under circumstances found necessary and appropriate.

(h) The Secretary for Food and Health sent a letter to FEHD, LCSD, and the Housing Department on 23 March 2018, reminding them the responsibility of venue managers, and encouraging them to maintain close contact and arrange joint-operations with TCO.

TCO adopts various measures to assist other tobacco control enforcement departments including FEHD and LCSD to carry out tobacco control enforcement at venues under their respective management, such as providing relevant guidelines for reference. In addition, TCO regularly notifies these departments the list of "locations requiring enhanced inspections" under their purview. Since 2018, the notification frequency has been increased from half-yearly to bi-monthly.

TCO also participates in the joint-operations with other departments having regard to the practical needs and circumstances. There were 69 joint-operations in 2017 and 39 in the first 5 months in 2018.

In order to further strengthen the communication between enforcement departments, TCO held working meetings with FEHD on 26 March and 4 July 2018 and LCSD on 28 March and 26 June 2018 respectively to discuss the tobacco control work at venues managed by them. Such working meeting will be held regularly every 3 months.

(i) FHB has updated and re-circulated the FHB Circular No. 2/2009 "The Smoke-free Government" to remind bureaux and departments to implement the smoke-free requirements. TCO reminds venue managers of their authority empowered by the Ordinance through health talks and during inspections. TCO also publishes various guidelines to assist venue managers to implement the smoking ban.

Apart from operations conducted jointly with TCO, FEHD has deployed a market squad to take enforcement actions in collaboration with district market management staff against various offences (including smoking offences) committed in the markets. In June 2018, FEHD beefed up the manpower of the market squad to strengthen enforcement work in public markets. Between January and June 2018, FEHD issued 44 fixed penalty notices to those who smoked in no smoking areas in venues under its management. In addition, FEHD has implemented various measures to step up publicity on the prohibition of smoking in public markets/cooked food centres/markets.

(j) FHB and TCO are aware that certain overseas jurisdictions impose criminal liabilities on venue managers should contravention of smoking bans be found at venues under their management. When implementing the relevant requirements, the respective governments need to consider the context of local smoking bans such as the responses from the public and relevant sectors.

The Legislative Council once discussed the legislation proposal of imposing such criminal liabilities on venue managers in 2006. However, the proposal would have extensive impact on different sectors which had grave concerns on the strong resistance against such liabilities by employees and venue managers, rendering enforcement difficult.

Having considered the views from various stakeholders as well as the difficulties in operation, the Government did not include such liabilities in the then legislation amendment. When adapting overseas measures on imposing such criminal liabilities, the Government has to conduct detailed research as well as extensive consultation, and consider the views from different sectors, in order to explore whether those measures are practicable in local context. FHB and TCO would continue to keep in view the implementation of relevant requirements in overseas jurisdictions.

(k) At present, the licensing authorities set out their own licensing conditions by the functions and powers given to them under different legislations. Following the recommendation of The Ombudsman's report, TCO has discussed with the licensing authorities of entertainment establishments, including LCSD and Home Affairs Department (HAD), the feasibility of including tobacco control requirements in the relevant licensing conditions.

TCO and LCSD held a meeting on 28 March 2018 and discussed the inclusion of tobacco control requirements in the licensing conditions of entertainment establishments under LCSD's authority (including billiard establishments, public bowling-alleys, and public skating rinks). LCSD replied that since the inclusion of these licensing requirements would require amendments to the existing legislation, they would consider such inclusion when the relevant ordinance is brought under review in future. Nevertheless, LCSD expressed that they would consider warning the licensee of an entertainment establishment should contravention of the smoking ban be found at the venue.

TCO had also discussed with HAD the inclusion of tobacco control requirements in the licensing conditions of mahjong-tin kau premises and amusement game centres under HAD's authority in December 2012. However, HAD considered that the proposal was not practicable having sought the advice of DoJ. HAD reiterated the same stance in its reply to TCO in May 2018 after the announcement of The Ombudsman's report. TCO would continue to liaise with other licensing authorities to discuss the inclusion of tobacco control requirements in their licensing conditions.

Housing Department and Water Supplies Department

Case No. DI/408 – The Arrangement Between Housing Department and Water Supplies Department Regarding Payment of Water Charges for Common Areas and Vacant Units in Public Housing Estates

Background

905. Public housing tenants are responsible for paying the water charges incurred during the occupancy of their units. When a tenant moves out, the Housing Department (HD) will make repairs and renovate the housing unit before allocating it to the next tenant. Water charges may be incurred during the renovation period. Under an agreement reached between HD and the Water Supplies Department (WSD) in 1976 (the 1976 Agreement), HD shall pay the water charges for vacant residential units in public housing estates. Moreover, as the department managing public housing, HD shall also be responsible for the water charges for the common areas in public housing estates.

906. Nevertheless, in handling a complaint case, the Office of The Ombudsman (the Office) found that HD's property services agent had actually sent the water bill of a housing unit payable by HD to the tenant for payment, thinking that the charges should be paid by the tenant. The Office also noticed that the Housing Manager Account of the housing estate concerned had remained in arrears for a long period. According to the Office's initial findings, the Housing Manager Accounts of 95 public housing estates have defaulted on water bill payments. In view of such administrative confusion, the Office initiated this direct investigation to identify the root cause of the problem and any areas of improvement.

The Ombudsman's observations

907. The Office's investigation revealed the following inadequacies due to the slipshod approach of HD and WSD in settling the payments of water charges for public housing estates –

(a) Innocent Tenants Affected Because of HD's Ineffective Control of Estate Management Offices and Property Services Agents

Situation and Procedures before the Office's Intervention

908. HD's internal guidelines provide that upon receipt of water bills, their estate management offices or property services agents will verify the details and water utilisation of the units concerned. Where the water charges are for the common areas or HD facilities in the public housing estates, the water bills will be checked and then submitted to HD's Finance Unit for settlement. The bills for water charges incurred during renovation of vacant units by works contractors will be sent directly to the contractors concerned for settlement.

909. The Office's investigation, however, found that as at the end of January 2016, the Housing Manager Accounts of 95 public housing estates had defaulted on water bill payments, involving 291 residential units and 94 non-residential units and over $100,000 of outstanding charges. Among those cases, the most serious default case had lasted more than 10 years. In one case, WSD had issued 61 reminder and disconnection notices (reminder) to HD due to non-payment of water charges in the Housing Manager Account of a housing estate between 2005 and 2016. Yet, HD had neither responded to this nor settled the outstanding charges. The estate management office/property services agent concerned had not reported the outstanding water bills to the HD headquarters and so the latter was not aware of the problem. Furthermore, in the complaint case handled by the Office, the property services agent had wrongly sent the water bill to the unit concerned, causing the tenant to pay the water charges that should have been settled by HD.

910. Although HD had established guidelines and procedures for water bill payments and stipulated in its contracts with property services agents that water charges should be settled on time, some of the estate management offices/property services agents had obviously failed to follow the guidelines properly. For all these years, HD had not set up a centralised record system for general monitoring of payment of water charges in public housing estates. As a result, HD's management was not aware of the problem of non-payment of water bills in Housing Manager Accounts. The Office considered it necessary for HD to step up immediately its monitoring of housing estate management and the performance of property services agents.

Improvement Measures Still to be Enhanced

911. After the Office's intervention, both HD and WSD have agreed that WSD should provide HD headquarters with monthly reports on default payments in Housing Manager Accounts in order to facilitate HD's monitoring and directing estate management offices/property services agents to handle and settle all the water bills as soon as possible. In addition to that, the Office urged HD to further step up monitoring by establishing a clear reporting mechanism and drawing up relevant guidelines on handling public housing water bills, thereby enabling staff of estate management offices/property services agents to promptly follow up and report in a timely manner any cases of outstanding water charges.

