THE GOVERNMENT MINUTE

IN RESPONSE TO

THE ANNUAL REPORT OF
THE OMBUDSMAN 2019

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Introduction

The Chief Secretary for Administration presented the Annual Report of The Ombudsman 2019 (the Annual Report) to the Legislative Council at its sitting on 23 October 2019. 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 205 full investigation cases in the Annual Report. This Minute responds to the 12 direct investigation and 105 full investigation cases for which recommendations were made by The Ombudsman. The vast majority of the 253 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 improvements to public services in a positive, professional and proactive manner.

3. In *The Ombudsman's Review* of the Annual Report, The Ombudsman reflected upon the role and functions of her Office. The Ombudsman saw her Office as not only a watchdog of public administration, but also a "collaborator" of government departments and public bodies in finding comprehensive systemic solutions and more effective improvement measures to problems that triggered complaints. The Office is always dedicated to resolving complaints lodged by individuals in an expeditious and effective manner. With streamlined complaint handling procedures, the Office consistently maintained the record of concluding 84% or more of the complaint cases in less than three months, surpassing its performance pledge of 60%. There was also a four-fold increase in the number of complaints concluded by mediation, an increase from 38 in 2013/14 to 205 in 2018/19.

4. The Ombudsman highlighted in her review two particular areas of concern, namely access to information and monitoring by government departments of outsourced work or services.

5. She noted that the number of complaints arising from government departments' refusal of requests for information remained high and suggested that government departments should review refusal cases, for example by considering revising the terms of agreement to avoid being

bound by the agreements with third parties and hence not being able to disclose the information concerned. She is also pleased that the Law Reform Commission has issued a consultation paper on access to information. The Government will positively consider the Ombudsman's suggestions and examine carefully any recommendations from the Law Reform Commission with a view to improving the access to information regime.

6. Noting The Ombudsman's concern about the management of outsourced work or services, the Government fully affirms its responsibility in closely monitoring and supervising its contractors and subvented organisations. To this end, government departments have taken steps to change their procurement arrangements and enhance its monitoring role to ensure performance compliance of contractors.

Part II
– Responses to recommendations in full investigation cases

Architectural Services Department

Case No. 2017/2801(I) – Mishandling the complainant's request for records of a seepage complaint

Case No. 2017/2972 – Failing to solve the seepage problem of a Government staff quarter

Background

7. The complainant complained that the seepage problem of the police quarters unit in which she used to live had not been properly solved for four years due to the Architectural Services Department (ArchSD)'s negligence in supervising the contractor concerned, and that a maintenance works completion record was suspected to be falsified (Complaint (a)). The complainant also complained against ArchSD for failing to accede to her request for information and records of the maintenance works of the unit in accordance with the Code on Access to Information (the Code) (Complaint (b)).

The Ombudsman's observations

Complaint (a): Failure to solve a seepage problem properly, and suspected falsifying of completion record

8. The seepage problem of the complainant's unit took more than two years (from August 2015, when the complainant first reported the case, to October 2017) to solve. The Office of the Ombudsman (the Office) would not comment on whether this was due to ArchSD's improper investigation and maintenance methodology or changes in the seepage condition during the period as it involved professional judgement on the works and maintenance aspects.

9. The Office's investigation revealed that works related to the seepage problem of the unit were completed within the timeframe as required by the works orders in all the cases except the one reported in December 2016, in which no consensus could be reached on the maintenance date. As ArchSD had instructed the contractor in a timely

manner to carry out on-site inspection and waterproofing and/or maintenance works upon receipt of the complainant's report every time, no delay was observed in the overall follow-up process.

10. The Office considered it justifiable that ArchSD's project staff had to take some time to observe the effectiveness of the completed waterproofing works before deciding on the next course of action. Notwithstanding this, as seepage occurred continuously at the same location of the unit's kitchen ceiling, ArchSD should have proactively tested the effectiveness of the waterproofing/maintenance works upon their completion by, for example, conducting water tests as soon as possible. ArchSD followed up the case only after receiving further seepage reports, and this inevitably gave the complainant, who had suffered much from the seepage nuisance for over a year, the feeling that the department was not discharging its duties actively.

11. On whether or not the complainant had objected to adopting injection grouting method for seepage prevention, as the complainant and ArchSD's project staff member (Staff A) each told a different version of the story and there was no other objective evidence, the Office was unable to ascertain the truth. In any case, being the department responsible for maintaining government properties, ArchSD should explain in detail to the tenant as far as possible the purpose of the works, the process involved and the consequences of not carrying out such works, or suggest other alternatives for the tenant's consideration in the event that the tenant disagrees to the maintenance proposal or fails to cooperate. That would enable the maintenance works to be completed and the problem solved as soon as possible.

12. On the scheduling of maintenance works, as Staff A and the complainant each told a different version of the story and there was no other objective evidence, the Office was unable to ascertain the truth either. However, the Office noticed that Staff A had not kept detailed record of the telephone communications with the complainant and this was far from satisfactory. The Office urged ArchSD to remind its staff to record in detail the follow-up actions (including the content of telephone communications with complainants) to ensure that appropriate follow-up actions and case reviews could be conducted when necessary.

13. On the complainant's suspicion that someone had falsified the dates of completion and checking on the completion certificate, ArchSD had already explained that no suspicion was found on the completion certificate after scrutiny by the external independent checker and

ArchSD's district supervisory staff. The contractor had explained that the delivery of the completion certificate to the independent checker took more than a month after completion of the works because the certificate was wrongly mixed with another batch of completion certificates by the sub-contractor. The Office considered that if ArchSD had closely followed up the outstanding works orders each month according to the prescribed monitoring measures, it could have discovered earlier, rather than over a month later, that the completion certificate had not been delivered to the independent checker on time. With respect to the problems revealed in this case, the Office urged ArchSD to remind its contractors to request the tenants to personally fill in the completion dates on the completion certificates, and not to fill in the dates on the tenants' behalf (especially afterwards). ArchSD should also remind its staff to carefully check the reports of completion of works orders so as to identify those outstanding and non-audited cases at the soonest.

Complaint (b): Failing to handle a request for information in accordance with the Code

14. ArchSD admitted that when handling the complainant's request for information made in June 2017, it had failed to provide the requested information to the complainant within the timeframe specified in the Code. ArchSD explained that its staff had not handled the complainant's request in accordance with the Code because the complainant did not make the request under the Code. This indicated that ArchSD's staff did not have sufficient knowledge of the requirements of the Code. According to the Guidelines on Interpretation and Application of the Code, a request for information, whether or not made under the Code, should be dealt with by the department concerned in accordance with the requirements of the Code and the response time specified therein should be adhered to.

15. Based on the above analysis, the Office considered Complaint (a) partially substantiated and Complaint (b) substantiated, and recommended that ArchSD –

Complaint (a)

(a) consider carrying out tests, if circumstances warrant, upon completion of waterproofing/maintenance works at locations with continuous water seepage, with a view to ascertaining as early as possible the effectiveness of the works and whether other measures are required;

(b) explain to the tenant as far as possible the purpose of the works, the process involved and the consequences of not carrying out such works, or suggest other alternatives for the tenant's consideration in the event that the tenant disagrees to the maintenance proposal or fails to cooperate, so as to solve the problem as soon as possible;

(c) remind its staff to record their actions when following up cases (especially the communications with the people who report the case) to facilitate following up action and case review;

(d) remind the contractors to request the tenant to personally fill in the completion date on the completion certificate;

(e) remind its staff to carefully check the monthly report of completion of works orders to identify outstanding and non-audited cases at the soonest; and

Complaint (b)

(f) enhance staff training to ensure that they clearly understand the requirements of the Code for proper handling of the public's requests for information.

Government's response

16. ArchSD accepted the Office's recommendations.

Recommendations (a) to (e)

17. ArchSD has issued a memo about the "lessons learnt" from this case to remind relevant staff members that they should –

(a) be vigilant when handling cases of repeated seepage and consider arranging tests to verify the effectiveness of maintenance works as soon as possible;

(b) explain to the tenant as far as possible or seek assistance from the Quartering Officer or representative of the responsible department for arranging the maintenance schedule in the event that the tenant disagrees to the maintenance proposal or fails to cooperate, so as

to solve the problem as soon as possible; and encourage staff members to attend training courses on communication skills;

(c) keep records of follow-up actions taken to facilitate further action and case review;

(d) instruct contractors at regular progress meetings to request tenants to sign and personally fill in the completion dates of maintenance works on the completion certificates; and

(e) remind staff members to check regularly the report of completion of works orders to identify outstanding and unaudited cases as soon as practicable.

Recommendation (f)

18. It is also stated in the above-mentioned "lessons learnt" that staff members should familiarise themselves with the requirements of the Code and be encouraged to attend training courses related to the Code. ArchSD has also conducted relevant training courses to enhance staff understanding of the Code so as to ensure proper handling of the public's requests for information.

Buildings Department

Case No. 2017/3831 – Failing to properly handle the complainant's report on unauthorised building works for subdivision of a flat

Background

19. The complainant had noticed unauthorised building works (UBWs) for subdivision of a flat on the same floor where he lived and made a complaint to BD in 2016. However, despite a removal order having been issued, for almost a year the UBWs items remained. Dissatisfied that the Buildings Department (BD) had failed to take enforcement action, he complained to the Office of The Ombudsman (the Office) in September 2017.

20. BD explained that under its prevailing policy, where there are technical errors in a removal order such as incorrect description of the UBW items concerned, the department may need to issue a superseding order.

21. In this complaint case, BD first issued an order to the owner of the flat where the UBWs were (the Owner), requiring removal of the UBWs items and reinstatement works to be carried out. BD's subsequent compliance check on the flat revealed that the UBWs items remained and there were newly added works. Hence, BD issued a warning letter to the owner, and later a superseding order as it considered the additional UBWs items a change in the circumstances. As the owner still failed to comply nearly four months after the issuance of the superseding order, BD issued another warning letter, stating that BD would contemplate prosecution and engage a contractor to carry out removal and reinstatements works at the Owner's costs.

The Ombudsman's observations

22. The Office noted that after issuing the first removal order, BD had tried to inspect the flat before the time limit of compliance expired but in vain. When BD found the additional UBWs items during the compliance check, it should have realised that the Owner had no intention to comply with the order and hence a superseding order should have been issued straightaway. However, BD did not do so until seven months later. In the

Office's view, that was a substantial delay on the part of BD in taking enforcement action.

23. While BD explained that it had taken longer time to follow up on the case due to the transfer of the case officer, the Office considered that BD's enforcement action must be efficiently and effectively carried out to deter UBWs.

24. The Office considered the complaint partially substantiated and recommended that BD to –

(a) in future expedite its enforcement action in cases of non-compliance with statutory orders; and

(b) in this case, initiate prosecution and removal actions promptly should the Owner disregard the latest warning letter.

Government's response

25. BD accepted the Office's recommendations and has taken the following actions.

Recommendation (a)

26. BD has reminded its staff to adhere to the timeframe set out in BD's internal instruction for instigating prosecution action against the owners for non-compliance of removal orders and selecting cases warranting default actions. Regular progress reports are generated by BD's Building Condition Information System to facilitate case officers' follow-up work including instigation of prosecution actions in a timely and orderly manner. In addition, through the regular Progress Monitoring Committee meetings, BD has tightened the monitoring of outstanding removal orders

Recommendation (b)

27. BD initiated prosecution action against the owner for non-compliance with the removal order in July 2018. The Magistrate acquitted the defendant in November 2018 on the ground that BD failed to inspect all the sub-divided units within the flat in the compliance inspection and was therefore unable to prove all the elements of conviction relating to the removal order. In view of the Magistrate's ruling, BD has repeatedly

attempted to inspect all the sub-divided units inside the flat but to no avail. Acting in accordance with the Buildings Ordinance (Cap. 123), BD has invoked the procedures for application for entry warrant and served on the owner a notice of intention to apply for a warrant on 12 August 2019. The entry warrant was granted by the Court on 6 November 2019. An inspection conducted by BD on 2 December 2019 revealed that the owner failed to comply with the removal order. As such, BD will instigate prosecution action shortly.

Buildings Department

Case No. 2018/0773 – (1) Failing to act seriously in removing an illegal structure at a flat; and (2) Failing to take enforcement action against the flat's current occupier and allowing the illegal structure to remain

Background

28. According to the complainant, the unauthorised building works (UBWs) at the flat roof of a unit of a building were merely supported by flimsy enclosure walls which might endanger nearby residents and passers-by. Since December 2013, the complainant had repeatedly reported the said UBWs to the Buildings Department (BD) via 1823. BD issued a warning notice, a removal order and a warning letter to the owner concerned, but the owner had not removed the UBWs. In September 2015, BD instigated prosecution action against the owner. In March 2017, BD informed the complainant that the owner had passed away and thus prosecution action could not proceed. As a result, the UBWs still remained.

The Ombudsman's observations

29. Initially, as the UBWs did not constitute obvious danger, BD took enforcement action against the UBWs in an orderly manner according to the prevailing enforcement policy. Subsequently, BD found that the UBWs were in a dilapidated condition and became an "actionable" item. Therefore, it was appropriate for BD to issue a removal order and a warning letter against the UBWs. The deficiency was that had BD made an early attempt to contact the owner and realised that she was deceased since 2003, it would not have wasted the time to instigate prosecution against the deceased owner in 2015.

30. The superseding order was not issued until April 2018 although BD had known in December 2015 that the owner was deceased. Although time was needed to resolve difficulties encountered by the current occupier of the flat concerned, the process was rather long particularly having regard to the safety hazard actionable UBWs could pose. If they were not removed as soon as possible, they might cause harm to residents and passers-by. In the event of natural disaster, the UBWs might not withstand the threats and could result in casualty. It was noted from the course of events that since 2016, BD and its social workers had repeatedly tried to

contact the occupier to provide assistance and counselling but was declined by the occupier. The Office of The Ombudsman (the Office) there considered that BD should take prompt enforcement action.

31. Considering that the complaint was partially substantiated, the Office urged BD to learn lesson from this case and avoid unnecessary delay in handling UBWs cases.

Government's response

32. BD accepted the Office's recommendation and has reminded its staff on this matter. The subject UBWs were demolished by Government contractor in January 2019.

Buildings Department

Case No. 2018/1109 – Failing to take enforcement action against some illegal structures on the flat roofs of a building

Background

33. The complainant, a company, solely owned the mezzanine floor of a building (Building A). Since some ten years ago, the complainant had complained repeatedly to the Buildings Department (BD) about unauthorized building works (UBWs) items on the flat roof of two units (Unit A and Unit B) located on the floor above its property. The complainant alleged that the UBWs items had caused water seepage on the ceiling of the mezzanine floor and affected environmental hygiene and structural safety of the building. Nevertheless, BD failed to take any enforcement action. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against BD in March 2018.

The Ombudsman's observations

34. In 2005, Building A was selected as a target building under the Coordinated Maintenance of Buildings Scheme. BD's inspection revealed that Unit A and Unit B each had an actionable UBWs item. In August, BD issued removal orders to the two owners concerned, and they subsequently demolished some parts of the UBWs items. According to the prevailing enforcement policy, BD suspended its enforcement action and discharged the removal orders.

35. While the complainant repeatedly complained to BD of water seepage from the flat roof to the mezzanine floor, BD, after inspection, considered that there was no obvious danger to the building's structural safety and took no enforcement action under the then prevailing enforcement policy. Instead, BD referred the case to the Joint Office for Investigation of Water Seepage Complaints, and advised the relevant owners and the Owners' Corporation to liaise among themselves for a solution to repair the drainage pipes on the flat roof.

36. In 2011, BD revised its enforcement policy to render all UBWs items on rooftops and flat roofs, in yards and lanes also actionable irrespective of whether they constituted a serious safety hazard. In October

2011, BD notified all owners of Building A in writing that the building was selected as a target of the large-scale operation for UBWs clearance and maintenance works, and a consultant was appointed to conduct building survey. The consultant submitted a survey report to BD in June 2015, but it failed to identify the UBWs item of Unit A in the report. In July 2015, BD issued a removal order against Unit B. In 2018, after the intervention of the Office, BD prosecuted the owner of Unit B for failing to comply with the removal order, and issued an order requiring the owner of Unit A to demolish its raised floor and parapet.

37. Although BD had followed up the complaint of seepage problem, the Office noted that the consultant appointed by BD in 2011 had taken more than three years to complete the survey report on Building A, and there were omissions in the report. This showed that BD had not properly monitored the consultant's performance, which in turn affected the effectiveness of enforcement. Furthermore, it was not until after the Office's intervention that BD proceeded to prosecute the owner of Unit B for non-compliance with the removal order.

38. Overall, the Office considered this complaint partially substantiated. The Office recommended BD to –

(a) step up its monitoring of the performance of consultants to prevent recurrence of similar incidents; and

(b) follow up the compliance of removal orders closely with the owners of the UBWs on the flat roofs of Building A including reviewing in a timely manner whether the owners have complied with the removal orders, and taking further enforcement action against the owners if they fail to do so.

Government's response

39. BD accepted the Office's recommendations and has taken the following actions.

Recommendation (a)

40. BD has taken a series of measures to enhance the monitoring of consultant's work progress and performance, including updating the internal instruction related to monitoring of consultant's performance covering timely issue of warning letters and adverse reports to

underperformed consultants; setting up a warning letter register; and updating BD's Contract Management Information System so as to prevent recurrence of similar incidents.

Recommendation (b)

41. BD has prosecuted the owners of Flat Roof A and Flat Roof B for non-compliance with their removal order. The owners pleaded guilty and were fined by the Court in April and May 2019 respectively. In the course of the prosecution proceedings, the owner of Flat Roof A had removed the UBWs and the order was complied with. For the UBWs at Flat Roof B, the owner indicated to the Court that she had health problem and financial difficulty to comply with the order. BD therefore mobilised its in-house Social Services Team to facilitate her compliance with the order. BD will continue to assist the owner and take appropriate enforcement action should the owner fail to comply with the order.

Buildings Department

Case No. 2018/2300(I) – Unreasonably refusing to provide information related to the granting of occupation permit for a former Government building

Background

42. Building A previously did not have an occupation permit (OP) as Government buildings are not subject to the regulation of the Buildings Ordinance (Cap. 123). Later, Building A was sold to a private owner and subsequently underwent alterations and additions works to become a hotel. The complainant alleged that the Buildings Department (BD) exercised discretion and issued an OP to Building A upon completion of the works. As it is not a general practice for BD to issue OPs to existing buildings, he wanted to know the factor(s) considered when BD exercises such discretion, and how that could be done.

43. On 25 May 2018, he made a request to BD under the Code on Access to Information (the Code) for certain information, including the meeting minutes of two BD's internal committees (Committees I and II) regarding the issue of an OP to Building A.

44. In its reply of 13 June 2018, BD advised the complainant that no Committee I meeting had been held on the above matters. BD refused to provide the meeting minutes of the Committee II on the ground that they were "information the disclosure of which would inhibit the frankness and candour of discussion within the Government, and advice given to the Government" (paragraph 2.10(b) of the Code).

45. The complainant considered BD's refusal unreasonable and lodged a complaint to the Office of The Ombudsman (the Office) on 14 June 2018.

The Ombudsman's observations

46. BD had accounted for its refusal to provide the meeting minutes of Committee II to the complainant. The Office accepted that those meeting minutes are information to which paragraph 2.10(b) of the Code applies and hence considered BD's refusal not unreasonable. The Office

had also examined BD's overall handling, such as the response time and the need to inform the complainant of the review and complaint channels, and found that to be in order. The Office, therefore, considered this complaint unsubstantiated.

47. Nevertheless, it would be good practice to ask enquirers what they were exactly after, if their requests were not very clear. The Office recommended that BD take reference from this case and advise staff to be more proactive in seeking clarification from enquirers in future.

Government's response

48. BD accepted the Office's recommendation and has reminded staff members to observe relevant internal instruction on how requests for information should be handled, particularly in case of a vague or uncommon request. Clarification with the enquirer via phone or letter for further details of the request should be undertaken proactively.

Buildings Department

Case No. 2018/2727 – Delay in taking enforcement action against unauthorized structures in a building

Background

49. Noting that the occupants of the topmost floor of his building had altered two fire rated doors leading to the rooftop and erected an unauthorized structure of substantial size in the staircase obstructing the escape route, the complainant lodged a complaint to the Fire Services Department in 2017. The complainant was informed that the case was related to unauthorized building works (UBWs) and had been referred to Buildings Department (BD) for follow up some years ago. The complainant was dissatisfied with the ineffective enforcement action taken by BD as the UBWs had not been removed for years. He thus lodged a complaint with the Office of The Ombudsman (the Office) in July 2018.

The Ombudsman's observations

50. In 2013, BD selected the subject building as a target building under a large scale operation to remove UBWs and issued removal orders in 2014. After finding such enforcement action to be ineffective, the non-compliant owners were not prosecuted until January 2018. This raised doubts as to whether BD was determined to take enforcement action. One might perceive that the statutory order could be disregarded, making enforcement more difficult in future. Moreover, the case had not been followed up by the dedicated team established during the period. The Office considered the situation unacceptable.

51. The Office appreciated that the workload of BD was heavy and that the application of closure order would involve extra manpower and resources. However, relevant owners of this case had disregarded the orders and warnings, and the scale of UBWs was substantial. The Office urged BD to take active steps, say by removing the relevant UBWs first and then recovering the cost from the owners concerned.

52. Considering that the complaint was partially substantiated, the Office urged BD to immediately explore the feasibility of applying for a closure order for access and removal of UBWs, and take immediate action if that is found feasible.

Government's response

53. BD accepted the Office's recommendations and has stepped up enforcement actions. On top of pursuing the prosecution against non-compliance with the removal order, BD has also served a Notice of Intention to the non-compliant owners informing the owners that the department would apply for closure orders from the court in November 2019 for access and removal of the UBWs. The owners completed the removal of the UBWs in November 2019, the removal orders were complied with.

Buildings Department

Case No. 2018/4498 – Failing to efficiently resolve the obstruction of pavement by the wooden hoardings of a shop

Background

54. According to the complainant, a ground floor shop of a building was originally rented by a bank. After the bank moved out in June 2018, the shop was vacant and enclosed with wooden hoardings. The enclosed hoardings extending from the shop had encroached on part of the pavement.

55. On 16 August 2018, the complainant lodged a complaint to the Lands Department (LandsD) via 1823 on the matter of government land being occupied by the hoardings. LandsD replied that the case would be referred to BD for follow-up action as the matter of hoardings was outside the jurisdiction of LandsD.

56. On 11 September 2018, the Buildings Department (BD) informed the complainant that after an inspection conducted on site that the hoardings did not constitute obvious hazard. Nonetheless, having considered that the hoardings would cause obstruction to pedestrians, BD issued an advisory letter reminding the shop owner concerned to remove the hoardings as soon as practicable. Since then, the complainant repeatedly urged BD to take prompt action, but the situation remained unchanged.

57. On 6 November 2018, BD replied to the complainant again and had ascertained, upon numerous site inspections that no building works were being carried out in the shop. BD considered that the above occupation of Government land was not under the BD's purview, and thus referred the case to LandsD for follow up action.

58. On 7 November 2018, LandsD wrote to the complainant stating that the department had posted a statutory notice on 1 November 2018 on the hoardings concerned, ordering the occupier to cease occupation of government land by 15 November 2018. Otherwise, LandsD would take land control action.

59. The complainant alleged BD of being inefficient in dealing with the complaint since the department had taken almost three months to ascertain the absence of renovation works at the shop concerned. He thus lodged a complaint with the Office of The Ombudsman (the Office) in November 2018.

The Ombudsman's observations

60. The Office considered that although BD had determined in the investigation on 24 August 2018 serving of removal order was not warranted for the hoardings at the shop concerned, those hoardings were indeed occupying government land and obstructing pedestrians. Hence, members of the public would still expect government departments to follow up the issue. As such, BD should inform LandsD about the findings of investigation, so that LandsD could consider if any follow up action should be taken. The Office believed that had BD informed LandsD of the findings of investigation earlier, the concerned occupation of government land might be resolved in a more timely manner.

61. Regarding the allegation about BD being inefficient in taking almost three months to ascertain the absence of renovation works at the shop concerned, the Office's investigation concluded that the allegation was not valid. However, BD's follow-up action had certain shortcoming as mentioned above, resulting in the persistence of the occupation of pavement.

62. Considering that the complaint was partially substantiated, the Office urged BD to learn from this case, and remind the staff in dealing with cases involving other departments, to timely relate the findings of their investigation to the relevant departments for consideration of taking up the cases as appropriate.

Government's response

63. BD accepted the Office's recommendation. BD has reminded its staff of this matter and updated the relevant internal instructions accordingly.

Companies Registry

Case No. 2017/4199 – (1) Delay in handling a complaint against a company director; and (2) Failing to properly investigate a complaint about a false address provided by a company director

Background

64. The complainant reported to the Companies Registry (CR) that a director cum shareholder (Mr. A) of a company (the Company Involved) had made a false report of his usual residential address (Address A).

65. The complainant subsequently lodged a complaint with the Office of The Ombudsman (the Office) against CR on the following issues –

(a) delay in handling his report, including delay in conducting site inspection, and allowing Mr. A to defer his reply to CR's enquiry; and

(b) the way CR followed up on the alleged false report of Mr. A's usual residential address is somewhat unreasonable, including accepting the landlord company's statement that Mr. A had resided at Address A without verifying whether it was true, and simply asking the Buildings Department about the matters related to the closure of the building without asking Mr. A to provide proof of his residential address.

The Ombudsman's observations

66. After a full investigation, the Office considered the case partially substantiated for the reasons set out below.

Allegation (a): delay in handling the report

67. CR explained to the Office that they had conducted site inspection in a timely manner upon receipt of supplementary information provided by the complainant, and that CR had all along been liaising with the company secretary of the Company Involved to follow up the case and had not allowed Mr. A to defer his reply. Upon noticing that Mr. A had not received the letter from CR, CR had sent another letter to him and issued a reminder letter to Mr. A, the Company Involved and the company

secretary. After repeated requests by CR, the legal representative of Mr. A had provided documentary proof to CR. The Office considered that there was no obvious delay in CR's handling of the complainant's report. Therefore, Allegation (a) is unsubstantiated.

Allegation (b): the way CR followed up on the alleged false report of Mr. A's usual residential address is somewhat unreasonable

68. Though CR had followed up on the alleged false report of Mr. A's residential address, the Office considered that there were inadequacies in the follow-up actions taken by CR –

(i) the Office was of the view that CR should not have readily accepted the documentary proof that Mr. A resided at Address A as one issued by the landlord company;

(ii) even if Mr. A did not have relevant Rates and Government Rent Demand Notes to prove his residential address, CR should have tried to ask him to provide other documentary proof; and

(iii) the Company Involved submitted a "Form ND2B" to CR in April 2017, reporting that Mr. A's usual residential address had been changed with effect from 8 April 2017. Later, after being questioned repeatedly by CR, the Company Involved changed the effective date to 1 April 2016.

69. The Office opined that as both the year and the day in question were different, it was unconvincing to say that it was just a typo. Moreover, the word "工業" (meaning "Industrial" in English) was omitted from the name of the building involved provided by Mr. A and Mr. A had stated that he resided at Address A and at Address B in March 2016. All these were suspicious. However, CR, having failed to question Mr. A or the Company Involved further about this, had apparently failed to fulfil its responsibility.

70. The Office was of the view that the company information registered by CR should be as accurate as possible. Otherwise, the effectiveness of the company search service provided by CR to the public would be seriously affected. In view of this, after CR had received a report on alleged provision of false information, it would be a dereliction of duty on CR's part if CR did not conduct investigation and gather evidence thoroughly. In view of the above analysis, the Office considered Allegation (b) substantiated.

71. The Office urged CR to learn from the case and strive to enhance the quality of investigation conducted by its staff.

Government's response

72. CR accepted the Office's recommendation and has taken the following follow-up measures to enhance staff's investigation skills.

73. After making reference to the requirements of other government departments regarding address proofs, CR issued instructions in June 2018 to all Companies Registration Officers in the General Registration Section responsible for handling complaint cases involving suspected breach of the provisions of the Companies Ordinance (CO) (Cap. 622), specifying in detail the acceptable address proofs and providing a list of case examples to facilitate staff to make clear requests to the persons concerned for appropriate documentary proofs. If address proofs of other categories were provided, officer handling the case should seek advice from the supervisor to decide whether the document would be acceptable. If necessary, the officer should also seek advice from CR's lawyers. CR has also instructed staff that in the handling of complaint cases, if the company confirmed that the registered information was incorrect, in addition to requesting the company to deliver the amended documents for rectification of the incorrect information, the officer should also ask the company to provide explanations for the error(s) to facilitate CR to consider whether there was provision of false information in breach of section 895 of CO.

74. CR had also forwarded a copy of the investigation report of the Office to CR's lawyers for their reference when they handle similar cases in future.

Correctional Services Department

Case No. 2018/1235 – Unreasonably posting the complainant's letters to overseas destinations by surface mail instead of airmail

Background

75. On 6 April 2018, the complainant complained to the Office of The Ombudsman (the Office) against the Lai Chi Kok Reception Centre (the Centre) of the Correctional Services Department (CSD).

76. The complainant was remanded at the Centre from 20 November 2017 to 26 March 2018. Allegedly, the Centre had assured the complainant that his mail to Taiwan would reach the destination in a few days. However, the Centre posted his letters by surface mail instead of airmail, thereby making the delivery time inordinately long.

77. Section 47 of the Prison Rules stipulates that a prisoner shall be furnished with materials and postage sufficient to write and send one letter per week not exceeding four pages of A4 paper in length at public expense, and shall, where the prisoner so requests, be furnished with materials and postage for additional letters subject to the payment of the cost thereof from the prisoner's earnings.

78. Persons in custody (PICs) on remand are allowed to send one letter of not more than four pieces of A4 paper every day at public expense. Letters to overseas destinations are to be sent by surface mail. Senders can also choose to use an aerogramme instead if its postage is lower than that for surface mail. PICs on remand may also receive from visitors aerogrammes and stamps for sending letters by airmail.

79. CSD has all along been prudent in using public funds. Allowing PICs to send letters overseas by surface mail is in compliance with the statutory requirement. The Department would allow use of aerogramme where its postage is lower than that for surface mail.

The Ombudsman's observations

80. The Office agreed in principle that CSD should use public funds prudently and the Department had in the complainant's case complied with the statutory requirement. This complaint is, therefore, unsubstantiated.

However, it is the Office's view that CSD could be more liberal in allowing PICs to use aerogrammes for mail to all overseas destinations, instead of restricting use of aerogramme to cases where its postage is lower than surface mail. Reasons are as follows –

(a) the Prison Rules do not stipulate that only surface mail is allowed for PICs;

(b) the postage of an aerogramme (at a uniform rate of $3.4) is not much higher, and at times even lower, than that for a small letter by surface mail. PICs should always be allowed to send aerogrammes for short messages and long letters by surface mail. This would not create a substantial financial burden on CSD; and

(c) most importantly, it is internationally acknowledged that contact with the outside world, including through regular correspondence with families and friends, is crucial for the rehabilitation and reintegration of prisoners. It would hinder the achievement of this objective if correspondence is restricted to surface mail, which is usually slow.

81. Accordingly, the Office found room for improvement in CSD's policy and recommends that CSD review its policy of strict restriction of sending letters by airmail. In particular, the Department should always allow PICs to use aerogrammes so that they can communicate with their families and friends overseas more quickly and closely.

Government's response

82. CSD accepted the Office's recommendation and has removed the restriction of using aerogrammes to cases where its postage is lower than surface mail. PICs may use aerogrammes at public expense for mail to all overseas destinations in order to facilitate communication with their families and friends overseas more quickly and closely.

Correctional Services Department

Case No. 2018/2214(I) – Failing to properly handle the complainant's request for information

Background

83. On 2 June and 23 June 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Correctional Services Department (CSD).

84. The complainant alleged that he filled in a form to request the Complaints Investigation Unit (CIU) of CSD to provide him with the materials concerning his complaints made to CIU between November 2016 and April 2018. On 1 June 2018, CIU replied to the complainant that the materials he requested were unavailable due to "issues on handling of internal documents".

85. On 3 May 2018, the complainant submitted a "Personal Data (Privacy) Ordinance (PD(P)O) (Cap. 486) - Data Access Request Form" ("the concerned form") to CSD to obtain "all documents concerning [his] complaints made to CIU of CSD (including statements, statements of staff members and all documents of the investigation records) during the period from 8 November 2016 to 23 April 2018.

86. CSD stated that, upon receipt of the concerned form, CIU staff interviewed the complainant on 10 May and 28 May 2018. During the interviews, the complainant said that he wanted to obtain the information related to his complaints made to CIU since April 2017, including records of interviews, statements of relevant staff members, investigation reports and records of his correspondence with CIU. At the time, the staff asked him what information he wanted to obtain in addition to the above four types of information. He made no further remarks. On 28 May 2018, CIU replied to the complainant that his request was too vague and asked him to provide more details for their follow-up action.

87. Having received his complaint referred by the Office, CIU wrote to the complainant on 20 August 2018 to inquire what other information he needed apart from the four types of information mentioned above. On 24 August 2018, CIU staff interviewed the complainant and asked him again whether he would like to obtain other information apart from the four

types of information. CSD stated that the complainant did not make any further requests then.

88. CSD explained that CIU only asked the complainant what other information he would need, and did not reject his request. CSD also denied the allegation that the Department was unable to provide the information to the complainant owing to "issues on handling of internal documents".

89. In accordance with PD(P)O, CSD may impose a fee for complying with a data access request. Such fees include the administrative fees for arranging manpower to check and photocopy the information. In other words, if the complainant did not make a one-off request for access to all documents he wanted to obtain and make another data access request later, CSD had to deploy manpower to retrieve the information and impose the administrative fees again. Since the complainant indicated that he wanted to obtain "all relevant documents concerning the complaints", CSD considered that he should state clearly beforehand what other documents he needed apart from the four types of information. Otherwise, the complainant might lodge a complaint due to payment of additional administrative fees in future.

The Ombudsman's observations

90. The Office pointed out that the complainant stated clearly as early as 10 May and 28 May 2018 when he was interviewed by CIU staff that he wanted to obtain the relevant information concerning his complaints made to CIU, including records of interviews, statements of relevant staff members, investigation reports and records of his correspondence with CIU.

91. Regarding CSD's claim that the purpose of CIU having repeatedly requested the complainant to clarify what other documents he wanted apart from the four types of information was to avoid payment of additional administrative fees by the complainant in future, the Office finds it unacceptable. It is the view of the Office that, to prevent the complainant from paying extra administrative fees for obtaining additional information, CSD should explain to the complainant the advantages of making an one-off data access request so that he would ascertain what other information he would like to access apart from the four types of information he has requested to access.

92. Although CSD defended that the Department had not refused to provide the information, the Department did not follow up properly the complainant's data access request. Consequently, the message of "two items of information are actually available for him" was not promptly conveyed to him.

93. Moreover, although CSD stressed that the Department acted in accordance with PD(P)O, the Department should also comply with the Code on Access to Information (the Code). PD(P)O and the Code are not contradictory. Therefore, the Office's conclusion remained unchanged: the complaint lodged by the complainant against CSD is substantiated.

94. The Office recommended that, to avoid recurrence, CSD should provide appropriate training to its staff in handling requests under the Code based on this case.

Government's response

95. CSD accepted the Office's recommendation. CSD shared this case with the heads of institutions and sections at the regular meeting of the Operations Division on 22 January 2019. CSD reminded all heads of institutions and sections to comply with PD(P)O and the Code when handling data access requests. Subsequently, CSD organised two sessions of scenario training on "Handling of Requests for Information in relation to the Code on Access to Information" on 13 March 2019 and briefed the management of various institutions and sections on the issues warranting attention when handling data access requests, using this case as an example, to enhance their understanding of the Code. CSD also uploaded a summary of this case onto the Departmental Intranet for reference by all staff members.

Department of Health

Case No. 2018/0612 – (1) Refusing to change the medication for the complainant; and (2) Failing to reply to the complainant on the change of the appointment date at a hospital

Background

96. The complainant lodged a complaint against the Department of Health (DH) with the Office of The Ombudsman (the Office) on 15 February 2018.

97. Allegedly, the complainant had all along taken a medicine (Medicine A) prescribed by a medical officer (MO) of DH at Stanley Prison (SP) for relieving the pain on his right shoulder. When the medicine was finished, the complainant went to Hospital A on 8 January 2018 but the doctor there prescribed another pain killer (Medicine B) to him. The complainant found Medicine B ineffective in relieving his pain and hurting his stomach. The complainant then requested the DH doctor at SP to prescribe Medicine A for him, but was told that he had to wait until the next appointment at Hospital A scheduled for six months later. SP hospital told the complainant many times that it would communicate with Hospital A for an earlier appointment. However, no reply was ever given to the complainant. The complainant was dissatisfied that the DH doctor at SP had refused to change the medication for him (Allegation (a)) and failed to get back to him on the change of the appointment date at Hospital A (Allegation (b)).

The Ombudsman's observations

Allegation (a)

98. According to the information provided by DH, Medicine A was prescribed to the complainant twice by the visiting Orthopaedic specialist from another hospital (i.e. Hospital B) instead of the MO of SP. As explained by DH, Medicine A is not available in the General Drug Formulary of DH and patients (including prisoners) who may need Medicine A would be referred to specialists for further assessment and management. Upon receipt of the complainant's request for change of medication to Medicine A, the MO of SP referred him to the visiting Orthopaedic specialist from Hospital B for further assessment and

management. In this connection, the Office considered DH to have acted in accordance with the standard practice and duly followed up the complainant's request by properly referring him to the specialist from Hospital B. There is no evidence suggesting maladministration on DH's part. Based on the above, the Office considered this allegation unsubstantiated.

Allegation (b)

99. The Office noted that the MO of SP made a request to Hospital A to advance the complainant's scheduled follow-up appointment, which was eventually declined by Hospital A on 21 February 2018. Hospital A's reply was received by hospital staff of SP (i.e. the Correctional Services Department (CSD)) but not MOs of SP. Under the prevailing practice, the duty MO was not asked to sign on the complainant's medical records to acknowledge Hospital A's rejection reply. As such, the Office believed that MOs of SP were not aware of Hospital A's rejection until the complainant's enquiry in the subsequent appointment, which took place three months later.

100. Furthermore, it is not a standard practice for medical practitioners to actively follow up referrals and appointments made for their patients. Therefore, the Office did not consider it appropriate to request MOs of SP to proactively find out the reply from Hospital A. Even if the duty MO is aware of the reply from Hospital A (if Hospital A accepts the advancement request), it might not be appropriate to request the duty MO to proactively approach the person in custody (PIC) to inform him so. In view of these, the Office considered this allegation unsubstantiated.

101. The Office noted that the complainant had attended the follow-up appointment at Hospital A on 25 June 2018 during which Medicine A was prescribed to him.

102. On the whole, the Office considered the complaint unsubstantiated.

103. On the other hand, this case reveals that under the current system, no one will proactively inform the PICs of the outcome of their requests for advancing medical appointments. The Office considered that undesirable, because patients (including PICs) may have a reasonable expectation that they would get a reply to their requests. If the complainant does not have a follow-up consultation with the MO at SP, he may not get a chance to enquire about his request at all. Having considered that

appointment bookings of PICs are handled by staff of CSD, the Office recommended that DH discuss with CSD the appropriate arrangements to keep PICs informed of the result of their request for advancing medical appointments.

Government's response

104. DH accepted the Office's recommendation. DH has discussed with CSD the handling of PICs' requests for advancing medical appointments. CSD has adopted the arrangement that CSD hospital staff will inform a PIC of the result of his/her request for advancing medical appointment. The said request for advancing medical appointment and the explanation given to the PIC should be properly documented in his/her medical record. MO should also acknowledge the result in order to consider whether any other treatment is required.

Department of Justice

Case No. 2017/5061A – Delay in handling the complainant's compensation claim regarding a traffic accident

Background

105. According to the complainant, his private car (the vehicle concerned) was involved in a traffic incident with an ambulance (the incident) on 10 December 2016. In February 2017, he lodged a claim for compensation (the claim) with the Fire Services Department, which then referred the case to the Department of Justice (DoJ) for consideration. To the complainant's knowledge, the ambulance driver involved in the incident pleaded guilty to the criminal offence of "careless driving" at the court in June 2017.

106. On 30 August 2017, DoJ wrote to the complainant and requested him to provide supplementary information and documents regarding his claim for "loss of time". The complainant replied on 11 September 2017. Since then, DoJ had not contacted the complainant regarding the result or progress of the claim.

107. On 20 December 2017, the complainant lodged a complaint with the Office of the Ombudsman (the Office) against DoJ, alleging that DoJ had failed to process his claim timely leading to delay.

The Ombudsman's observations

108. First, the Office stressed that the focus of the investigation of the complaint was on whether DoJ had delayed processing the claim. As to whether the claim was justified by evidence and whether the amount claimed was reasonable, these were matters subject to negotiation and possible agreement between the complainant and DoJ.

109. Regarding the incident, DoJ received the referral from FSD in April 2017 and started handling the case in May 2017. By August in the same year, DoJ had obtained the necessary information for processing the claims for "repair costs" and "assessment fees". DoJ's follow-up actions were considered largely appropriate.

110. In relation to the claim for "loss of time", DoJ considered that further information should be obtained from the complainant so that a reasonable amount of compensation for the case could be considered in its entirety. Accordingly, the complainant was requested to provide supplementary information and documentary proof on 30 August 2017. On DoJ's request, the complainant provided DoJ with supplementary information regarding the claim for "loss of time" on 11 September 2017, which, however, fell short of the documentary proof that DoJ considered as necessary.

111. The Office considered that DoJ's repeated requests for the required information were indeed due to the complainant's failure to provide sufficient documentary proof, and that, as a matter of fact, his claim for "loss of time" was eventually rejected for a lack of the necessary documentary proof for his leave application and the approval thereof. It could be seen from the above that DoJ's request for documents from the complainant was necessary and was not a deliberate delay in processing the compensation claim.

112. Having said that, there was room for improvement in the way DoJ handled the claim. As DoJ considered that the complainant had failed to provide sufficient information on 11 September 2017 in response to its request of 30 August 2017, it should have requested supplementary information from him as soon as possible, or should even have considered his claim based on the available information straight away, rather than requesting the complainant to provide supplementary information only after more than four months (i.e. in February 2018 after this Office had already intervened). Even if DoJ had a heavy workload and had to handle a lot of cases at the same time, its failure to timely respond to the complainant's reply of 11 September 2017 and follow up on the claim for "loss of time" had hardly met public expectations and would inevitably give an impression that there had been a delay on the part of DoJ at the material time.

113. Based on the above analysis, the Office considered the complaint partially substantiated. The Office urged DoJ to learn from the experience in this case and follow up on claim cases closely in future, including requesting supplementary information from claimants as soon as possible.

Government's response

114. DoJ accepted the Office's recommendation. DoJ has revised the guidelines issued to the team handling compensation claim cases on 27 June 2018. The revised guidelines specify that if any supplementary information relating to the supporting documents or information submitted by the claimant is needed for the proper assessment of the claim, DoJ should make the follow-up request as soon as possible and within four weeks after receipt of the supporting documents or information from the claimant. DoJ will keep in view its staff's compliance with the above-mentioned guidelines.

Department of Justice

Case No. 2018/3193 – (1) Failing to comply with the Victims of Crime Charter in not informing the complainant of the progress of a criminal case in which he was the victim; and (2) Lack of response to the complainant's written enquiries

Background

115. The complainant is a reporter of a Press Group. When he was doing media coverage on 4 June 2017, a man shouted profanities at him and intimidated him. The complainant subsequently reported the incident to the Police.

116. As the Department of Justice (DoJ) had not instituted any prosecution in respect of the incident, the complainant, in a bid to seek justice, wrote to DoJ on 25 February 2018 through the Press Group to enquire about the progress of the case and raise a number of questions, including why DoJ had not instituted any prosecution against the man, whether someone was harbouring the man and if there were any political considerations. Since then, the Press Group had repeatedly written to DoJ to make enquiries. However, the complainant claimed that the replies from DoJ were all vague and empty words.

117. The complainant was of the view that under the Victims of Crime Charter, DoJ should inform him, i.e. the victim, of the progress of the case, including the progress of the investigation and the decision whether or not to institute prosecution. Nevertheless, DoJ failed to act in accordance with the Charter.

118. On 3 and 28 May 2018, the complainant wrote twice to DoJ in the capacity of a victim to enquire about the investigation progress of the case, whether DoJ had completed the follow-up actions, the reasons for not instituting any prosecution yet and the time when the decision to prosecute would be made. However, DoJ did not give any reply.

119. Feeling aggrieved, the complainant lodged a complaint with the Office of The Ombudsman (the Office) on 16 August 2018. He alleged DoJ of –

(a) breaching the Victims of Crime Charter by failing to keep him informed of the progress of a criminal case in which he was the victim; and

(b) not responding to his written enquiries of 3 and 28 May 2018.

The Ombudsman's observations

120. After a full investigation, the Office considered the case partially substantiated for the reasons set out below.

Allegation (a)

121. According to the Victims of Crime Charter, victims of crime have the right to be kept fully informed of the progress of the case, subject to the prerequisite of not prejudicing its progress or outcome. DoJ was of the view that disclosing the specific progress of and approach to the case may prejudice its criminal proceedings. Therefore, the Office considered that DoJ had not breached the Victims of Crime Charter by not disclosing the specific progress of the case to the complainant.

Allegation (b)

122. Regarding the failure to respond to the complainant's two email enquiries, DoJ admitted that the allegation was true and provided explanations. In the Office's view, although the enquiries were similar in content and sent from the same email address, the sender of the two email concerned and that of the previous email received by DoJ were noticeably different, and the complainant also clearly stated that the enquiries were made in his capacity as a victim. For these reasons, DoJ should have replied to the complainant's enquiries in accordance with its performance pledge, rather than conflating them with those received earlier. DoJ's total lack of response to the two emails was plainly inappropriate.

123. The Office urged DoJ to promptly respond to enquiries in strict accordance with its performance pledge.

Government's response

124. DoJ accepted the Office's recommendation. In June 2018, DoJ reminded the staff unit handling enquiries to make prompt replies to the enquirers. Since June 2018, DoJ had replied to the complainant's enquiries of 21 June, 16 August and 5 September 2018 within 14 working days (i.e. in the next day or within two days of receipt of such enquiries) in strict accordance with its performance pledge.

Drainage Services Department and Lands Department

Case No. 2018/0298A & B – Shirking of responsibility when handling a complaint about illegal landfilling and unauthorised building works

Background

125. On 18 January 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Drainage Services Department (DSD) and the Lands Department (LandsD).

126. According to the complainant, at several lots in a district, unauthorized filling works (including blockage of streams and illegal occupation of Government land) had been carried out at a natural stream (Watercourse A) and a bridge which could serve as a vehicular access had been built, posing a threat to the lives and properties of nearby villagers.

127. On 13 December 2017, the complainant made a complaint to DSD and LandsD regarding the above-mentioned unauthorized activities. DSD, in its reply, said that it had referred the case to LandsD and would take follow-up action upon receipt of a complaint about flooding at the location concerned. LandsD replied that since the location concerned was private land involving old scheduled agricultural lots and the filling activities did not contravene the lease conditions, the case would not be followed up by LandsD. LandsD then referred the case to other relevant departments for follow-up.

128. The complainant accused DSD and LandsD of shifting the responsibility to each other.

The Ombudsman's observations

129. The problems of illegal occupation of Government land and blockage of watercourses raised by the complainant were mainly within the purview of LandsD. It was not inappropriate for DSD, under the division of responsibilities set out in the "Environmental, Transport and Works Bureau Technical Circular (Works) – Maintenance of Stormwater Drainage Systems and Natural Watercourses" (Technical Circular), to refer the case to LandsD for follow-up and on the other hand, continue to monitor the flood risk.

130. As for LandsD, they have been actively following up the matter and taking corresponding actions. At present, the illegal occupation of government land has ceased. Regarding the blockage of watercourses, LandsD, while discussing an improvement proposal with DSD, will also seek legal advice.

131. LandsD replied to the complainant that they would not follow up the issue of filling the private land as there was no violation of the relevant lease conditions and LandsD therefore had no authority to take enforcement action.

132. In other words, the complainant's complaint about DSD and LandsD shifting the responsibility to each other resulted from a misunderstanding. The Office considered the complainant's complaint against DSD and LandsD unsubstantiated.

133. Even so, noting that LandsD currently needs to seek DSD's assistance to address the technical difficulties encountered while following up the problem of the blocked stream, the Office also urged DSD and LandsD to collaborate and actively deal with the problem as soon as possible. For instance, the Office urged DSD to consider carrying out special major remedial works on a need basis (according to the Technical Circular) to avoid affecting the lives and properties of the villagers in the event of flooding.

Government's response

134. DSD and LandsD accepted the Office's recommendations.

DSD

135. Apart from liaising closely with LandsD, DSD has provided LandsD with technical advice based on the site condition of the location concerned.

136. Furthermore, DSD has assessed that the unauthorised obstructions and land filling of the watercourse affect the original drainage capacity of the watercourse and has to be removed to restore the original drainage capacity. Nevertheless, based on the prevailing circumstances, there is yet no unacceptable increase in risk of flooding to nearby residents and properties, necessitating major engineering remedial works. DSD has also been closely monitoring the drainage condition of the location

concerned. During the passage of the super typhoon Mangkhut and occurrence of several rainstorm events last year, there have so far not been any flooding reports received at the location concerned.

137. Having said that, when a report of flooding involving the obstructed watercourse is received, DSD will inspect and take emergency action to provide a quick relief to any flooding under the division of responsibilities set out in the Technical Circular.

LandsD

138. As land filling at the subject lot does not constitute lease breach, no follow-up action by LandsD on land filling is warranted. For the unlawful occupation of government land in the present case, LandsD has taken enforcement actions which have been largely completed now as construction waste and crops on site have been removed. Regarding the metal bridge which straddles across government land and the neighbouring private land, after seeking legal advice and establishing that there is a breach of lease, LandsD has taken lease enforcement actions by issuing a warning letter to the registered owner(s) of the lot concerned. If the registered owner(s) do not purge the lease breach by the deadline set in the warning letter, the warning letter will be registered at the Land Registry against the lot concerned (commonly known as "imposing an encumbrance"), and LandsD will also reserve the right for further lease enforcement action against the breach.

Electrical and Mechanical Services Department and Food and Environmental Hygiene Department

Case No. 2018/1530B (Electrical and Mechanical Services Department) – Failing to resolve the frequent malfunctions of escalators in a market and ineffective monitoring of the progress of repair works

Case No. 2018/1530A (Food and Environmental Hygiene Department) – Allowing a contractor to delay the replacement of escalators in a market

Background

139. According to the complainant, in late 2017, there was a lift breakdown during the repair works of two escalators in a Food and Environmental Hygiene Department (FEHD) market in a district (the market concerned). The public had to go up and down more than 80 steps to access the first and second floors of the market. The repair works took three to four months to complete, causing great inconvenience to the public. In mid-March 2018, the complainant lodged a complaint with FEHD about the prolonged repair period of the escalators. FEHD replied that the works contractor of the escalators needed time to purchase spare parts and the problem would be relayed to the Electrical and Mechanical Services Department (EMSD).

140. In mid-April of 2018, the escalators broke down again shortly after the repair works. On 25 April, the management office of the market concerned contacted the complainant by phone. It stated that the management office had nothing to do with either the escalator breakdown or the repair works, and suggested that the complainant express his views on the escalator breakdown to FEHD.

141. The complainant alleged that FEHD had allowed the works contractor to delay the replacement of the escalators instead of maintaining them in a proactive manner; and that EMSD had failed to resolve the root cause of escalators breakdown or properly monitor the progress of repair works of the escalators.

The Ombudsman's observations

142. The municipal services building concerned was of a design prior to 1994. Members of the public travel between the ground floor and the first floor of the market mainly with escalators E1 and E2, and between the second and third floors with escalators E3 and E4. As the lifts of the building concerned are not located at the centre of the market, people find it more convenient using the escalators.

143. In 2015, FEHD found all escalators of the market concerned aging actively and considered replacement necessary. EMSD started to replace escalators E2 and E4 (Project (a)) and escalators E1 and E3 (Project (b)) in July 2017 and March 2018 respectively. The Office of The Ombudsman (the Office) opined that both FEHD and EMSD had taken actions to resolve the root cause of the frequent breakdown of escalators.

144. Project (a) and Project (b) were completed on schedule. Therefore, it was inappropriate to say that the works contractor had delayed the replacement of the escalators. The Office considered that in the course of Project (a) and Project (b), EMSD had taken appropriate actions, including –

(a) maintaining escalator service going up from the ground floor to the first floor, and that from the first to the second floor;

(b) making available the six lifts (i.e. lifts L1 to L6) in the market building for use of the public; and

(c) staff of the market contractor displaying notices and directional signs by to indicate the locations of the lifts connecting different floors, to minimise the inconvenience caused to the public.

145. EMSD has clarified that no reports on breakdown of all the four escalators and six lifts at the same time (date of the complaint inclusive) were received during the period concerned. However, the Office noticed that Project (a) and Project (b) each took five months to complete, and members of the public (the elderly and mobility-handicapped in particular) had to take a circuitous route to use the escalators and lifts to access the first and second floors in the course of the projects. This certainly caused inconvenience.

146. The Office considered the complaint unsubstantiated but recommended that FEHD and EMSD should learn lessons from the case. When replacing or overhauling escalators/lifts in markets in future, they should carefully strike a balance between the convenience of the repair works and the inconvenience that may be caused to the public (the elderly and mobility-handicapped in particular). Additional resources (including repair personnel) should be allocated if necessary in order to shorten the repair time and minimise the inconvenience caused to the public.

Government's response

147. FEHD and EMSD accepted the Office's recommendations.

FEHD

148. FEHD has all along been concerned about the use of lifts and escalators in markets and the relevant safety issues, and has timely arranged for routine inspections. In case of breakdown, FEHD will immediately contact EMSD for follow-up and emergency repair works. The majority of routine inspections and repair works can be completed on the same day or within several days and services can then resume, to minimise the impacts on the public and stall operators. FEHD has discussed with EMSD and requested the stocking of sufficient spare parts for emergency repair works.

149. As for the replacement of escalators and/or lifts in markets, FEHD will, taking into consideration factors including the service life, conditions and records of repair and breakdown of the facilities, other ongoing replacement projects, EMSD's professional advice as well as support from stakeholders (including tenants), etc., and devise plans for replacement where resources allow and implement the projects in order of priority. FEHD will also listen to traders' views through Market Management Consultative Committees, and formulate proposals with EMSD (such as avoiding replacing all escalators and/or lifts at the same time and providing alternative routes), so as to alleviate the inconvenience caused to customers and traders in the course of the projects.

150. When replacing or overhauling escalators and/or lifts in markets in future, FEHD will work with EMSD to carefully strike a balance between the convenience of the repair works and the inconvenience that may be caused to the public. It will request EMSD to take appropriate

actions to shorten the repair time and minimise the inconvenience caused to the public.

EMSD

151. Based on the experience learnt from this case, EMSD will strengthen communication with relevant client government departments and carefully strike a balance between the arrangement of repair works and the inconvenience brought to members of the public when carrying out replacement or major maintenance works for escalators and/or lifts in markets in future, and will suitably increase resources and request contractors to enhance their maintenance services when necessary to minimise the time required for the replacement or major maintenance, thereby reducing the inconvenience caused to the public.

Electrical and Mechanical Services Department, Food and Environmental Hygiene Department and Water Supplies Department

Case No. 2018/1883A, B & C – (1) Failing to remove an unauthorised cooling tower installed by a restaurant; and (2) Shifting responsibility onto other departments when handling the complaint

Background

152. The complainant found irregularities in the installation of fresh water cooling tower facilities (the cooling towers) of a restaurant. Worried that it might cause an outbreak of Legionnaires' disease, she made a complaint to the Electrical and Mechanical Services Department (EMSD), Water Supplies Department (WSD) and the Food and Environmental Hygiene Department (FEHD). The three departments, however, shifted the responsibility to one another and failed to take enforcement actions against the owner of the cooling towers.

153. EMSD indicated that it had been following up on the cooling towers prior to receipt of the complainant's complaint. EMSD found legionella in one of the water samples collected from the cooling towers, but the legionella count was below the upper threshold. EMSD then issued an advisory letter to the restaurant, which then cleaned and disinfected the cooling towers. EMSD also sent a relevant information leaflet and issued a verbal advice to the person in charge of the restaurant.

154. According to WSD, upon receipt of the complainant's complaint, it had visited the restaurant several times but was refused entry. Later when WSD was allowed to enter the restaurant, it found that the water pipe of the cooling towers was connected to a tap in the kitchen. The restaurant, however, refused to let WSD conduct further check on the water source of the cooling tower storage tank. In a subsequent site inspection, WSD noticed the pipe originally connected to a tap on the kitchen was cut off and the restaurant claimed that the water inside the cooling towers came from a well in the restaurant. Some two months later, WSD received a referral from FEHD about the suspected use of mains water for the cooling towers by the restaurant, but was again refused entry to the restaurant. After a few days, the restaurant arranged for WSD's entry for inspection, but the Department did not find any irregularities. Finally, WSD obtained from the court a warrant for entry and found that the restaurant had illegally

connected the cooling tower storage tank to the inside service. WSD then took enforcement action.

155. FEHD stated that it had taken follow-up actions on the complaint based on its observations from inspections, its investigation findings, relevant laws and restaurant licensing requirements. Such actions included conducting inspections, instigating prosecutions, requiring the restaurant to submit an application for change of plans, etc.

156. EMSD, WSD and FEHD all indicated that they had informed the complainant about their follow-up work in a timely manner.

The Ombudsman's observations

157. The Office of The Ombudsman (the Office) considered that EMSD had followed up on the complaint in a timely manner by issuing an advisory letter to urge the restaurant to disinfect the cooling towers and submit another report of laboratory test on water samples. FEHD had also taken appropriate actions within its ambit of enforcing restaurant licensing requirements and assessing whether there were environmental nuisances caused by the cooling towers. In the Office's view, EMSD and FEHD had followed up this complaint within their purviews, and they had properly updated the complainant on the case progress. There was no evidence that the two departments had shifted their responsibilities to others.

158. While WSD had not shifted its responsibility to others, its handling of the case was obviously ineffective. The restaurant was extremely uncooperative that it repeatedly rejected WSD's requests for entering the restaurant and investigating the water source of the cooling tower storage tank. In spite of this, WSD continued to make appointment with the restaurant and failed to apply for a warrant from the court or step up its action promptly. It allowed the restaurant to take advantage of such loophole to temporarily remove the water pipe connecting the tank and the waterworks, thereby preempting WSD's investigation. Moreover, despite the unconvincing explanation (i.e. water in the cooling tower tank was supplied from a well) given by the restaurant, WSD accepted it readily without any investigation. It was perfunctory of WSD to do so. It had given people an impression that WSD was indecisive in taking enforcement action.

159. Overall, the Office considered the complaint against WSD substantiated, but the complaint against EMSD and FEHD unsubstantiated. The Office has also made the following recommendations to the Departments –

WSD

(a) to review the need to formulate a guideline for determining the circumstances under which cases should be followed up by an inspection by appointment and when the handling of cases should be escalated, such as by applying for a warrant to enter the premises;

(b) to tackle the non-compliance in this case, (i.e. connecting fresh water supply pipes to the cooling towers), as soon as possible and continue to follow up the case to avoid recurrence; and

WSD, EMSD and FEHD

(c) to remind their staff to clearly explain the role, powers and obligations of the department(s) to the complainant when handling public complaint, and if necessary, refer the case to the appropriate department(s) for follow-up actions.

Government's response

160. WSD, EMSD and FEHD accepted the Office's recommendations.

Recommendation (a)

161. WSD has issued to its staff a guideline for determining the kind of actions to be taken under different circumstances and the procedures of conducting an inspection for complaint investigation purposes.

Recommendation (b)

162. WSD has taken prosecution action against the restaurant concerned in accordance with the Waterworks Ordinance (Cap. 102) and issued a Repair Notice requesting the restaurant to rectify the non-compliant connection to the water cooling towers. During subsequent inspections, the connection of the cooling towers to the inside service was not found. WSD will continue to conduct surprise inspections to ensure

that the restaurant will not reconnect the cooling towers to the inside service.

Recommendation (c)

163. WSD has issued a reminder to its staff reminding them to clearly explain the role, powers and obligations of the Department to the complainant when handling public complaint, and, if necessary, refer the case to the appropriate department(s) for follow-up actions. In order to handle complaint cases more effectively in the future, EMSD has reminded staff of the Fresh Water Cooling Tower Team to clearly explain the role, powers and obligations of the Department to the complainant, and, if necessary, refer the case to the appropriate department(s) for follow-up actions. FEHD has also reminded its staff to clearly explain the terms of reference and powers and responsibilities of FEHD when handling public complaints, and to refer the cases to appropriate departments for follow-up actions where necessary.

Environmental Protection Department

Case No. 2018/0100(I) – Unreasonably refusing to provide information regarding a project

Background

164. The complainant made a request to the Environmental Protection Department (EPD) under the Code on Access to Information (the Code) for a breakdown of the sum of a contract (the Contract) that EPD had awarded to a company (Company A) for the design, construction and operation of waste management facilities (the Project) into the amounts of the initial capital cost and the annual operation cost for 15 years of the Project (the Breakdown).

165. EPD informed the complainant of the estimated contract sum of the Project and the estimated capital cost and annual recurrent expenditure approved by the Legislative Council, but refused to release the Breakdown on grounds of "commercial sensitivity" and that the Breakdown was "third party information related to business affairs".

The Ombudsman's observations

166. The Office of The Ombudsman (the Office) accepted that the Breakdown was third party information, and the Contract contained provisions governing their confidentiality. Hence, it was not unreasonable of EPD to consider it necessary to seek Company A's consent for disclosure of such information. The Office considered this complaint unsubstantiated.

167. Nevertheless, the Office doubted the need to keep such information confidential. In this day and age, the public expects a higher degree of transparency with regard to the operation of the Government than ever before. The fact that Company A eventually consented to disclosure of information showed that such information was not commercially sensitive after all.

168. The Office recommended that EPD review its templates for tender documents and contracts to remove unnecessary obstacles to the Government's provision of information to the public.

Government's response

169. EPD accepted the recommendation of the Office and has completed a review of the templates for the EPD's tender documents and contracts. EPD would amend the clause governing the announcement of tender results such that in future, the total amount, with a breakdown into capital value and total operation fee, of the successful tender would be published.

170. There are also some relevant clauses in the conditions of contract for Government works contracts governing the use or disclosure of contract information, which are under the Development Bureau (DEVB)'s purview. DEVB has reviewed these clauses and advised the Office that there is no unnecessary obstacle to the Government's provision of information to the public. No further comment from the Office was received.

Equal Opportunities Commission

Case No. 2018/2200 – (1) Failing to acknowledge a complaint in writing or by email; (2) Failing to inform the complainant that it may decide not to conduct an investigation into a complaint of the incident under complaint took place more than 12 months ago; (3) Failing to inform the complainant of its decision and the reasons in writing when deciding not to investigate his complaint; and (4) Wrongly refusing to investigate his complaint on the grounds that the incident under complaint took place more than 12 months ago

Background

171. According to the complainant, he sent an email (the Email) to the Equal Opportunities Commission (EOC) on 28 February 2016 to lodge a complaint against a government department for alleged infringement of the Disability Discrimination Ordinance (DDO) (Cap. 587) (the 2016 Complaint). The complainant later indicated in a telephone conversation with the case officer of EOC (Staff Member A) on 23 March 2016 that he would seek more information from the government department concerned and provide further information to EOC.

172. On 5 April 2018, the complainant sent supplementary information to EOC. EOC replied to the complainant by post on 3 May, 6 June and 19 June 2018, explaining that his case had been concluded in 2016 and that EOC would not follow-up the relevant case as his re-lodged complaint exceeded the statutory 12-month time-bar.

173. The complainant lodged a complaint with the Office of The Ombudsman (the Office) on 6 June 2018 against EOC as follows –

(a) EOC did not issue an interim reply to the 2016 Complaint in writing or by email, nor did EOC provide him with a reference number for the case;

(b) As regards the 2016 Complaint, Staff Member A had requested that the complainant replied to EOC after gathering the evidence, without informing him of any specific time to give a reply or explaining to him the statutory time-bar;

(c) When EOC decided not to follow up the 2016 Complaint, it did not advise him of the decision and the reasons for the decision in writing as required by DDO; and

(d) The EOC unreasonably refused to follow up the 2016 Complaint on the grounds that the statutory time-bar had lapsed.

The Ombudsman's observations

174. The Office considered the complaint partially substantiated and found the following problems on the part of EOC in its investigation on the complaint lodged by the complainant –

Allegation (a): Failing to acknowledge a complaint in writing or by email

175. The Office held that EOC's mere usage of an automatic reply mechanism to acknowledge receipt of complaints was not completely reliable. Furthermore, while EOC did open a case file with a reference number for the Email, it did not provide the complainant with the reference number. The complainant had never been clearly informed of whether and how EOC would follow up his complaint. Therefore, Allegation (a) was partially substantiated.

Allegation (b): Failing to inform the complainant that it may decide not to conduct an investigation into a complaint if the incident under complaint took place more than 12 months ago

176. Based on records provided by EOC on the tele-conversation with the complainant on 23 March 2016, the Office believed that Staff Member A had not explained the statutory time-bar to the complainant. This contributed to the complainant failing to provide further information on the 2016 Complaint to EOC within the time-bar period, and subsequent refusal by EOC to investigate the case. Allegation (b) was substantiated.

Allegation (c): Failing to inform the complainant of its decision and the reasons in writing when deciding not to investigate his complaint

177. EOC explained that it had classified the Email as an "enquiry" instead of a "complaint", thus it was not necessary to follow the statutory requirement to serve notice on the complainant informing him of the decision not to investigate the case and the reasons for that decision. The Office considered that the 2016 Complaint was obviously a complaint and

had been unreasonably classified as an "enquiry". Furthermore, EOC did not provide a written reply to the Email in accordance with its Internal Operating Procedures Manual (the Guidelines). Therefore, Allegation (c) was substantiated.

Allegation (d): Wrongly refusing to investigate his complaint on the grounds that the incident under complaint took place more than 12 months ago

178. The Office considered it unreasonable for EOC to refuse following up and investigating the 2016 Complaint on the grounds that the statutory time-bar had lapsed for the 2016 Complaint (which relates to acts that happened between 2013 and 2015). Firstly, EOC had not informed the complainant that his case had been concluded; and thus the supplementary information provided in 2018 should be attributed to the 2016 Complaint instead of a new complaint. Secondly, EOC had not given due consideration as to whether the complainant's delay in providing the supplementary information was justified by extenuating circumstances. Allegation (d) was substantiated.

179. Overall speaking, the Office considered the complaint partially substantiated and recommended that EOC –

(a) remind its staff to reply to enquiries according to the Guidelines; and

(b) consider reviewing the Guidelines to ensure that enquirers or complainants will be informed of the statutory time-bar requirement so that they will not miss the statutory time-bar for lodging complaints to EOC.

EOC's response

180. EOC accepted the Office's recommendations and has implemented the following improvement measures –

Recommendation (a)

181. Staff responsible for handling enquiries from members of the public have been further reminded to follow up enquiries according to the Guidelines so as to respond to enquiries clearly and appropriately.

Recommendation (b)

182. Guidelines have been issued on 18 February 2019 to staff responsible for handling enquiries and complaints to remind them to notify enquirers who are potential complainants of the 12-month time-bar. Such notification will be issued to complainants in writing.

Food and Environmental Hygiene Department

Case No. 2017/4990 – Unreasonably rejecting the complainant's application for relocating the urn grave of his father

Background

183. According to the complainant, his late father was buried in urn grave space A in an urn grave section of a cemetery managed by the Food and Environmental Hygiene Department (FEHD) (Urn Grave Space A) and his late mother was buried in coffin burial space X in a coffin section of the same cemetery. In April 2017, the complainant applied to FEHD for urn grave space B in an urn grave section (Urn Grave Space B) for burial of his late mother's exhumed remains (Application (a)). Application (a) was approved by FEHD.

184. Afterwards, the complainant found that urn grave space C (Urn Grave Space C) adjacent to Urn Grave Space B was vacant. In September 2017, the complainant applied to FEHD for reburial of his late father to Urn Grave Space C (Application (b)). FEHD considered that the approval of Application (a) had facilitated the parents of the complainant to be buried in the same urn grave section for the convenience of grave sweeping. For this reason, Application (b) was rejected. FEHD also suggested that the complainant might consider applying for adjoining vacant urn grave spaces in other urn grave sections of the same cemetery (Option (a)).

185. The complainant accused FEHD of unreasonable rejection of Application (b).

The Ombudsman's observations

186. FEHD's rejection of Application (b) was mainly due to the reasons listed below –

(a) Since FEHD had approved Application (a), and Urn Grave Spaces B and A were located in the same urn grave section and not far away from each other, the complainant's wish for convenience of grave sweeping was actually fulfilled. Moreover, the complainant might consider co-burial of his late mother's skeletal remains in Urn Grave Space A to satisfy his late mother's wish for co-burial with her husband in the same space. Application (b) would then

be unnecessary;

(b) Approval of Application (b) would draw similar applications involving urn grave spaces in "non-open sections" (which FEHD described as "chain reaction"). FEHD estimated that there would probably be works carried out by masons in all urn grave sections then, and FEHD would have to monitor dozens of urn grave sections scattered over the cemetery. That would affect management efficiency and was not in line with the FEHD's original intent of centralised management of urn grave spaces. FEHD inferred that since many who were buried in the cemetery were close relatives or relatives, a chain reaction would likely be triggered;

(c) The chain reaction might involve not only adjoining vacant urn grave spaces, but also a single vacant urn grave space. Where there was a vacant urn grave space between two occupied urn grave spaces, and the descendants of the occupied spaces had close relatives who were buried in the same urn grave section, the descendants might possibly lodge an application similar to Application (b). FEHD would also have to handle many similar applications covering dozens of urn grave sections then. Given that from time to time members of the public and masons made enquiries about and requests for reburial of skeletal remains to spaces in the same section, FEHD believed that relaxation of the policy would set off a chain reaction affecting over 50 urn grave sections and pushing up the number of such applications significantly;

(d) A large amount of earth-moving and digging works carried out in different urn grave sections would cause soil erosion and landslides, rendering the land unsuitable for burial of the skeletal remains of the deceased and thus wasting land resources. Upon centralisation of available urn grave spaces in "open sections", the vacant land in "non-open sections" and the urn grave spaces returned to FEHD due to reburial could be better utilised for environmental improvement in the cemetery such as provision of handrails and seating; and

(e) Besides the skeletal remains in coffin burial spaces, members of the public might apply for reburial of skeletal remains in an urn grave space to another vacant urn grave space in the same urn grave section (except the eight sections which ceased to accept

applications due to landslides). The complainant might consider applying for co-burial of his late mother's skeletal remains in Urn Grave Space A (Option (b)), or applying for reburial of the skeletal remains of his late parents to Urn Grave Space B allocated to him (Option (c)), in order to achieve the aim of co-burial of the skeletal remains of his late parents. Alternatively, the complainant might apply for reburial of the skeletal remains of his late parents to two adjoining vacant urn grave spaces (alternative urn grave spaces) in an "open section" (Option (a)).