(b) Failure of WSD to Properly Address Problem of Outstanding Water Charges under Public Housing Manager Accounts, Thereby Condoning Non-payment

Past Situation and Procedures

912. WSD indicated that Housing Manager Account was basically a multi-service points account, such that a number of water consumption service points were grouped under a single account for HD's easy management of water bills of different units in the same public housing estate. Where a Housing Manager Account had any outstanding water charges, WSD would issue a reminder to HD. According to the 1976 Agreement between the two departments, WSD would not disconnect the water supply of a public housing unit even where HD had not paid the water bill for the vacancy period. However, what WSD stated was different. WSD noted that under existing procedures it would still disconnect the water supply in case of default payments by HD. Yet, if a new tenant had already taken up the consumership of the vacant housing unit, WSD would not disconnect the water supply in order not to affect the consumership of the new tenant.

913. Regarding why those default cases were not referred to the Debt Recovery Section for follow-up action, WSD explained that its computer system would only activate the relevant process to recover any overdue payments upon closure of all service points under a Housing Manager Account. Since a Housing Manager Account was frequently updated as tenants vacate or move into their units, it rarely happened that all the service points in an account were closed, with the case referred to the Debt Recovery Section. In short, even though a Housing Manager Account had long-standing non-payment of water charges, it was very

unlikely that the water supply of the relevant unit would be disconnected or the account closed and referred to the Debt Recovery Section for follow-up action because the account details were frequently updated. WSD had mainly relied on issuing reminders to HD and imposing overdue surcharges for debt recovery. It had not set up any other mechanism for dealing with long-standing cases of overdue payments in Housing Manager Accounts.

914. The Office considered WSD to have overlooked the fact that details of Housing Manager Accounts were frequently updated and also the limitation posed by the procedures applicable to multi-service points accounts. Its practice of relying solely on its computer system to issue repeatedly reminders to HD and not taking other appropriate action to recover the default payments was in effect condoning HD's delay in paying water bills. Moreover, WSD had not devised any counter-measures or procedures to follow up the long-standing problem of HD's non-payment of water charges, nor had it set up any internal reporting mechanism for officers to report such cases to the management. Apparently, WSD had failed to properly address the problem of non-payment of water charges by HD.

Improvement Measures Still to be Enhanced

915. In view of the limitation of the multi-service points accounts, WSD will now assign to HD a new Housing Manager Account for each service point when it is notified that the consumership of a vacant public housing unit is taken up by HD. This will facilitate separate follow-up actions on individual default cases. WSD has also reminded the officers responsible for handling Housing Manager Accounts to report in a timely manner long-standing cases of non-payment of water charges to directorate officers. The Office considered that WSD should think about including the reporting mechanism in its departmental guidelines and stipulate the procedures so that responsible staff could follow and take proper action in similar circumstances. Furthermore, as WSD and HD jointly review the 1976 Agreement, they should discuss and clarify the recovery action for outstanding water charges in Housing Manager Accounts and include the results of their discussion in the new agreement to avoid any misunderstanding in the future.

(c) HD and WSD Failing to Make Proper Arrangement for Change of Consumership

Past Situation and Procedures

916. Under the 1976 Agreement between HD and WSD, HD is responsible for paying the water charges of public housing units for their vacancy periods. When a tenant returns his housing unit to the Department, HD staff would record the reading of the unit's water meter with the tenant together and pass the information to WSD, which would terminate the water account of the tenant upon receipt of such information. The consumership of the vacant unit would then be transferred to the Housing Manager Account of the housing estate concerned automatically (Automatic Procedures) in WSD's computer system. The procedures, however, are not applicable to those residential flats that have already been sold under the Tenants Purchase Scheme (sold TPS flats), and non-residential units in public housing estates.

917. Yet, this direct investigation found that the consumership of a number of residential and non-residential units for which HD had no management responsibility had been wrongly transferred to Housing Manager Accounts, and some of the accounts had defaulted on water charges. While WSD had recovered some of the outstanding charges with HD's assistance, water charges involving five sold TPS flats and 10 non- residential units (nearly $50,000) could not be recovered and all of them had to be eventually written off, resulting in loss of public revenue.

918. Despite its established procedures and guidelines regarding change of consumership of both residential and non-residential units in public housing estates, WSD admitted that some staff members had failed to follow the guidelines strictly such that the consumership of some units had been wrongly transferred to Housing Manager Accounts via the Automatic Procedures of its computer system. On the other hand, some estate management offices/property services agents of HD had long been unaware of the problem, and so they failed to notify WSD that the consumership of some units in their housing estates for which HD had no management responsibility had been wrongly transferred to Housing Manager Accounts. In sum, there were deficiencies on the part of both departments in their handling and monitoring of change of consumership concerning both residential and non-residential units in public housing estates.

Improvement Measures Still to be Enhanced

919. To address the problem of wrong change of consumership, HD and WSD have separately issued updated procedural guidelines to their staff members. WSD would compile reports regularly for identifying non-residential units in public housing estates whose consumership has been wrongly transferred to Housing Manager Accounts. To prevent the recurrence of similar problems more effectively, the Office considered that WSD should also think about adding instructions in its computer system for monitoring whether there are sold residential and non-residential units in public housing estates having been wrongly transferred to Housing Manager Accounts via the Automatic Procedures, and remind its staff members that when handling applications for change of consumership involving residential units in public housing estates and those non- residential units under Housing Manager Accounts, steps should be taken to ensure that the application details have been confirmed by HD.

920. The Ombudsman made the following recommendations –

(a) HD should monitor closely all Housing Manager Accounts for any outstanding water charges, establish a clear reporting mechanism and relevant guidelines for handling water bills in public housing estates. This would help officers responsible to follow up and report promptly cases involving overdue water charges and enhance the effectiveness of monitoring.

(b) HD must step up its monitoring of the performance of property services agents and urge them to provide adequate instructions or training to their staff members. If property services agents are found to have handled payment of water charges improperly, HD should take follow-up or punitive action in accordance with the provisions of their service contracts.

(c) WSD should consider including in its departmental guidelines the reporting mechanism regarding long-standing cases of default on water charges by HD. To facilitate execution and follow-up action by the officers responsible, specific procedures under the reporting mechanism should be drawn up.

(d) WSD should consider adding instructions in its computer system for monitoring whether there are sold residential and non-residential units in public housing estates having been

wrongly transferred to Housing Manager Accounts via the Automatic Procedures, and remind its staff members that when handling applications for change of consumership involving residential units in public housing estates and those non-residential units under Housing Manager Accounts, steps should be taken to ensure that the application details have been confirmed by HD.

(e) HD and WSD should draw up as soon as possible a new agreement regarding payment of water charges.

Government's response

921. HD and WSD accepted The Ombudsman's recommendations and have taken the following actions –

(a) HD has enhanced the reporting mechanism with WSD and the current mechanism is working smoothly. HD will review the payment status of water charges monthly. Upon receipt of WSD's monthly reports on overdue water charges under Housing Manager Accounts, HD Headquarters will send them to regional management offices immediately to be closely followed up and monitored. Besides, HD issued the Estate Management Division Instruction No. M17/2017 and related Operation Manual on 29 December 2017. The Manual stipulates the procedures and details in processing and monitoring the settlement of water charges.

(b) Regarding enhancement of the monitoring of Property Services Agents (PSAs), HD has issued new monitoring and assessment guidelines on 17 May 2017. Relevant staff will conduct monthly check on the payment status of water charges of PSAs. If PSAs are found to have handled payment of water charges improperly, HD will take appropriate follow-up or punitive actions in accordance with relevant contract terms, including issuance of warning letters and deduction of scores. HD has also sent an e-mail to all PSAs on the same day, urging them to provide sufficient instructions and training to their staff.