187. FEHD considered that its current measure was effective, as it was conducive to central management and could increase the overall efficiency. All in all, the measure had given consideration to the convenience of grave sweepers. The existing practice of allocating urn grave spaces was appropriate and no change was necessary for the time being. There were concerns that approving Application (b) would lead to a chain reaction which might cause serious problems with profound impact on the management of the urn grave sections.

188. Overall, the Office of The Ombudsman (the Office) considered the complainant unsubstantiated, and accepted FEHD's explanation and understood its concern over the possible chain reaction. FEHD's rejection of Application (b) and its counter-proposal of Options (a), (b) and (c) were not unreasonable or unfair to the complainant.

189. Nevertheless, the public might find it hard to comprehend and accept that some urn grave spaces were not available for application even though they were not occupied. While FEHD might want to avoid setting off a chain reaction by refusing to entertain the special requests made by individual applicants, it should not give an impression of being passive and leaving urn grave spaces vacant as a result. Thus, the Office recommended that FEHD should review its policy with a view to making good use of the vacant urn grave spaces in the "non-open sections".

Government's response

190. FEHD accepted the Office's recommendation. Currently, there are a total of nine urn grave sections which are "open sections" in that cemetery, providing about 29 700 urn grave spaces. From 2015 to June 2019, the number of urn grave spaces in "open sections" allocated to the public was as follows –

Year	Approximate number of urn grave space allocated in "open sections"
2015	620
2016	660
2017	780
2018	760
2019 (as at 30 June)	360
Average (2015 - 30 June 2019)	710

191. As at June 2019, about 4 500 urn grave spaces in nine "open sections" are available for public application. New "open sections" will be opened by FEHD where necessary.

192. For vacant urn grave spaces in "non-open sections", FEHD allows the close relatives of the deceased buried in an urn grave to apply for an urn grave space in the same urn grave section for the convenience of grave sweeping. From 2015 to June 2019, the number of urn grave spaces in "non-open sections" allocated under such special circumstances was as follows –

Year	Approximate number of urn grave spaces allocated in "non-open sections"
2015	80
2016	60
2017	60
2018	80
2019 (as at 30 June)	20
Average (2015 - 30 June 2019)	70

193. As shown by the above figures, FEHD currently provides sufficient urn grave spaces in "open sections" for public application. On the other hand, approval will be given to applications for allocation of vacant urn grave spaces in "non-open sections" made by eligible applicants under special circumstances, in order to optimise the use of the land resources.

194. FEHD will continue to keep in view the latest situation and conduct a review in a timely manner to ensure that relevant policies and initiatives can keep pace with the times and meet the needs of the community.

Food and Environmental Hygiene Department

Case No. 2018/0029 – Failing to take effective enforcement action to tackle the obstruction problem caused by on-street commercial promotional activities

Background

195. Allegedly, there were salespeople displaying easy-mount stands on a street in a certain district (the Location) to promote their commercial services or goods, causing obstruction to pedestrians (the Problem). The complainant considered the Food and Environmental Hygiene Department (FEHD) to have failed to tackle the Problem, and lodged a complaint with the Office of the Ombudsman (the Office) on 3 January 2018. Specifically, he criticized the Department for failing to prosecute the salespeople for contravening section 104A of the Public Health and Municipal Services Ordinance (the Ordinance) (Cap. 132).

The Ombudsman's observations

196. The staff of the Office conducted site visits to the Location in the afternoons of 8 April 2018 (Sunday) and 30 April 2018 (Monday). They found easy-mount frames and promotion booths densely placed on the part-time pedestrian street, causing obstruction to pedestrians.

197. Records showed that FEHD did conduct blitz operations at the Location and initiate prosecutions against offenders under section 104A of the Ordinance, with a view to tackling the Problem. Indeed, the number of the blitz operations had substantially increased since October 2017.

198. Nevertheless, the Office noted that in October and November 2017 and February and March 2018, while 14 to 21 blitz operations were conducted monthly, there was only 0 to one prosecution each month. With the Location already identified by FEHD as a black spot of on-street commercial promotional activities and the persistence of the Problem as revealed by the Office's observation, such a low prosecution rate calls into question the effectiveness of FEHD's actions.

199. Moreover, among the 140 blitz operations conducted in the 15 months between January 2017 and March 2018, only eight of them were conducted on Saturdays (one of which was a public holiday) and one on Sunday. The other 131 operations were all conducted on weekdays. FEHD staff should be well aware that on-street commercial promotional activities are busier on non-weekdays with longer periods of pedestrianisation. While the Office acknowledged the pressure of competing enforcement priorities, reasonable resources should still be allocated to tackle the Problem on weekends and public holidays.

200. The Office considered the complaint partially substantiated and recommended that FEHD should seriously review its enforcement strategy, including more blitz operations to be conducted at times when the Location has busier pedestrian traffic, and stepping up enforcement actions (i.e. initiating more prosecutions and seizures) so as to tackle the Problem more effectively.

Government's response

201. FEHD accepted the Office's recommendation and has taken follow-up actions. FEHD has adopted a series of stringent enforcement measures to stop obstruction problem caused by on-street commercial promotional activities. Such measures include strengthening static patrols and blitz prosecution actions; issuing fixed penalty notices (FPNs) and summons as well as seizure of the unauthorised displayed promotional materials. From January to June 2019, staff of FEHD carried out static patrol to the location on weekdays from 1200 hours to 1900 hours daily. On top of the static patrol, two to three blitz operations were also mounted monthly, either on Saturday, Sunday, public holidays, or at night on weekdays to deter the offenders. A total of 18 blitz operations were conducted during the period in which 13 operations were conducted on Saturday, Sunday and public holidays. For enforcement actions, FEHD instituted a total of 36 prosecutions (34 FPNs for contravention of section 104A of the Ordinance and two summonses for contravention of section 4A of the Summary Offenses Ordinance (Cap. 228) were issued) against the salespeople whilst 45 unauthorized displayed promotional materials were seized. Following a series of stringent combating actions, the obstruction problem caused by on-street commercial promotional activities at the Location has shown apparent restraint. The ground situation has improved substantially.

202. FEHD will continue to monitor closely the obstruction problem caused by on-street commercial promotional activities at the Location and take stringent enforcement actions.

Food and Environmental Hygiene Department

Case No. 2018/0207 – (1) Failing to discover that the filtration tanks of a swimming pool had been replaced and altered despite numerous inspections; (2) Rashly approving renewal of the swimming pool licence; and (3) Asserting that water quality of the swimming pool was up to statutory standards even though it had been closed many times due to poor water quality

Background

203. The complainant, the Owners' Committee of a private housing estate, complained against the Food and Environmental Hygiene Department (FEHD) for –

(a) failing to notice that the property management company (the PMC) had, without prior approval, replaced the filtration tanks of the estate's swimming pool, even though the Department had conducted a number of inspections and checked the layout plan;

(b) failing to check the swimming pool facilities against the final approved plan before rashly granting its approval for licence renewal; and

(c) ignoring the fact that the swimming pool had been closed urgently due to poor water quality and still maintaining that the water quality was up to the statutory standards.

The Ombudsman's observations

Allegation (a)

204. According to the information provided by the complainant, the PMC had replaced and installed filtration tanks in both 2015 and 2016. In the Office of The Ombudsman (the Office)'s view, the replacement of the original five large filtration tanks by 18 small ones should have been easily noticed. It was inconceivable that during the aforesaid seven inspections by FEHD, "no alteration of the facilities was found". The Office had reasons to believe that the inspections by FEHD staff were perfunctory,

and that the staff concerned might have failed to study the layout plan or check the facilities on-site, let alone made any comparison.

Allegation (b)

205. Under the current mechanism for renewal of swimming pool licence, FEHD had to consider whether the licensee had been convicted so many times that a cancellation of licence was warranted. However, FEHD was not obliged to check the swimming pool facilities against the approved layout plan. Therefore, whether FEHD had done such checking or not had no bearing on its approval of licence renewal.

Allegation (c)

206. FEHD stated that the water samples collected during its inspections in the swimming seasons of 2016 and 2017 had failed to meet the standards on one occasion only. However, the swimming pool was in fact closed during many inspections and no water samples had been collected on those occasions. The Office considered it improper of FEHD to decide that the water quality of the swimming pool met the statutory standards when its staff had failed to follow the guidelines to collect water samples from the swimming pool for testing on a monthly basis.

207. In the light of the above, the Office considered Allegations (a) and (c) substantiated and Allegation (b) unsubstantiated.

208. Besides, it should be noted that on two occasions FEHD staff had indicated in their inspection records that the swimming pool was "closed" and "the main gate locked". But in the column "Record of Action Taken by Inspecting Officer", they stated that the swimming pool was "in order". Furthermore, according to the complainant, the swimming pool was actually open on the days when the two inspections were carried out.

209. Overall speaking, the Office considered the complaint partially substantiated and recommended that FEHD should –

(a) instruct its staff to conduct inspections of swimming pools carefully;

(b) investigate thoroughly why there were discrepancies in the inspection records made by its staff; and

(c) review the mechanism for penalising the management of swimming pools involved in repeated violations of law so as to ensure water quality for the hygiene of swimming pool and safety of swimmers.

Government's response

210. FEHD accepted and implemented the Office's recommendations.

211. FEHD has instructed staff of the district environmental hygiene office (DEHO) concerned to conduct inspections of swimming pools carefully, including inspecting swimming pools and checking approved layout plans in accordance with the established procedures. Should there be sufficient evidence indicating that a swimming pool or its facilities have undergone major alterations, prosecution will be instituted. The DEHO concerned has also reminded its staff to fill out inspection records after swimming pool inspections and should double-check the information to avoid inconsistency of information in the records. Moreover, if no water sample is taken from a swimming pool as scheduled, sampling should be arranged again within the same month so as to fulfil the requirement for collecting water samples from the swimming pool for testing on a monthly basis. After thorough investigation, FEHD confirmed that the staff handling the case were perfunctory in conducting the inspections and completing the inspection records. Disciplinary action was taken against the staff in question.

212. The above case was shared in the regular internal meetings of FEHD to remind all DEHOs to conduct inspections of swimming pools carefully. FEHD also plans to enhance knowledge and training on swimming pool inspections and checking of layout plans in its induction training for new recruits.

213. Lastly, FEHD has reviewed and revised the sanction system for penalising the management of swimming pools convicted of repeated violations of the Swimming Pools Regulation (Cap. 132CA). The level of sanction have been adjusted upwards for premises issued with a swimming pool licence and with multiple convictions for contravening any provision of the Public Health and Municipal Services Ordinance (Cap. 132) or its subsidiary legislation, which entails licence suspension under the established policy of FEHD. The suspension period has been lengthened from two days to seven days for first suspension and from four days to

14 days for second suspension to enhance the deterrent effect. The new policy came into effect on 1 May 2019.

Food and Environmental Hygiene Department

Case No. 2018/1178(I) – (1) Impropriety in handling an application for allocation of an urn grave space for the complainant's mother who in fact was still alive; (2) Failing to notice the wrong information inscribed on tombstones; (3) Refusing to disclose the details and developments of the case; and (4) Refusing to disclose the registration information of two urn grave spaces

Background

214. The complainant claimed that in 2010, his late father had been buried in a coffin grave in a cemetery managed by the Food and Environmental Hygiene Department (FEHD). In 2017, the complainant's elder brother submitted an application to FEHD for exhumation and reburial of his late father's skeletal remains. Subsequently, he informed the complainant that he had purchased two adjoining urn grave spaces (namely Urn Grave Space X and Urn Grave Space Y) in that cemetery, one for his late father and the other for his late grandmother.

215. Nevertheless, the complainant later discovered that based on the information on FEHD's website, while his late father was buried in Urn Grave Space X, a man named "Z" (Mr. Z), but not his grandmother, was buried in Urn Grave Space Y (Problem (a)). Since the name of the complainant's living mother was also "Z", he suspected that someone had given false information to FEHD for "advanced purchase" of the urn grave space for future use by his mother who was still alive.

216. Besides, the complainant also discovered that his late father's tombstone was wrongly erected in Urn Grave Space Y and the inscription on the tombstone in Urn Grave Space X was "yet another name" (Problem (b)).

217. In October 2017, the complainant lodged a complaint with FEHD about Problem (a) and Problem (b) (the complaint).

218. The complainant's dissatisfaction with FEHD can be summarised as follows –

(a) there were loopholes in FEHD's procedures for handling matters of urn grave spaces. The office responsible for handling the sale

and purchase of the urn grave spaces and the office responsible for managing the cemetery "neither supervised nor cross-checked each other's work". The applications for the purchase of Urn Grave Space X and Urn Grave Space Y were approved by these offices without verifying clearly the authenticity of the information provided;

(b) FEHD did not notice that the names of the deceased on the tombstones of the urn grave spaces concerned did not match the registered information;

(c) FEHD neither actively followed up the complaint nor informed him of the development of the complaint case; and

(d) FEHD did not furnish the following information as requested by him (request for information) –

(i) the registered information of Urn Grave Space X and Urn Grave Space Y; and

(ii) the file records of the purchase of Urn Grave Space Y, including all relevant instruments and documents.

The Ombudsman's observations

219. As regards the complainant claimed FEHD had not verified the authenticity of the information provided in the application for the urn grave space before giving approval, the Office of The Ombudsman (the Office) had examined in detail how the application was approved and obtained the relevant information and documents. The Office considered that FEHD had not carefully verified the information provided in the application before giving approval, resulting in the suspected case of illegal burial.

220. The complainant further claimed that FEHD had failed to notice that the names of the deceased inscribed on the tombstones did not match the registered information. According to the details of the incident, FEHD had discovered the problem well before receiving the complaint and had taken appropriate follow-up actions.

221. To avoid affecting the criminal investigation of the Police and protect the privacy of individuals, FEHD had not disclosed the details of the case to the complainant. The justification for non-disclosure was

consistent with the reasons for withholding information stated in paragraphs 2.6(e), 2.15(a) and 2.15(b) of the Code on Access to Information. Thus, the Office held that FEHD's act was not unreasonable. Moreover, FEHD had kept the complainant and his mother informed of the development of the case in an appropriate manner and responded to their request for handling the skeletal remains of the complainant's late father.

222. Overall speaking, the Office considered the complaint partially substantiated and made the following recommendations to FEHD –

(a) even if an applicant could not produce documentary proof in respect of his/her application for the exhumation of the remains of the deceased and purchase of an urn grave space (such as the proof of his/her relationship with the deceased and any document certifying the death of the deceased), FEHD staff should still request the applicant to provide as much corroborative evidence as possible to help verify the authenticity of the information provided, and to reduce the opportunity for using false information; and

(b) FEHD staff should be reminded to verify carefully the information on the related persons in an application for "change of holder of a grave/an urn grave" and check the information against FEHD's computer records on the applications concerning the deceased/urn grave space. FEHD should also assign a senior officer to verify the applications so as to ensure proper handling.

Government's response

223. FEHD accepted the Office's recommendations. FEHD has reviewed its guidelines on the handling of applications submitted by the public for the exhumation of the remains of the deceased and allocation of urn grave spaces with a view to improving the vetting mechanism. Meanwhile, a list of other supporting documents required in case an applicant cannot provide proof of his/her relationship with the deceased has been issued to FEHD staff for reference and observance.

224. In addition, FEHD has promulgated a set of operational instructions on the handling of applications for changing the holder of a grave/an urn grave space to ensure that applications are handled with caution. When FEHD staff handle an application for "changing the holder of a grave/an urn grave space", they are required to check the information

on the related persons to ensure that the information on the original holder matches that in FEHD's computer record. Upon confirming that the information provided is correct, the application should be verified by a Senior Health Inspector before giving approval.

Food and Environmental Hygiene Department

Case No. 2018/2162 – Failing to take action against illegal hawking and obstruction on Government land

Background

225. Allegedly, the operator of the shop on G/F of a New Territories Exempted House in a certain location had been persistently occupying the Government land and pedestrian walkway outside the shop with goods and metal racks. The complainant's family owns 1/F and 2/F of that house, and had in February and September 2017 complained about this through other departments to the Food and Environmental Hygiene Department (FEHD) and from January to April 2018 direct to FEHD. FEHD did not respond to the former complaints. As regards the latter complaints, FEHD informed the complainant of a number of inspections it had conducted and inter-departmental joint operations it had participated in between 16 January and 19 April 2018. Obstruction of pavement was detected in the joint operation of 13 March 2018. No other irregularity was detected.

226. The complainant was of the view that FEHD had focused on the pedestrian walkway, and ignored obstruction on the Government land (which could have been used as pedestrian walkway if not occupied) and the illegal hawking activities there. Also, it was the complainant's observation that obstruction recurred shortly after FEHD's inspections and enforcement actions.

227. The complainant was dissatisfied and complained to the Office of The Ombudsman (the Office) that FEHD had failed to follow up his complaints in 2017, take action against the obstruction on the Government land and the illegal hawking activities there or step up enforcement when obstruction recurred.

The Ombudsman's observations

228. Having examined the relevant records (including the relevant guidelines/policy, copies of the inspection records, photos taken during inspections and the relevant court document), the Office considered FEHD's explanation acceptable. FEHD had followed up the complaints of the complainant and his family members, and had given them timely

responses on the result. For the obstruction to pedestrian flow detected on 13 May 2018, FEHD had already summoned the shop operator. Since no irregularity was found in other inspections, it was not unreasonable for FEHD not to take enforcement action against the subject shop.

229. Overall speaking, the Office found the complaint unsubstantiated. Yet in view of the complainant's views that the obstruction problem persisted, the Office recommended that FEHD closely monitor the situation of the subject shop and to take immediate enforcement actions should irregularities arise.

Government's response

230. FEHD accepted the Office's recommendation.

231. Shop front extension is a street management problem spanning the responsibility of a number of government departments. The core function of FEHD is to maintain environmental hygiene. FEHD will accord priority to handling cases relating to illegal hawking activities or causing obstruction to scavenging operation.

232. FEHD will continue to participate actively in the joint operations coordinated by the Home Affairs Department such that concerned departments could take appropriate action under their respective purview to curb any irregularities within their jurisdiction.

233. In this connection, FEHD conducted 28 inspections from January to June 2019 at the concerned location, and neither illegal hawking activities nor obstruction to scavenging operation were detected.

Food and Environmental Hygiene Department

Case No. 2018/2557 – Lax and ineffective enforcement action against street obstruction caused by a vegetable stall

Background

234. The complainant claimed that the street obstruction caused by goods placed by a vegetable stall (the stall) on the pavement it occupied in a certain street had persisted for over two years. Since mid-June 2018, the complainant had repeatedly lodged complaints with the Food and Environmental Hygiene Department (FEHD), but the problem remained. The complainant considered FEHD's enforcement action lax and ineffective. He lodged a complaint with the Office of The Ombudsman (the Office) against FEHD in July 2018.

The Ombudsman's observations

235. The Office deployed staff to conduct inspection of the location concerned in the afternoon of 14 September 2018 and found that there were still racks set up by the stall on the pavement for selling fruits and vegetables.

236. FEHD had been taking actions against the offences of the stall. According to the information provided by FEHD, however, the obstruction caused by the goods illegally placed by the stall had persisted for over two years. The Office opined that the results of the enforcement actions taken were hardly satisfactory.

237. Considering that the complaint was partially substantiated, the Office urged FEHD to continue to closely monitor the situation of the stall and take vigilant enforcement action to enhance deterrence against the offence for continuous abatement of the street obstruction.

Government's response

238. FEHD accepted the Office's recommendation and has taken the following follow-up actions.

239. The local District Environmental Hygiene Office (DEHO) conducted 45 blitz inspections of the stall from 22 November 2018 to 30 June 2019. During 13 inspections, DEHO staff issued 10 fixed penalty notices to the stall operator for obstruction caused by goods placed on the pavement and took three arrest and charge actions for unlicensed hawking with seizures of goods.

240. FEHD will continue to closely monitor the situation of the stall and take vigorous enforcement action.

Food and Environmental Hygiene Department

Case No. 2018/2945 – (1) Failing to take effective steps to combat street obstruction and illegal hawking; and (2) Delay in giving a substantive reply to the complainant

Background

241. According to the complainant, a large quantity of objects had frequently been placed in a street under a flyover (Location (a)) and its vicinity (Location (b)), causing obstruction to pedestrians (objects problem). On 10 April 2018, the complainant reported the objects problem to the Food and Environmental Hygiene Department (FEHD), but to no avail. Worse still, there were illegal hawking activities of aged hawkers at Location (a) (hawking problem), but FEHD staff only issued verbal warnings to them rather than taking enforcement actions. On 26 June of the same year, the complainant reported the objects and hawking problems to FEHD again (the report). FEHD responded in writing that a substantive reply would be issued within 30 calendar days, which had yet to be received.

242. The complainant complained to the Office of The Ombudsman (the Office) on 30 July 2018 and accused FEHD of –

(a) failing to curb the objects and hawking problems in an effective manner; and

(b) prolonged delay in giving a substantive reply to the report.

The Ombudsman's observations

243. Staff of the Office conducted on-site inspections at Locations (a) and (b) at around 3:00 to 4:00 p.m. on 24 September and 4 October 2018 respectively and found that –

(a) objects, mainly cardboard boxes, cardboard, polystyrene foam boxes, trolleys and other miscellaneous stuff, were scattered over eight to nine places at Location (a). That said, the walkway of Location (a) was wide enough and the objects did not cause obstruction to pedestrians;

(b) about two to three old women placed objects and also goods (including clothes, shoes and accessories) for sale at Location (a);

(c) the environmental hygiene at Locations (a) and (b) was not too bad, there was no refuse dumping; and

(d) shops at Location (b) committed shopfront obstruction and illegal hawking.

Allegation (a)

244. For Allegation (a), FEHD did take follow-up and enforcement actions against the objects and hawking problems at Locations (a) and (b), which included conducting on-site inspections from time to time, issuing fixed penalty notices and notices to remove obstruction, and instituting prosecutions.

245. As for the hawking problem at Location (a), FEHD only issued to the aged unlicensed hawkers verbal warnings rather than instituting prosecutions. The Office was of the view that it was not unreasonable for FEHD, based on social considerations, to adopt a more lenient enforcement policy towards aged unlicensed hawkers.

246. Based on the above analysis, the Office considered Allegation (a) unsubstantiated.

247. Having said that, the Office would urge FEHD to continue to closely monitor the situation at Locations (a) and (b), step up inspections and exercise stricter control to curb the objects and hawking problems as far as possible.

Allegation (b)

248. As for Allegation (b), FEHD admitted its failure to give timely and substantive reply to the complainant within 30 calendar days. In addition, the Office noted that it was not until 31 July 2018, after a lapse of over 30 calendar days, that FEHD issued an interim reply to the complaint made by the complainant on 26 June. In this light, the Office considered Allegation (b) substantiated.

249. Considering that the complaint was partially substantiated, the Office suggested that FEHD alert the staff concerned in writing that they should reply to the public's reports and complaints in a timely manner.

Government's response

250. FEHD accepted the Office's recommendation and has alerted the staff concerned in writing that they should reply to the public's reports and complaints in a timely manner.

Food and Environmental Hygiene Department

Case No. 2018/3090 – Failing to take effective action against persistent occupation of a parking space by the operator of a bicycle shop with a goods vehicle for operating business

Background

251. According to the complainant, an operator of a bicycle shop persistently occupied a parking space at the location, running bicycle rental, repair and sale business on a goods vehicle. The situation had lasted for at least three years. The complainant lodged three complaints with the Food and Environmental Hygiene Department (FEHD) (in 2015, 2016 and between May and June 2018 respectively). On each occasion, FEHD staff replied that inspection(s) had been conducted but no prosecution action could be taken as no monetary transaction was detected. The complainant was dissatisfied with FEHD's failure to handle his complaints seriously and complained to the Office of The Ombudsman (the Office) in August 2018.

The Ombudsman's observations

252. On 5 October 2018, the Office's staff made an appointment with the bicycle shop via telephone for bicycle rental. He then went to the place in question and successfully rented a bicycle after paying the responsible person of the bicycle shop. The staff of the Office was also informed by the responsible person of the bicycle shop that he had helmets for sale.

253. FEHD did take follow-up actions after receiving the complaints of the complainant. However, the Office was of the view that since the goods vehicle of the bicycle shop had persistently (for three years from September 2015 to August 2018) parked at the same location and members of the public (such as the complainant) had complained against the vehicle for operating business rather than just parking, as an enforcement department, FEHD should strive for effective investigation to ascertain whether the shop had really been operating business.

254. The Office considered that the bicycle shop had obviously been operating in a way to avoid being discovered by FEHD during inspections that it was doing business. Hence, investigation by way of inspections

could hardly bear fruit. Compared with inspections, "decoy operations" as suggested by the complainant would definitely be more effective. In fact, the Office's staff had attempted to patronise the bicycle shop by disguising as customer, which was by no means difficult in practice. Evidence of the bicycle shop operating business was successfully collected.

255. Considering the complaint was partially substantiated, the Office made the following recommendations to FEHD –

(a) Monitoring of the operations of the bicycle shop should be stepped up. Proactive actions should be taken to investigate and collect evidence to curb its offences if there are reasons to suspect that the shop has only relocated its operations to another location; and

(b) The case should be used as an example to provide FEHD staff with guidance on how effective follow-up actions can be taken on similar complaints. Operational guidelines should be formulated as appropriate.

Government's response

256. FEHD accepted the Office's recommendations and has taken the following actions.

Recommendation (a)

257. Upon receipt of the Office's report in December 2018, FEHD immediately instructed the staff concerned to stay vigilant and flexible in handling complaints and conducting inspections in accordance with operational guidelines, and to also mount blitz operations from time to time to prevent illegal hawkers from taking root. Between January and April 2019, FEHD conducted 23 surprise inspections in the vicinity of the location and no illegal hawking activities were detected. Subsequently, the goods vehicle of the bicycle shop left the street and parked in the car park of a housing estate.

Recommendation (b)

258. FEHD will from time to time remind its staff to consider various investigation methods (including "decoy operations") for effective follow-up on similar irregularities in the light of actual needs and circumstances.

Food and Environmental Hygiene Department

Case No. 2018/3105A – Failing to endeavour to enforce an Abatement Order

Background

259. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Joint Office for Investigation of Water Seepage Complaints (JO), formed by the Food and Environmental Hygiene Department (FEHD) and the Buildings Department (BD), in August 2018. She alleged that there had been a seepage problem at the ceiling of her flat since 2012. JO had confirmed the upper floor unit as the source of the seepage. In late 2016, the court issued an abatement order, requiring the owner of that flat (the Owner) to carry out proper repairs within the period specified to abate the seepage nuisance. The owner did not comply and was subsequently prosecuted by JO in July 2017. Nevertheless, as at August 2018, the summons in relation to the prosecution still could not be successfully served on the Owner. Meanwhile, the hearing for the case was postponed as many as ten times because the Owner did not appear in court. The complainant was aggrieved by JO's failure to make the best endeavours to execute the abatement order such that the seepage nuisance persisted.

260. JO explained that serving summons on defendants is a judiciary process in which JO has no statutory role. JO would, however, try different means to obtain the address of the defendant to facilitate this judiciary process. Between July 2017 and July 2018, JO had made enquires with the Immigration Department and the Rating and Valuation Department for the address of the Owner and notified the court of the information. The court then tried eight times, all to no avail, to serve the summons on the Owner by post and via bailiffs/the Police, including serving it at different times of the day and at different addresses. The hearing for the case was, therefore, postponed time and again. Finally, at the end of November 2018, after confirming that the Owner still failed to appear in court despite the summons having been successfully served, FEHD applied to the court for an arrest warrant.

261. Regarding why it had waited for so long before applying for an arrest warrant, JO explained that –

(a) the magistrate may refuse to issue an arrest warrant if the prosecution has not exhausted all viable means to serve a summons;

(b) before applying for an arrest warrant, other factors, such as the severity of the seepage problem and how the warrant would affect the defendant's personal liberty, should be taken into account;

(c) the seepage problem in this case does not pose severe dangers to society; and

(d) the summons was successfully served on the Owner on 9 October 2018. JO then applied to the court for the arrest warrant when the Owner still failed to attend the hearing on 8 November 2018.

262. JO considered that a defendant should be regarded as having no knowledge of being prosecuted or required to appear in court as long as a summons remains unserved. JO considered it legal, reasonable and correct to have refrained from applying for an arrest warrant from the court before the summons was successfully served by the Police.

The Ombudsman's observations

263. The Office considered JO to have tried its best to obtain the address of the Owner. It had advised the court to serve the summons following established procedures and ultimately applied to the court for issue of an arrest warrant. However, the Office did not agree, for the following reasons, that it was correct and reasonable of JO not to apply for an arrest warrant before the summons was successfully served on 9 October 2018 –

(a) During the 12 months between July 2017 and July 2018, the responsible officers had tried eight times to serve the summons via different means, at different times of the day and at different addresses, but to no avail. As such, the magistrate might accept that the prosecution had used every viable means to serve the summons and hence issue the arrest warrant;

(b) The court already issued an abatement order in December 2016, but the Owner defied the order. Consequently, the complainant had to endure the persisting seepage; and

(c) Issuing the warrant for the Owner's arrest and subjecting her to the court's punishment should have made her comply with the abatement order promptly.

264. The Owner was obviously an inconsiderate person who showed no regard whatsoever for the court's abatement order and the law. JO's failure to consider applying for an arrest warrant as soon as possible when the summons remained unserved after a number of attempts resulted in the complainant's prolonged distress due to the seepage.

265. In sum, the Office considered this complaint partially substantiated. The Office recommended that JO should consider applying for an arrest warrant by invoking section 9(1) of the Magistrates Ordinance (Cap. 227) as soon as possible in cases where the summons remained unserved for long so as to prompt owners concerned to fulfil their duties in buildings maintenance and improving seepage condition.

Government's response

266. JO did not accept the Office's recommendation.

267. Regarding water seepage cases in buildings where the court is unable to serve the summons for long, JO will, having regard to the causes of unsuccessful service, provide assistance. Serving summons on defendants to attend hearing under the Magistrates Ordinance is a judiciary process, in which JO has no statutory role in respect of the arrangements and procedures for delivery of summons. JO will, however, help the court by trying different means to obtain the address of the defendant to facilitate service of the summons. For example, if the defendant has moved out, JO will check via possible means his/her other or latest correspondence address(es) (such as making enquiries with other government departments). Since the defendant's address is personal data, enquiries with individual departments will only be made where necessary and JO will exercise due caution in the process. It is therefore understandable that longer time is needed.

268. A defendant will have no knowledge of the prosecution if the summons remains unserved. Hence, JO considers that relevant factors, including procedural justice (i.e. whether the defendant would be given an opportunity to answer the charge), severity and impact of the seepage problem, impact of the arrest on the defendant's personal liberty (for example, constituting constraint) and whether the seepage problem will

pose severe dangers to society, should be taken into account before deciding whether to apply for an arrest warrant. For cases which do not pose severe dangers to society, JO considers that it should essentially help the court in serving the summons on the defendants wherever possible.

269. Under section 9(1) of the Magistrates Ordinance, the magistrate should consider whether a complaint or information is substantiated before issuing a warrant to arrest the defendant. Even if the complaint or information is substantiated, the magistrate will exercise his judicial discretion to issue an arrest warrant only in appropriate cases. The magistrate may refuse to issue an arrest warrant if the prosecution has not exhausted all viable means to serve a summons. Even if the magistrate issues an arrest warrant, it does not mean that the defendant will be arrested within a short period of time. Under the current practice, the arrest warrants will be executed by relevant departments (including the Hong Kong Police Force) during the time they are in force. JO understands that after issuing an arrest warrant, it may take some time for the defendant to appear in court, and the court to deliver the judgment (it took four months in this case).

270. FEHD wrote to convey the above-mentioned views and responses to the Office on 4 April 2019. On 24 June 2019, the Office requested FEHD to provide supplementary information for its consideration. FEHD provided the Office with the relevant information on 23 September 2019.

Food and Environmental Hygiene Department

Case No. 2018/3197 – Failing to take enforcement action against the persistent breach of hawker licence conditions by a wall stall

Background

271. The complainant stated that there was a wall stall (the stall) outside his flat. The hawker licensee concerned had not operated any business at the stall for years, but had used the stall for storage only, allegedly breaching the hawker licence conditions for wall stall. The complainant had complained repeatedly to the Food and Environmental Hygiene Department (FEHD) since May 2017, but FEHD failed to take any enforcement action against the irregularity. The complainant thus lodged a complaint with the Office of The Ombudsman (the Office) in August 2018.

The Ombudsman's observations

272. The Office found it unbelievable that FEHD failed to provide the inspection records of almost three years. Although FEHD believed the records were only misplaced and could not be found at the moment, the Office did not accept that the relevant officers had conducted and recorded the inspections unless FEHD could provide corroborative evidence. Given the importance of the inspection records, FEHD should hold any persons involved responsible and examine how to prevent the recurrence of similar incidents.

273. Though incomplete, the existing records showed that FEHD had not followed the established procedures, and as a result, the problem of operation of the stall in breach of regulations persisted and remained unresolved for years.

274. The Office found the complaint substantiated and recommended that FEHD –

(a) thoroughly investigate the cause of the missing of inspection records of almost three years and take appropriate actions and improvement measures based on the findings to avoid recurrence of similar incidents; and

(b) step up monitoring to ensure that frontline officers adhere to the established procedures when following up cases.

Government's response

275. FEHD accepted the Office's recommendations.

Recommendation (a)

276. In response to the Office's recommendations, FEHD explained that as the Hawker Case Work Office of the District Environmental Hygiene Office concerned was relocated in August 2018, it was believed that the inspection records in question might have been misplaced during the relocation. FEHD had actively searched for the records and reported the case to the local police station but there had not been any progress so far. To investigate the actual situation of the stall during inspections conducted in that particular period, FEHD took the initiative to contact the responsible inspecting officers. Except for those who had passed away, resigned or left the service and could not be contacted, all inspecting officers stated that they could not recall the actual situations of the stall in that particular period, as the inspections were conducted several years ago. Moreover, the results or findings of inspections would only be recorded in the inspection records. Given the above investigation results, FEHD was in fact unable to provide the Office with the inspection records concerning the stall. Nevertheless, FEHD would continue to search for the records and inform the Office of any update when available. With the lesson learnt from the missing of inspection records, FEHD demanded the District Environmental Hygiene Office concerned to make more meticulous arrangements for office relocation in future to prevent recurrence of similar incidents. The arrangements should include preparing an inventory of items/documents to be relocated in advance and labelling them with their designated storage location in the new office. These measures would facilitate systematic stowing of items/documents at designated places and location of them in future.

Recommendation (b)

277. In addition, FEHD examined the case and agreed with the Office that improvement should be made by inspecting officers who followed up the non-compliance of licence conditions by the stall. To ensure that frontline officers would conduct inspection of licensed hawker stalls and

follow up every non-compliant case according to the established policies and procedures, FEHD introduced an e-Inspection System (the system) in July 2018. When conducting on-site inspection of hawker licences, frontline officers are required to enter the inspection results into tablet computers for uploading to the system. In accordance with the procedures set out in the policy and based on the inspection results, reminders or warnings are sent via the built-in functions of the system to remind relevant users and/or supervisory staff to take appropriate follow-up actions. The system provides the management staff with a convenient way to check if frontline officers have followed up and overseen every case concerning hawker licence in accordance with the established procedures, so as to avoid delays. It also facilitates the access of supervisory staff to the relevant information stored in the system. As for the case in question, the officers concerned were given serious advice to strictly observe the departmental operational guidelines, while supervisory officers were reminded to step up monitoring of the inspection work of frontline officers with the help of the new functions of the system, so as to ensure that every case would be dealt with appropriately in accordance with the established guidelines or procedures. Moreover, FEHD has also instructed the management of the District Environmental Hygiene Offices to supervise the routine inspections performed by their Hawker Control Team (HCT). Particularly, irregular inspections should be conducted to better understand the working conditions of HCT officers and hawker issues in the district, including the business of unlicensed and licensed hawkers. If any inadequacy is found, they should give instructions to frontline officers and initiate relevant enforcement actions.

Government Secretariat –
Chief Secretary for Administration's Office
(Policy Innovation and Co-ordination Office)

Case No. 2018/0885 – (1) Unfairly rejecting an application for research funding; (2) Failing to provide constructive advice to assist the complainant to revise his application; (3) Failing to select the reviewers nominated by the complainant; (4) Failing to give the complainant fresh reasons for upholding the refusal decision; and (5) Unnecessarily copying emails to the complainant's colleagues

Background

278. Allegedly, in June 2017, the complainant applied to the then Central Policy Unit (CPU) for funding under the Public Policy Research Funding Scheme (PPRFS) [1] for conducting a research entitled "Evaluating Departmental Policy and Attitudes to The Ombudsman" (the Application). The PPRFS Assessment Panel (AP) gave an average grading of 3.25 to the Application, but rejected the Application on 7 September 2017. The complainant later learned that two out of the four reviewers had given unreasonably low grades with incorrect comments on the Application. The complainant queried whether the four reviewers had been selected from the five whom he had nominated in the Application. AP reviewed the Application, but eventually upheld its decision.

279. The complainant's allegations against the then CPU are summarised below –

(a) AP's decision was unreasonable;

(b) reviewers' comments were unfair and lacked details;

(c) reviewers appeared not to have been selected from those nominated;

(d) CPU failed to give fresh reasons for maintaining its refusal decision; and

(e) CPU copied emails to the applicant's colleagues.

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[1] Policy Innovation and Co-ordination Office (PICO) was established on 1 April 2018 and took over the role of the then CPU in administering the PPRFS.

The Ombudsman's observations

280. The Office of The Ombudsman (the Office) considered the complaint partially substantiated and the analyses are set out below –

Allegations (a) and (b)

281. The Office accepted the explanation provided by PICO that AP's decision on the Application was based on multiple factors, not just the gradings given by the four reviewers. The Office also accepted PICO's explanation that it was inappropriate to disclose to the complainant the detailed comment of the Chief Secretary for Administration's Office on the policy relevance of the Application as such disclosure would inhibit the frankness and candour of discussion within the Government and the PPRFS relies heavily on inputs from Government bureau/departments to ensure policy relevance of the applications. The Office was of the view that while the complainant may find some reviewers' comments to be of little help, those reviewers are under no obligation to offer any constructive advice to the Principal Investigators (PIs). The Office considered Allegations (a) and (b) unsubstantiated.

Allegation (c)

282. The Office considered PICO's explanation that the AP Chairman and Vice-Chairman were not bound to select reviewers from those nominated by PIs not unreasonable and hence it found Allegation (c) unsubstantiated. The Office also noted that the practice of inviting PIs to nominate reviewers has ceased since 8 June 2018.

Allegation (d)

283. The Office considered that the then CPU had indeed not given the complainant clear specific reasons for upholding the refusal decision. The Office also considers that the then CPU's claim that "the comments are provided to the PIs to help them improve and refine their research methodology and/or re-submit their applications. The PIs are encouraged to revise their applications for re-submission taking into account the review's comments" sounds hollow and disingenuous. The Office considered that the then CPU should have given the complainant a more substantial reply so that he might take reference for revising the Application to the satisfaction of AP. The Office, therefore, considered Allegation (d) substantiated.

Allegation (e)

284. The Office considered that as the application had been submitted to the then CPU through the Research Office, with the covering message copied to some staff members of that Office, it was not unnatural for the then CPU to notify all those people of the refusal decision. The Office found Allegation (e) unsubstantiated.

285. The Office urged PICO to give more details to the unsuccessful applicants on why their applications are refused.

Government's response

286. PICO accepted the Office's recommendation and noted that the Office is pleased that starting from the AP meeting in September 2018, AP Secretariat has informed unsuccessful applicants of AP's collective view on why funding for their research proposals are not supported. No follow-up action is required.

Government Secretariat – Education Bureau

Case No. 2018/0221 – (1) Misinterpreting Item 7 of the Point System of Primary One Admission System (POAS) by saying that it does not apply to civil servants applying for places in government primary schools for their children; and (2) Unreasonably refusing to award 5 points to the children of civil servants under Item 7 of the POAS Point System

Background

287. The complainant was a civil servant and his daughter was at the material time eligible for joining the Primary One Admission (POA) of September 2018. On 29 September 2017, the complainant wrote to the Education Bureau (EDB), enquiring whether Item 7[2] of the Points System of the POA System applies to civil servants applying for places in government primary schools for their children during the "Discretionary Places (DP) Admission" stage of POA.

288. On 6 October 2017, EDB replied to the complainant that Item 7 does not apply to civil servants applying for places in government primary schools for their children. Between 6 October 2017 and 12 January 2018, the complainant and EDB exchanged views on the interpretation and application of Item 7. However, EDB did not provide the complainant with any records or documents showing the aforementioned inapplicability of Item 7.

289. The complainant complained that EDB had misinterpreted Item 7 by saying that it does not apply to civil servants applying for places in government primary schools for their children; and treated civil servants unfairly by refusing to award five points to their children under Item 7.

The Ombudsman's observations

290. It was clear from EDB's explanation that the Government should not be regarded as the school sponsoring body of government schools in the true sense of the term, and civil servants are employees, not "members" of the Government. Hence, Item 7 of the Points System is not applicable

[2] Item 7 stipulates that an applicant child will be awarded 5 points if his/her parent is a member of the same organization which sponsors the operation of the primary school.

to civil servants applying for places in government primary schools for their children.

291. Most importantly, the Office of The Ombudsman (the Office) did not see any injustice in the Government providing equal opportunities to all members of the public to have access to government schools and not giving priority to children of civil servants. As employer, the Government has never pledged to give the children of civil servants an edge in gaining admission to government schools.

292. In view of the above, the Office considered the complaint unsubstantiated.

293. The Office recommended that EDB should specify more clearly to the public that Item 7 does not apply to the Government, government schools and government employees, so as to avoid any possible misunderstanding as that in this case.

Government's response

294. EDB accepted the Office's recommendation. EDB has included a new Question and Answer (QA) in the Frequently Asked Questions (FAQ) on POA starting from the POA 2019 cycle, setting out clearly that Item 7 of the Points System under the POAS is not applicable to civil servants applying for places in government primary schools for their children during the DP Admission stage. Parents have been advised in the "Notes on How to Complete the Application Form for Admission to Primary One" to refer to the FAQ on common issues concerning the DP Admission. EDB has also briefed staff responsible for POA matters thoroughly and reminded them to convey clear message to the public in future. In addition, EDB has shared with the subject team as well as all government primary schools the relevant QA with the detailed considerations for reference and deployment, if necessary.

Government Secretariat – Education Bureau

Case No. 2018/1377(I) – Refusing to provide the membership of the textbook review panel of the Chinese History subject

Background

295. On 17 April 2018, the complainant asked the Education Bureau (EDB) for the membership of the textbook review panel of the Chinese History subject. On 19 April 2018, EDB replied to him that the textbook review exercise should be kept confidential to ensure that it could be conducted fairly, objectively and professionally free from interference, pressure and bias. Hence, the identity of reviewers should also be kept confidential.

296. The complainant claimed that the work of textbook review should be monitored by members of the public to ensure that the content of textbooks would not be manipulated. In view of this, members of the public should have the right to know by whom the textbooks are reviewed. The complainant criticised EDB for its refusal to disclose the membership of the textbook review panel without a legitimate reason.

The Ombudsman's observations

297. EDB had explained reasons for not being able to provide the membership concerned to the complainant. The Office of the Ombudsman (the Office) reckoned that keeping the identity of the textbook reviewers confidential is one of the crucial elements to the textbook review mechanism. The Office accepted that the disclosure of the identity of the textbook reviewers would harm or prejudice the proper and efficient conduct of the operations (work related to textbook review) of EDB (paragraph 2.9(c) of the Code on Access to Information (the Code)), and would inhibit the frankness and candour of discussion within EDB and the advice given to the Government (paragraph 2.10(b) of the Code). Members of the public could also monitor the operation of textbook review and the textbook content by means of reviewing the textbooks available for sale in the market. As a matter of fact, EDB, rather than members of the textbook review panel, should be the one who is accountable to the public in case questionable textbook content is found. In this connection,

it is indeed unnecessary to disclose the membership of the textbook review panel.

298. The Office reckoned that the complainant's complaint to the EDB was unsubstantiated.

299. Nonetheless, the Office opined that EDB had deficiencies in handling this case of information request. Though the complainant did not make specific reference to the Code when requesting for the membership concerned, as stipulated in the Guidelines on Interpretation and Application (the Guidelines) of the Code, EDB should, as far as possible, give reasons for refusal in accordance with the provisions in Part 2 of the Code. EDB's written reply to the complainant, which did not quote the Code when specifying the reasons for refusing the request for information, did not accord with the Guidelines.

300. The Office suggested that EDB enhance its staff's understanding of the Code, so that they would be able to meet the requirements of the Code and the relevant Guidelines when handling the requests for information from members of the public.

Government's response

301. EDB accepted the Office's recommendation and has taken the following actions.

302. The salient points of the Code as well as the areas requiring special attention have been particularly highlighted at the Section Head's Meetings of the Curriculum Development Institute (CDI) on 13 November 2018 and 15 February 2019 to draw all section heads' attention. Experience sharing on handling requests for information was also arranged during these meetings.

303. Section heads of the CDI have been requested to enhance their staff's understanding of the Code through internal sharing and meetings to ensure that all CDI colleagues would handle requests for information made by members of the public in accordance with the Code and relevant Guidelines.

304. The internal circular on the Code will be re-circulated among all relevant staff on a half yearly basis.

305. EDB will continue to enhance CDI staff's understanding of the Code and relevant Guidelines through the above-mentioned channels as and when necessary.

Government Secretariat – Education Bureau

Case No. 2018/1686(I) – Refusing to provide the membership of the textbook review panel of the History subject

Background

306. On 8 May 2018, the complainant asked the Education Bureau (EDB) for the membership of the textbook review panel of the History subject. On 9 May, EDB replied to him that the textbook review exercise should be kept confidential to ensure that it could be conducted fairly, objectively and professionally free from interference, pressure and bias. Hence, the identity of reviewers should also be kept confidential.

307. The complainant claimed that the work of textbook review should be monitored by members of the public to ensure that the content of textbooks would not be manipulated. In view of this, members of the public should have the right to know by whom the textbooks are reviewed. The complainant criticised EDB for its refusal to disclose the membership of the textbook review panel without a legitimate reason.

The Ombudsman's observations

308. EDB had explained reasons for not being able to provide the membership concerned to the complainant. The Office of The Ombudsman (the Office) reckoned that keeping the identity of the textbook reviewers confidential is one of the crucial elements to the textbook review mechanism. The Office accepted that the disclosure of the identity of the textbook reviewers would harm or prejudice the proper and efficient conduct of the operations (work related to textbook review) of EDB (paragraph 2.9(c) of Code on Access to Information (the Code)), and would inhibit the frankness and candour of discussion within EDB, and the advice given to the Government (paragraph 2.10(b) of the Code). Members of the public could also monitor the operation of textbook review and the textbook content by means of reviewing the textbooks available for sale in the market. As a matter of fact, EDB, rather than members of the textbook review panel, should be the one who is accountable to the public in case questionable textbook content is found. In this connection, it is indeed unnecessary to disclose the membership of the textbook review panel.

309. The Office reckoned that the complainant's complaint to the EDB was unsubstantiated.

310. Nonetheless, the Office opined that EDB had deficiencies in handling this case of information request: though the complainant did not make specific reference to the Code when requesting for the membership concerned, as stipulated in the Guidelines on Interpretation and Application (the Guidelines) of the Code, EDB should, as far as possible, give reasons for refusal in accordance with the provisions in Part 2 of the Code. EDB's written reply to the complainant, which did not quote the Code when specifying the reasons for refusing the request for information, did not accord with the Guidelines.

311. The Office suggested that EDB enhance its staff's understanding of the Code, so that they would be able to meet the requirements of the Code and the relevant Guidelines when handling the requests for information from members of the public.

Government's response

312. EDB accepted the Office's recommendation and has taken the following actions.

313. The salient points of the Code as well as the areas requiring special attention have been particularly highlighted at the Section Head's Meetings of the Curriculum Development Institute (CDI) on 13 November 2018 and 15 February 2019 to draw all section heads' attention. Experience sharing on handling requests for information was also arranged during these meetings.

314. Section heads of the CDI have been requested to enhance their staff's understanding of the Code through internal sharing and meetings to ensure that all CDI colleagues would handle requests for information made by members of the public in accordance with the Code and relevant Guidelines.

315. The internal circular on the Code will be re-circulated among all relevant staff on a half yearly basis.

316. EDB will continue to enhance CDI staff's understanding of the Code and relevant Guidelines through the above-mentioned channels as and when necessary.

Government Secretariat – Food and Health Bureau

Case No. 2018/3890(I) – Refusing to provide the annual bed occupancy rate of 12 private hospitals between 2014 and 2016

Background

317. The complainant wrote to the Food and Health Bureau (FHB) in July and September 2018 to request the bed occupancy rates of the 12 private hospitals in Hong Kong each year from 2014 to 2016 (the information in question). FHB provided the average bed occupancy rates of all private hospitals each year from 2014 to 2016 to the complainant without breakdown.

318. On 13 September 2018, the complainant wrote again to FHB to obtain the information in question. FHB explained that when the Department of Health (DH) collected the information in question from private hospitals, it was stipulated that such information was for DH's statistical purpose only. Hence, FHB did not provide the breakdown of bed occupancy rates by individual private hospitals.

319. The complainant found FHB's decision unreasonable. She noted that FHB did provide the bed occupancy rates of individual private hospitals when the Finance Committee of the Legislative Council (LegCo) examined the Estimates of Expenditure for the years 2016-17 and 2017-18. Moreover, she believed that the information in question did not belong to information relating to research, statistics and analysis, the disclosure of which may be refused under paragraph 2.13 of the Code on Access to Information (the Code). The complainant lodged a complaint to the Office of The Ombudsman (the Office) against FHB for suspected violation of the Code in October 2018.

The Ombudsman's observations

320. Under the Code, government departments should provide the public with Government-held information as far as possible, unless there are reasons to refuse disclosure as stated in Part 2 of the Code. When refusing to disclose information, departments must quote the relevant paragraph(s) in Part 2 of the Code as the basis to inform the applicants of the reasons for refusal and advise them of the channels for review of the decisions.

321. FHB admitted that it had failed to respond to the complainant's request for the information in question within the relevant time limit. The Office considered that in this case, it was clear FHB did not comply with the requirements in preceding paragraph in the following three aspects –

(a) When refusing to provide the complainant with the information in question, it did not quote the reason(s) stated in Part 2 to explain the refusal in accordance with the Code;

(b) The reason given in the reply letter, i.e. the information was used for statistical purpose only, was not stated in Part 2 of the Code; and

(c) It did not advise the complainant of the review channels.

322. FHB did not provide the information in question on the ground of paragraph 2.14 (a) of the Code. In this regard, the Office considered that although the information was compiled by DH, it was "third party information" because its original data was provided by various private hospitals on DH's request. If the private hospitals did not agree to disclose the information concerned, or there was no overriding public interest in disclosing the information in question, FHB might refuse such request. However, FHB did not accede to the complainant's request without consulting the private hospitals, which was not in full compliance with paragraph 2.14 (a) of the Code.

323. In addition, paragraph 2.14.8 of the Guidelines on Interpretation and Application (Guidelines) of the Code specifies that "[paragraph 2.14(a) of the Code on 'third party information which may be refused to disclose'] will not apply where the information is already in the public domain, has become widely known, or is available upon inspection of a register or another document which is open for public inspection". FHB provided LegCo with the bed occupancy rates of 11 private hospitals of 2014 and 2015, which were contained in LegCo papers available for public access. Although FHB had disclosed relevant data without seeking the consent from various private hospitals at that time, such information has already been made public. Therefore, FHB should not have refused to provide the complainant with the data for these two years.

324. As observed from the above, the Office considered that there were inadequacies in FHB's processing of the complainant's request for the information in question, reflecting its insufficient understanding of the

requirements of the Code and the Guidelines. Upon the Office's intervention, FHB took remedial measures and provided the complainant with the bed occupancy rates of eight private hospitals. As to the information about the bed occupancy rates of the remaining three private hospitals in 2016, the Office agreed there was no substantial evidence indicating an overriding public interest to justify disclosure without the agreement of the hospitals.

325. Nevertheless, the Office considered it reasonable for the complainant to seek to learn about the bed occupancy rates of private hospitals, which would show the actual usage of these hospitals, so as to assess whether the healthcare resources planning was appropriate. In fact, over the years, many LegCo Members have requested information from the Government on the bed occupancy rates of private hospitals. In the long run, FHB should consider discussing with private hospitals and encouraging all of them to disclose bed occupancy rates so as to facilitate public monitoring.

326. In view of the above, the Office considered the complaint substantiated and recommended FHB to –

(a) enhance training on the Code to ensure that staff are familiar with and strictly abide by the requirements of the Code and the Guidelines; and

(b) consider discussing with private hospitals and encouraging all of them to disclose information on bed occupancy rates so as to facilitate public monitoring.

Government's response

327. FHB accepted the Office's recommendations.

Recommendation (a)

328. FHB has distributed the relevant information on the Code to FHB and DH officers who are responsible for handling the information on bed occupancy of private hospitals, so as to remind them of the requirements.

Recommendation (b)

329. DH contacted all private hospitals in February 2019 to seek their consent in disclosing their bed occupancy rate information for matters relating to LegCo, and that the information disclosed might be accessible to the public. Among the 12 private hospitals in Hong Kong, 11 have given their consent to DH for the disclosure of bed occupancy rates. The remaining one disagreed to the disclosure by the Government as it considered that bed occupancy rate was sensitive information to its investors. FHB has already provided the above information to LegCo in written replies to Members' questions during the Examination of the Estimates of Government Expenditure 2019-20 by the Finance Committee.

330. FHB will continue to make every effort to handle requests for information from the public and all sectors in accordance with the requirements of the Code.

Government Secretariat – Innovation and Technology Bureau (Efficiency Office)

Case No. 2018/1615C – Lack of reply to a complaint about illegal use of agricultural land

Background

331. According to the complainant, in January 2018, he found that a large number of trees on a piece of agricultural land adjacent to the section of Ng Tung River opposite to a residential estate (the subject location) had been fallen and the subject location was illegally converted for car parking and other purposes. The strong light emitted therefrom constituted nuisance to the residents nearby during night-time. He therefore made a complaint to the Lands Department (LandsD) via 1823.

332. In early March, 1823 informed the complainant that according to LandsD, his complaint was not within the department's jurisdiction, and that 1823 had referred his complaint to the Civil Engineering and Development Department (CEDD). Afterwards, CEDD staff called to tell the complainant that the subject location was outside CEDD's works site and the department would refer the complaint to LandsD. Thereafter, the complainant received no reply from any department.

333. The complainant was dissatisfied that his complaint was not followed up properly by LandsD, CEDD and 1823.

The Ombudsman's observations

334. It can be seen from the case that the District Lands Office concerned (DLO) under LandsD and CEDD have already followed up the complaint.

335. Since the result of the preliminary inspection conducted by DLO revealed that the alleged illegal site fell within an area under temporary land allocation, it is not improper for DLO to request 1823 to refer the complaint to CEDD for follow-up and reply. It is, however, unfortunate that due to the oversight of 1823 staff, the complaint was not referred back to LandsD for follow up as requested by CEDD. Thus it is improper that the complainant has not been provided with a reply. Nonetheless, LandsD has followed up the matter.

336. In view of the oversight of 1823 staff, the Efficiency Office has taken a series of improvement measures to avoid the recurrence of the abovementioned issues.

337. Based on the above analysis, the Office of The Ombudsman (the Office) considered the complaint against the Efficiency Office substantiated.

338. The Office welcomed the improvement measures taken by the Efficiency Office as set out in the paragraph below.

Government's response

339. The Efficiency Office identified the following improvement measures and fully implemented them –

(a) 1823 has instructed its staff to pay more attention to the content of replies from departments in order to avoid recurrence of similar incidents. Moreover, 1823 has enhanced staff training in this respect and will continue to arrange supervisory staff to conduct regular sample checks to monitor the performance of its staff;

(b) The management of 1823 suggested to CEDD verbally and via e-mail on 12 September 2018 and 15 January 2019 respectively that CEDD staff who are to make an online request to 1823 for case referral should state the request in the designated field of the 1823 online system. The responsible officer of CEDD has then reminded all relevant staff of the advice; and

(c) 1823 enhanced its online system on 21 December 2018. A confirmation step was added for departments to review the matters they intend to request 1823 to follow up when replying to 1823, thereby reducing input errors. 1823 has informed all departments concerned of the modification and reminded the departments to take note of it when providing replies. 1823 conducted four briefing sessions on 2 January 2019 to explain the changes to a total of 65 officers from different departments.

Government Secretariat - Security Bureau and Immigration Department

Case No. 2017/3893B (Government Secretariat - Security Bureau) – Lack of response to the complainant's petition

Case No. 2017/3057(I) (Immigration Department) – Unreasonably refusing to provide contact information of foreign domestic helpers in debt and failing to take any action against them

Background

340. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Immigration Department (ImmD) for unreasonably refusing to provide contact information of foreign domestic helpers in debts and failing to take any actions against them. He also complained against the Security Bureau (SB) for lack of response to his petition.

341. According to the Code on Access to Information (the Code) and its Guidelines on Interpretation and Application (the Guidelines), upon receipt of a request, information will where possible be made available within ten days, or where not possible in 21 days (with an interim reply within ten days), or in such exceptional circumstances as a need to seek legal advice in 51 days (with an explanation to requestor).

342. In refusing a request, the complainant should be given "the reasons for refusal quoting all 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".

343. Paragraph 2.15 of the Code (Privacy of the individual) stipulates that the Government may refuse to release the information about any 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 appropriated person, has given consent to its disclosure, or (c) disclosure is authorized by law, or (d) the public interest in disclosure outweighs any harm or prejudice that would result.

344. The complainant runs a company offering emergency loan to foreign domestic helpers. Some failed to repay the debts and absconded. The complainant suspected fraud and reported it to the Police.

345. He also asked ImmD for the absconders' contact information and to stop granting them working visas. In 2013, the complainant wrote several times to ImmD, drawing its attention to the alleged fraud and asked that the alleged defrauders be refused working visas, ImmD replied that it should process applications by foreign domestic helpers for visas in accordance with established procedures and mechanism. On 26 August 2015, the complainant requested in writing that ImmD provide contact information of a number of debtors. ImmD refused on 14 September 2015, citing paragraph 2.15 of the Code. The complainant made on 30 October the same request, which was refused on the same ground on 17 November 2015. On 3 December 2015, the complainant made the same request to ImmD, this time providing some written consent of the debtors. ImmD issued four interim replies before a substantive reply on 17 February 2016 (some 76 calendar days from receipt), again refusing the request, citing paragraph 2.15 of the Code without further elaboration, such as why the debtors' consent provided by the complainant was insufficient for disclosure.

346. The Police subsequently curtailed the case concerned in view of the investigation results.

347. On 4 December 2015, the complainant wrote to the Chief Executive, expressing his dissatisfaction with ImmD and the Police. This letter was forwarded as a petition to SB for follow-up. SB was not able to reply the complainant substantively after a lapse of over a year.

348. SB eventually issued from December 2016 to November 2017 nine interim replies to the complainant and on 11 January 2018, informed the complainant of its decision to uphold ImmD's decisions and dismiss the complainant's complaint against the Police's failure to investigate the fraud case.

349. In this light, the complainant complained to the Office.

The Ombudsman's observations

350. The complainant requested ImmD to provide information on certain individuals in order to establish a communication channel with

them. Such information, be it telephone number, email/postal address, residential address, address of employers or movement record, clearly concerns privacy of the individual and is caught by paragraph 2.15 of the Code.

351. The Office agreed with ImmD that none of the four exceptions in paragraph 2.15 of the Code applies in this case.

352. First, it is clear that the purpose of collection of any contact information from the individuals has nothing to do with enabling a third party such as a debt collector to trace the whereabouts of the individuals.

353. Second, when ImmD collected any such information from the individuals, no consent has been sought or given at the time regarding disclosure to a third party outside the Government. The subsequent consents shown to ImmD through a third party were indirect and of questionable quality.

354. Third, ImmD is under no legal obligation or court order to disclose the requested information.

355. Fourth, the Office did not see any public interest in disclosure that would outweigh the intrusion of the privacy of the individuals concerned. The express purpose of the requester to obtain the information is to facilitate him to pursue its civil claims against the individuals in order to sustain his company's loan business. There is hardly any public interest involved.

356. The Office considered, therefore, the refusal to be in compliance with the Code.

357. However, the target response time was not met in handling the 3 December 2015 request. As evidenced by ImmD's interim replies, the information sought was clear with no need for clarification. As the maximum target response time was 51 days, ImmD should have answered by 24 January 2016. The need to seek legal advice has been taken into account in the target response time and was, therefore, no excuse in exceeding the maximum target response time.

358. The Office also considered it better for ImmD to explain with appropriate elaboration in its reply of 17 February 2016 to justify its refusal under paragraph 2.15(b) of the Code despite the apparent provision of

consent. The Office considered there be room for better handling in these two areas.

359. As regards SB's handling of the petition, the Office considered the overall response time unreasonably long. Its decision to uphold ImmD's decisions and dismiss the complainant's complaint against the Police's failure to investigate the fraud case is SB's judgment having considered the circumstances and the Office did not intend to intervene.

360. The Office considered the complaint against ImmD unsubstantiated but that against SB substantiated. It recommended ImmD and SB to –

ImmD

(a) step up staff training to enhance their understanding about the provisions of the Code;

SB

(b) remind staff that they should adhere to the performance pledge set out in the operational guidelines for handling petitions; and

(c) step up monitoring of outstanding cases.

Government's response

361. ImmD and SB accepted the Office's recommendations and have taken the following actions.

ImmD

362. On recommendation (a), ImmD continues to arrange regularly training courses for its officers on handling of requests made under the Code and the Personal Data (Privacy) Ordinance (Cap. 486). In addition, ImmD has introduced in-house workshops on an on-going basis to enhance staff's awareness and understanding on the provisions of the Code, and for sharing of experience.

363. ImmD has in place a Departmental Circular which highlights the salient features of the Code and the special areas of attention, and also sets out the general procedures and guidelines for handling requests for

information under the Code from members of the public. The Circular is circulated regularly to all relevant staff. ImmD has also issued additional instruction to remind staff of the importance of proper handling of requests for information made under the Code.

364. On management level, a departmental meeting was held to share salient points of the investigation report in relation to the issue of privacy compliance.

SB

365. On recommendation (b), SB has arranged re-circulation of the relevant operational guidelines for handling petitions every six months to remind relevant officers of the Bureau of the handling procedures and to adhere to the performance pledge therein.

366. On recommendation (c), relevant teams in SB responsible for handling petitions have put in place measures (e.g. maintaining a register of cases to track progress) to monitor the progress of outstanding petitions.

Government Secretariat – Transport and Housing Bureau

Case No. 2018/2412 – Delay in taking enforcement action against unauthorised building works in a shopping centre

Background

367. The complainant filed a complaint to the Office of The Ombudsman (the Office) against the Independent Checking Unit (ICU) under the Transport and Housing Bureau for failing to take follow-up action properly against the unauthorised building works at the ground floor of a shopping centre.

368. The complainant had been complaining to the ICU since early January 2018 about the occupation of public area and obstruction of "fire escape" by the unauthorised building works carried out at the ground floor of a shopping centre. Staff of ICU conducted a site inspection subsequently. On 24 July 2018, the ICU staff informed the complainant that an "order" was issued on 14 June 2018 requiring the owner concerned to demolish the unauthorised building works and reinstate the concerned part of the building within 60 days.

369. The complainant alleged that ICU had failed to effectively follow up the unathorised building works, leaving the problem unsolved.

The Ombudsman's observations

370. In respect of the complainant's allegation of occupation of public area by unauthorised building works (the works), the ICU, after examining the relevant information (including the works area of the addition of glass walls, the shop boundaries of the shopping centre and the comparison with the as-built drawings of the Housing Authority) provided by the owner, considered that the area concerned fell within the boundary of the shopping centre and therefore did not constitute occupation of public area, and that the use of public area was not related to the Buildings Ordinance (Cap. 123).

371. That said, the Office's investigation found inadequacies on the part of ICU in following up the obstruction of fire escape by the works.

372. During the site inspection conducted on 26 January 2018, the Minor Works Team of ICU already found that the glass walls added by the works had been obstructing the fire escape. The Office considered that even though the ICU did not think the situation was an emergency, the incident nonetheless would affect public safety. ICU should therefore ascertain as soon as possible whether the added glass walls would affect the fire escape routes or pose any danger so that it could request the owner and the contractors to make rectification promptly.

373. According to the established guidelines, ICU should complete audit checks within 60 days upon receipt of the minor works submission. The "follow-up actions after audit checks" were also set out in the guidelines, which stated that if no irregularities were identified during the checks, the case could be recommended to be closed; otherwise follow-up actions should be taken accordingly. As far as this case was concerned, ICU received the submission in respect of the works on 2 January 2018. It then followed up on the owner's and contractor's clarifications and supplementary information during the period from 18 January to 13 April 2018 before it made the decision to take enforcement actions on 17 April 2018. Hence, ICU had failed to complete the audit checks within the target timeframe as stipulated in the guidelines, which was undesirable.

374. According to the record, the Existing Buildings Team of ICU discovered the locked exit door of the works during its site inspection on 9 March 2018, but it did not inform the Fire Services Department (FSD) promptly. The case was not referred to FSD for follow-up until 14 June 2018. This should be considered a delay. ICU clarified that it had communicated with FSD all along, and that its reply to FSD on 14 June 2018 was intended to report the follow-up progress of the referral case and remind FSD to be aware of the locked exit door.

375. The Office was of the view that for cases under the purview of other departments (whether or not ICU considered referrals or reminders necessary), ICU should inform the departments concerned promptly. ICU should remind frontline staff to take reference from this case and make improvements.

376. In light of the above analysis, the Office found the complaint partially substantiated. The Office recommended that HD –

(a) urge frontline staff to complete audit checks within the target timeframe and take appropriate follow-up actions in accordance with the relevant guidelines when handling similar cases; and

(b) remind frontline staff to make prompt referral of cases which concern the purview of other departments.

Government's response

377. ICU accepted the Office's recommendations and has taken the following actions –

Recommendation (a)

378. The Minor Works Team of ICU sent an email to frontline staff on 24 January 2019, reminding them to complete audit checks of minor works submission within the target timeframe and take appropriate follow-up actions in accordance with the relevant guidelines.

Recommendation (b)

379. The Existing Buildings Team of ICU reminded frontline staff at its regular meeting on 13 February 2019 that they should take reference from this case and make prompt referral of cases which concern the purview of other departments.

Highways Department

Case No. 2017/5069, 2018/0051, 2018/0105, 2018/0106 and others – Failing to conduct public consultation on the construction of a pedestrian link

Background

380. A number of residents of a building (the Building) in a private estate (Estate A) lodged a complaint with the Office of The Ombudsman (the Office) against the Highways Department (HyD) for failing to conduct proper public consultation on a pedestrian link (the Project). They were dissatisfied that HyD had –

(a) put at inconspicuous spots the documents and works plan for the Project (the Project Information) during the enquiry period, such that local residents had overlooked their significance;

(b) failed to provide the Project Information to all the three Owners Corporations (OCs) and the three management companies in Estate A. As a result, some residents (including those of the Building) could not have a clear idea about the Project and its possible impacts as early as possible;

(c) treated the residents' enquiries lightly in that the HyD staff responsible for answering their enquiries were on vacation leave during the enquiry period;

(d) misled the residents because HyD once indicated that there was no timetable for gazetting the Project, but in fact the Project Information already contained the date for gazetting; and

(e) failed to provide the estimated construction costs and data/information on the cost-effectiveness of the Project to the local District Council and to the residents concerned.

381. The Project was proposed by a committee under the local District Council (the Committee) in 2008. HyD subsequently appointed a works consultant (the Consultant) to conduct a study and draw up an initial design, which was then revised in 2016. In late September 2017, the Consultant wrote directly to the 29 OCs (including the OC of Estate A)/Owners' Committees/management offices and other stakeholders along the route of

the pedestrian link (the Stakeholders) regarding the revised design. In October 2017, HyD consulted the Committee on the revised design and gained unanimous support from its members.

The Ombudsman's observations

Allegation (a)

382. In addition to following general requirements to conduct public consultation, HyD also made extra efforts to mail the Project Information to the Stakeholders and display it at 31 spots, such as railings by the roadside, on pavements and on footbridges. Those spots could hardly be described as "inconspicuous". The fact that some residents contacted HyD after reading the Project Information at those display spots proved that the spots had been effective in attracting public attention.

Allegation (b)

383. The Consultant was not aware initially that there were three OCs in Estate A. On notification, it sent the Project Information to the other two OCs as well. The Office considered that while the OC of the Building and that of the other building received the information a few days later than the other parties, their chance of raising their views had not been really affected.

Allegation (c)

384. HyD had clarified that the officers responsible for the Project were not on vacation leave during the enquiry period.