(c) WSD has updated the relevant departmental instructions to include specific procedures in reporting long-outstanding cases of default on water charges by HD. In addition, WSD will

prepare monthly reports listing out all the default cases, which will then be reviewed and forwarded to HD for handling by a Senior Accounting Officer. The report will also be submitted to the Assistant Director and Senior Treasury Accountant of WSD who will follow up the cases with HD.

(d) WSD has added instructions in its computer system and established mechanism to ensure that sold residential units in public housing estates will not be included in the Automatic Procedures. HD will provide a list of sold residential units in public housing estates to WSD every year for the latter to update the relevant records in its computer system. WSD has updated its departmental guideline to the effect that when handling application for change of consumership involving residential units in public housing estates, if the computer system indicates that the unit concerned is not a sold unit, the staff should confirm with HD and seek its agreement to the details of the application before proceeding with the case. Besides, WSD now prepares monthly reports to monitor whether any non-residential units in public housing estates have been labelled as applicable for Automatic Procedures in the computer system, so as to avoid the account being wrongly transferred to Housing Manager Account in future.

(e) HD and WSD have signed a new agreement regarding payment of water charges in June 2017.

Leisure and Cultural Services Department

Case No. DI/357 – Leisure and Cultural Services Department's Criteria and Procedures for Procuring and Withdrawing Library Materials

Background

922. This investigation revealed ten inadequacies on the part of Leisure and Cultural Services Department (LCSD) in the procurement and withdrawal of library materials, as well as coordination between these two processes.

Procurement of Materials

Obscure Rationale behind Procurement Target

923. Taking reference from the relevant policy formulated by the former Urban Council, LCSD had adopted for years an annual procurement target of acquiring "at least 700,000 items" for its library collections. However, LCSD had so far failed to explain the specific rationale for this target. In fact, for many years actual acquisition had exceeded the target, which showed that the target had failed to keep up with the times and the public could hardly monitor whether the quantity of library materials acquired was appropriate.

Continued Increase in Library Stock Despite Drop in Number of Loans

924. LCSD statistics showed that the total stock of its public libraries has increased by 16.8% in the past eight years, but the number of items lent by public libraries each year had dropped by 18.2% over the same period. While LCSD contended that fluctuation in the number of loans was caused by multiple factors and not directly comparable with new acquisition, the Office of The Ombudsman (the Office) considered it necessary for LCSD to conduct more robust analysis into the reasons behind the decline in loans. This would provide useful parameters for LCSD to review whether the quantity and types of library materials to be acquired every year needed to be adjusted.

Lack of Records on Consolidation and Compilation Procedures and Justification of Master Procurement Plan for Verification

925. According to current procedures, librarians are required to prepare a Collection Development Plan (the Plan) every year for the libraries they are in charge of for submission to the Technical Processing Unit (TPU) for consolidation and compilation of an annual Master Procurement Plan (the Master Plan). However, the Office's investigation had revealed that the librarians were only required to suggest in the Plan the total number of Chinese/English materials to be acquired but needed not provide the categories and titles of materials or the reasons for "strengthening" certain subjects and the quantity to be acquired. Moreover, when compiling the Master Plan, the TPU would only follow certain general principles and take into account the available resources. There were no clear procedural guidelines on how the TPU would compile the Master Plan based on the Plans from individual libraries, nor were there any records documenting the justification for the procurement decisions made in the Master Plan.

No Means to Ascertain Whether the Plans Suggested by Individual Libraries are Implemented

926. On receipt of the newly acquired library materials allocated to them each year, individual libraries were not required to check against their original procurement suggestions in the Plans to ascertain whether they had been implemented. Therefore, it was difficult for the libraries to evaluate whether the books and quantity of materials allocated by the TPU did meet their needs.

Withdrawal of Materials

Reasons for Withdrawing Individual Library Materials Unknown Prior to Mid-2015

927. According to LCSD's procedural guidelines on withdrawal of library materials, those withdrawn must be worn out/damaged or outdated materials. Nevertheless, LCSD had all along maintained only lists of withdrawn materials without requiring its staff to record the reasons for withdrawal of individual items. It was not until mid-2015 that LCSD revised its guidelines, instructing its staff to record also the reasons for withdrawing individual library materials. The reasons for withdrawal of individual materials prior to that are, however, unknown and no statistics could be compiled for management analysis.

Management Information Regarding Withdrawal of Materials Still Inadequate After Mid-2015

928. Despite LCSD's revision of the internal guidelines in mid-2015 to require its staff to record the reasons for withdrawal of library materials, the data collected did not help much in enhancing the standards of management of library collections.

Disposal of Withdrawn Library Materials by Means of Paper Recycling Should be Reviewed

929. Each year, LCSD withdraws hundreds of thousands of library materials and disposed of them as waste paper for recycling or as refuse in accordance with the Government's relevant regulations. Library materials are sources of knowledge and cultural information. It is a great pity that they were disposed of as waste paper for recycling.

Indecisiveness in Handling Publications of Listed Companies

930. Under the Books Registration Ordinance, all listed companies have to submit to LCSD's Books Registration Office five copies/sets of their publication for registration. After registration, three sets of those publications will be sent to university libraries and the Hong Kong Central Library. For the remaining two sets, LCSD, considering that the CD-ROMs containing information on listed companies donated monthly by the Hong Kong Exchanges and Clearing Limited (HKEx) were sufficient for readers' use, decided in 2009 to dispose of them by means of paper recycling. In 2014, some newspaper commentaries criticised such practice. LCSD then considered there to be still public demand for printed copies of listed companies' publications in the Hong Kong Exchanges Collection[1], finally retracted its previous decision and resumed the practice of placing the two copies in the Reference Libraries of two public libraries for public use.

931. The incident above reflected LCSD's indecisiveness on whether to include the remaining two sets of publications of listed companies into its library collections. LCSD had failed to consider thoroughly the check-out rates of such materials and had to retract its decision in the face of public criticism. Nevertheless, the cost effectiveness of the current practice is still open to question.

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[1] The Hong Kong Exchanges Collection accommodates annual reports of and information on listed companies, which are donated by HKEx each month for public reference.

Coordination between Procurement and Withdrawal of Materials

Procurement and Withdrawal Should Complement Each Other

932. LCSD indicated that procurement and withdrawal of library materials were based on different objectives and visions. It also stated that while the two processes were not directly related, they could naturally adjust themselves to achieve a balanced mix in library collections. However, under the current mechanism, acquiring library materials was the sole responsibility of the Collection Development Meeting while withdrawing materials, the Departmental Disposal Committee. There was no arrangement for communication whatsoever between the two.

Information System on Library Materials Should be Enhanced

933. There are tremendous amounts of data on library materials kept in the computer information systems of public libraries. However, such data had not been integrated to become a useful management database for understanding the public's utilisation of library materials for adjustment of management strategies and measures. Upon the Office's commencement of this direct investigation, LCSD set up a working group in 2016 on the enhancement of its library information systems to step up analysis and management of its library collections.