Allegation (d)

385. The word "proposed" was indeed used in the Project Information prepared by HyD, indicating that the date for gazetting had yet to be fixed, pending consideration and processing of all relevant views received. There was no misleading on the part of the Department.

Allegation (e)

386. HyD explained that the Project was still in the early design stage. Its construction costs could be accurately estimated only when the detailed design was finalized and were, therefore, not available at present. HyD

would respond to public concerns and queries as far as possible during consultation. Financial details of the Project would be submitted to the Finance Committee of the Legislative Council later when applying for funding and approval. The Office considered HyD's explanation reasonable. It was not improper of it not to provide the information about the construction costs of the Project at this stage.

387. Overall, HyD had handled the Project in accordance with established procedures and requirements. Nothing improper was found. This complaint was a result of the incomplete list of OCs initially held by the Consultant.

388. In the light of the above, the Office considered this complaint unsubstantiated, but there was room for improvement for HyD.

389. The Office urged HyD to instruct its staff that, in conducting similar public consultations in the future, they should obtain from the local District Office an updated list of OCs/Owners' Committees/management offices to ensure that consultations with all parties concerned can be conducted without any omissions.

Government's response

390. HyD accepted the recommendation of the Office. In carrying out similar public consultations in the future, HyD would obtain from the local District Office an updated list of the Owners' Corporations/Owners' Committees/management offices to ensure that consultations will be conducted comprehensively in an early manner with no parties concerned being missed out.

Highways Department

Case No. 2018/1097 – (1) Delay in installing lighting system for a village footpath; and (2) Unreasonably cancelling the relevant works without notifying the villagers

Background

391. The complainant stated that an application for installation of lighting at the footpath of a village was submitted to the Highways Department (HyD) via the relevant District Office (DO) in May 2015, but HyD had not carried out the works. In mid-2017, the complainant suddenly learned that the concerned works was cancelled because of an obstruction found at the location. The complainant immediately requested HyD via the DO to resume the installation but did not receive a reply.

The Ombudsman's observations

Complaint (a): Delay in installing lighting system for a village footpath

392. The Office of The Ombudsman (the Office) understood that the village footpath was outside the areas maintained by HyD. When HyD found that the proposed footpath works did not include a lighting system, it immediately made a recommendation to the DO which was responsible for the coordination of the Village Lighting Programme (VLP) such that the villagers could have lighting services. It was the good will of the HyD to take forward the matter in a people-oriented manner, but there was room for improvement in its follow-up actions that led to a delay unfortunately. Whilst Complaint (a) is considered substantiated, the Office was pleased to note that HyD had frankly admitted its shortcoming, apologised to the complainant and taken an improvement measure by itself.

393. However, the Office saw two root causes of the problem in this case –

(a) a detailed investigation of obstruction or condition of the works alignment was not carried out prior to the issuing of works order; and

(b) the obstruction was identified prior to the issuing of works order, but it was believed that the person who unlawfully occupied the government land would cooperate as a matter of course without making contingency plan.

394. When the concerned person was requested to remove the obstruction, the relevant law enforcement authority was not informed. Consequently, extra time was taken to liaise with the relevant law enforcement authority and amend the original alignment when the concerned person refused to cooperate.

Complaint (b): Unreasonably cancelling the relevant works without notifying the villagers

395. HyD had already given a detailed explanation of the incident and clarified that only the works order but not the installation of the lighting system was cancelled. The Office considered that the misunderstanding might be due to unclear communication between the two parties. Complaint (b) was unsubstantiated.

396. Taking the view that the complaint was partially substantiated, the Office made the following recommendations to HyD –

(a) prior to issuing works orders for any works, the contractor should be instructed to carry out detailed investigation to ascertain if there is any obstruction within the works area; and

(b) if an obstruction is found, apart from approaching the concerned person to resolve the issue, the relevant law enforcement authority should also be notified such that prompt enforcement action could be taken when necessary to avoid delay of works.

Government's response

397. HyD accepted the Office's recommendations and has taken the following actions.

Recommendation (a)

398. HyD already updated the relevant instruction to the Lighting Division on 23 January 2019 stating that works orders will only be issued

if the contractors confirm that there is no obstruction within the works area when submitting the cable alignment scheme for village lighting.

Recommendation (b)

399. If any obstruction is found illegally occupying Government land within the works area, HyD will notify the Lands Department to take follow-up action, and will request the Home Affairs Department to assist in coordinating with the party occupying the land to remove the obstruction.

Home Affairs Department

Case No. 2017/5111(I) – (1) Refusing to provide the complainant with the Model Rules for Rural Committee Elections in full and the constitutions of 27 Rural Committees; and (2) Failing to inform the complainant of the reason(s) for partial refusal by quoting the relevant paragraph(s) in Part 2 of the Code on Access to Information

Background

400. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Home Affairs Department (HAD) in December 2017.

401. The complainant made an application to HAD requesting to obtain the Model Rules on Rural Committee Elections (Model Rules) and the Constitutions of all 27 Rural Committees (RCs) in November 2017 in accordance with the Code on Access to Information (the Code). The complainant stated in his application that although the relevant information may involve third party information, he considered that the public interest in disclosure of the information outweighs any harm or prejudice that could result. If HAD was to decline the request, the applicant should be so informed with the reason(s) supporting that the public interest in disclosure of the information does not outweigh any harm or prejudice that could result, and whether HAD had any explicit or implicit understanding from the third party that the information requested would not be further disclosed.

402. In December 2017, HAD replied to the complainant in writing, stating that as some parts of the Model Rules contained information relating to individual RCs, an abridged version of the Model Rules with the concerned information redacted was provided. It also advised the complainant to request RC Constitutions from the RCs, as the information is drawn up and owned by the latter.

403. The complainant thus complained against HAD for –

(a) refusing to provide the complainant with the Model Rules in full and the Constitutions of the 27 RCs; and

(b) failing to inform the complainant of the reason(s) for partial refusal by quoting the relevant paragraph(s) in Part 2 of the Code.

The Ombudsman's observations

Allegation (a)

404. The Office did not agree that information in the Model Rules regarding the number and composition of seats of RC General Assemblies and the RC Constitutions was third party information. In fact, information about the composition of seats in RCs contained in the Model Rules was derived from the RC Constitutions, which District Officers must require RCs to provide so that the Secretary for Home Affairs (SHA) and District Officers would be able to discharge their statutory duties and be accountable to the public.

405. Even if the relevant information is "third party information", one of the valid reasons under the Code and the Guidelines on Interpretation and the Application of the Code (the Guidelines) for withholding "third party information" is that there must be a consensus or agreement between the information provider and the Government on keeping the information confidential. In the abridged version of the Model Rules provided to the complainant, the parts obliterated by HAD included information about the category of seats in the General Assemblies of RCs for which HAD officers would perform the duties of returning officers or observers. HAD officers perform the duties of returning offices or observers in official capacity. They were not doing any clandestine work undercover. Therefore, the Office did not consider that the RCs had any reason to expect that such information would be kept confidential.

406. One of the reasons cited by HAD in withholding information from the complainant was the RCs' explicit refusal to give consent. However, as the Office noted, the relevant information did not constitute "third party information" and no agreement on confidentiality regarding such information should have been established between HAD and the RCs. Therefore, the Office considered that there was no need for HAD to seek consent from the RCs for disclosure of information in the first place.

407. The Office considered that the RCs' role, function and composition are closely intertwined with public and political affairs. Disclosure of information in the RC Constitutions and the Model Rules regarding the number and composition of seats of RC General Assemblies would allow members of the public to understand the duties performed by SHA and the District Officers in various New Territories districts, and thereby monitor their work and hold them accountable. Hence, there is clear and compelling public interest involved.

408. The Office considered that both the society's expectations of public bodies and the political situation are now different from the past when the RCs were first established in 1940s/50s (for instance, the establishment of District Councils, and the chance for RC Members to join the Legislative Council and the Chief Executive Election Committee). It follows that disclosure of the relevant information has become reasonable and necessary. Consequently, neither HAD nor RCs can live up to current expectations if they adamantly adhere to the past practice of non-disclosure.

409. The Office considered that while HAD has reasons to be concerned about full disclosure of the relevant information, HAD should have clearly explained the pros and cons to the RCs with a view to disclosing to the public the full version of the Model Rules and the Constitutions of all the RCs. Overall, the allegation was considered partially substantiated.

Allegation (b)

410. The Office noted that HAD did not provide justification for its partial refusal to the application according to paragraph 2.1.2 of the Guidelines. The allegation was considered substantiated.

411. Having regard to the above, the Office urged HAD to –

(a) disclose the complete version of the Model Rules on RC Election and the Constitutions of all RCs after thorough communication with all RCs to secure their understanding; and

(b) learn from this case and provide justifications for refusal/partial refusal to any future applications for access to information in accordance with the Code and the Guidelines.

Government's response

412. HAD accepted the Office's recommendations.

Recommendation (a)

413. HAD clearly explained the view of the Office to the RCs through the New Territories District Offices (NTDO) in late August 2018 with a view to soliciting their understanding and support to release the relevant

information. After the completion of RC and Heung Yee Kuk (HYK) elections in March and July 2019 respectively, HAD has written to the RCs again to solicit their support to release the relevant information.

414. HAD has clearly explained the justifications for disclosing the complete version of the Model Rules and the Constitutions, and the principles of the Code to the RCs in writing. Yet the HYK also expressed concern about the disclosure of the relevant documents and all the 27 RCs formally raised objections to the disclosure. In view of the RCs' concern, about the disclosure of information, HAD planned to further explain the justifications for disclosing the relevant documents to the HYK and the RCs at the Rural Election Review Working Group Meeting to be held in mid-January 2020, with a view to obtaining their consent. In response to the Office's request, HAD would report the progress of lobbying in late February 2020.

Recommendation (b)

415. HAD had again issued an email to the staff responsible for the relevant duties to remind them to handle requests for access to information in compliance with paragraph 2.1.2 of the Guidelines.

Home Affairs Department

Case No. 2018/3717 – Failing to take effective enforcement action against the Incorporated Owners of a building which failed to comply with the Building Management Ordinance to procure a third party risks insurance policy for the building

Background

416. On 25 and 30 September 2018, the complainant, who was the Secretary of the Incorporated Owners of a building (the IO), complained to the Office of the Ombudsman (the Office) against the Home Affairs Department (HAD).

417. Allegedly, in the IO meeting of 4 December 2014, upon the advice of an officer of HAD who was invited to attend the meeting, the IO agreed to procure a policy of third party risks insurance (TPRI) pursuant to the Building Management Ordinance (BMO) (Cap. 344). Afterwards, the Chairman of the IO refused to take action accordingly. The complainant and some owners of the building reported this to HAD in May 2017 and August 2018 respectively. However, HAD only provided relevant BMO provisions for their reference.

418. The complainant was dissatisfied that HAD failed to take effective actions to enforce BMO.

The Ombudsman's observations

419. Non-compliance with the provisions of BMO may stem from unresolved disputes or difficulties encountered by owners' corporations (e.g. disputes on the interpretation of Deed of Mutual Covenant and defunct of the management committee (MC) as in this case), which would hinder owners' compliance with relevant provisions. Hence, it is understandable that HAD favours an advisory approach at least initially.

420. HAD has explained its actions taken since the receipt of the complaint of May 2017, including why it had first allowed time for the parties to resolve the disputes and to rectify the issue among themselves and then stepped up its actions upon the receipt of the complaint of August 2018, which are in line with the standing procedures. It can be seen that

the parties had indeed tried to resolve the issues among themselves and considered taking actions as advised by the relevant District Office (DO). Thus, it is not unreasonable for the DO to allow time for the parties to rectify the issues accordingly in handling the complaint.

421. Overall, the Office considered this complaint unsubstantiated.

422. Nonetheless, the Office recommended HAD to take prompt action(s) upon receipt of Department of Justice (DoJ)'s views on possible enforcement actions. HAD was requested to keep the Office posted on the progress of implementation every three months until the recommendation is fully implemented.

Government's response

423. HAD accepted the Office's recommendation. In the light of DoJ's advice, HAD is making the necessary preparation, including compiling evidence in a form admissible to the court, in order to facilitate further consideration of the case and potential prosecution. Meanwhile, HAD is exploring possible means to help reactivate the defunct MC of the IO. HAD hopes that the reactivated MC could then perform duties and exercise powers of the IO, including the procurement of TPRI. The Office noted that HAD has accepted its recommendation and taken follow-up action accordingly. The case has been closed.

Hong Kong Housing Society

Case No. 2018/1612(R) – Refusing to disclose to the complainant the membership of a panel of external advisers appointed for a study

Background

424. Prior to the appointment of a consultant to study the feasibility of housing development on the periphery of country parks, the Hong Kong Housing Society (HKHS) had invited 12 scholars nominated by local universities to act as external advisers on ecological matters for facilitating the assessment of tender documents and selection of consultant. In November 2017, the complainant requested HKHS to provide the membership of that panel of external advisers, but HKHS refused on the grounds of "third party information".

425. The complainant complained to the Office of The Ombudsman (the Office) in May 2018. She contended that HKHS should have taken into account the public interest involved and disclosed the information, notwithstanding the confidentiality agreement between HKHS and the external advisers.

The Ombudsman's observations

The spirit and stipulations of "the Code"

426. HKHS stated that the study on land use within the country parks, admittedly a subject of immense public concern, would be carried out by the consultant ultimately appointed by HKHS, while the external advisers were only responsible for providing expert advice during the tender exercise. HKHS held that the identity of the external advisers should have no direct bearing on the study itself, nor did it involve any public interest. Disclosing the membership might cause external nuisance and pressure on the panel members, thereby inhibiting the frankness and candour of discussion. Because of this, HKHS had undertaken to keep their identity confidential.

427. After receiving the complainant's request for information, HKHS sent an email to seek consent from the external advisers on disclosure of their identity, but did not receive any reply. HKHS later informed the complainant that the membership could not be disclosed.

428. The Government's Code on Access to Information (the Code) is not applicable to HKHS. With reference to the Code, HKHS has drawn up its own Code on Access to Information (the HKHS Code) to suit its own circumstances. The Office had reservations on whether the panel membership should be regarded as "third party information", because the list was compiled by HKHS, not held for, or provided by, a third party. Nevertheless, since the list included personal information, HKHS might refuse to disclose any personal information pursuant to paragraph 5(a) of the HKHS Code, and it was not required to consider whether the public interest in disclosure outweighs any harm or prejudice that would result.

429. The Office did not accept HKHS's argument that it did not need to take heed of public interest in handling requests for access to information. Given that HKHS is a public body, the HKHS Code should also conform to the current social aspirations in fostering an open and accountable corporate culture. The Office considered that HKHS should have notified the advisers that their identity would be made public when inviting them to join the panel, so that it would not have to worry about violating the Personal Data (Privacy) Ordinance (Cap. 486).

430. The Office also disagreed to HKHS's claim that no public interest was involved in the identity of the external advisers. The scholars invited were specialists in various academic fields, and they could provide comprehensive and professional advice. Disclosure of the membership would raise public confidence in the study, and allow the public to monitor whether any panel members might have conflicts of interest. Since the complainant only requested the list of membership, rather than the views provided by panel members, the Office did not think disclosure of such information would inhibit the frankness and candour of discussion.

Response to the request for access to information

431. According to the HKHS code, under general circumstances, relevant information would be provided within 10 calendar days upon receipt of the written request; if not possible, preliminary reply would be provided within 10 calendar days. Under any circumstances, the period of response to request for access to information (including for cases that are rejected) should not exceed 30 calendar days from the date of receipt of the case.

432. Though HKHS had responded to the complainant within the specified time period in accordance with the HKHS Code upon receipt of

the complainant's request for access to information on 28 November 2017, but after the complainant lodged a follow-up enquiry on 6 December the same year, calling on HKHS to provide a reply after seeking consent from the external advisers, HKHS did not respond even after the specified time period ended (12 December 2017). HKHS only responded after the complainant lodged another enquiry about the case progress on 13 March 2018 (i.e. 105 days after receipt of the request). The Office considered that the response had far exceeded the time limit required in the HKHS Code, and had been a major delay from the perspective of handling enquiries.

433. Given the pre-existing consensus of non-disclosure of membership between HKHS and the external advisers, it was understandable that HKHS rejected the complainant's request before obtaining the consent from individual advisers. However, HKHS wrongly cited "third party information" as the reason for withholding information, and failed to properly seek consent from the external advisers and consider the issue of public interest. There was also significant delay in HKHS' response to the complainant's request for information. The Office, therefore, considered this complaint partially substantiated.

434. The Office recommended HKHS to –

(a) review the complainant's request for information, seek consent from the external advisers again and inform them of the Office's comments, and disclose the panel membership unless the external advisers refused such disclosure in writing and provided ample reasons to justify that the potential harm or prejudice resulted would outweigh the public interest;

(b) when inviting non-public officers to become members of any advisory or statutory bodies (on a voluntary basis or otherwise) in the future, state from the outset that their identity would be made public;

(c) remind staff that cases related to public requests for access to information should be followed up in a timely manner; and

(d) review paragraph 5(a) of the HKHS Code on disclosure of personal information to ensure it is in line with the principles and spirit of the Code.

HKHS' response

435. HKHS accepted the Office's recommendations and follow-up actions have been carried out.

Recommendation (a)

436. HKHS had sought consent from 12 external advisers through email again, of whom five responded and agreed to have their identity disclosed, five disagreed and two did not respond. HKHS later sent a written reply to the complainant, providing a list of the five external advisers who agreed to have their identity made public.

Recommendation (b)

437. When inviting non-public officers to become members of any advisory or statutory bodies (on a voluntary basis or otherwise) in future, HKHS would consider the actual need of notifying the concerned parties that their identity could be made public.

Recommendation (c)

438. When handling public requests for access to information, HKHS staff would ensure the cases are provided with appropriate follow-up in accordance with the HKHS Code.

Recommendation (d)

439. After taking into consideration the Office's recommendations and the legal adviser's opinion, paragraph 5(a) of the HKHS Code had been amended to enhance the Code with more concrete criteria concerning the handling of public requests for access to personal data, by including the consent from the subject of such information, and the purpose for which such information was collected, so as to maintain the optimal balance between disclosure of information, and the protection of individual privacy and corporate confidential information. HKHS had already submitted the amended HKHS Code to the Office for reference.

440. The Office accepted HKHS's implementation of recommendations (a) to (c) in general. For recommendation (d), notwithstanding that HKHS had already amended the HKHS Code and incorporated the criteria regarding the consent of the subject of such information as well as the purpose for which such information was

collected in paragraph 5.1 (a), the Office noted that the consideration of public interest had not been included. Though the Code was not applicable to HKHS, the Office was of the view that the Code had laid a good regulatory system and foundation for public administration. The Office would therefore examine similar future cases in accordance with the principles and spirit of the Code. The Office indicated that there would be no further follow-up on this case.

Hong Kong Police Force

Case No. 2017/4607(I) – Refusing to provide the statistical information on the number of suspicious transaction reports relating to human trafficking received from 2012 to 2016

Background

441. The complainant complained to the Office of The Ombudsman (the Office) on 19 November 2017 against the Hong Kong Police Force (HKPF) for unreasonably refusing to provide the statistical information on the number of suspicious transaction reports (STR) it had received related to human trafficking from 2012 to 2016 (the requested information), breaching the Code on Access to Information (the Code).

The Ombudsman's observations

442. HKPF cited paragraph 2.13(a) as the reason to refuse the complainant's information request i.e. "information related to incomplete analysis, research or statistics where disclosure of which could be misleading or deprive the department or any other person of priority of publication or commercial value". Paragraph 2.13.1 of the Guidelines states that "As a general rule analysis, research information and statistics should be subject to disclosure on the same basis as any other information: such information will be published routinely on a regular basis, and when a policy decision is announced specific information of this nature may be published to assist public understanding of the decision". The purpose of this paragraph is to prevent premature release of research findings or statistics to the public, which may be misleading. However, the requested information in the present case would only be yearly statistics, it can hardly be considered as "incomplete". HKPF also has no intention to publish such data at a later date. The Office did not consider paragraph 2.13(a) of the Code to be applicable to this case.

443. HKPF further cited paragraphs 2.6(e) and 2.9(c) of the Code as reasons for refusal. During The Ombudsman's meeting with HKPF, HKPF provided detailed elaboration on the mechanism of the STR regime and further explained how the disclosure of the requested information would undermine the effectiveness of the regime. The Office appreciated that if HKPF discloses the number of STRs for a particular kind of crime (in this case, human trafficking), it would have to disclose similar figures

for all kinds of crimes if asked. This could divulge the pattern and behaviour of reporting by the reporting entities, which may give rise to possible loopholes or avenues for actual/potential lawbreakers to bypass the system. In such case, the Office agreed that disclosure of such information may harm or prejudice the prevention of crime, and the proper and efficient operation of HKPF.

444. The Office came to the view that the complaint was unsubstantiated but other inadequacy found. The Office urged HKPF to enhance its staff training on application of the Code.

Government's response

445. HKPF accepted the Office's recommendation. On 31 August 2018, this case was shared among officers of the Narcotics Bureau (NB) of HKPF during the Formation's Training Day with a view to enhancing the officers' understanding of the interpretation and application of the Code, particularly the handling of similar requests in future. The Training Day was attended by over 120 officers of NB. In April, June and September 2018, four workshops were organized targeting HKPF's Access to Information Officers and other officers concerned to enhance their knowledge of the Code and the handling of requests for information. The workshops were attended by about 200 officers.

446. HKPF will continue to enhance members' knowledge and understanding of the Code through different platforms. The six-episode training video relating to the Code produced by the Constitutional and Mainland Affairs Bureau has been uploaded to the HKPF's intranet since September 2018 for easy access and reference by staff.

Hospital Authority

Case No. 2017/2362 – (1) Removing the patient's intravenous lines before the doctor certified his death; (2) Removing the patient's pace-maker without the family's consent; and (3) Failing to respond properly to the complainant's complaint against the hospital

Background

447. The complainant's husband (Mr. A) died in a hospital (the Hospital) under the Hospital Authority (HA) in early February 2015. Dissatisfied with the nursing staff's handling of several issues surrounding his death, the complainant lodged a complaint with the Public Complaints Committee of HA (the Committee), which nevertheless failed to give definite answers to her queries.

448. Specifically, the complainant was dissatisfied with the Hospital/Committee for the following –

(a) Nurses at the ward informed her that Mr. A passed away at 2:05 am and they removed all his intravenous lines (I.V. lines) before the complainant arrived at 2:20 am, but the doctor concerned (the Doctor) had not yet certified him clinically dead then;

(b) Documents relating to Mr. A's death showed that he was certified dead at 4:38 am (time as certified by the Doctor) and the complainant was present at his death. Yet, the nurses said that he had passed away at 2:05 am, when she was not yet there. The complainant alleged that Hospital's records deviated from the facts;

(c) Despite the complainant's indication of burial arrangement to the nurses and objection to removing the cardiac pacemaker (the pacemaker) inside Mr. A's body, the Doctor still removed the device and did not explain how the device was then disposed of;

(d) Mr. A's pyjamas was badly blood-stained after removal of the pacemaker. The complainant worried that Mr. A was not yet completely brain-dead and could still feel the pain when the pacemaker was being removed. She was unable to accept this; and

(e) Ward staff claimed that they had not been notified by Mr. A's family that burial would be arranged, contrary to what the complainant had said. The complainant felt aggrieved by the Committee's conclusion that it could not comment on which side was right due to the absence of corroborative evidence.

The Ombudsman's observations

449. Nurses do not have the authority to confirm when a patient dies, but have sufficient professional clinical knowledge to judge whether a patient is no longer showing any vital signs.

450. Normally, doctors would conduct clinical tests on brain stem reflexes and cardio-pulmonary circulation for dying patients (the assessments). If no response is registered, they would print a flat-lined electrocardiogram (ECG) for the record. The time when these procedures finish would be the patient's time of death. Consequently, the time of death as shown on the patient's medical records, etc. is later than the clinical time of death as confirmed by doctors. While the flat-lined ECG can serve as objective evidence of death to prevent arguments later, printing it out is not a required step in death confirmation, and HA had not formulated any guidelines on the procedures.

451. After a patient dies, the nursing staff would usually remove all the I.V. lines and tidy up his/her appearance. If there is a pacemaker implant and cremation is considered by the family, the device must be removed lest it should explode during cremation. The removed device would not be handed over to the family to prevent spreading infectious diseases or explosion because of improper disposal. Nurses would make a written record and notify the doctor concerned if the patient's family objects to removing the pacemaker.

452. The crux of this case lay in the time of Mr. A's death. Both HA and the Doctor asserted that Mr. A was confirmed lifeless at 2:15 am and "already clinically dead", but could only be "certified dead" at 4:38 am because of circumstances then. There was a gap of more than two hours in between. Nevertheless, the Committee failed to reveal this important detail in its several replies to the complainant. This reflected a lack of consideration for the family's doubts (that Mr. A was not yet dead when the I.V. lines were removed) and their feelings.

Allegation (a)

453. The complainant and the nurses each told a different version regarding when the I.V. lines of Mr. A were removed. Without corroborative evidence, the Office of The Ombudsman (the Office) could not confirm what had really happened and would refrain from making a judgement.

454. HA admitted that printing the flat-lined ECG was not a required step in confirming death of a patient. The Office, therefore, considered that certifying Mr. A's death at once when no vital signs were detected would have prevented the alleged delay in the time of death certification and the ensuing arguments. The Office also queried whether it was just an isolated incident, as HA had claimed.

455. In the light of the above, Allegation (a) was unsubstantiated but other inadequacies were found.

Allegation (b)

456. Based on the facts laid out above, the Office opined that even if the nursing staff did indicate that Mr. A had already passed away around 2:00 am or shortly thereafter, it could not be considered an incorrect statement, only that it was not the legal time of death (which was 4:38 am). However, HA and the Committee should have clearly explained this to the complainant to clear her doubts and worries.

457. Based on the legal time of death as registered in the Medical Certificate of the Cause of Death, the complainant was indeed present at the time Mr. A died. The Office, therefore, considered Allegation (b) unsubstantiated but there was room for review by HA.

Allegation (c)

458. The complainant and the nursing staff concerned did not agree on whether the family had mentioned the burial arrangement and objected to removing the pacemaker. The Doctor confirmed that he had not communicated with the family regarding removal of the pacemaker. There was a remark on removal of the pacemaker but not its disposal in Mr. A's medical records. The Office considered it normal for the family of a deceased patient to be concerned about the removal and disposal of the pacemaker inside the body. It was incumbent upon HA to communicate

with them and explain the related procedures and risks. That no relevant guidelines had been drawn up then revealed HA's inadequacy.

459. Owing to the lack of corroborative evidence, the Office considered Allegation (c) inconclusive, but found HA's practice then inadequate.

Allegation (d)

460. Medical records showed that the pacemaker was removed after Mr. A had been certified dead by the Doctor. As such, we found it unjustified to claim that Mr. A was not completely brain-dead and could still feel pain. Besides, the Doctor also explained that the pacemaker could be removed through a small incision, and the blood circulation of Mr. A had long ceased, so massive bleeding should not have occurred. Allegation (d) was, therefore, unsubstantiated. Nevertheless, the Office urged HA to remind doctors to be considerate of the feelings of the deceased's family and avoid staining the deceased's clothes with blood during removal of a pacemaker.

Allegation (e)

461. The complainant and the nursing staff insisted on their own versions as to whether the former had indicated arrangements for burial. In the absence of independent corroborative evidence, the Office considered it not unreasonable of the Committee not to make a conclusive comment. The Office, therefore, considered Allegation (e) unsubstantiated.

462. Overall, the Office considered this complaint unsubstantiated, but there were other inadequacies found. The Office recommended that HA should –

(a) remind its doctors of the proper procedures for confirming death of patients, including to avoid unnecessary delay in the time of death certification due to printing of the flat-lined ECG;

(b) explain clearly in its replies to complainants all the relevant details, particularly those being factually challenged, so as to allay their doubts and worries as far as possible; and

(c) enhance the skills of doctors and nurses in communicating with patients' family and remind them to adopt a patient and family-oriented approach in handling problems.

HA's response

463. HA accepted the Office's recommendations and has taken the following actions –

(a) The Hospital has shared the case in its department meeting, reminding its frontline clinical staff of the procedures for certifying a patient's death, and explaining that the printing of the flat-lined ECG was not mandatory in certifying a patient's death. Since October 2018, the Hospital has also included this topic in the orientation and training courses for doctor interns to avoid recurrence of unnecessary delay in death certification due to printing of the flat-lined ECG;

(b) As regards the handling of complaints, Patient Relations Officers would, after understanding complainants' dissatisfaction, confirm and record the allegations of the complainants as appropriate before referring the complaints to the departments concerned for investigation and provision of information. This would facilitate the Hospital to clearly and thoroughly address the issues raised by the complainants in its reply; and

(c) The Hospital would regularly provide training on communication skills for frontline staff. Department heads would arrange medical and nursing staff to attend the training so as to enhance their communication skills with patients and relatives.

Hospital Authority

Case No. 2017/5107 – Impropriety in handling the complainant's complaint against a hospital and his request for information

Background

464. The complainant's father (the patient) was admitted to a public hospital (the Hospital) for leg injury on 2 February 2017. Subsequently, the patient suffered from pneumonia. At around 9:30 am on 13 March 2017, a nurse noted that the patient had cardiac arrest and was unresponsive. The doctor and patient's relatives were then informed immediately. When explaining the patient's condition to the relatives upon their arrival, the ward manager inadvertently stated that the time of cardiac arrest was 8:30 am. Immediately, the ward manager clarified with the relatives that the correct time was 9:30 am instead. The patient eventually passed away on 18 March 2017.

465. The complainant was dissatisfied with the clinical management rendered, and concurrently lodged a complaint to the Hospital and the Public Complaints Committee (PCC), which is the appeal handling body of the Hospital Authority (HA). In his written complaints to PCC on 7 March and 24 March 2017, the complainant raised several queries about the patient's case and requested copy of the patient's vital signs records. In accordance with the HA's complaint handling procedures, the case was first handled by the Hospital. On 18 August 2017, the Patient Relations Officer (PRO) replied to the complainant by phone on the Hospital's investigation findings. The complainant considered that the reply was factually incorrect, and requested the PRO's supervisor to further handle his case. On 25 August 2017, the PRO's supervisor telephoned the complainant to explain the case. According to the Hospital, the complainant noted the explanations given and expressed that he would approach PRO again if follow-up was required. It was only upon receipt of the complainant's letter in early January 2018 did the Hospital realise that the complainant remained dissatisfied and expected further follow-up by the Hospital.

466. On 23 December 2017, the complainant lodged a complaint to the Office of The Ombudsman (the Office) against the PCC for failing to handle his complaints properly. The complaints involve the following administrative matters on which the Office is in a position to comment –

(a) the healthcare staff intended to conceal the time of patient's deterioration;

(b) the Hospital failed to provide copy of the patient's vital signs records as requested by the complainant; and

(c) the Hospital delayed replying to the complaint.

The Ombudsman's observations

467. Overall, the Office considered the complaint partially substantiated. The reasons are set out below –

(a) HA admitted that the ward manager had provided incorrect information on the time of patient's cardiac arrest to the complainant's relatives and apologised to the complainant in this regard. The Office considered that there was no evidence to support the allegation that the ward manager intentionally concealed the truth. However, the provision of inaccurate information was unsatisfactory, as the ward manager should have confirmed the factual accuracy of information before communicating with the relatives;

(b) HA was clearly aware that the complainant lodged a written complaint on 24 March 2017 and explicitly requested copy of the patient's vital signs records of 22 February evening, 13 March morning and 14 March evening. Not only did the Hospital fail to respond and provide the complainant with the relevant records, nor had it informed him of the proper application procedures for obtaining such records. The Office considered that the Hospital had neglected the complainant's request for information, and it was not a matter of "communication breakdown" as claimed by HA. While disregarding the complainant's request, the Hospital put the blame on others by arguing that the complainant did not make such request in his subsequent phone conversations with PRO and the PRO's supervisor, when he contacted the Patient Relations Office subsequently. The Office was of the view that a request not raised again should not be regarded as one that could be ignored. The Office concurred with HA that the Hospital should proactively inform the complainant of the prevailing channel and procedure for application for medical records/data

access request. The Office disagreed with HA that this incident was a result of misunderstanding due to ineffective communication; and

(c) the complainant lodged his complaint in writing on 7 March and 24 March 2017. The Hospital took approximately five months for investigation before PRO gave a verbal reply to the complainant by phone on 18 August 2017. Since the complainant was discontented with this verbal reply, the case was handed over to the PRO's supervisor, who again replied verbally to the complainant by phone on 25 August 2017. It appeared that it was the Hospital's usual practice to give verbal reply by phone to complainants. The Office opined that, unless the complaint was lodged verbally on simple matters or the complainant only requested a verbal reply, the Hospital should provide a written reply. This would allow both parties to have a clear record of the case handling and explanation given, and prevent further disputes arising from misunderstanding, ambiguities or incorrect memory of the verbal communication. Taking this case as an example, whether the Hospital's two verbal replies to the complainant had addressed his concerns or not could not be verified afterwards. As explained by HA, if the complainant was not satisfied with the Hospital's written reply, he could appeal to PCC. This showed that replying to a complaint in writing was the established procedure. As a matter of fact, the interim replies sent to the complainant from HA and the Hospital were in written form. In addition to HA's comment that there was room for improvement in the Hospital's efficiency in handling complaints, the Office considered that the Hospital should strictly follow the established procedure of replying to complainants in writing.

468. As a result, the Office recommended that HA should –

(a) remind its healthcare staff to carefully verify the information before communicating with patients and their relatives in order to avoid misunderstanding;

(b) remind its staff to prudently handle enquiries and requests from the public. Enquires/requests should not be ignored even though they were not raised in the subsequent communications; and

(c) remind its staff to reply to the complainant in writing according to the prevailing procedure.

HA's response

469. HA accepted the Office's recommendations and has taken the following actions –

(a) the Hospital had advised the concerned department management and ward manager to remind all staff to carefully verify and confirm the factual accuracy of information when communicating with patients and their relatives to avoid misunderstanding; and

(b)&(c) the Hospital had reminded staff of Patient Relations Office to prudently handle enquiries and requests from the public, and to strictly follow HA's complaint handling procedure and target response time. Unless the staff, in his/her preliminary verbal reply, had obtained the complainant's agreement to accept reply in verbal form, a written reply should be provided. Furthermore, the Hospital has reprimanded the staff concerned and strengthened its supervision.

Housing Department

Case No. 2017/4796 – Unreasonably prohibiting the organiser of a fund raising event sponsored by the Estate Management Advisory Committee from displaying its name on the stage backdrop

Background

470. A social service association of a public housing estate (the complainant) had been organising a fund raising event in the Estate for a charitable organisation (Organisation A) for a number of years. The complainant had been receiving sponsorship from the Estate Management Advisory Committee (EMAC) of the Estate, the Chairman of which was Ms B, a Housing Manager of the Housing Department (HD), with Members including representatives of estate residents and commercial tenants. The stage and the backdrop of the above event had been provided by EMAC. In the last few years, it was shown on the backdrop that the event was organised by the complainant and co-organised/sponsored by other bodies. As claimed by the complainant, EMAC had confirmed in late May 2017 that the arrangements for the fund raising event to be held on 19 November 2017 would be the same as those in the past year. However, a subordinate of Ms. B informed the complainant in October 2017 that Ms. B had decided that the names of the organisers, co-organisers and sponsoring bodies would no longer be displayed on the backdrop due to complaints from political parties. The complainant pointed out that a majority of EMAC Members did not support Ms. B's decision, but she, as the EMAC Chairman, ignored Members' views.