The Ombudsman's observations

934. The Ombudsman made the following eight improvement recommendations to LCSD –

(a) review the annual target of "procuring not less than 700,000 library items" and consider setting a clearer procurement target with good justification;

(b) continue to examine the effectiveness of the revised Plan submitted by the libraries and make timely review and revision;

(c) maintain records of the workflow of consolidating, adjusting and devising the Master Plan, as well as the justification for procurement decisions. LCSD should also consider setting up a mechanism for the libraries in all districts to give feedbacks

upon receipt of their allocation of newly acquired materials;

(d) record and make good use of the data on withdrawal of materials by conducting analysis for more effective monitoring of the withdrawal process and timely revision of management principles;

(e) study with the policy bureaux/departments concerned to review and consider revising the current practice of disposing of withdrawn library materials as waste paper and refuse;

(f) gather and analyse the check-out records of printed copies of publications of listed companies and related data for careful review of the disposal method of such publications;

(g) consider setting up a mechanism for assessing whether library collections are in line with existing policies, coordinate procurement and withdrawal of library materials to achieve a balanced mix of library collections; and

(h) expedite the enhancement of computer information systems of public libraries for more effective management of library collections.

Government's response

935. LCSD accepted The Ombudsman's recommendations. Follow-up actions taken or to be taken are set out as follows –

Recommendation (a)

LCSD has reviewed the basic reference target of "procuring at least 700 000 items of library materials annually". In November 2017, the Public Libraries Advisory Committee (PLAC) was consulted and supported LCSD's recommendation that instead of setting a fixed target for the annual library acquisition plan, LCSD would take into account macro planning and various relevant factors, including the per capita library collection as recommended by the International Federation of Library Associations and Institutions (i.e. 2 to 3 items per capita) to maintain broad comparability between Hong Kong and the international level, in formulating the annual budget and collection development plan. LCSD subsequently updated the

"Collection Development of the Hong Kong Public Libraries" document and uploaded it to the relevant webpages.

Recommendation (b) & (c)

LCSD has completed the review of, and made appropriate revisions to, the template of "Collection Development Plan", and requested all libraries to provide justifications for the quantity requested for various collections. Since 2018-19, the Hong Kong Public Libraries (HKPL) of LCSD has filed the records on the consolidation, revision and formulation of the Master Procurement Plan, including recording the key points of discussion, review and amendments in relevant meeting documents. A new "Suggestion Form For Library Purchase" has been developed to enable libraries to give feedback by putting forward their proposed titles of materials to the Technical Processing Unit after assessment of their existing collection, withdrawn library materials and newly acquired materials allocated to them. This arrangement helps to enhance the collections of individual subjects and better meets the needs of individual libraries.

Recommendation (d) & (g)

HKPL has conducted a brief analysis of the withdrawal of library books for the past two financial years (i.e. 2015-16 and 2016-17). In 2018-19, apart from conducting a more detailed analysis on library books withdrawn in 2017-18, HKPL will also regularise the analysis on the withdrawal of library books.

Recommendation (e)

HKPL is reviewing the current practice of disposing of withdrawn materials as waste paper, and will explore ways to work with non-profit-making organisations. Subject to compliance with government regulations, cost-effectiveness and availability of resources, HKPL will explore the option of donation by introducing a trial scheme on community book sharing with a view to better serving the community.

Recommendation (f)

HKPL is gathering the check-out records of printed copies of publications of listed companies. Analysis of the related data and suggestions will be submitted to the Collection Development Meeting

under HKPL at the end of 2018 for review of the disposal method of such publications.

Recommendation (h)

LCSD has engaged a consultancy firm to conduct a feasibility study on the introduction of a new generation library information system, including the enhancement of data management and the use of analytic tools of intelligence in order to support collection management and development in a more effective way. LCSD will seek additional resources under the established mechanism and procedures for taking forward the initiative.

Lands Department

Case No. DI/406 – Lands Department's Enforcement against a Village House with Irregularities

Background

936. The owner of a piece of agricultural land (the Agricultural Land) in the New Territories had engaged in a number of irregularities for more than 20 years. The irregularities included –

(a) breach of the conditions of the Short Term Waiver (Waiver) granted to New Territories Exempted Houses (NTEHs);

(b) erection of unauthorised structures on private agricultural land; and

(c) illegal occupation of Government land.

Despite having known the situation for a long time, LandsD had not taken any effective enforcement action.

937. In this light, The Ombudsman initiated a direct investigation to probe into the underlying causes and identify any problem in LandsD's enforcement regime.

Relevant Legislation and Enforcement Policy

938. A Waiver carries restrictive conditions on the height, area and use of the NTEH. Any breach of those conditions may lead to cancellation of the Waiver. An NTEH having had its Waiver cancelled would be regarded as being in breach of the land lease conditions (lease conditions).

939. Erecting unauthorised structures on private agricultural land also constitutes breach of the lease conditions. LandsD may take lease enforcement actions against the land owner, including issuance of a warning letter and registration of the warning letter at the Land Registry if the irregularity persists. Under the new policy established in April 2014, if irregularities are not rectified despite registration of the warning

letter, LandsD will proceed to re-enter the agricultural land pursuant to section 7 of the Government Rights (Re-entry and Vesting Remedies) Ordinance (the Re-entry Provision).

940. Where illegal occupation of Government land is found, LandsD may post a notice under section 6 of the Land (Miscellaneous Provisions) Ordinance (the Occupation of Government Land Provision), ordering the occupier to cease occupation of the land by a specified date. If the notice is not complied with, LandsD may take possession of the property or structure(s) on the land and institute prosecution against the occupier. If convicted, the occupier may be subject to a fine. LandsD may also remove the structure(s) and recover the costs incurred from the convicted occupier.

The Ombudsman's observations

941. The Office's investigation revealed the following improprieties in LandsD's enforcement actions against the Village House with irregularities.

Laxity and Delay in Cancelling the Waiver

942. When the local District Lands Office (DLO) of LandsD conducted its first inspection of the NTEH concerned (the House) in 1995, it failed to notice that a significant part of the House had encroached on Government land. It was not until 2002 that LandsD noticed various irregularities. This shows that its inspections were far from thorough. LandsD had taken more than eight years before deciding to cancel the Waiver in 2004, and the nine inspections conducted were totally ineffective. LandsD simply turned a blind eye to the continual unauthorised extensions of the House and tolerated the irregularities, resulting in a waste of manpower, resources and time.

Inappropriate Strategy for Prioritising Cases and Delay in Tackling Problem

943. The New Territories Action Team (the Action Team) of LandsD took over the case from DLO in 2007. At first, the Action Team adopted a strategy of "straightforward cases first, thorny cases last" (i.e. to handle simple cases first) and "last-in-first-out" (i.e. to handle the most recent cases first) for outstanding cases that did not pose a threat to public safety or require urgent action, so that more outstanding cases could be

completed quickly. Since the House did not pose any threat to public safety or require urgent action, and the problem was "difficult" and long standing, the Action Team withheld action for more than six years – a serious delay indeed.

944. It would not have been a big problem if the strategy of "straightforward cases first, thorny cases last" and "last-in-first-out" had merely been a temporary measure as to clear outstanding cases. However, LandsD had never reviewed the strategy. As a result, a number of serious and complicated cases (including this one) had remained outstanding for years, thus allowing offenders to continue to enjoy benefits that they did not deserve and encouraging others to do the same.

945. The saving grace was that after the intervention of the Office of The Ombudsman, the Action Team finally revised its strategy to give priority to long standing cases.

Indecisiveness in Enforcement Actions

946. The Action Team initiated enforcement actions against the House in 2014. Nevertheless, during the subsequent three years, it did not demolish, or compel the owner to demolish, the unauthorised structures on the Agricultural Land and the Government land concerned. This shows the indecisiveness of the Action Team in taking enforcement actions. Moreover, after a registration of warning letter had been executed, the irregularities on the Agricultural Land persisted, and yet the Action Team did not proceed to activate the procedures to reenter the Agricultural Land. Besides, the Action Team repeatedly prosecuted the owner without exercising its statutory power under the Occupation of Government Land Provision to take possession of the Government land concerned and demolish the unauthorised structures on it, and that was not cost-effective at all.