471. According to the complainant, it was against common sense that the names of the organisers, co-organisers and sponsoring bodies were not to be displayed on the backdrop in a fund raising event. As a consequence, the complainant refused EMAC's sponsorship and engaged a contractor on its own to produce the stage and the backdrop. The complainant was dissatisfied that Ms. B initially, out of her own wishes, insisted on providing a stage for the event and producing a backdrop that displayed none of the names of the organisers, co-organisers or the sponsoring bodies and demanded the complainant to use them. No consensus could be reached between the two parties. Shortly before the event, Ms. B suddenly backed off, providing only the stage to the complainant and no longer demanding the complainant to use the backdrop, which led to a waste of public funds. Given that the event was about to begin, the complainant was unable to cancel the stage production order with the contractor. The

complainant eventually had to use part of the donation to cover the expenses, which impacted on the sum of donation.

472. The complainant held that Ms. B's practice went against procedural fairness and wasted public funds.

The Ombudsman's observations

473. HD explained that its staff members, even after seeking EMAC's views, still have to act in accordance with HD's policies and procedures. If there are conflicts between EMAC's views and HD's policies, the final decision rests with HD. In this case, HD, having taken into account different views of EMAC Members, believed that in order to avoid confusion over the role of HD, there was a need to change its past practices of providing funding support to organisations for holding events. Despite the disagreement of a number of EMAC Members, Ms. B was still obliged to follow HD's policies and made the decision that a backdrop displaying the names of the organisers/co-organisers should no longer be provided. There was no maladministration on her part in this case.

474. However, the Office of The Ombudsman (the Office) cast doubt on the fact that HD, on one hand, sets down a policy of providing funding support to organisations/bodies for holding community activities via EMAC, while the EMAC Chairman, on the other hand, removed articles displaying the names of such organisations/bodies from the funded items. The Office was of the view that this practice was disputable.

475. HD provided further explanations on the lending out of venues and the role of EMAC in funding provision. The Office considered that such explanations failed to clear all the doubts. As far as this case was concerned, the same wording on the backdrop had been put up for display with no opposing views in the past. It was not until last year when opposing views emerged that EMAC could not handle the situation according to the established procedures. On account of the diverse opinions, the EMAC Chairman had to make a final decision, thus giving a wrong impression that there was a lack of procedural fairness. As clearly reflected in this incident, there were inadequacies in the EMAC procedures drawn up in the past by HD. Its consideration in the lending out of venues and the provision of funding for setting up the stage and the backdrop were also found to be incomprehensive.

476. Based on common sense, it is logical to display the names of the organisers/co-organisers on the event backdrop. If the event to be held is not in line with EMAC's objective of fostering community building and neighbourliness, or HD and EMAC have grounds to believe that the bodies/organisations concerned are not suitable to play the role of organisers/co-organisers, HD and EMAC fundamentally should not provide sponsorship in any form to these bodies/organisations for holding the event. Otherwise, it would be puzzling for them to sponsor the event while demanding the organisers/co-organisers not to display their names on the funded materials (the stage and backdrop in this case).

477. According to HD, EMAC's expenses are funded by the Housing Authority. In case EMAC, after providing funding support to the organisers/co-organisers for setting up the stage and the backdrop, allows them to display their names on the latter, this would create a misunderstanding that HD or EMAC supports organisations or bodies, other than Mutual Aid Committees, to hold events with public funds for their self-promotion. By the same logic, allowing acknowledgement to be given to these organisations/bodies in any other forms on a stage financed by public funds may also be accused of giving support to their promotion.

478. HD also stated that the organisers/co-organisers had the freedom to display their names on the backdrop, so long as the cost of the backdrop was not covered by public funds. However, the public/estate residents participating in the event would not be able to tell whether the cost of the backdrop was covered by public funds or paid by the organisers/co-organisers out of their own pockets. In other words, HD's arrangement in this case essentially could not avoid the scenario in which "the public/estate residents may think that HD or EMAC is providing funding support to these organisations for their self-promotion", which was the concern of both HD and some EMAC members. Furthermore, when HD allowed the organisers/co-organisers to use the estate venue for free to hold the event, it was already making use of government resources to provide funding support to these organisations. The only difference lied in the absence of support in the form of "cash".

479. In the final analysis, the Office considered that the crux of the matter lied in whether the event was held in line with EMAC's objective of fostering community building and neighbourliness. If so, EMAC should provide funding support to the organisers/co-organisers/bodies for holding the event, allowing them to display or provide a brief description of the names of the organisations/bodies as appropriate on the funded backdrop and stage. Based on common sense, the public or estate residents, even

knowing that the cost of the backdrop and the stage was covered by public funds, might not necessarily cast doubt on the fact that this constitutes providing support to the self-promotion of these organisations/bodies by public funds. On the contrary, if HD or EMAC considered that holding the event fundamentally did not tally with its objective, it should not sponsor the activities of the organisers/bodies in any forms. The Office considered that HD's current ambiguous approach in providing sponsorship might leave the organisations/bodies interested in holding community activities confused, which could possibly lead to further disputes.

480. The Office believed that, although the complaint against HD in this case was not substantiated, there was other deficiency. In particular, the Office urged HD to review afresh its current policy of providing funding support to organisations/bodies by EMAC in holding community activities, clearly defining the scope of funding and the relevant requirements (including any appropriate limits) and setting out clear justifications for staff members responsible for the discharge of relevant duties (especially those representing HD to assume the role of EMAC Chairmen in various estates), EMAC Members, and organisations/bodies wishing to obtain funding support for holding events to gain a thorough understanding of EMAC's funding criteria, so as to prevent re-occurrence of similar situations in this case.

Government's response

481. HD accepted the Office's recommendation and had issued an email on 21 December 2018 to frontline staff members discharging the relevant duties of EMAC, laying down more detailed guidelines on the prudent use of EMAC funds and related matters.

482. The Office has also replied by a letter of 29 April 2019 in which they noted that HD had considered the recommendations made by the Office, and had reviewed the policy regarding EMAC funding arrangement to the organisations for community activities. More detailed guidelines have been issued to responsible staff, including –

(a) the budgets of community activities organised by the non-governmental organisations (NGOs)/bodies partnered with EMACs must be vetted by EMAC chairpersons and be endorsed by EMACs before commencement;

(b) if the EMAC chairpersons, after taking account of all the local situation including the political aspect, find it worth using EMAC fund to jointly organize a community activity with a particular NGO/body, they should consult their seniors when and as necessary. In addition, under all circumstances, no cash or sponsorship in any kind should be given to the concerned NGOs/bodies if the estate offices are not involved in arranging or managing the activities; and

(c) partnering NGOs/bodies should display conspicuously the name and logo of the EMACs in all publicity materials (including backdrops) of the approved project and state that the activities are financed by EMAC funds. HD comprehends that it is impracticable not to allow NGOs/bodies to display their own names and logos in all publicity materials. However, in any case, the NGO/body should not promote their own images or beliefs in the course of the approved project including all publicity materials. Estate staff should check the content of all publicity materials to comply with such rule.

In view of the above, the Office considered that follow-up actions in respect of the case had been completed.

Housing Department

Case No. 2018/0130 – Failing to properly handle a complaint about nuisance caused by some dripping flower pots placed by the tenant living above the complainant

Background

483. The complainant alleged that the tenant of the public housing unit above (Unit A) had put several flower pots on and dangling under the air-conditioner hoods outside its windows. Water dripping from the flower pots spoiled her laundry. Despite her numerous complaints to the Housing Department (HD), the dripping nuisance persisted. She thus lodged a complaint with the Office of The Ombudsman (the Office) in January 2018.

484. HD noted that the Estate Office had taken follow-up actions on the complaint. Since they did not find any water dripping from the flower pots outside Unit A's windows and the flower pots had not caused danger to others, HD could not take any control action under the Marking Scheme for Estate Management Enforcement or the Tenancy Agreement. However, the Estate Office had issued three advisory letters to Unit A, urging the tenant to remove the flower pots to avoid any accidents. In March 2018, HD issued a warning letter to Unit A, citing public safety concerns. Eventually, the tenant removed all the flower pots from the air-conditioner hoods in late June.

485. In the light of this case, HD would review and revise the relevant Estate Management Division Instruction (EMDI) to stipulate clearer procedures for handling tenants placing potential fallen objects outside the external walls (including those placed on air-conditioner hoods, edge of windows and canopies).

The Ombudsman's observations

486. The Office considered that air-conditioner hoods should be used solely for installation of air-conditioners. It was not only improper for the tenant to put other objects such as flower pots on the hoods, the insecured objects might also fall down and cause injuries to residents and passersby. HD had indeed failed to consider public safety in stating that there was no potential danger. It should have required the tenant to rectify such

misdeed as soon as possible, and referred the case to the Police for further action where necessary.

487. Although the Estate Office had followed up the dripping nuisance complaint, nearly three months had passed before HD issued the warning letter, and it only took further action after the Office commenced a full investigation. HD's attitude in handling this complaint was too slow and unacceptable. Moreover, HD's warning letter lacked deterrent effect as it failed to remind the tenant of the serious consequences of allowing any objects to fall from his unit, which might result in an offence and termination of tenancy. The Office, therefore, considered this complaint partially substantiated.

488. The Office recommended that HD –

(a) review and consider revising, where appropriate, the relevant EMDI as soon as possible; and

(b) handle in a stringent manner the irresponsible behaviours of wilfully placing objects on air-conditioner hoods, which may cause injuries to residents and passers-by.

Government's response

489. HD accepted the Office's recommendations.

Recommendation (a)

490. Currently, HD has a set of operational guidelines in place under the relevant EMDI on throwing objects from height for frontline staff to follow and take appropriate actions when handling relevant cases. This set of guidelines will be reviewed in a timely manner. HD, when reviewing and revising the EMDI, will stipulate more clearly the procedures in handling throwing objects from height and potential fallen objects, and if necessary, the responsible staff will consider referring the cases to relevant government departments for further actions. The above revision is completed by the end of October 2019.

Recommendation (b)

491. HD keeps monitoring whether there are any nuisances or irregularities caused by tenants placing objects on the air-conditioner hoods. Up to now, the tenant of the public housing unit concerned was no longer found placing flower pots on the air-conditioner hood. If any tenants are found to have placed objects on the external walls (including air-conditioner hoods, edge of windows and canopies) of their units, causing nuisance or irregularities, HD will take enforcement actions under the Marking Scheme for Estate Management Enforcement or the Tenancy Agreement, so as to avoid any potential nuisance or danger caused by these objects to other persons (including passers-by and residents).

Housing Department

Case No. 2018/0321 – Failing to take enforcement action against smoking in the no-smoking area of a public housing estate

Background

492. The complainant lodged complaint to the Housing Department (HD) against illegal smoking in a public housing estate in July 2017 and on 19 January 2018. However, no follow-up actions had been taken by the security guards. The staff receiving the complaintant's phone call on 20 January 2018 advised the complainant to contact the Food and Environmental Hygiene Department (FEHD). The complainant queried that HD was ineffective in its enforcement and shirking its responsibility.

The Ombudsman's observations

493. Housing Authority (HA) designated all common areas in its public housing estates as no-smoking areas and included illegal smoking as one of the misdeeds in the Marking Scheme for Estate Management Enforcement (Marking Scheme) since 1 April 2007. Tenants smoking in no-smoking areas will be allotted five penalty points without any prior warning.

494. The shopping centre, market and carpark of the subject estate were under the management of the Link Real Estate Investment Trust (Link REIT). HD was not allowed to take enforcement actions in these areas. A property service company engaged by HD was responsible for the property management work of the subject estate. Staff at managerial level (i.e. Estate Officers or above) (operational staff) of the property service company were authorised by HD to enforce the Marking Scheme whereas security guards were not authorised to do so or issue tickets.

495. In their routine patrols, security guards would issue immediate warnings to any persons found to be smoking or carrying lighted cigarettes in the no-smoking areas of an estate. Those suspected to be going to light a cigarette or holding an unlit cigarette would be given advice, and also be reminded that they should proceed to designated smoking areas if necessary. In addition, operational staff, while conducting irregular patrols in estate common areas, would issue Notification Slip for

Allotments of Points (NS) to smoking offenders, while those confirmed to be residents of the subject estate would be allotted penalty points by HD under the Marking Scheme.

496. Between February 2017 and January 2018, the security guards had given advice or warnings to 766 suspected or confirmed smoking offenders. Operational staff had also issued NS to 132 smoking offenders, of whom 61 were confirmed to be residents of the subject estate and were allotted penalty points. There were a total of eight point-allotments cases at the location of concern to the complainant. Special Operation Teams under HD had also carried out a total of 20 operations in the estate, issued a total of four Fixed Penalty Notices (FPNs) and allotted penalty points to seven residents.

497. The property service company had also reflected the problem of illegal smoking in the subject estate to the Tobacco Control Office (TCO) under the Department of Health. Four joint operations had been conducted with TCO in the same period, and TCO had carried out 37 operations at the shopping mall, market and public transport interchange of the subject estate. FPNs were issued to a total of 17 smoking offenders. Furthermore, the property service company had conducted a total of 13 joint operations with Link REIT in the above period to step up the effectiveness in combatting illegal/unauthorised smoking.

498. In the evening of 19 January 2018, a fresh water pipe at a certain floor of the estate burst, with huge amount of fresh water flowing out. Due to the emergency nature of the incident, most of the security guards on duty that evening were assigned to deliver sandbags to the subject floor for placement, so as to prevent fresh water from rushing into the residential units or flowing to the lift lobby and/or into the lift shafts. Under such circumstances, no staff could be immediately deployed to handle the complainant.

499. The security guard answering the call that evening did not clearly explain to the complainant that there was a need to re-deploy manpower for handling the urgent pipe burst incident. The security guard merely told the complainant that his complaint against illegal smoking could only be followed up by other staff members later as they were attending to another urgent incident. It was not until about two hours after the security supervisor had finished handling the pipe burst incident that security guards could be arranged to carry out patrol duties at the location mentioned by the complainant.

500. On 20 January 2018, the security control room received a call complaining that illegal smoking was identified at a number of locations in the subject estate, including the area owned by Link REIT. Nevertheless, in the conversation with the complainant, the security guard failed to clearly explain to the complainant that the property service company could only discharge its duties in the area owned by HA and even mistakenly took TCO as FEHD in his response, thus leading to the misunderstanding.

501. The Office of The Ombudsman (the Office) found the complaint unsubstantiated but noted other inadequacy. The Office urged HD to continue to encourage the property service company to step up staff training and strengthen their communication skills in a bid to avoid the same situation recurring.

Government's response

502. HD accepted the Office's recommendation and had taken the following measures. The property service company has displayed land boundary plans of the subject estate, which clearly indicates the areas owned by HA and Link REIT respectively at the security control room, reception room of the estate office and security counter on the ground floor of each block, so that the security guards could more readily understand the area covered in their tobacco control duties. Estate manager or the security supervisor in the property service company will, at least twice a week, brief the security guards on the skills to communicate with residents, matters requiring attention and HA's tobacco control policy, so as to deepen their understanding and facilitate their effective implementation of the related policy. HD will continue to encourage the property service company to step up staff training and strengthen their communication skills on an on-going basis, maintain close ties with Link REIT and other law enforcement departments, and, from time to time, appeal to the residents through the Estate Management Advisory Committee to enhance publicity on the misdeed of illegal smoking.

Housing Department

Case No. 2018/0719 – (1) Lack of transparency in the quotation for reinstatement costs of a surrendered public housing unit; (2) Inconsistent information provided by different staff members on the reinstatement items; (3) Allowing insufficient time for the complainant to carry out the reinstatement works; (4) Charging exorbitant fees for the reinstatement items; (5) Staff improperly photographing with smart phone the complainant's tenancy agreement which contained personal data; and (6) Refusing to offset the outstanding payment against the complainant's deposit

Background

503. The complainant filed a complaint with the Office of The Ombudsman (the Office) against the Housing Department (HD). The allegations are as follows –

(a) lack of transparency in the quotation for reinstatement costs of a surrendered public housing unit;

(b) inconsistent information provided by different staff members on the reinstatement items;

(c) allowing insufficient time for the complainant to carry out the reinstatement works;

(d) charging exorbitant fees for the reinstatement items;

(e) staff improperly photographing with smart phone the complainant's tenancy agreement which contained personal data; and

(f) refusing to offset the outstanding payment against the complainant's deposit.

The Ombudsman's observations

Allegations (a) and (c)

504. HD's stance is that outgoing tenants are encouraged to reinstate the flats at their own expense in order to shorten the time taken by HD to reinstate the flats before reallocation. However, since tenants may choose to leave the reinstatement works to HD under the current policy, the list of charges provided by HD for the reinstatement items, even though not for the purpose of cost comparison, still to a certain extent serves as a reference for the tenants. Notifying the outgoing tenants in advance of the costs of reinstatement carried out by HD will also enable the tenants to make better estimates and choice.

505. In this case, staff of the property services agent conducted initial inspection of the complainant's flat and assessed the facilities required to be reinstated. On the following day, the staff made a reply to the complainant, informing him of the items required to be removed and reinstated as well as the related costs. At that time there were only less than two weeks left before the approved evacuation day. The complainant indeed did not have sufficient time to arrange the reinstatement works in merely two weeks and needed to leave the reinstatement works to HD. However, in fact, HD had provided nearly 90 days for the complainant to vacate and reinstate his public rental housing (PRH) unit. It was just that the complainant did not choose to make such arrangement on his own. Therefore, the Office considered it unreasonable for the complainant to accuse HD of not providing sufficient time for the reinstatement and depriving him of any "bargaining power".

506. In view of the above, the Office considered Allegation (a) unsubstantiated with room for improvement and Allegation (c) unsubstantiated.

Allegation (b)

507. HD had given a detailed account of the purposes and course of the three inspections of the complainant's flat. The Office was of the view that the staff could not make an accurate assessment on the items required to be reinstated during the initial inspection as the flat was full of furniture and miscellaneous items, and that it should not be considered a mistake. It was reasonable for HD to make conclusion based on the final inspection results on the evacuation day. Therefore, Allegation (b) was considered unsubstantiated.

Allegation (d)

508. HD clarified that they had not charged the fees for replacing the cistern and explained the reason for charging the fees for replacing the pedestal toilet with toilet seat. Upon reviewing the related information, The Office confirmed that HD's explanation was correct. The Office considered that there was no evidence of HD charging exorbitant fees and Allegation (d) unsubstantiated.

Allegation (e)

509. According to the statement of the staff concerned, both she and the complainant had to leave the office. However, the complainant was not willing to take back his tenancy agreement, so the staff member took a photo of her office desk with a smart phone for record. In this regard, the Office considered that since the complainant was present at the material time, he should have opposed immediately if he did not want the staff to take a photo of his tenancy agreement. The complainant did not raise objection then and possibly made the staff misunderstand that he agreed to her action. As a matter of fact, as the staff of the property services agent in charge of this case, she just needed to retrieve the record from HD if she had to access the personal information of the complainant on the tenancy agreement. It was not necessary for her to photograph the tenancy agreement.

510. On the other hand, however, the act of the staff member, i.e. taking a photo of her own desk, did little to help prevent the loss of the complainant's tenancy agreement. Instead, she should put the tenancy agreement in a drawer or other safe places. It was indeed inappropriate for her to photograph the complainant's tenancy agreement with her personal smart phone.

511. In light of the above, the Office considered Allegation (e) partially substantiated.

Allegation (f)

512. HD also admitted that the staff of the property services agent had failed to make timely arrangements to offset the outstanding payment against the complainant's deposits and Allegation (f) was substantiated.

513. Having perused the contents of the tenancy agreement, the Office was convinced that, as HD had stated, PRH tenants, when signing the tenancy agreement, understood that they had to reinstate the original fixtures of the flat upon the termination of the tenancy. The Office agreed that outgoing tenants had the responsibility to discharge their obligations under the tenancy agreement so that the time required for HD to reinstate the flat before reallocation could be shortened, thereby benefiting the applicants on the Waiting List. Therefore, it was the current practice of HD not to provide the list of charges for the reinstatement items for tenants' reference upon receipt of application for tenancy termination.

514. The Office understood that the said list of charges was not to be provided for outgoing tenants for cost comparison. Yet, the Office had doubts whether not providing tenants with the said list beforehand could suppress their intentions to leave the reinstatement works to HD. Besides, the outgoing tenants might be able to obtain the said list through other channels. The Office noticed that if outgoing tenants did not complete the reinstatement works and clear away the disposed items from the flat before it was surrendered, an administration fee at the prevailing rate, on top of the reinstatement and cleansing charges, would be charged by HD. Therefore, the price charged by HD should normally be higher than the market price. Providing the tenants with the list of reinstatement charges as soon as practicable might, on the contrary, incentivise the tenants to do their own reinstatement. In case the fees charged by HD were lower than those in the market, HD might have the need to review its charges so as to achieve its policy intent.

515. Taking into account the pressing need of the Government to speed up the turnover of PRH units, the Office recommended that HD review the existing charging mechanism, including –

(a) considering whether the reinstatement charge and administration fee should be raised; and

(b) notifying tenants as soon as practicable so as to provide a greater incentive for them to arrange the reinstatement works by themselves before surrendering the PRH units.

Government's response

516. HD accepted the Office's recommendation (b) but had reservations about recommendation (a). Details are set out below –

Recommendation (a)

517. All along, HD has determined the fees and charges for its work or services on a cost recovery basis. Given that only the full cost of the service and administration fees will be recovered under this principle, it is quite difficult for HD to raise the reinstatement charge and administration fee intentionally to compel the tenants to arrange the reinstatement works by themselves before surrendering the flats. However, HD has reviewed the workflow of collecting the reinstatement charges. A guideline has also been issued to request estate staff to explain to tenants as soon as practicable the items required to be reinstated when they conduct inspection prior to the recovery of the flat, so that the tenants could carry out the reinstatement works on their own before surrendering the flats and thus accelerating the recovery and turnover of PRH units.

Recommendation (b)

518. In response to the Office's recommendations, HD has revised the templates of the Notice-to-Quit and relevant written replies to be submitted by tenants to incorporate the message of "completion of reinstatement works by tenants before surrendering a PRH unit will expedite HD's flat recovery process, thereby speeding up the turnover of PRH units". The aim is to notify outgoing tenants of HD's stance to urge them to carry out flat reinstatement works by themselves. Meanwhile, HD will step up publicity through various channels, including the Estate Newsletter, Housing TV Channel and notices, so as to enhance tenants' understanding of the importance of PRH as a precious community resource, raise their awareness on the issue and promote co-operation.

519. The Office has replied by a letter of 14 March 2019 in which they noted that HD had carefully considered the recommendations made by the Office, and HD in its reply had elaborated in details on the feasible and infeasible items with explanations. For the recommendation that could not be implemented due to infeasibility, HD had given an account to explain the difficulties. Moreover, HD had accepted and implemented the recommendations that were feasible, including the issue of guideline to require estate staff to explain to tenants as soon as practicable the items to be reinstated and the related charges; revised the templates of Notice-to-Quit and the related reply letters to indicate as early as possible the stance of HD on requesting out-going tenants to complete the reinstatement works at their own cost. The Office has concluded that the case was closed and considered that follow-up actions in respect of the case had been completed.

Housing Department

Case No. 2018/0722 – Impropriety in handling a noise nuisance complaint

Background

520. The complainant complained that since transferred to the present unit in 2016, he had suffered noise nuisance caused by his neighboring and upper unit households. He had requested assistance from the estate management office for numerous times, but he alleged that the Housing Department (HD) failed to handle his noise complaint in a proper manner.

The Ombudsman's observations

521. Generally speaking, the security guards had followed up the complainant's complaints in a timely manner and informed him of the results accordingly. From September 2016 to April 2018, the complainant made 357 noise complaints in total. The estate office did not detect any sound during 323 follow-up visits and only heard normal sounds of household activities during the other 34 visits. Noticing that most of the complaints were made between 7:00 a.m. and 11:00 p.m., the Office of The Ombudsman (the Office) deemed it normal to hear sounds of household activities during this time of the day. From an administrative point of view, the Office found no impropriety on the part of HD as it had been proactive in handling the complainant's complaints.

522. Given that sensitivity to sounds differs from one person to another, HD must, in order to trigger off the Marking Scheme, prove with sufficient evidence that the sound can be defined as noise. In this connection, HD established a relatively objective rule of "two households plus two staff". Investigation results revealed that no person other than the complainant considered there was a noise problem. In other words, the sounds concerned had not reached a nuisance level according to the "two households plus two staff" rule. Hence, HD could not take any action under the Marking Scheme apart from giving advice to the tenant concerned.

523. By and large, there was no maladministration on the part of HD, which had made every endeavour as far as practicable to follow up the

complainant's complaint. Advice was given to the tenant concerned and the complainant was informed of the results of follow-up actions. Regrettably, a Senior Property Officer of the estate management office (Staff member A) succumbed to the strong pressure of the complainant and handled the case inappropriately which created an unreal scenario of "complaints from two households" having been received, warranting the issue of a warning from HD to the tenant in the upper unit.

524. Although the complaint was unsubstantiated, the Office took the view that as HD's representatives in managing the estate, outsourced staff of the estate management office should uphold the customer-oriented principle in providing estate management services, while at the same time serve every individual household with fairness, sincerity and dignity. In face of an individual's pestering or threatening behavior, the staff should not resort to any biased act or disregard the truth. In this case, Staff member A gave an unnecessary warning to the tenant of the upper unit in order to pacify the complainant and to avoid being complained. Not only was this unfair to the tenant concerned, but would also damage HD's reputation and undermine tenants' confidence in HD's impartiality in performing its duties.

525. The Office found the complaint unsubstantiated but with other inadequacy. To avoid re-occurrence of similar incidents, HD should continuously monitor the performance of outsourced management agents to ensure their service standard, so as to maintain the public's confidence in HD's services.

Government's response

526. HD accepted the Office's recommendation. Actions taken by HD include –

(a) keeping staff alert of cases by sharing with them at seminars;

(b) uploading case-related information to the intranet for staff's reference;

(c) issuing email to management agents, reminding them to continue and strengthen training of frontline staff in dealing with personal data and verbal violence; and

(d) drawing up corresponding measures and work procedures.

Housing Department

Case No. 2018/0807 – Impropriety in handling the complainant's application for flat transfer

Background

527. The complainant alleged that for the sake of his wife's health, he made an application with the support of social worker to the Housing Department (HD) for transfer to a flat with two toilets. However, in the course of handling the application, HD repeatedly issued letters to the Hospital Authority (HA) within a short period of time and cited HD's flat allocation policy in its letters, which might mislead the doctor in his reply. Furthermore, the letter from HD to HA dated 13 December 2017 was issued without the consent and authorisation of the complainant and his wife. The complainant queried that HD did not handle his application in a fair manner and there was impropriety in the procedure.

The Ombudsman's observations

528. The objective of the transfer policy is to alleviate the tenant's health or daily problems through flat transfer, subject to the availability of resources. As the gatekeeper of public housing, HD has a responsibility to handle transfer applications in a prudent manner to ensure optimal use of the precious housing resources.

529. Regarding this case, there were only three persons in the complainant's household. HD had already exercised discretion and allocated a two-bedroom flat designated for a five-person household to the complainant's household, having regard to the special circumstances of the complainant's wife. Allocation of a two-toilet flat for a household of six to eight persons as requested by the complainant would largely exceed the allocation standard, which required very strong justifications. Otherwise, it would be unfair to others. It was thus prudent for HD to inform the hospital and the doctor concerned of the allocation standard of public rental housing (PRH) and that the complainant's transfer application had far exceeded the allocation standard for the doctor's consideration. In fact, HD had also considered and offered other alternatives in an attempt to solve the complainant's problems without exceeding the PRH allocation standard. The options include –

(a) exploring the feasibility of installing an additional toilet in a suitable unit of the same block type, but the restrictions imposed by relevant legislation on natural lighting and ventilation rendered the option not feasible;

(b) reserving two adjoining small units in the newly completed estate in the vicinity for the complainant, but the option was rejected; and

(c) owing to the medical need of the complainant's wife, special approval was granted for allocation of a two-bedroom flat for a five-person household to the complainant by counting one more member to his family, but the option was rejected.

530. The Office of The Ombudsman (the Office) considered that the purpose of HD was to safeguard the rational allocation of public housing resources. There was no impropriety in its handling of this case.

531. HD had issued a memo to the hospital in which the prevailing allocation standard was mentioned. The memo was subsequently withdrawn in view of the agitated emotions of the complainant's wife.

532. The Office understood that HD's frontline staff withdrew the said memo due to the agitated state of the complainant's wife at that time, and that HD staff agreed to such a move in order to soothe her. This, however, was not a sensible move as it resulted in the misunderstanding and false expectation of the complainant and his wife. The Office was of the view that HD should explain to the wife or the complainant, after the wife had calmed down, the reasons for the issue of the memo and that their request could not be proceeded with if the doctor failed to answer HD's queries. Subsequently, when HD decided to review the case and issue the said memo again, remedial measures should also be taken, including explaining clearly to the complainant and his wife the reasons for the actions already taken and the grounds for the subsequent actions. The Office considered the complaint unsubstantiated but with other inadequacy.

533. The Office hoped that HD can, by making reference to this case, train its staff to keep calm when they encounter unexpected incidents, and to communicate with complainants in a sensible manner rather than compromising the principles of the policy concerned just to pour oil on troubled water.

Government's response

534. HD accepted the Office's recommendation and has shared this case with the staff of estate offices through meetings and seminars to strengthen their ability to respond to sudden changes and their communication skills, so as to enable them to better carry out the Department's work. HD has also uploaded information about the case to the intranet for staff's reference.

Housing Department

Case No. 2018/2364 – Failing to resolve noise nuisance from the flat below

Background

535. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Housing Department (HD), claiming that a tenant (the subject tenant) living in the flat below had been frequently screaming loudly, swearing and pounding on objects at different times of the day since 2012, causing extreme nuisance to him. The allegations are as follows –

(a) the complainant held that the noise problem remained unresolved for years because HD failed to take effective measures;

(b) the complainant claimed that he had lodged three complaints on 5 July 2018. He saw that the subject tenant was swearing when two security guards were carrying out one of their patrols. However, staff of the estate's property service company indicated that the two security guards did not identify any noise problem that evening. The complainant was dissatisfied that the property service company did not handle the incident in a serious manner;

(c) the complainant claimed that the staff of HD and the property service company did not go through the complaint records for the past few years and follow up on each of his complaints as a new case; and

(d) the complainant was dissatisfied that HD wilfully disclosed his personal information. As a result, all security guards and the subject tenant knew that he was the one who complained of the noise nuisance.

The Ombudsman's observations

Allegation (a)

536. The Office was satisfied that HD handled the complaint according to established policies and procedures. It had invoked the Marking Scheme for Estate Management Enforcement (the Marking Scheme) and the tenancy provisions (with warning letters issued) on multiple occasions to follow up on the confirmed noise nuisance complaint. Staff of HD had, on many occasions, advised the subject tenant and his family members not to make noises and reminded them that they had been allotted penalty points. Yet after HD staff had interviewed the subject tenant, HD still received noise complaints almost every day. The subject tenant showed no improvements, reflecting HD's approach to handling the complaints was not effective. The Office found Allegation (a) substantiated.

Allegation (b)

537. There were discrepancies between the statements of the complainant and the security guards as to whether the sounds made by the subject tenant on that evening were noises. In the absence of independent corroborative evidence, it was difficult for the Office to establish the truth. Nevertheless, given that sensitivity to noises varies from person to person, HD, in following up noise complaints, should define noise according to its established objective criteria. The Office found Allegation (b) unsubstantiated.

Allegation (c)

538. HD made it clear that related complaints would not be classified as new cases or treated as independent cases. Nonetheless, the case had been ongoing for several years and there was a large amount of information involved. When the complainant asked about incidents that happened many years ago and the frontline staff could not give an immediate response, the complainant might misunderstand that HD would take his case as a new complaint. The Office found Allegation (c) unsubstantiated.

Allegation (d)

539. Staff of HD and the property service company strictly adhered to relevant guidelines and would not disclose the identity of any complainants. According to HD's explanation, the security guards might be able to figure out the complainant's identity as he had, on many occasions, called and

appeared in person at the property service company, and stood outside the subject flat to follow up on the investigation. The Office believed that such an inference was reasonable and found Allegation (d) unsubstantiated.

540. The Office considered the complaint partially substantiated and recommended HD –

(a) to continue enforcing the Marking Scheme and the tenancy provisions in a stringent manner, and explore ways to take further tenancy control actions against the subject tenant; and

(b) to improve the investigation methods of the security guards in a bid to enhance the effectiveness in verifying noise complaints.

Government's response

541. HD accepted the Office's recommendations and had taken the following measures.

Recommendation (a)

542. HD takes actions as appropriate in accordance with its prevailing policies and guidelines and strictly enforces the Marking Scheme and the tenancy provisions. HD will also take further tenancy control actions in the light of the circumstances.

Recommendation (b)

543. The property service company has been doing its utmost to handle the related complaint cases. Starting from January 2019, the security guards have been taking the lift to another floor before going to the floor of the subject flat via the staircase. To enhance the effectiveness of their work, they will stay at the corridor and listen outside the subject flat, while trying to avoid alerting the subject tenant as far as possible in order not to compromise the inspection results.

Independent Commission Against Corruption

Case No. 2018/0672(I), 2018/0673(I), 2018/0674(I), 2018/0675(I), 2018/0676(I) and 2018/0677(I) – Refusing to reveal details of the outcome of Independent Commission Against Corruption's investigation of certain complaints lodged by the complainant against Independent Commission Against Corruption officers

Background

544. The complainant is a former staff member of the Independent Commission Against Corruption (ICAC). He left ICAC in September 2016. Concurrently, he lodged a complaint with ICAC (the complaint). He alleged that an officer of ICAC (Officer A) had –

(a) made up stories to cover up his mistakes in hiring a lorry for transporting some mats (the transportation service) and misled his senior(s); and

(b) asked ICAC to settle payment for the transportation service even though the service had actually not been carried out.

545. In November 2016, ICAC issued a letter to the complainant, setting out the terms of the complaint. The complainant wrote back to ICAC, stating that he was making not only non-criminal allegations, but also a criminal one against Officer A. After seeking legal advice, ICAC decided to conduct only a non-criminal internal investigation into the complainant's allegations. ICAC so informed the complainant in February 2017. The complainant later lodged another two complaints against the ICAC officers who handled his complaints and made a number of requests for information.

546. Between January and 7 November 2017, in relation to his complaints against ICAC officers, the complainant made a total of 33 requests to ICAC for information, under the Code on Access to Information (the Code), and 16 non-Code information requests.

547. On 7 November 2017, the ICAC Complaints Committee (ICC) endorsed ICAC's assessment that the complainant's allegations, which were all found to be unsubstantiated, were untenable and that ICAC had deployed enormous resources to handle the complainant's complaints. ICC also endorsed ICAC's recommendation that no further response be

given to the complainant in respect of his complaints or requests for reviewing the investigation outcome, unless he came up with fresh information with substance for ICAC's assessment (the decision).