"Order of Priority" to account for "Inaction"

947. In defending the failure of DLO and the Action Team to take concrete enforcement actions against the irregularities of the House, LandsD gave the following reasons: breach of conditions of a Waiver was not accorded "high priority" under the then prevailing guidelines; a case of an NTEH having had its Waiver cancelled was of "medium priority"; and this case "posed no hazard" and was "not urgent". The Office found those reasons hardly acceptable. Furthermore, under LandsD's

guidelines, there was no timeframe for enforcement actions against cases accorded "high", "medium" and "low" priorities. That was tantamount to connivance at persistent offence.

948. The Ombudsman recommended that LandsD –

(a) set a target completion date for processing each case for enforcement staff to follow; and

(b) step up its enforcement efforts on this case; should the irregularities persist, LandsD should demolish the unauthorised structures and re-enter the land, so as to eradicate the problem once and for all.

Government's response

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

(a) LandsD has prepared instruction that once a land control case calls for high priority enforcement action, a time frame for completing the case should be set, which is normally 4 months from date of receipt of the complaint/referral. However, depending on the complexity of each individual case and other issues which may cropped up after the posting of relevant notice under the Land (Miscellaneous Provisions) Ordinance (Cap. 28), relevant DLO may review the progress of the relevant case, and if justified, extend the targeted completion time.

(b) The unauthorised structures (i.e. a 2-storey structure with associated fence wall) were built off-site, straddling government and private land. Regarding the portion of structures on government land, two criminal prosecutions were initiated against the same defendant (i.e. the occupier) under the Land (Miscellaneous Provisions) Ordinance (Cap. 28). The defendant was convicted and fined by the Court in both proceedings. For the remaining portion of structures on private land, The Ombudsman's recommended re-entry action has been conducted by LandsD under the Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap. 126). The occupier demolished all the unauthorised structures on government land and private land in October 2017.

Social Welfare Department

Case No. DI/386 – Social Welfare Department's Support Services for Persons with or Suspected to Have Mental Health Problems and Their Families/Carers and Neighbours

Background

950. The Social Welfare Department (SWD) is responsible for providing community support services for mental patients and persons suspected to have mental health problems, their families, carers and local residents. SWD has engaged non-governmental organisations (NGOs) by way of "Lump Sum Grant" service agreements to set up Integrated Community Centres for Mental Wellness (Wellness Centres) in various districts, offering one-stop and community-based support services ranging from early prevention to crisis management for the aforementioned target groups.

951. The Office of The Ombudsman (the Office) initiated this direct investigation to explore whether SWD had been providing adequate community services for persons with or suspected to have mental health problems, their families, carers and people living in the neighbourhood (generally referred to as neighbours).

The Ombudsman's observations

952. The Office found the following problems in the support services provided by SWD.

Problem (a): Different Parties Have Different Interpretations Regarding Target Groups of Wellness Centres

953. Regarding the question of target groups of the Wellness Centres, especially whether the neighbours of persons with or suspected to have mental health problems were included, there were different interpretations among SWD as the subventor of the Wellness Centres, the social services and rehabilitation sectors as the service operators and the Hospital Authority (HA), which had frequent contacts with mental patients.

954. Since the relevant documents and publicity materials had not stated clearly whether the target groups of the Wellness Centres included the neighbours of persons with or suspected to have mental health problems, there might be misunderstanding among the staff of the Wellness Centres and members of the public who needed help from the Centres.

Problem (b): Good Use Should be Made of Neighbours' Observations in Pursuing Cases of Persons Suspected to Have Mental Health Problems

955. Neighbours may have some degree of knowledge and understanding about the condition of persons with or suspected to have mental health problems. It was the Office's view that SWD and the Wellness Centres should consider paying more heed to the neighbours' observations and actively approach those persons suspected to have mental health problems. The Wellness Centres can notify community nurses or medical social workers of the condition of those persons for suitable follow-up action.

Problem (c): SWD Does Not Adequately Monitor Wellness Centres' Service Quality

956. All the Wellness Centres are subject to SWD's monitoring and are required to submit regular statistical reports and self-assessment reports to the Department. The performance standards stipulated by SWD for all the Wellness Centres cover a wide range of output indicators, including the number of new cases, new members and outreaching visits.

957. In the past few years, all the Wellness Centres had been able to achieve the stipulated levels in respect of all the above performance standards. Yet, what SWD mainly examines were the quantitative data submitted by the Wellness Centres and the Centres' levels of outputs with reference to the output standards. SWD should more proactively monitor how all the target groups of the Wellness Centres (including family members, carers and neighbours of persons with or suspected to have mental health problems) were utilising the services in order to strengthen its regulation of service quality.

Problem (d): Publicity and Information about Wellness Centres Are Still Inadequate

958. The services of the Wellness Centres were published mainly through SWD's website and hotlines, together with the Centres' own pamphlets and various promotional, educational and community linkage activities. SWD had not made adequate efforts to publicise and promote the services of the Wellness Centres, and hence many people still knew very little about the services. SWD should step up its publicity about the role, target groups and scope of services of the Wellness Centres together with the relevant complaint channels, so as to enhance the effectiveness of the Wellness Centres.

Problem (e): Complaint Handling Mechanism Needs Enhancement

959. SWD referred all complaints that it received about the services of the Wellness Centres to the Lump Sum Grant Independent Complaints Handling Committee (ICHC) for handling. Nevertheless, the ICHC mainly handles complaints relating to "lump sum grants" and it normally does not handle anonymous complaints or complaints about staff attitude of the Wellness Centres. For complaints involving the professional judgement of individual officers of the NGOs concerned, the ICHC will not take any action either, because they are regarded to be outside the Committee's ambit. Consequently, SWD itself rarely took action on public complaints about the services of the Wellness Centres.

960. The Office considered that SWD had a responsibility to better understand the operations of the Wellness Centres and to identify room for improvement, through complaints lodged by the service users. That would make its monitoring of the Centres' services more effective.

961. Furthermore, SWD should not lightly dismiss anonymous complaints and complaints about staff attitude. Even if not all the facts could be determined in the end, SWD should at least remind the NGOs concerned to rectify any errors found and to aspire to higher standards. Besides, the Office found it unacceptable that SWD should have given such reasons as "professional judgement is outside the ICHC's ambit" for not pursuing complaints involving professional judgement.

962. The Ombudsman recommended that SWD –

(a) clarify the target groups of the Wellness Centres so as to include also the neighbours who need their services, and provide such information clearly in relevant documents;

(b) instruct the Wellness Centres to enhance communication with the neighbours and to strengthen outreach work and joint efforts with other service agencies in the community, so that better assistance can be provided for persons with or suspected to have mental health problems;

(c) strengthen its monitoring of the quality of services provided by the Wellness Centres, including also the utilisation of services by all the target groups (such as family members, carers and neighbours), rather than relying predominantly on quantitative data;

(d) step up publicity of and disseminate more information about the Wellness Centres; and

(e) review its guiding principles and mechanism of handling complaints against the Wellness Centres, so as to reinforce its role in overseeing those Centres.

Government's response

963. SWD accepted The Ombudsman's recommendations and has taken/will take actions as set out below.

Recommendation (a)

964. SWD has discussed the matter with service operators and relevant stakeholders on various platforms including meetings with the Network on Services for Persons with Mental Illness of the Hong Kong Joint Council for People with Disabilities and the Hong Kong Council of Social Service. There is consensus among the operators and stakeholders that local residents, whether or not acting in the capacity of neighbours, may approach Wellness Centres for enquiries or assistance in relation to mental health as necessary. Assistance or services will be rendered by Wellness Centres according to their needs. SWD has updated the "Frequently Asked Questions" relating to Wellness Centres

on its website, with a view to enhancing the message of support provided by Wellness Centres for local residents (especially neighbours).