548. On 8 November 2017, ICAC informed the complainant in writing (the letter) of the outcome of its investigation of the complaint (the investigation), viz. no impropriety was found. The letter also set out an account of events as discovered by the investigation. Dissatisfied with the outcome, the complainant requested ICAC to reveal more details of the investigation. He also lodged four more complaints with ICAC against the officers who had conducted investigations into his previous complaints.

549. On 20 March 2018, ICAC reported to ICC the complainant's further complaints against ICAC officers and his requests for information, which were assessed to be related to his previous complaints. From the date of the decision till March 2018, the complainant had made a further 24 Code requests and 27 non-Code requests. He also sought a review of 17 of his requests that had been rejected by ICAC. Agreeing that ICAC had been handling the complainant's further complaints and information requests in accordance with the decision, ICC further endorsed ICAC's recommendation that the complainant be informed of the effect of the decision. Accordingly, on 23 March 2018, ICAC wrote to inform the complainant that no reply or response would be given to his future complaints, enquiries or requests for review of the investigation outcome in relation to his previous complaints.

550. In his complaint to the Office of The Ombudsman (the Office), the complainant alleged that ICAC had unreasonably refused his request, made under the Code for the following information –

(a) whether "the relevant logistical arrangements handled by his (Office A's) subordinates", referred to in paragraph 2 of the letter, included "communication with ICAC officers about use of the facilities of ICAC";

(b) description/scope of the transportation service recorded in the quotation document(s) by ICAC;

(c) a copy of the "established procedures", referred to in paragraph 2 of the letter, and, if any regulations of the Government/orders of ICAC are mentioned in those "established procedures", a copy of such regulations/orders;

(d) whether "the relevant documents", referred to in paragraph 3 of the letter included three emails and one record of interview of an ICAC officer;

(e) the name of the contractor that provided the transportation service, the quotation from the contractor and the quotation accepted by ICAC; and

(f) the information of the ICAC officer who approved the payment to the contractor rendering the transportation service and the expenditure sub-head/item number in relation to that transaction.

The Ombudsman's observations

551. The Office's investigation has shown that the complainant's complaints stemmed from the complaints about the outcome of the investigation.

552. All his complaints and information requests had been considered by ICC, an independent committee comprising certain members of the Legislative Council and prominent members of the community. The Committee had not only found the complainant's complaints unsubstantiated but had also agreed that no reply or response be given to the complainant's further complaints, enquiries or requests for review of investigation outcome in relation to his previous complaints, so as to avoid further drain on and waste of ICAC's resources.

553. In other words, it was ICAC's opinion, endorsed by ICC, that the complainant's complaints and requests had shown to be vexatious at the time of the decision and that responding further to them would represent an unreasonable use of the Commission's resources. ICAC considers that it was not unreasonable of ICAC to have held this opinion taking into account the circumstances, context and history of the requests, and to have rejected the complainant's information requests in line with the advice of ICC, whose impartiality and judgement were to be respected.

554. In view of the reasons above, the Office considered the complaints unsubstantiated.

555. The Office, nevertheless, wishes to point out that instead of citing paragraph 2.9(c) of the Code, it would be more appropriate to cite paragraph 2.9(d) as a reason for refusing the complainant's information

request. ICAC has made out a case that meeting the complainant's request would require an unreasonable diversion of resources, but it had yet to demonstrate how disclosure of the information concerned would harm or prejudice the proper and efficient conduct of its operations. Hence, while the complaint is unsubstantiated, the Office found inadequacy in ICAC's understanding and application of the Code.

556. The Office recommended that ICAC take reference from the complaint for improvement in application of the Code.

ICAC's response

557. ICAC accepted the Office's recommendation. ICAC has been conducting training to officers so as to enhance their understanding and application of the Code. ICAC has updated its training materials on the Code as and when required. For cases concerned in the Annual Report of The Ombudsman 2019, ICAC has briefed its subject officers handling the Code in ICAC and also shared with them the case summary from the Office so as to enhance their understanding and application of the Code.

Independent Commission Against Corruption

Case No. 2018/1002(I) – Refusing to reveal details of the outcome of the Independent Commission Against Corruption's investigation of certain complaints lodged by the complainant against Independent Commission Against Corruption officers

Case No. 2018/1229(I) – Refusing to disclose the security classification of several letters that Independent Commission Against Corruption sent to the complaintant and the security classification of Independent Commission Against Corruption file(s) pertaining to the reference numbers cited in those letters

Background

558. The complainant is a former staff member of the Independent Commission Against Corruption (ICAC). He left ICAC in September 2016. Concurrently, he lodged a complaint with ICAC (the complaint). He alleged that an officer of ICAC (Officer A) had –

(a) made up stories to cover up his mistakes in hiring a lorry for transporting some mats (the transportation service) and misled his senior(s); and

(b) asked ICAC to settle payment for the transportation service even though the service had actually not been carried out.

559. In November 2016, ICAC issued a letter to the complainant, setting out the terms of the complaint. The complainant wrote back to ICAC, stating that he was making not only non-criminal allegations, but also a criminal one against Officer A. After seeking legal advice, ICAC decided to conduct only a non-criminal internal investigation into the complainant's allegations. ICAC so informed the complainant in February 2017. The complainant later lodged another two complaints against the ICAC officers who handled his complaints and made a number of requests for information.

560. Between January and 7 November 2017, in relation to his complaints against ICAC officers, the complainant made a total of 33 requests to ICAC for information, under the Code on Access to Information (the Code), and 16 non-Code information requests.

561. On 7 November 2017, the ICAC Complaints Committee (ICC) endorsed ICAC's assessment that the complainant's allegations, which were all found to be unsubstantiated, were untenable and that ICAC had deployed enormous resources to handle the complainant's complaints. ICC also endorsed ICAC's recommendation that no further response be given to the complainant in respect of his complaints or requests for reviewing the investigation outcome, unless he came up with fresh information with substance for ICAC's assessment (the decision).

562. On 8 November 2017, ICAC informed the complainant in writing (the letter) of the outcome of its investigation of the complaint (the investigation), viz. no impropriety was found. The letter also set out an account of events as discovered by the investigation. Dissatisfied with the outcome, the complainant requested ICAC to reveal more details of the investigation. He also lodged four more complaints with ICAC against the officers who had conducted investigations into his previous complaints.

563. On 20 March 2018, ICAC reported to ICC the complainant's further complaints against ICAC officers and his requests for information, which were assessed to be related to his previous complaints. From the date of the decision till March 2018, the complainant had made a further 24 Code requests and 27 non-Code requests. He also sought a review of 17 of his requests that had been rejected by ICAC. Agreeing that ICAC had been handling the complainant's further complaints and information requests in accordance with the decision, ICC further endorsed ICAC's recommendation that the complainant be informed of the effect of the decision. Accordingly, on 23 March 2018, ICAC wrote to inform the complainant that no reply or response would be given to his future complaints, enquiries or requests for review of the investigation outcome in relation to his previous complaints.

564. In his complaint to the Office of The Ombudsman (the Office), the complainant alleged that ICAC had unreasonably refused his request, made under the Code for the following information –

(a) a copy of the documents in the "Staff Report File of an ICAC officer" which the complainant intended to present as evidence in his complaint(s) against ICAC officer(s); and

(b) the security classification of the letter and two other letters that ICAC had sent him in November 2016 and November 2017 respectively and the security classification of ICAC file(s)

pertaining to the reference numbers cited in those three letters.

The Ombudsman's observations

565. The Office's investigation has shown that the complainant's complaints stemmed from the complaints about the outcome of the investigation.

566. All his complaints and information requests had been considered by ICC, an independent committee comprising certain members of the Legislative Council and prominent members of the community. The Committee had not only found the complainant's complaints unsubstantiated but had also agreed that no reply or response be given to the complainant's further complaints, enquiries or requests for review of investigation outcome in relation to his previous complaints, so as to avoid further drain on and waste of ICAC's resources.

567. In other words, it was ICAC's opinion, endorsed by ICC, that the complainant's complaints and requests had shown to be vexatious at the time of the decision and that responding further to them would represent an unreasonable use of the Commission's resources. ICAC considered that it was not unreasonable of ICAC to have held this opinion taking into account the circumstances, context and history of the requests, and to have rejected the complainant's information requests in line with the advice of ICC, whose impartiality and judgement were to be respected.

568. In view of the reasons above, the Office considered the complaints unsubstantiated.

569. Furthermore, for Complaint (b), having examined the relevant records, the Office accepted ICAC's account of its handling of the complainant's previous similar requests.

570. The Office, nevertheless, wishes to point out that instead of citing paragraph 2.9(c) of the Code, it would be more appropriate to cite paragraph 2.9(d) as a reason for refusing the complainant's information request. ICAC has made out a case that meeting the complainant's request would require an unreasonable diversion of resources, but it had yet to demonstrate how disclosure of the information concerned would harm or prejudice the proper and efficient conduct of its operations. Hence, while the complaint is unsubstantiated, the Office found inadequacy in ICAC's understanding and application of the Code.

571. The Office recommended that ICAC take reference from the complaint for improvement in application of the Code.

ICAC's response

572. ICAC accepted the Office's recommendation. ICAC has been conducting training to officers so as to enhance their understanding and application of the Code. ICAC has updated its training materials on the Code as and when required. For cases concerned in the Annual Report of The Ombudsman 2019, ICAC has briefed its subject officers handling the Code in ICAC and also shared with them the case summary from the Office so as to enhance their understanding and application of the Code.

Labour Department

Case No. 2018/0267(I) – Refusing to provide the name and number of pages of the internal guidelines on handling telephone enquiries from job seekers

Background

573. According to the complainant, he called the Labour Department (LD) Telephone Employment Services (TES) hotline in January 2018 and learnt that LD still kept records of his job application made in 2012. He then requested under the Code on Access to Information (the Code) Staff A to tell him immediately the formal name of the operational guidelines for hotline staff to handle calls from job seekers (the requested information). However, Staff A refused to disclose the requested information to him for reason that it was "internal document". He further asked Staff A the total number of pages of the requested information, but Staff A also refused to disclose and informed him that he had to make a written request for the information under the Code.

574. The complainant accused Staff A of failing to handle his request for information according to the Code.

The Ombudsman's observations

575. Regarding whether Staff A had refused to inform the complainant of the formal name of the requested information for reason that it was "internal document" and asked the complainant to make a written request for the information, the complainant and Staff A gave different accounts of the event. In the absence of independent corroborating evidence (such as recording), the Office of The Ombudsman (the Office) found it difficult to establish whether Staff A has violated the requirements under the Code in handling the information request of the complainant. As such, the Office found this complaint inconclusive.

576. However, even if Staff A had informed the complainant that the requested information was "Operational Guidelines", it was nonetheless not the formal name of the requested information. Staff A should have told him the full name of the requested information.

577. Besides, Staff A explained that she was unable to inform the complainant immediately of the total number of pages and the parts that could be disclosed verbally because it was "internal document". The Office considered that it was inappropriate for Staff A to make up an excuse for the refusal. If it was impossible to answer the questions of the complainant immediately, Staff A should explain the reasons to him and provide him with a proper reply later. The Office was pleased to learn that LD had already reminded Staff A and other staff of TES about this.

578. Based on the above analysis, the Office found this complaint inconclusive, but considered LD to have other inadequacies.

579. The Office urged LD to learn from this case and enhance its training for its staff to ensure that they are familiar and in compliance with the Code so that requests for information from the public could be handled more appropriately and efficiently.

Government's response

580. LD accepted the Office's recommendation and has strengthened the relevant training to its staff, including briefing them during internal meetings, circulating relevant documents and reference materials of the Code, ensuring that the staff are familiar and in compliance with the Code and requests for information from the public are handled properly.

Labour Department

Case No. 2018/1237(I) – Refusing to provide the internal guidelines of Job Vacancy Processing Centre and Telephone Employment Service Centre, and failing to fully respond to the complainant's enquiry

Background

581. According to the complainant, among the job vacancies orders published by the Labour Department (LD) for employers, he discovered two duplicate job vacancies. He therefore made a written enquiry to the Job Vacancy Processing Centre (JVPC) of LD. JVPC gave him a written reply, explaining the reasons for duplicate vacancy orders.

582. The complainant then made a written enquiry to LD under the Code on Access to Information (the Code) for the following information –

(a) the name and post title of the JVPC staff who replied him;

(b) the staff responsible for posting and vetting of the concerned vacancy orders;

(c) whether the relevant unit had set out any checklist/guidelines/ procedures on the work process of posting vacancy orders (soft copy of the said work process requested); and

(d) the operational guidelines/work procedures and relevant documents of the Telephone Employment Service Centre (TESC) of LD for the hotline staff, including: the guidelines for staff in handling enquiries from job seekers about the detailed address and the business nature shown in the Business Registration Certificate (BRC) of the employers, and guidelines for staff on the necessity of informing job seekers about the contact means of the employers before providing the employers' names.

583. LD replied the complainant in writing to provide him information under items (a) and (b). As for items (c) and (d), LD pointed out that although JVPC and TESC had internal operational guidelines, the disclosure of the relevant operational guidelines and other related internal information would harm or prejudice the proper and efficient conduct of the operations of LD, and his request for the concerned information was

thus refused. Nevertheless, LD provided him brief information on the work of JVPC and TESC. Regarding item (d), LD indicated that staff can, if requested by job seekers, inform them of the street name of the employer's location but not the street number.

584. The complainant was dissatisfied that LD only provided him with brief information of JVPC and TESC but refused to provide him with the operational guidelines. He also considered that LD did not fully respond to his request under item (d), and did not explain how TESC staff would handle job seekers' enquiries on the business nature of the employers shown in the BRC, and why TESC staff had to inform job seekers of the contact means of the employers before providing the employers' names.

The Ombudsman's observations

585. According to paragraph 2.2.2 of the Guidelines on Interpretation and Application of the Code, it is not necessary for government departments to prove in any particular case that harm or prejudice, i.e. damage or detriment, would result from disclosure of particular information. It will be sufficient if there is a risk or reasonable expectation of harm in the circumstances.

586. Regarding the information request, LD explained why they were unable to disclose the operational guidelines of JVPC and TESC to the complainant. The Office of The Ombudsman (the Office) considered that, in disclosing these guidelines, the proper and efficient conduct of the operations of JVPC and TESC would probably be harmed or prejudiced. The Office also did not regard the disclosure of these operational guidelines in the public interest. On the contrary, disclosure of these operational guidelines might be against public interest. Therefore, it was not unreasonable for LD to refuse the disclosure of these operational guidelines to the complainant by virtue of paragraph 2.9(c) of the Code. In fact, LD's provision of brief information to the complainant had already facilitated his understanding of the operation of JVPC and TESC.

587. However, the spirit of the Code is to provide information to the public as far as possible so as to enhance the transparency of government operation. As the complainant specifically mentioned in item (d) the information requested included "the guidelines for staff in handling enquiries from job seekers about the detailed address and the business nature shown in BRC of the employers, and guidelines for staff on the necessity of informing job seekers about the contact means of the

employers before providing the employers' names" and LD in fact had no difficulty in answering these enquiries, LD should answer these enquiries even though the operational guidelines of TESC could not be provided. Therefore, LD not responding to the complainant's enquiries in this regard in the written reply was indeed not flawless.

588. Taking the view that the complaint was partially substantiated, the Office urged LD to learn from experience of this case and handle future requests for information from the public more properly.

Government's response

589. LD accepted the Office's recommendation and has strengthened the relevant training to its staff, including briefing them during internal meetings, circulating relevant reference documents and relevant materials of the Code, ensuring that the staff are familiar and in compliance with the Code and requests for information from the public are handled properly.

Labour Department

Case No. 2018/1908(I) – Failing to handle the complainant's request for all the information about the overtime work undertaken by the staff of the Labour Department in accordance with the Code on Access to Information, and failing to give a direct response to the request for information

Background

590. According to the complainant, he cited the Code on Access to Information (the Code) to make an enquiry to the Labour Department (LD) on 1 May 2018 about the overtime situation of staff in various work units of LD in the past two years, including overtime hours, overtime allowance and compensatory time-off hours (Information Request I). On 21 May 2018, LD indicated in its reply letter to him (Reply Letter A) that it did not keep statistics on the requested information for individual sections/offices/centres and thus could not provide such information to him. LD refused "Information Request I" citing paragraph 2.9(d) in Part 2 of the Code. LD further explained to the complainant that only some of its staff had to work overtime but they (especially those ineligible for overtime allowance) did not necessarily keep record of all their overtime work. Therefore, the figures on overtime hours, overtime allowance and compensatory time-off hours for the staff in various work units could not reflect the actual overtime situation of the staff.

591. On 27 May 2018, the complainant, in accordance with the Code, requested LD to provide the following information instead: all information relating to the overtime work undertaken by staff of LD since 1 January 2016, including but not limited to circulars, rules, guidelines, minutes of meetings, reports and data (Information Request II). On 5 June 2018, LD outlined in its reply letter to him (Reply Letter B) the internal guidelines on overtime work; as for the data on overtime work, LD indicated that this had already been addressed in "Reply Letter A" and it had nothing to add.

592. The complainant accused LD of failing to handle his information request in accordance with paragraph 1.13 in Part 1 of the Code, and failing to give a direct response to "Information Request II".

The Ombudsman's observations

593. Regarding "Information Request I", LD confirmed that each unit under LD had compiled its own statistics and records of overtime hours, overtime allowance and compensatory time-off hours of its staff, and that the Finance Registry of LD had kept monthly records of overtime allowance by individual units. Nevertheless, LD still had to deploy substantial resources to check and consolidate the records of more than 200 work units in the past two years (i.e. more than 4 800 records) if it had to provide the complainant with all the records exactly as they were according to paragraph 1.13 of the Code. The Office of The Ombudsman (the Office) did not consider there was so much public interest at stake that warranted the deployment of substantial resources from LD to provide the information to the complainant. LD therefore refused "Information Request I" by citing paragraph 2.9(d) in Part 2 of the Code. The Office considered it reasonable to do so.

594. Regarding "Information Request II", the complainant indicated that he requested all the information on the overtime work undertaken by staff of LD from 1 January 2016, including but not limited to circulars, rules, guidelines, minutes of meetings, reports and data. LD considered the complainant's request unspecific and too broad in scope.

595. Regarding the data on overtime work undertaken by staff of LD in "Information Request II", the Office believed LD could provide the information to the complainant considering that LD's computerised accounting system had recorded the total amount of overtime allowance for staff of LD. The Office therefore took the view that LD should notify the complainant in "Reply Letter B" that the total amount of overtime allowance for all staff of LD could be provided, while reiterating that the overtime allowance could not reflect the actual situation and data of overtime work undertaken by the staff of LD. It should leave it to the complainant to decide whether or not he still wanted to obtain the information.

596. As to the information requested by the complainant in "Information Request II" concerning the overtime work undertaken by the staff of LD, including items related to the overtime work undertaken by the staff of LD, such as circulars, rules, guidelines, minutes of meetings, reports, data, etc., LD really had to deploy substantial manpower to search and then consider case by case which part of the contents did not involve personal information, internal discussion, impact on operation, etc. before providing the information to the complainant. The Office considered that

instead of stating that the complainant's request was unspecific and too broad in scope, LD could indeed decline the complainant's access to such information by citing paragraph 2.9(d) in Part 2 of the Code.

597. Considering that the complaint was partially substantiated, the Office urged LD to –

(a) consider providing to the complainant information on the total amount of overtime allowance for all staff of the Department; and

(b) take reference from this case and handle the public's requests for information more appropriately in future.

Government's response

598. LD accepted the Office's recommendations.

Recommendation (a)

599. LD sent an email to the complainant in October 2018 advising him of the total amount of overtime allowance for all its staff from 2016 to 2018. The complainant subsequently requested LD to further provide yearly breakdowns of the total amount of overtime allowance, as well as internal guidelines on the control and administration of overtime work. LD also disclosed the information to him.

Recommendation (b)

600. LD will continue to adhere strictly to the principles of the Code and relevant guidelines and handle the public's requests for information appropriately in accordance with established procedures.

Land Registry

Case No. 2017/5044 – (1) Wrongly registering a document against a property on the land register; (2) Failing to notify the complainant, i.e. the property owner concerned, of the application for registering the document; and (3) Delay in cancelling the registration of the said document from the land register

Background

601. Mr. A and his wife (collectively the complainants) claimed that they had been the joint owners of a property (the Property) which was their residence since 2003. In June 2013, Mr. A's father instructed his solicitors to issue a letter (Letter A) claiming that he was the beneficial owner of the property and Mr. A held the property as a trustee only. In the same month, Mr. A instructed his solicitors to issue a letter to his father's solicitors denying the allegation as stated in Letter A.

602. In June 2017, the complainants' application to a bank for re-financing the mortgage of the Property was rejected. According to the understanding of the complainants, the bank rejected their application because Letter A was delivered to the Land Registry (LR) for registration in June 2013. In response to the complainants' enquiry, LR's staff acknowledged that there was impropriety about Letter A, but LR could not cancel the registration record of Letter A.

603. In December 2017, the complainants complained to the Office of The Ombudsman (the Office) against LR for –

(a) improperly registering Letter A;

(b) not notifying them of the registration of Letter A; and

(c) delay in cancelling the registration record of Letter A.

The Ombudsman's observations

Allegation (a)

604. LR explained that Letter A was an instrument presented by Mr. A's father unilaterally claiming an interest in other person's (i.e.

Mr. A's) property, but not a land-related instrument of action or proceedings. Letter A was not considered an instrument affecting interests in land and thus did not comply with the registration requirements. LR therefore returned Letter A and its memorial to the lodging solicitors (the Solicitors) for clarification and follow-up actions (including consideration of withdrawing Letter A from registration). Concurrently, a remark "暫緩註冊 (REGISTRATION WITHHELD)" was added to the entry of Letter A in the "deeds pending registration" section of the land register (the register) of the Property per statutory requirements. Letter A had not been registered.

605. Having considered the relevant provisions of the Land Registration Ordinance (LRO) (Cap. 128) and the Land Registration Regulations (LRR) (Cap. 128A) as well as the entry of Letter A in the register of the Property, the Office confirmed that LR had not registered Letter A.

606. LR, in entering Letter A and its memorial in the "deeds pending registration" section of the register of the Property to record that Letter A had been lodged for registration but was withheld from registration, acted in accordance with the statutory provisions. There was no malpractice on the part of LR.

607. The Office concluded that Allegation (a) was unsubstantiated.

Allegation (b)

608. The Office's analysis was that under the existing law, LR was not required to inform the relevant property owner of the lodgement of an instrument for registration against a property. Property owners who wished to know if any instrument had been lodged for registration against their properties may subscribe to the "e-Alert" Service[3] launched in July 2015. Being a subscriber of the "e-Alert" Service, the property owner would receive an email alert from LR upon lodgment of any instrument with LR for registration against his property.

609. Based on the analysis in the paragraph above, the Office concluded that Allegation (b) was unsubstantiated.

[3] "E-Alert" Service has been renamed as "Property Alert" with effect from 28 January 2019.

Allegation (c)

610. The Office commented that LR was not empowered to remove the entry of Letter A from the land register. According to LR's records, since Letter A was considered not acceptable for registration, LR had repeatedly contacted the Solicitors to follow up on the case. However, there was no request made by the Solicitors nor a court order demanding the withdrawal of Letter A from registration. Hence, LR could not cancel the relevant entry of Letter A from the register simply based on the request made by the complainants.

611. The Office concluded that Allegation (c) was unsubstantiated.

612. Overall speaking, the Office considered the complaint unsubstantiated but made the following recommendations to LR –

(a) the Office noted that when LR withheld Letter A from registration in accordance with Regulation 15 of the LRR and added a remark to the relevant entry on the land register concerned, the wording used was "暫緩註冊"[4] instead of "中止註冊"[5] in the provision of the LRR. The Ombudsman opined that "暫緩註冊" might mislead searchers that the instrument concerned would be registered eventually. As such, the Office recommended that the wording "中止註冊" in the provision of LRR should be adopted instead of "暫緩註冊"in future in the remark for the entry of any withheld instrument in the register so as to clearly and accurately reflect its status; and

(b) the Office recommended LR to step up the promotion of "e-Alert" Service.

Government's response

613. LR accepted the Office's recommendations and follow-up actions have been carried out.

[4] 暫緩註冊: registration postponed
[5] 中止註冊: registration withheld

Recommendation (a)

614. This recommendation has been implemented with effect from 23 March 2019.

Recommendation (b)

615. This recommendation has been implemented. In addition to promoting the "e-Alert" Service through the existing channels, LR has enhanced the service (including introducing a one-off subscription charge for the service until a change of ownership of the property concerned and accepting postal applications for subscription to the service) and renamed the service as "Property Alert" on 28 January 2019 to highlight the features and benefits of the service. At the same time, LR has stepped up publicity for the service including broadcasting a radio Announcement in the Public Interest (API), releasing a blog post by the Secretary for Development together with a short video featuring the "Property Alert" service, and displaying posters and distributing leaflets at the Consumer Advice Centres of the Consumer Council. In addition, LR has publicised the service overseas through the Hong Kong Economic and Trade Offices and member associations of the Federation of Hong Kong Business Associations Worldwide to enable Hong Kong property owners residing outside Hong Kong to learn about the Service. To further publicise the service to the public, a televised API on "Property Alert" was launched on 19 July 2019.

Lands Department

Case No. 2018/0388(I) – Delay in handling a request for information concerning illegal occupation of Government land

Background

616. Allegedly, on 6 January 2017, the Lands Department (LandsD) posted up a notice (Statutory Notice) pursuant to the Land (Miscellaneous Provisions) Ordinance (Cap. 28), requiring the complainant to cease its unlawful occupation of a piece of Government land (the G land) by 24 February 2017.

617. On 23 February 2017, the complainant's representative (Company A), made a request under the Code on Access to Information (the Code) to LandsD for a copy of all correspondence with regard to the alleged unlawful occupation of the Government land by the complainant. On 28 March 2017, LandsD provided Company A with some documents. On 18 April 2017, Company A wrote to LandsD seeking further information. However, it was not until 5 January 2018 that LandsD advised Company A that it would provide further information.

618. On 30 January 2018, the complainant complained to the Office of The Ombudsman (the Office) against LandsD for failing to provide in a timely manner the information it wanted.

The Ombudsman's observations

Company A's first information request

619. On 23 February 2017, Company A made a request to LandsD for a copy of all correspondence related to the alleged unlawful occupation of the G land by the complainant. On 6 March 2017, Company A provided LandsD with an authorisation letter from the complainant stating that Company A, as the complainant's authorized representative, would handle all matters on its behalf. LandsD then proceeded to process Company A's request.

620. LandsD considered the following correspondence relevant to Company A's request –

(a) 11 letters between LandsD and the complainant or its agents spanning from August 2012 to February 2017; and

(b) two Statutory Notices posted on 27 December 2012 and 6 January 2017 respectively.

621. On 22 March 2017, LandsD wrote to inform Company A that the requested information could be provided to them at a charge of $35.50. After settling the payment, Company A was provided with the information on 28 March 2017. LandsD considered that Company A's first request in accordance with the Code has been handled.

Company A's second information request

622. Company A wrote to LandsD on 18 April 2017, pointing out that certain structures on the G land had been erected as early as in 1960. It requested LandsD to "make an effort to identify those information associated with" the complainant's unlawful occupation of the Government land as alleged.

623. On 21 April 2017, LandsD wrote to Company A, claiming that a copy of all relevant correspondence had already been provided to Company A on 28 March 2017.

624. On 29 April 2017, Company A wrote to LandsD, pointing out that the information provided by LandsD on 28 March 2017 was limited to the period between August 2012 and February 2017.

625. On 5 May 2017, LandsD wrote to ask Company A to specify what information it would like to have.

626. During the telephone conversation with LandsD on 16 May 2017, Company A agreed that correspondence/records spanning from 1992 to 2017 should suffice.

627. Subsequently, LandsD examined all relevant file records and found that an ex-Government Land Licence and some squatter control records were relevant to Company A's request.

628. Meanwhile, LandsD sent Company A two interim replies on 16 May and 12 July 2017 respectively. In the second interim reply, LandsD explained that it was seeking legal advice on Company A's request.

629. On 5 January 2018, LandsD wrote to inform Company A that the requested information could be provided at a charge of $15.60. After settling the payment, Company A was provided with the requested information on 11 January 2018. As regards Company A's second request finalised on 16 May 2017, LandsD provided the information to Company A on 11 January 2018, i.e. a lapse of some eight months.

630. LandsD found it necessary to take time to clear any legal implication arising from the provision of the information to Company A, since LandsD was considering prosecution action against the complainant. LandsD considers that it was not unreasonable or improper to take a cautious approach and seek legal advice on Company A's second request. The Department quoted paragraphs 1.2.1 and 2.6.1 of the Guidelines on Interpretation and Application of the Code (the Guidelines) to support its viewpoint.

631. LandsD took 16 days to respond to Company A's first request, counting from the date of the complainant's authorisation of Company A as its representative, which was well within the general 21-day time-frame stipulated in the Code.

632. As regards Company A's second request, LandsD took some eight months, which was a far cry from the 51-day maximum time-frame specified by the Code.

633. LandsD attributed that to its intention to take prosecution action against the complainant and hence the need to seek legal advice. However, in the opinion of the Office, the information in question, i.e. an ex-Government Land Licence and some squatter control records, does not appear to have any implication at all on LandsD's intended prosecution against the complainant for unlawful occupation of the Government land. In other words, LandsD could have responded to Company A's second request much earlier. The so-called cautious approach has resulted in an unjustified long wait by Company A.

634. The Office considered this complaint partially substantiated and recommended that LandsD should take reference from this case and advise staff not to unnecessarily spend time seeking legal advice unless clearly warranted.

Government's response

635. LandsD accepted the Office's recommendation and has advised its staff not to unnecessarily spend time seeking legal advice unless clearly warranted. LandsD has conducted and will continue to conduct routine briefings or seminars for its staff on the handling of requests for access to information. The last briefing was conducted in December 2019 and the upcoming briefing is scheduled for early 2020.

Lands Department

Case No. 2018/0659(I) – Refusing to provide squatter inspection records

Background

636. The complainant was a reporter from a media organisation. He lodged a complaint with the Office of The Ombudsman (the Office) against the Lands Department (LandsD) on 21 February 2018.

637. In November and December 2017, the complainant wrote a few times to LandsD to request and LandsD provided, details of site inspection by two regional Squatter Control Offices (SCO A and SCO B) of LandsD, including patrol records of the patrol teams on two days in November 2017 (Date A and Date B), which disclosed the staff's departure time (setting off by car), the time they returned to their offices, the patrol routes and the time they arrived at patrol check-points for card-punching. The media organisation the complainant worked for broadcast its in-house production, revealing the information that LandsD had provided, and questioning whether LandsD patrol was effective in squatter control.

638. On 2 January 2018, the complainant submitted an application to LandsD under the Code on Access to Information (the Code) for access to patrol records of the patrol teams of SCO A and SCO B on four days from October to November 2017 (inclusive of Date A and Date B). Such records included the staff's departure time (setting off by car), the time they returned to their offices and the card-punching time at various patrol check-points (collectively referred to as the information requested). On 24 January 2018, LandsD rejected the complainant's request in writing on grounds that the disclosure of such information might prejudice enforcement and detection of offences (paragraphs 2.6(a) and 2.6(e) of the Code).

639. The complainant criticised LandsD for unreasonably refusing to provide the information requested on the following grounds –

(a) Similar information was already made public in the Audit Report published in April 2017;

(b) The information requested was patrol records in the past (certain days from October to November 2017); he could not see how such information would "affect the administration of justice and investigation". As a matter of fact, LandsD had provided part of the relevant information, at his request, in November 2017; and

(c) LandsD should disclose the information requested because the use of public money and hence public interests were involved.

The Ombudsman's observations

640. The Office considered that the media plays a role in monitoring the Government. Hence government departments should endeavor to be co-operative and responsive. The request for access to information by the complainant, a media worker, to facilitate his understanding of LandsD's squatter control work and its effectiveness is obviously a matter of public interest. The Office was of the view that LandsD should provide the complainant with the information as far as possible, unless it has sufficient reasons to justify its rejection. LandsD refused to provide the complainant with the information requested by quoting paragraph 2.6(a) ("Information the disclosure of which would harm or prejudice the administration of justice") and paragraph 2.6(e) ("Information the disclosure of which would harm or prejudice the prevention, investigation and detection of crime and offences") of the Code. The Office considered that LandsD had not explained specifically how the disclosure of the information requested would harm or prejudice the administration of justice or law enforcement. The information requested was only patrol records of LandsD's patrol teams on certain days in the past (the department had already provided him with part of the information earlier). Such records neither disclose action plans to be taken, nor do they reveal any details of the irregularities of individual squatter structures, LandsD's inspection results and/or planned control actions. The Office had doubts as to whether it is possible for the complainant "to compile some information through consolidating the material at hand and hamper the effective law enforcement of LandsD", even if the information is disclosed to the complainant.

641. Furthermore, the Office considered that, regardless of any request by the complainant for access to information, if LandsD aims for effective law enforcement against unauthorised squatter structures, its should adopt a flexible and adaptive approach in planning patrol check-points, patrol routes, patrol schedules and so on in order to prevent non-compliant parties from being aware of the SCOs' enforcement arrangements in advance.

Even if LandsD provides the complainant with the information requested, the effectiveness of the SCOs' law enforcement should not be undermined as the information has nothing to do with their patrol strategy.

642. Moreover, the media organisation (that the complainant worked for) had already published related information before. There is no indication that the administration of justice or law enforcement by LandsD has thus been harmed or prejudiced.

643. Overall speaking, the Office considered LandsD's justifications insufficient. Hence, the complaint was substantiated.

644. The Office recommended that LandsD should re-examine the complainant's request for access to information, and should furnish him with the information requested unless there are other reasons under Part 2 of the Code that can justify its refusal to disclose such information.

Government's response

645. LandsD accepted the Office's recommendation. After re-examining the case, LandsD has furnished the complainant with the information requested, considering the squatter control work conducted by SCOs a matter of public interest and on the basis that enforcement actions of the SCOs would not be adversely affected.

Lands Department

Case No. 2018/2165(I) – Refusing to disclose the land premium and administrative fee for land use modification approved by the Department through a letter of no objection

Background

646. According to the complainant, on 12 April 2018, she approached the Lands Department (LandsD) to enquire about the staging of concerts by a lot owner at its public car park (the car park). On 16 April, she requested to obtain details of the Letter of No Objection concerning the concerts under the Code on Access to Information (the Code), including the waiver granted to the applicant for change of land use; the dates, time and site area in respect of the concerts at the car park; and the amounts of land premium and administrative fee (the fees) payable by the relevant lot owner.

647. On 4 June, LandsD wrote to the complainant, indicating that the District Lands Office concerned had issued a Letter of No Objection in the form of a one-off instrument, allowing the relevant lot owner to stage the concerts from 25 April to 17 May 2018 at the car park with an area of approximately 41 180 square metres. However, by citing the reasons contained in paragraph 2.14(a) ("Third Party Information") and paragraph 2.16 ("Business Affairs") of the Code, LandsD considered that information about the fees should be withheld from the complainant because it involved commercially sensitive information of the relevant lot owner, the disclosure of which would harm the competitive or financial position of that lot owner. Besides, the relevant lot owner had refused to disclose information about the fees, and hence it should be kept confidential on the explicit or implicit basis.