Recommendation (b)

965. SWD has allocated an additional full-year recurrent expenditure of about $32 million in 2017-18 to further increase Wellness Centres' manpower by a total of 96 social workers and welfare workers, so as to strengthen outreach services and provide in-depth support to assist needy ex-mentally ill persons and those suspected to have mental health problems in the community (especially those with lower motivation to seek assistance) to re-integrate into society. SWD will also continue to encourage Wellness Centres to communicate with the parties concerned (including neighbours) more frequently, as appropriate, during the provision of outreach services, in order to facilitate professional staff to map out and execute relevant outreach and intervention plans.

966. SWD will continue to allocate additional resources in 2018-19 to create clinical psychologist posts and increase the manpower of professional social workers with a view to strengthening the professional training of and clinical supervision over frontline staff, thereby enhancing the professional support provided for ex-mentally ill persons, those suspected to have mental health problems, and their families/carers.

967. In terms of making more joint efforts with other service agencies, SWD, HA and the NGOs operating Wellness Centres have developed a mechanism for patient information sharing, including the joint adoption of a standardised "needs-strength-risks assessment framework", and a consent form for referral of personal data for more effective and closer collaboration and communication between medical institutions and social service organisations, so as to provide more timely intervention and services for service users. The initiative has been implemented since end-December 2017. SWD and HA will review the implementation and effectiveness of the initiative on a regular basis.

Recommendation (c)

968. SWD monitors the service performance of subvented services provided by NGOs (including Wellness Centres) through the Service Performance Monitoring System (SPMS). Under the SPMS, SWD shall collaborate with subvented NGOs in formulating their Funding and Service Agreements (FSAs), with the objective to determine the service standards and assess the service performance. The NGOs are required

to properly manage their subvented service units to ensure their compliance with the requirements and performance standards laid down in the FSAs, including the Essential Service Requirements, Output/Outcome Standards and Service Quality Standards (SQSs). There are a total of 16 SQSs, defining the quality level that service units are expected to attain in terms of management and service provision.

969. SWD revised the FSA of Wellness Centres in April 2017 with the aim of introducing outcome indicators, including the satisfaction rate of service users following receipt of services provided by Wellness Centres, whether the services provided may assist service users to enhance their problem-solving abilities, and whether the services provided may strengthen the provision of community support for service users. Based on the statistics for 2017-18, Wellness Centres have met the standards of the outcome indicators in general. Operators of the services also agree that adoption of the aforementioned outcome indicators helps assess the overall service performance of Wellness Centres.

Recommendation (d)

970. To further step up publicity and promotion of Wellness Centres, SWD has planned to promote district-based mental health education and services in a proactive and in-depth manner by deploying four publicity vans through Wellness Centres to hold mobile exhibitions, mini-talks and activities, and enable simple on-site consultation or assessment in various districts in Hong Kong Island, Kowloon, New Territories East and New Territories West respectively in 2018-19.

971. SWD has also planned to complete the translation of the service content of Wellness Centres on its website into six ethnic minority languages in the third quarter of 2018 to enable more persons in need to learn about the services.

972. SWD launched a Pilot Project on Peer Support Service in Psychiatric Service Units in March 2016, under which trained peer supporters will provide support for other ex-mentally ill persons in Wellness Centres. They would organise small groups and mental health education activities, and attend media interviews with a view to enhancing the public's understanding and positive acceptance of ex-mentally ill persons, as well as facilitating the promotion and publicity of services provided by Wellness Centres. The Pilot Project has been regularised since March 2018, and the number of full-time peer supporter

positions has increased from 32 in the pilot stage to 40 after regularisation.

Recommendation (e)

973. SWD will make good use of the current complaint handling mechanism. Through reports submitted by ICHC on the outcomes of investigations and relevant recommendations after handling the complaints against Wellness Centres, SWD will be aware of the areas of services that call for further improvement.

974. ICHC will refer anonymous complaints relating to Wellness Centres to the relevant NGOs for handling. If the complaints are related to the misuse of the Lump Sum Grant (LSG) subventions or damage of the interest of service users or staff members, ICHC will require the relevant NGOs to submit a report for consideration of further follow-up action.

975. Regarding the complaints concerning the attitude of Wellness Centres staff members, if the complainants can provide specific and concrete evidence, ICHC will take appropriate follow-up actions. For complaints that cannot be investigated, ICHC will refer the complaints to the relevant NGOs so that the latters may be aware of the incidents and pay due attention.

976. For complaints relating to the professional judgment of Wellness Centres staff members, ICHC will require the relevant NGOs to provide the basis for their judgment, such as whether there are relevant workflows or procedural guidelines, so as to see if any follow-up action can be taken. If ICHC considers that the complaints should be handled by other professional bodies after the review of relevant information, it will assist the complainants to report the complaints to the relevant professional bodies.

Transport Department

Case No. DI/412 – Transport Department's Handling of a Road Section Enclosed and Left Idle for Prolonged Period

Background

977. In early 2016, the Office of The Ombudsman (the Office) noticed a media report alleging that a section of Hing Wah Street (the Section), located between Cheung Sha Wan Road and Lai Chi Kok Road in Sham Shui Po, had been partially enclosed for more than a decade. Apart from being a waste of scarce road resources, it also caused frequent traffic accidents and the problem of illegal fly-tipping. The Office, therefore, initiated a direct investigation to examine why the Section had been enclosed and left idle for such a long period with a view to making recommendations for improvement to the Government.

The Ombudsman's observations

978. The investigation revealed that the Government had planned to widen Hing Wah Street as early as in the early 1970s, so that the street could be converted into a multi-lane two-way carriageway in the future to cater for development of the district. The specific expansion works commenced in the late 1980s and were carried out in phases. In the first phase completed in the early 1990s, the road surface of Hing Wah Street between Cheung Sha Wan Road and Hang Cheung Street was expanded. The expanded part, with a width roughly equivalent to a three-lane carriageway, was soon enclosed upon completion of road works. However, the Transport Department (TD) has no record about which department at that time took the lead in deciding to enclose this section of the widened road surface.

979. In the late 1990s, the Housing Department (HD) vacated a plot of land in Hing Wah Street (with a width roughly equivalent to a three-lane carriageway) between Hang Cheung Street and Fortune Street during the construction of Hang Chun Court and Fortune Estate. When construction was completed in 1999, the vacated road surface was immediately enclosed. TD indicated that it had agreed to HD's proposal of enclosing the relevant road surface to reduce safety hazards to motorists and pedestrians, as an overly wide carriageway would attract

rampant illegal parking, loading/unloading activities and the problem of fly-tipping.

980. The aforementioned enclosed road sections remained enclosed and idle since then and were closed to public use. It was not until late 2017 that road improvement works were carried out in Hing Wah Street and the road sections were fully opened afterwards. The enclosure period lasted for more than 20 years.

981. TD explained that the development of Hing Wah Street had been disrupted because the Cheung Sha Wan Temporary Wholesale Poultry Market (the Poultry Market) had not been relocated as scheduled. Consequently, the Government's planned housing development projects (the Long-term Plan) at the original site after relocation of the Poultry Market could not be followed through, resulting in reduced urgency to develop Hing Wah Street into a multi-lane two-way carriageway (the Long term Proposal).

982. The Government's plan in the 1970s was based on the prevailing social conditions and community needs at the time. It is difficult to trace now whether there was any misjudgement involved. Nevertheless, being the department chiefly responsible for road traffic management, TD should be held accountable for following up the transport development of Hing Wah Street and the prolonged idling of the Section. This direct investigation had identified the following three major inadequacies on the part of TD in the incident.

(a) Passive Attitude in Playing the Coordinator Role

983. TD initially told the Office that it was not the coordinating department in respect of the expansion works in Hing Wah Street. While TD subsequently clarified that it did have a leading role in the transport planning and management of Hing Wah Street, it had no record about which department, in the early 1990s, actually made the decision to enclose the widened road surface of Hing Wah Street between Cheung Sha Wan Road and Hang Cheung Street after completion of construction works. As for the widened road surface of Hing Wah Street between Hang Cheung Street and Fortune Street after completion of works in 1999, TD confirmed that it had agreed to HD's enclosure of the relevant road surface after taking into account the local traffic conditions at the time. In other words, although the enclosure was carried out by HD and the role of TD appeared to be passive, TD did play a decisive part in the enclosure of the Section. However, there is no information to show that TD

subsequently took any action to regularly review whether the Section should remain enclosed. It was not until a local District Council member made a request to open the northbound traffic lanes of Hing Wah Street in 2005 and 2006 that TD started to study proposals for opening the Section.

984. The Office considered that all along TD had not regarded the enclosure and idling of the Section as a matter requiring follow-up action on its part. Hence, TD did not take any action to regularly review what could be done to tackle the problems caused by enclosure of the Section, and how to make better use of the idle space (such as converting it into temporary pedestrian walkways or a green belt for the benefit of local residents). In sum, while TD actually had the responsibility to coordinate and take the lead in the transport planning and management of Hing Wah Street, it failed to give attention to this responsibility, resulting in the Section remaining enclosed and idle for years with no one paying any heed.

(b) "Long-term Proposal" Lacking Justifications and Wasting Eight Years' Time

985. The Long-term Proposal originated in 2005 and 2006, when the local residents made their requests via a local District Council member to open the northbound traffic lanes of Hing Wah Street. At that time, the plan to relocate the Poultry Market had yet to materialise and the three-lane carriageway of Hing Wah Street was considered sufficient in meeting the traffic needs till 2031. Hence, there was no urgency to convert Hing Wah Street into a multi-lane two-way carriageway. Notwithstanding this, in 2006 TD made the Long-term Proposal based on the Government's earlier Long-term Plan. After eight years' engineering preparation work and the related environmental impact assessment, the Long-term Proposal was however eventually shelved in view of strong objections raised by the Transport Affairs Committee of the Sham Shui Po District Council because an acoustic shield had to be constructed. The Long-term Proposal was subsequently replaced by an alternative plan that did not require an acoustic shield.

986. How the roads should be used involves TD's professional judgement. Nevertheless, despite being fully aware that the relocation plan of the Poultry Market had yet to materialise, the Department still put forward the Long-term Proposal based on the Government's earlier Long-term Plan (i.e. developing housing projects at the original site after relocation of the Poultry Market). This decision was obviously not

well-justified and TD's action hard to understand.

987. Preparation work for the Long-term Proposal and the environmental impact assessment took as long as eight years. The Office appreciates that when traffic needs arise, spending time on making preparations is justifiable, that environmental impact assessment will take time and unforeseeable delay caused by litigations is also understandable. Yet, according to TD's own assessments at that time, the original three-lane carriageway of Hing Wah Street could already meet the traffic needs up till 2031. Thus, there should be no urgency to implement the Long-term Proposal. So why did TD still insist on pushing it ahead? It is questionable whether TD had made prudent assessment and given careful consideration when it put forward the Long-Term Proposal in 2006. The purpose behind submitting the Long-term Proposal at that time was also puzzling. In fact, the Government eventually substituted the Proposal with an alternative plan that required neither extra traffic lanes nor an acoustic shield. That alternative plan proved to be an adequate response to the residents' requests to open the northbound traffic lanes of Hing Wah Street. In hindsight, TD's decision to put forward the Long-term Proposal lacked justifications and wasted eight years of time on the preparation work.

(c) Effectiveness of Enclosing the Section Questionable

988. TD explained that part of the widened road surface of Hing Wah Street between Hang Cheung Street and Fortune Street was enclosed, lest an overly wide carriageway would attract rampant illegal parking, loading/unloading activities and the problem of fly-tipping which could jeopardise the safety of motorists and pedestrians.

989. However, site inspections by the Office's investigators found that there were no crossing facilities at the enclosed Section. Some pedestrians jaywalked along the side of the concrete parapet fronting the traffic. Clearly, enclosing the Section in fact posed potential threats to the safety of pedestrians trying to cross the road.

990. As for TD's claim that enclosing the road surface could prevent illegal fly-tipping, it was just common sense that enclosing road surface of such a large area and then leaving it idle for so many years would more likely achieve the opposite effect. Statistical information provided by the Highways Department (HyD) confirmed that fly-tipping activities had indeed been found there.

991. Overall, TD's agreement to HD's enclosure of the Section failed to achieve the expected result. On the contrary, the safety of crossing pedestrians was jeopardised and fly-tipping activities were still found. TD also failed to proactively review the situation at the Section enclosed and consider how best to utilise the carriageway that had been constructed. From the perspective of transport planning and road use, TD's handling of the situation had been unsatisfactory.

992. The Ombudsman urged TD to –

(a) closely monitor the development in the vicinity of Hing Wah Street, in particular the progress of implementing the Long-term Plan. It should also review regularly the need to implement the Long-term Proposal and make necessary adjustments to the local transport planning and road use arrangements where appropriate; and

(b) proactively exercise its role as the leading department in handling road development projects, and set its objectives for the long, medium and short terms with timetables for the long-term planning of related roads to facilitate regular monitoring of progress.

Government's response

993. TD accepted all the recommendations of The Ombudsman and has taken the following actions –

Recommendation (a)

994. For the long-term transport planning and road use arrangement of Hing Wah Street, TD will regularly seek inputs from relevant departments (including the Planning Department, the Lands Department, the Leisure and Cultural Services Department, the Food and Environmental Hygiene Department, the Government Logistics Department and HD) on the planning and development of nearby areas, and request them to inform TD of any changes in relevant planning parameters as soon as possible, so that the long-term transport planning of Hing Wah Street to support local development can be formulated in a timely manner. At present, these departments have no particular plan to change the development plan in the vicinity of Hing Wah Street. In particular, no concrete timetable has been drawn up for the relocation of

Cheung Sha Wan Temporary Wholesale Poultry Market.

995. In addition, TD plans to carry out review of the traffic condition of Hing Wah Street and conduct traffic flow survey at Hing Wah Street annually. The last review and survey were conducted in March and April 2018. The traffic at Hing Wah Street during morning and evening peak hours on weekdays was relatively busy and TD had already adjusted the traffic signal timing of the junction of Hing Wah Street/Cheung Sha Wan Road and Hing Wah Street/Lai Chi Kok Road to suit the actual traffic flow so as to improve traffic condition.

996. The traffic improvement works at Hing Wah Street, including footpath widening and conversion of one traffic lane from southbound to northbound, were completed in October 2017 and January 2018 respectively. In addition, TD plans to provide a Green Minibus (GMB) en-route stop at the concerned section of Hing Wah Street to facilitate boarding/alighting of passengers. The locals and GMB operators have been consulted and the works order has been issued to HyD to implement the relevant traffic improvement works. The Sham Shui Po District Office has also carried out greening works at Hing Wah Street by placing suitable planters. The greening works was completed in mid-July 2018.

Recommendation (b)

997. For long-term road development such as transport planning of Hing Wah Street, TD will carry out review annually and set the targets and timetable of various road development projects in a timely manner in the light of the development plan and traffic conditions in the vicinity. On the other hand, when TD implements local minor traffic improvement projects, it will communicate with relevant departments periodically on specific issues, draw up corresponding targets and timetables at appropriate time and continuously monitor the progress.

Water Supplies Department

Case No. DI/390 – Water Supplies Department's Maintenance of Government Water Mains and Risk Management

Background

998. Water is a very precious resource in Hong Kong. In recent years, however, there have been frequent incidents of water main bursts (both fresh and salt water mains). Those incidents have not only caused inconvenience to the public, but also resulted in huge waste of fresh or salt water.

999. The leakage rate of water mains in Hong Kong (15.2%) compares unfavourably with other countries and cities (e.g. 5% in Singapore and 8% in Lisbon). If the Water Supplies Department (WSD) can manage to reduce the leakage rate in Hong Kong to 5%, it would mean an annual reduction of fresh and salt water loss equivalent to 38,429 and 10,883 standard-size swimming pools respectively. The amount of fresh water thus saved could meet the demand of some 2 million people in Hong Kong for a year. At the average cost of Dongjiang water over the past three years, the expenditure saved would amount to HK$530 million.

The Ombudsman's observations

1000. This direct investigation revealed inadequacies on the part of WSD in three aspects, namely, minimising water main bursts, follow-up actions on cases of water main bursts, and reducing leakages.

(a) Minimising Water Main Bursts

(i) Failure to Target Hot Spots of Water Main Bursts for Monitoring and Follow-up Actions

1001. At certain locations, incidents of water main bursts occurred several times within a few years. Shortly after WSD's repair works, the water mains burst again. Nevertheless, it was not until December 2016 (i.e. more than one year after the commencement of this direct investigation) that WSD listed those locations with recurrent bursts as

"hot spots" and started analysing the reasons behind. The Office of the Ombudsman (the Office) considered that WSD should closely monitor those "hot spots" and prioritise them for prompt follow-up actions.

(ii) Lack of Deterring Penalty against Public Works Contractors for Damaging Water Mains

1002. In the past five years, the amount of compensation recovered by WSD from public works contractors for damaging water mains was just $31,000 per case on average, reflecting a lack of deterrent effect. WSD should remind all works departments concerned that such poor performance (for damaging water mains) should be properly reflected under their existing evaluation systems for contractors.

(iii) Ambiguous Assessment Criteria Regarding Risk of Damage of Water Mains

1003. WSD had not drawn up clear and objective criteria for its special inspection team to assess the risk of damage of water mains. As a result, inconsistencies might arise and some of the water mains that required inspection might be left out inadvertently.

(b) Following up on Cases of Main Bursts

(i) Lack of Performance Targets on Resumption of Salt Water Supply

1004. WSD had not set performance targets on the time required for resuming salt water supply after a main burst, and the time required to resume salt water supply tended to be much longer than that for fresh water supply. The Office opined that WSD should consider setting specific performance targets on the resumption of salt water supply, and examine the reasons behind the longer time required for resuming salt water supply, with a view to initiating and implementing improvement measures.

(ii) Performance Targets Too Complicated

1005. WSD's performance targets on handling cases of main bursts, and its performance in meeting those targets as presented on its website, were unclear. The Office considered that Government departments should set and present clear performance targets for easy understanding to facilitate monitoring by the public.

(c) Reducing Leakages in Water Mains

(i) WSD Should Actively Examine and Introduce the Latest Leak Detection Technologies

1006. The Office considered that WSD should take reference from other cities' experience and double its efforts in survey, leak detection technologies and water pressure management, so as to further reduce the leakage rate of our water mains.

(ii) WSD Should Set Performance Targets on Reducing Leakage Rate and Regularly Publish the Latest Data

1007. WSD should set targets on further reducing the leakage rate of water mains and publish regularly the latest leakage rate and its target leakage rate to facilitate public monitoring.

(iii) No Comprehensive Measures Following the Replacement and Rehabilitation Programme of Water Mains to Ensure Stability of Water Supply Network

1008. WSD completed the Replacement and Rehabilitation Programme of Water Mains in 2015. Thereafter, WSD has been monitoring water main leakages through the Water Intelligent Network (WIN), which, however, will not be fully established until 2023.

1009. The Office considered that WSD should make ongoing assessment regarding risk of bursts and leakages of water mains and, where necessary, replace those mains with high risk or repeated bursts and leakages. Moreover, it should expedite the establishment of WIN.

1010. The Ombudsman made the following ten improvement recommendations to WSD –

Minimising Water Main Bursts

(a) to monitor closely the main burst "hot spots", prioritise its follow-up works, and actively carry out improvement works;

(b) to remind other Government departments of the need to reflect the poor performance of any contractors who have damaged water mains in their evaluation reports in order to exert a greater

deterrent effect;

(c) to revise the guidelines for inspection of road works and set out objective criteria for planning inspections;

Following up on Water Main Bursts

(d) to examine the reasons for the longer time required for resuming salt water supply than for resuming fresh water supply, and initiate and implement improvement measures;

(e) to consider setting performance targets on the time required for resuming salt water supply after main bursts;

(f) to review and simplify the performance targets for follow-up actions on cases of water main bursts;

Further Reducing Leakage Rate of Water Mains

(g) to further reduce the leakage rate of water mains in Hong Kong;

(h) to set targets on reducing the leakage rate and publish regularly the latest leakage rate;

(i) during the establishment of WIN, to implement asset management measures to maintain the stability of the water supply network; and

(j) to expedite the full implementation of WIN.

Government's response

1011. WSD has been proactively following up the recommendations of The Ombudsman.

Minimising water main bursts

(a) WSD has been closely monitoring the main burst "hot spots", including conducting regular review meetings chaired by an Assistant Director, and proactively planning and carrying out improvement works for the concerned water mains, including

consultation with the relevant District Councils to solicit their support.

(b) WSD has reminded all works departments to reflect the poor performance of the contractors who have damaged water mains in the relevant item in the Contractor's Performance Report to exert greater deterrent effect.

(c) WSD is reviewing its guidelines with a view to including objective criteria for planning the inspections of road works near water mains and targets to issue the revised guidelines by end 2018.

Following up on water main bursts

(d) Since the inconvenience arising from suspension of salt water supply is less than that of fresh water supply, when carrying out urgent repair to salt water mains, WSD would take into consideration factors such as disruption to road traffic, noise nuisance during the night time, etc. to determine the most appropriate timing for carrying out the works. That would result in longer time for completion of the repair and resumption of the salt water supply on some occasions. To improve the situation, WSD has revised its Departmental Instruction that repairs to salt water mains shall not be deferred, except for minimising the disruption to the traffic as requested by the Police or for avoiding noisy operation during night time in residential areas when the salt water supply interruption is not affecting a large population.

(e)&(f) WSD is reviewing the performance target of the time required for resuming salt water supply after salt water main bursts as well as simplifying the current performance targets of the time required for valve closure and resuming fresh water supply after main bursts. The revised target will be used in the 2019/20 financial year.

Further reducing leakage rate of water mains

(g) WSD continues to make reference to the experience of cities that have been maintaining low leakage rates of water mains by exchanging experience with them and conducting visits to them.

(h) WSD has set the target of reducing the leakage rate of water mains to 10% by 2030 and the latest leakage rate will be published in the Controlling Officer's Report as well as in the website of WSD.

(i) WSD is formulating its underground asset management plan for water mains and is implementing various asset management measures for water mains including active leakage control, pressure management, risk based improvement to water mains, etc.

(j) WSD continues to establish District Metering Areas (DMAs) for WIN in full swing. About 1 200 DMAs have been established as of June 2018 which are being used for water loss management. Moreover, WSD is arranging to procure and install an intelligent network management computer system by end 2019 for managing the vast amount of data collected from the DMAs to identify the DMAs with water loss and prioritise them for follow-up actions.