648. The complainant complained to the Office of The Ombudsman (the Office) on 5 June 2018, alleging that LandsD had unreasonably refused to provide information about the fees. Her grounds were as follows –

(a) The complainant argued that LandsD, as a party to the lease enforcing lease conditions, has the powers and responsibilities to approve applications for short-term change of land use and determine the amount of the fees. Information about LandsD's

approval for such applications is not third party information, and neither any confidentiality principle nor confidentiality consensus exists. The complainant pointed out that in general when LandsD approved an application for short-term change of land use by way of a temporary waiver, such waiver letter will be registered at the Land Registry and is neither confidential nor sensitive commercial information. However, on this occasion, LandsD approved the relevant lot owner's application through a Letter of No Objection, making it unnecessary to register the waiver conditions and the amount of the fees at the Land Registry. This arrangement violated the principles of transparency and open accountability of the Government; and

(b) The complainant considered that information about the fees was contractual information between the Government and the lease holder, which did not constitute commercially sensitive information. In her view, LandsD only subjectively thought that releasing such information would have a negative impact on LandsD and the relevant lot owner without providing any justifications. The complainant also pointed out that the Government had handled tenancies of the Central Harbourfront Event Space in an open and transparent manner, so that the public could play a monitoring role. The potential interests of the relevant lot owner arising from the staging of the concerts at the car park should be monitored by the public as well. The complainant believed that LandsD should disclose information about the fees, otherwise the public would not be able to monitor the matter.

The Ombudsman's observations

Allegation (a)

649. LandsD explained that at the complainant's request for information, it had written to ask whether the relevant lot owner would consent to the disclosure of information. The lot owner expressed consent to the disclosure of the dates, time and site area involved, but not the fees, in respect of the concerts. The lot owner considered that the fees were sensitive commercial confidences under paragraph 2.16 of the Code.

650. After the Office commenced investigation, LandsD had written to the lot owner again, which maintained its stance that the fees were sensitive commercial confidences and disagreed with the disclosure of the fee information.

651. In addition, LandsD sought legal advice regarding the complainant's complaint and her arguments. Having considered all information and legal advice, LandsD admitted that there might not be sufficient justifications to support that information about the fees was third party information under paragraph 2.14(a) of the Code. LandsD also agreed that there might not be any explicit or implicit agreement or understanding between LandsD and the lot owner for keeping such information confidential.

652. However, LandsD considered that the fee information belonged to commercial confidences under paragraph 2.16 of the Code. The disclosure of the fees might undermine the capability of the relevant lot owner in negotiating similar business activities with its business partners, hence possibly putting the lot owner in a disadvantaged position when organising similar commercial activities in the future.

653. LandsD also said that it had considered the factor of public interest. LandsD considered that there was no evidence to conclude that the public interest arising from the disclosure of the fee information would outweigh any harm that might be caused to the lot owner; thus disclosure was not justified.

654. As regards the complainant's statement that in general when LandsD approved an application for short-term change of land use by way of a temporary waiver, such waiver letter will be registered at the Land Registry, LandsD clarified that Short-term Waiver Letters are applicable to undertakings that span a relatively longer period of time, while Letters of No Objection are applicable to one-off activities. In case of permanent modifications to lease conditions, such as land exchange transactions or lease modification transactions, generally LandsD would send the relevant land instruments to the Land Registry for registration. LandsD generally did not send approvals or waivers of one-off or momentary nature to the Land Registry for registration.

655. As to the tenancies of the Central Harbourfront Event Space cited by the complainant, LandsD pointed out that the two pieces of government land at Lung Wo Road and off Piers 9 and 10 at the Central Harbourfront were short-term tenancy (STT) sites let out through open tenders. In these

two STT open tenders, the tenderers had agreed that, after the award of the tenders, the Government may announce the tender results in response to public or media enquiries. As the two sites let out by open tenders were government land while the car park concerned was situated on private land, the nature of the land instruments issued were different and thus not comparable.

656. The terms of the Letter of No Objection are prescribed upon discussion and mutual agreement between Lands D as the Government's agent and the lot owner, and LandsD has final say on the fee amount. As LandsD is the owner and the holder of such information, such information is not held or provided by the lot owner (a third party). Generally speaking, the content of a contract between a government department and a third party should not be regarded as information acquired from the third party. The Office considered that the information contained in the Letter of No Objection should not be regarded as third party information under the Code. Therefore, it was inappropriate for LandsD to withhold information about the fees from the complainant in the first place by citing the reasons under paragraph 2.14(a) of the Code. Indeed, upon seeking legal advice, LandsD also agreed that the reasons under paragraph 2.14(a) were not applicable.

Allegation (b)

657. LandsD indicated that the fees fell into the category of commercial confidences under paragraph 2.16 of the Code. The Office accepted this point. Lands D held the view that the disclosure of such information might possibly harm the competitive position of the relevant lot owner and that there was no compelling public interest which necessitated such disclosure. The Office considered such a view was not unreasonable under the circumstances of this case (that it was not specified in advance that such information might be disclosed). After all, the staging of the concerts by the relevant lot owner at the car park was one-off in nature, which was different from the situation of renting government land on a longer-term basis.

658. To conclude, the Office considered it acceptable for LandsD to withhold information about the fees from the complainant by citing the reasons under paragraph 2.16 of the Code, but citing paragraph 2.14(a) of the Code as one of the reasons for rejecting the request of the complainant at the beginning was inappropriate. Hence, the complaint against LandsD was unsubstantiated but there were other inadequacies found.

659. Nevertheless, since the fees payable in respect of a temporary waiver can be made available to the public by sending the short-term waiver letters to the Land Registry for registration, the Office did not see any justifications why LandsD cannot specify that similar information contained in a Letter of No Objection may be disclosed in future cases.

660. The Office urged LandsD to –

(a) consider including new terms in Letters of No Objection to specify that the information therein (including the fees) can be made public by the Government; and

(b) draw a lesson from this case and remind its staff of the importance of accurate understanding and application of the Code.

Government's response

661. LandsD accepted the Office's recommendations and has taken the following actions.

Recommendation (a)

662. Upon review, when issuing Letters of No Objection and other approval instruments of a short-term nature in future, if collection of fee(s) is involved, LandsD will incorporate appropriate terms to disclose the content of relevant instruments (including the relevant fee(s)) to third parties by delivering the instruments to the Land Registry for registration. Members of the public can inspect the relevant information at the Land Registry.

Recommendation (b)

663. LandsD has reminded its staff of the importance of accurate understanding and application of the Code and will continue to regularly remind its staff of the content of the Code.

Lands Department

Case No. 2018/2249(I) – Refusing to revise the figures previously provided as per the complainant's request

Background

664. According to the complainant, since September 2017, he has been asking the Lands Department (LandsD) for statistics on "non-commercial publicity materials" handled by respective District Lands Offices (DLOs) on a monthly basis , including –

(a) the number of substantiated complaint cases involving "non-commercial publicity materials" (Data (a)); and

(b) the number of unauthorised publicity materials (Data (b)).

665. As reported by one of the DLOs concerned, Data (a) was 10 while Data (b) was zero in March 2018. The complainant considered the two figures unreasonable and thus made an enquiry with LandsD. On 21 May 2018, LandsD replied that Data (b) was zero because no unauthorised publicity materials had been identified during the joint operations conducted by the DLO concerned and the Food and Environmental Hygiene Department in March 2018.

666. The complainant sent an email to LandsD on the same day and requested a review of Data (b) as the information he intended to obtain was the number of unauthorised publicity materials identified by respective DLOs during investigation into "complaints about non-commercial publicity materials", instead of the number of unauthorised publicity materials identified during their joint operations. However, in LandsD's reply to the complainant on 11 June 2018, the explanation given in the paragraph above was repeated and amendment to the data provided was refused. The complainant is therefore dissatisfied and lodged a complaint with the Office of The Ombudsman (the Office) on the same day.

The Ombudsman's observations

667. LandsD has outsourced the management of "non-commercial publicity materials" displayed on roadside designated spots. The

contractor is required to keep statistics reports and submit them to the respective DLOs.

668. LandsD indicated that the contractor responsible for the management of "non-commercial publicity materials" had not compiled statistics for Data (a) and Data (b) requested by the complainant, and the information was provided to the complainant after collating available information.

669. LandsD further explained that the subject DLO considered Data (b) to refer to the number of publicity materials eventually removed under substantiated complaints.

670. The Office considered that although LandsD's contractor did not have readily available statistics on the requested Data (a) and Data (b), it was indeed not difficult for LandsD to provide such information to the complainant. Furthermore, the request made by the complainant was fairly clear and precise and he had also clarified with LandsD the information he requested. The Office was of the view that, unless there are any specific reasons, LandsD's non-provision of rectified Data (b) goes against the spirit of the Code on Access to Information (the Code), which is to provide members of the public with their requested information as far as possible, unless there are specific reasons for not doing so.

671. The Office therefore considered this complaint substantiated. It opined that LandsD should provide the complainant with the correct figures of Data (b) covering March 2018 in respect of the Kowloon West District.

672. In its reply to the Office on 1 November 2018, LandsD indicated that it had accepted the Office's recommendation and had already provided the complainant with rectified Data (b) covering March 2018 in respect of the Kowloon West District.

673. The Office considered that this was a simple enquiry. Yet LandsD failed to handle it properly, which revealed the insufficient knowledge and inaccurate understanding of staff about handling requests for access to information. The Office recommended LandsD to take this case as an example and point out the inadequacies identified to all staff responsible for handling enquiries, so that they could draw a lesson from this case and avoid making the same mistakes again.

Government's response

674. LandsD accepted the Office's recommendation and has, in light of this case, issued a memo on 5 March 2019 to all DLOs reminding all officers to observe the Code and the applicable departmental guidelines when handling enquiries and requests for information. Moreover, in order to handle similar access to information requests more efficiently in future, LandsD has formulated a standard form for DLOs to fill out the necessary data to facilitate the collection and consolidation of the data of various DLOs and to avoid internal miscommunication.

Lands Department

Case No. 2018/2437 – Failing to take enforcement action against illegal occupation of Government land

Background

675. On 30 December 2016, the complainant lodged a complaint with the Office of The Ombudsman (the Office), indicating that the owner of a unit on the ground floor of a house in the New Territories (House A) had been occupying the government land in front of the unit (the site) with flower pots, but the Lands Department (LandsD) failed to take effective law enforcement action. On 16 March 2017, the Office completed its inquiry and urged LandsD to closely follow up the case, strengthen evidence collection and prosecute the offender, so as to put an end to the unlawful occupation of government land.

676. On 25 June 2018, the complainant lodged another complaint with the Office against LandsD since LandsD had failed to tackle the said unlawful occupation of government land.

The Ombudsman's observations

677. In January 2017, LandsD conducted a site inspection and found that some miscellaneous objects had been placed on the site. LandsD posted statutory notices under the Land (Miscellaneous Provisions) Ordinance (the Ordinance) (Cap. 28), requiring cessation of the unlawful occupation by a deadline. As the situation had persisted after the deadline, LandsD arranged a contractor to remove the objects concerned in April 2017.

678. To ascertain the identity of the unlawful occupier for initiating prosecution, LandsD issued letters to residents in the subject neighbourhood between April and June 2017 to seek any relevant information, but no positive information could be gathered.

679. In October 2017 and January 2018, LandsD conducted site inspections again, it was found that the site was no longer being occupied unlawfully.

680. While it seemed that the ground floor unit of House A benefited from the unlawful occupation, LandsD was unable to prove beyond reasonable doubt that the owner of the ground floor unit was the unlawful occupier, no prosecution could therefore be initiated against the person concerned.

681. LandsD conducted another site inspection in July 2018, during which miscellaneous objects were found to be placed on the site again. LandsD would take appropriate land control actions (including posting statutory notices) and initiate prosecution if sufficient evidence was available.

682. The Office considered that LandsD did conduct site inspections from time to time and took enforcement actions based on the inspection results. When the unlawful occupation had recurred after a period of time, LandsD took follow-up actions as well. However, the measures taken by LandsD, namely repeatedly posting statutory notices and removing the miscellaneous objects, were mere temporary band-aid measures that did not tackle the problem at root.

683. Even though no prosecution could be initiated against any person as the identity of the unlawful occupier remained uncertain, LandsD should consider taking more effective actions, such as removing the fence between the platforms in front of House A and its adjoining House B, such that House A could no longer fence off the front platform for its own use.

684. In conclusion, the Office considered that there were inadequacies in LandsD's s actions; the complaint was therefore partially substantiated.

685. The Office urged LandsD to –

(a) take control actions as soon as possible when unlawful occupation of the site recurs;

(b) remove the fence on the site; and

(c) collect evidence as far as possible, so that the unlawful occupier of the site will be subject to legal sanction.

Government's response

686. Lands D accepted the Office's recommendations and has taken the following actions.

Recommendation (a)

687. Land control actions were taken in June 2019 against re-occupation of the government land involving placement of miscellaneous articles on unleased land which blocked the opening between the parapet wall and the railing. A notice under section 6(1) of the Ordinance was posted on site requiring the unlawful occupation to cease before 26 June 2019. The unlawful occupation had ceased upon expiry of the notice, no prosecution could therefore be initiated. LandsD will closely monitor the situation and take land control actions where necessary to combat any unlawful re-occupation of government land.

Recommendation (b)

688. Under the land lease of House A, the relevant lot owner is required to, other than constructing his house on the site, conduct site formation and build a retaining wall. As the fence mentioned in the Office's recommendation may be structurally connected to the retaining wall, LandsD will not remove the fence. LandsD will closely monitor the situation and take land control actions where necessary to combat any unlawful re-occupation of government land.

Recommendation (c)

689. LandsD would try its best endeavours to collect evidence and discharge its duties under the Ordinance.

Lands Department

Case No. 2018/4352 – Failing to effectively resolve the illegal occupation of Government land by the wooden hoardings of a shop

Background

690. According to the complainant, a shop unit (the shop unit) was originally leased to a bank. Since the bank's relocation in June 2018, the shop unit had been left vacant and fenced off with hoardings. The enclosed area had exceeded the permitted area of the shop unit, thus occupying part of the shop-front pavement.

691. On 16 August 2018, the complainant complained to the Lands Department (LandsD) about the aforesaid unlawful occupation of Government land via 1823. LandsD responded that the case fell outside its purview and would be referred to the Buildings Department (BD).

692. On 11 September 2018, BD informed the complainant their site inspection detected no obvious danger posed by the hoardings, but an advisory letter was served to the shop owner requiring his early removal of the subject hoardings in view of possible obstruction to pedestrians. The complainant sought BD's expeditious action to address the problem multiple times but the problem remained.

693. In its reply dated 6 November 2018 to the complainant, BD confirmed after several site inspections that no building works were being carried out inside the shop unit. Considering that the occupation of Government land in question did not fall within its purview, the department referred the case to LandsD for follow-up.

694. On 7 November 2018, LandsD notified the complainant in writing that statutory notices had been posted on the hoardings on 1 November, requiring the occupant to cease occupation of the land before 15 November; otherwise, land control actions would be taken.

695. The complainant criticised LandsD for having shirked its responsibilities by referring the case to BD upon the receipt of his complaint, without making the effort to conduct any site inspection beforehand.

The Ombudsman's observations

696. The Office of The Ombudsman (the Office) considered it not improper for LandsD to have referred the case of pedestrian obstruction caused by hoardings to BD for follow-up. As such, the complainant's allegation that LandsD had shirked its responsibilities by referring the case to BD without making the effort to conduct any site inspection beforehand was unsubstantiated.

697. Notwithstanding the above, the hoardings are undoubtedly occupying Government land and it is the responsibility of LandsD instead of BD to address the problem. If BD can act to remove the hoardings, the problem of Government land occupation will naturally be resolved and LandsD will not be required to step in. Confined by its jurisdiction, BD, however, may not be able to take action against obstruction to pedestrians by the hoardings. The problem will remain unresolved if LandsD does not take over the case.

698. Therefore, the Office considered that BD is obliged to notify LandsD of the outcome of its follow-up (i.e. it will not order removal of the hoardings), so that LandsD may consider whether and how to follow up. In the meantime, LandsD should have checked with BD the position of the case in a timely manner, so as to determine whether to take over the case. Based on the above, the Office considered that there were indeed inadequacies in LandsD's follow-up although the complaint was unsubstantiated.

699. The Office advised LandsD to remind its staff that when handling similar cases in the future (such as hoardings occupying the pavement in the present case), although the case may first be referred to BD for follow-up, it is necessary to keep track of the progress and take over the case where necessary.

Government's response

700. LandsD accepted the Office's recommendation. LandsD will enhance its communication with BD in order to improve the procedure of handling similar cases in future, and has reminded its staff that they should keep track of BD's investigation progress and result in a timely manner so as to consider whether to take appropriate land control action.

Leisure and Cultural Services Department

Case No. 2018/0088 – Unreasonably allowing private coaches to teach learner swimmers in public swimming pools, causing obstruction to other swimmers

Background

701. The complainant filed a complaint to the Office of The Ombudsman (the Office) against the Leisure and Cultural Services Department (LCSD), alleging that LCSD had unreasonably allowed private coaches to teach learner swimmers in public swimming pools for personal gains, occupying the swimming lanes and causing obstruction to other users. However, LCSD's staff did not stop the persons involved in the activities. The complainant queried whether LCSD had put in place any mechanism or adopted any measures to regulate private coaching activities.

The Ombudsman's observations

702. LCSD has clear justifications for allowing persons (including private coaches who charge fees) to teach learner swimmers in public swimming pools. The Office is of the opinion that the relevant policy is consistent with the LCSD's objective and responsibility of promoting swimming, and considers it justifiable. That said, the Office takes the view that there is a need for LCSD to establish a mechanism to divert users and take regulatory measures to maintain order in swimming pools.

703. The Office understands that to invoke section 5 of the Public Swimming Pools Regulation (Cap. 132BR) to allow coaching activities to be carried out within the precincts of a public swimming pool, prior written approval must be obtained from the Director of Leisure and Cultural Services (the Director).

704. Notices are displayed at appropriate locations in the swimming pools with designated "Public Coaching Area", to indicate that written approval has been obtained from the Director for coaching activities.

705. However, in swimming pools without designated "Public Coaching Area" (e.g. Kwun Tong Swimming Pool), no notice is displayed in the "Public Swimming Area", where coaching activities are allowed, to

clearly indicate that approval has been obtained from the Director for coaching activities. The public is hence unaware of the granting of written approval by the Director. The Office saw the need for LCSD to make rectification.

706. The Office considered the complaint unsubstantiated but other inadequacies found.

707. The Office recommended that LCSD consider clearly displaying notices at prominent locations with regard to allowing coaching activities in "Public Swimming Area" so as to indicate that written approval has been obtained from the Director and ensure that swimmers are well informed of the arrangement.

708. LCSD has all along been emphasising that coaching activities are allowed in public swimming pools (whether the activities are fee-charging or not) for promoting swimming as long as these activities are carried out in an orderly manner and do not cause nuisance to other swimmers. In swimming pools without designated "Public Coaching Area" (e.g. Kwun Tong Swimming Pool), LCSD has all along allowed members of the public to teach learner swimmers in the "Public Swimming Area" of the swimming pool in an orderly manner as long as these activities do not cause nuisance or obstruction to others.

709. The Office is of the view that LCSD should consider designating a "Public Coaching Area", or prohibiting fee-charging coaching activities in "Public Swimming Area" if LCSD considers that allowing such activities to be carried out in "Public Swimming Area" would cause nuisance or obstruction to others. On the other hand, LCSD's notice can also clearly indicate that coaching activities must be carried out without nuisance or obstruction to others, otherwise staff of LCSD have the right to ask the persons concerned to leave the pool.

710. As for how to implement the recommendations of the Office, LCSD can consider seeking legal advice with a view to drawing up notice with appropriate choice of words and making the most suitable arrangement.

Government's response

711. LCSD accepted the recommendation of displaying notices in "Public Swimming Area" but has yet to seek legal advice and consolidate the recommendations put forward by stakeholders. Notices will be displayed in the "Public Swimming Area" of some swimming pools on a trial basis after drawing up the appropriate content.

Leisure and Cultural Services Department

Case No. 2018/2918 – (1) Unreasonably refusing to set up a register for recording the checking of venue users' eligibility for enjoying concessionary rates; and (2) Unreasonably requiring a venue hirer to give at least two days' prior notice for cancellation of bookings through a booking counter

Background

712. The complainant lodged a complaint with the Office of the Ombudsman (the Office) against the Leisure and Cultural Services Department (LCSD) for the following issues –

(a) In implementing the provision that "persons who are aged 60 or above are eligible for concessionary rates for booking facilities", LCSD did not set up a register for recording the checking of venue users' eligibility conducted by venue staff and insisted that it would not maintain one; and

(b) With regard to the notice period for "cancellation of booked facilities", LCSD's requirement for a hirer to cancel the booking through a booking counter two days prior to the date of using the facility is unreasonable. This requirement is also inconsistent with that of Leisure Link e-Services System where booking can be cancelled right before the start of the booked session.

The Ombudsman's observations

Complaint (a)

713. According to the statistics provided by LCSD, there were nearly 30 000 cases in 18 months where hirers were required to top up "the shortfall between the concessionary and normal rates" (the shortfall). Most of the cases (about 80%) involved hirers topping up the shortfall only after being checked and reminded by venue staff, which indicates that venue staff did conduct checking. LCSD had also explained not maintaining a "register" for the checking so as to avoid duplication in work processes and reducing service efficiency. The Office considered that LCSD's view was not unreasonable. Moreover, if a "register" is to be maintained to

record the "personal data" (such as name, age and Hong Kong Identity Card No., etc.) of venue users checked by staff, such "personal data" must be handled with due care in accordance with relevant legislation, let alone being made available for access and follow up on the checking work by members of the public. In view of this, there is no impropriety for LCSD not to maintain a register.

714. Yet, the Office identified inadequacies in the existing mechanism adopted by LCSD for regulating the abuse of "concessionary rates". According to Clause 13 of the "Conditions of Use of Recreation and Sports Facilities" ("Conditions of Use"), the hirer and all his/her partner(s) should be eligible for "elderly concessions" in order to enjoy concessionary rates for the use of facilities. The Office considered that hirers were obliged to ascertain that all of their partner(s) were eligible. In cases where hirers were found to have used facilities with their partner(s) who were ineligible for concessionary rates and LCSD had reason to believe that the hirers had breached the "Conditions of Use" intentionally, they should be treated as abuse of concessionary rates and consideration should be given to imposing penalties pursuant to Clause 12 or other effective provisions of the "Conditions of Use". LCSD's current practice fails to thoroughly check whether abuse of concessionary rates is involved and allows hirers to settle the matter simply by topping up "the shortfall between the concessionary and normal rates", which is too lenient with a serious lack of deterrent effect. Hirers may be induced to take chances by abusing the concessionary rates as they are only required to top up "the shortfall between the concessionary and normal rates" even if they are found to have breached the "Conditions of Use".

715. For cases in which the hirers had voluntarily topped up "the shortfall between the concessionary and normal rates", or the hirers has breached the "Conditions of Use" and abused the concessionary rates for the first time, the Office considered it reasonable for LCSD to allow the hirers to top up "the shortfall between the concessionary and normal rates" without imposing penalty. However, if a hirer is found to have breached the "Conditions of Use" even after being reminded by venue staff upon check-in, LCSD should consider it as a case of knowingly abusing the concessionary rates and impose relevant penalty.

716. To ensure hirers understand the relevant provisions of the "Conditions of Use" and ascertain that all of their partner(s) are eligible for concessionary rates, LCSD should take measures to require hirers to make a declaration, such as adding the declaration concerned in the "Sign-in Form" requiring their signature. If partner(s) of a hirer is/are found

ineligible for concessionary rate during patrol by venue staff, the declaration signed by the hirer can be used to prove that the hirer has knowingly abused the concessionary rates, with a view to eliminating the chance of the hirer making up excuses and denying responsibility.

717. To sum up, the Office considered that LCSD should review and step up the regulatory control over the abuse of the "concessionary rates" mechanism.

718. In addition, the Office considered that LCSD should review the procedural guidelines concerning the information collection and analysis of cases involving topping up "the shortfall between the concessionary and normal rates" so as to analyse whether abuse of concessionary rates is involved and take corresponding regulatory action, with particular regard to the following statistical breakdown –

(i) cases in which the hirers had topped up "the shortfall between the concessionary and normal rates" after being reminded by staff during sign-in;

(ii) cases in which partner(s) of the hirers were found ineligible for concessionary rates during patrol by staff and asked to top up "the shortfall between the concessionary and normal rates"; and

(iii) cases in which the hirers had topped up "the shortfall between the concessionary and normal rates" twice or more.

Complaint (b)

719. LCSD had explained that requiring "at least two days' notice" for cancellation of bookings through a "booking counter" was necessary to prevent booking counter staff from using relevant authority for personal gains. The Office opined that it was not unreasonable for LCSD to set the notice period having regard to actual operational needs.

720. On the other hand, the Office opined that as recreational and sports facilities were heavily subsidised by public funds and in keen demand, it would be a waste of facility resources if hirers failed to take up booked sessions even if they had paid the hire charges. LCSD must take effective measures to ensure facilities are put to optimal use. However, hirers are currently allowed to cancel booking through the computerised booking system or "Leisure Link" Self-service Kiosks at a very short notice (last minute before the booked sessions start). Hence, LCSD is

unable to release the sessions cancelled on ad-hoc basis for booking by members of the public but can only make "standby arrangements" instead, resulting in possible waste of facility resources which is unsatisfactory.

721. The Office opined that LCSD should review and consider advancing the notice period for cancellation of booking (i.e. not less than one day prior notice), so as to facilitate the implementation of its regulatory measures. Although advancing the notice period for cancellation of booking might bring inconvenience to hirers, The Ombudsman was of the view that the Government had to strike a balance between optimising the use of resources and providing convenience for the public in managing public facilities.

722. The Office considered the complaint unsubstantiated, but other inadequacies were found on the part of LCSD. It made the following recommendations to LCSD –

(a) review and strengthen the regulatory measures against and penalty level for cases involving ineligibility of partners of hirers for elderly concessions so as to more effectively prevent abuse of concessionary rates;

(b) review the procedural guidelines for collecting and analysing cases involving topping up "the shortfall between the concessionary and normal rates", in particular enhancing the analysis of statistical breakdown so as to facilitate the implementation of corresponding regulatory and follow-up actions; and

(c) review and consider changing the notice period for cancellation of booking to facilitate the implementation of regulatory measures.

Government's response

723. LCSD accepted the Office's recommendations and has taken the following actions.

Recommendation (a)

724. To further strengthen the regulatory control over abuse of concessionary rates by hirers, LCSD plans to revise the "Conditions of Use" and tighten the penalty for breaches of conditions of booking/use of

recreational and sports facilities by individual hirers. The revised "Conditions of Use" will require a hirer enjoying a concessionary rate to ascertain that his/her partner(s) is/are eligible for the concessionary rate and clearly spell out that if a hirer uses the facility with his/her partner who is ineligible for the concessionary rate, the hirer will be required to top up "the shortfall between the concessionary and normal rates" before using the facility, or else his/her partner will be refused the use of the booked facility. Hirers who are found to have used booked facilities with persons ineligible for concessionary rates during the use of facilities will be imposed a penalty for abuse of concessionary rates.

725. Apart from revising the "Conditions of use", the Government will also include the statement concerned in the Leisure Link facility booking webpage and "Sign-in Form" so as to remind hirers to comply with the "Conditions of Use". The improvement measures mentioned above are expected to be implemented in 2019-20.

Recommendation (b)

726. After the implementation of the improvement measures mentioned in Recommendation (a), cases involving ineligibility of partners of hirers for concessionary rates found during patrol by venue staff would be regarded as "abuse of concessionary rates" and topping up "the shortfall between the concessionary and normal rates" would not be accepted. Cases of "abuse of concessionary rates" would be recorded in the Leisure Link computerised booking system. It is therefore not necessary to collect and record such cases separately.

Recommendation (c)

727. The Government plans to advance the notice period for cancellation of booking to at least one day prior to the date of using facilities so that the cancelled sessions of booked facilities can be released for booking by members of the public. Currently, the Leisure Link booking system is being modified to tie in with the new arrangement in 2019-20.

Leisure and Cultural Services Department

Case No. 2018/3209(I) – Refusing to provide the investigation report submitted by a sports association regarding the allegations against its affiliated clubs for reaping profits by exploiting public resources and the member list of the panel responsible for the investigation

Background

728. The complainant lodged a complaint with the Office of The Ombudsman (the Office) in August 2018 alleging that the Leisure and Cultural Services Department (LCSD) had refused to provide the independent investigation report submitted by a swimming association (the Association) on the Central Lane Allocation Scheme (CLAS) and suspected transfer of swimming lanes by its registered swimming clubs (affiliated clubs) for profit-making purposes, as well as the membership list of the committee set up within the Association responsible for carrying out the independent investigation (the information). LCSD was alleged to have breached the Code on Access to Information (the Code).

The Ombudsman's observations

729. Regarding LCSD's refusal of the complainant's request under Section 2.14(a) of Part 2 of the Code, the Office accepted that the information was "third party information" under the Code. As the Association had indicated clearly its objection to the disclosure of the information to the complainant, the decision as to whether the information should be disclosed by LCSD to the complainant hinged on whether the public interest in disclosure would outweigh the harm or prejudice that might result.

730. The Office is of the view that although the Association is not a statutory body, it receives government subvention every year and thus its operation must be transparent. In addition, the affiliated clubs of the Association, in the capacity as non-profit-making organisations, were given priority allocation of swimming lanes in public swimming pools under CLAS at a fee lower than commercial rate. Therefore, the Association should explain to the public how the public swimming lanes had been used by its affiliated clubs, so as to ensure the proper use of public funds. Besides, the investigation was conducted by the Association at the

request of LCSD in response to the media's allegation concerning the suspected contraventions involving the use of public swimming lanes by its affiliated clubs for profit-making purposes. The issue, involving precious resources of public swimming lanes, had aroused wide public attention. Disclosure of the information undoubtedly involved huge public interest. Although LCSD had provided a summary of the investigation report (the summary) to the complainant, it only gave a general account of the investigation conclusion of the committee, stating that swimming lanes were not monopolised nor transferred by the affiliated clubs, and that representative was appointed by the affiliated clubs only to take care of the administrative work of the related courses and the allocated public swimming lanes were not used for profit-making purposes. The summary revealed no details of the investigation process and the justifications for the conclusion arrived at by the committee. That could hardly answer public queries.

731. On the other hand, the Office did not accept LCSD's adoption of the explanation given by the Association for refusing to disclose the information on the ground that such disclosure might bring its affiliated clubs into disrepute. The Office pointed out that the investigation conducted by the committee set up by the Association and the subsequent submission of investigation report had aimed to ascertain whether the media's allegation was true or not. If the investigation had been conducted by the committee in a fair and just manner with objective analysis of the findings before a conclusion was drawn, disclosing the information should not have any unfair or unreasonable impact on the reputation of the Association and its affiliated clubs. As a matter of fact, LCSD had not stated clearly which part of the information and how the disclosure would tarnish the reputation of the Association and its affiliated clubs. The Ombudsman opined that even if LCSD had reason to believe that the disclosure of a certain part of the Information would tarnish the Association's reputation, it could, in providing the information to the complainant, consider redacting such content that should not be disclosed as specified in paragraph 1.13.1 of the "Guidelines on Interpretation and Application" of the Code. However, there was no record showing that LCSD had made such consideration and arrangements in accordance with the Code.

732. Public swimming lanes are precious public resources. As LCSD has given priority and allocated public swimming lanes to the Association and its affiliated clubs under CLAS for their conduct of courses and training, the allocation should be subject to public scrutiny. The investigation was actually conducted at the request of LCSD in response

to the public's query about the suspected contraventions involving the use of public swimming lanes by the affiliated clubs of the Association. Although the Association had requested LCSD to keep the information confidential, the public had legitimate expectation that LCSD would publish the investigation report and the membership list of the committee so that the public could see whether the investigation had been conducted in a fair and proper manner and monitor whether public resources had been put to effective and appropriate use.

733. The Office opined that LCSD had not examined whether the justifications given by the Association were sufficient when considering its will. In fact, LCSD should have made it clear from the outset when requesting the Association to conduct the investigation that relevant information including the investigation report and the membership list of the committee would normally be made public.

734. As regards the Association's view that it was not appropriate to disclose the information to the complainant on the ground that the Office had initiated a direct investigation against LCSD regarding CLAS, the Office clarified that whether or not LCSD or the Association had disclosed the information to the public would not prejudice the direct investigation.

735. The Office found the complaint substantiated and recommended that LCSD should reconsider the complainant's request pursuant to the Code and provide the information concerned to him as appropriate, in particular those concerning the allocation and use of public swimming lanes under CLAS in the investigation (including the operation of CLAS, the membership list of the committee, the operation and findings of the investigation such as interviews with the affiliated clubs involved and findings of the record audits, etc., the committee's analysis of the findings of the investigation and its justifications for the conclusion). If certain content was considered not suitable for disclosure, LCSD should, in accordance with the reasons specified in the Code, consider redacting such content and provide the rest of the information to the complainant.

Government's response

736. LCSD accepted the Office's recommendations. After considering carefully the recommendation made in the Office's investigation report and in accordance with relevant provision under paragraph 2.15 (Privacy of the Individual) and paragraph 2.16 (Business Affairs) of the Code, LCSD contacted the Association again and obtained its consent to delete

the personal details and commercially sensitive information contained in the information before providing it to the complainant in April 2019.

Marine Department

Case No. 2018/3074 – (1) Unreasonably long waiting time for taking a pleasure vessel operator examination; and (2) High examination fee

Background

737. The complainant intended to take the Pleasure Vessel Operator Grade 2 Certificate of Competency (PVOC2) examination. In early August 2018, he checked the examination schedules on the Marine Department (MD)'s website and found that the next available examination date was more than five months away (in mid-January 2019). Besides, he had to pay an examination fee of $1,255. He then lodged a complaint with the Office of The Ombudsman (the Office) against MD and MD responded to his allegations as set out below.

Allegation (a): the unreasonably long waiting time

738. In 2017, the examination centre at MD's Headquarters for PVOC2 examination was practically fully utilised in terms of both working days available (at 92.3%, with only 19 days reserved for computer system maintenance, etc.) and capacity (with 28 computer booths accommodating 28 candidates in each written examination session). The average waiting time for taking the PVOC2 examination (i.e. the time between application date and examination date) was about 5.5 months between 2016 and 2018.

739. The total number of PVOC2 candidates varied from year to year and there was no fixed pattern in the fluctuations. Since MD could not make plans for predictable peaks, setting up an additional examination centre would be unjustifiable. Besides, absence of some candidates from the examination had become the norm. For example, between December 2017 and November 2018, the average absence rate was about 22.2%.

740. A candidate may cancel or postpone the taking of PVOC2 examination by written notice at least five working days before the date of the examination. The examination fee paid can either be refunded or be held for his/her future examination. Besides, a candidate may also get a refund of the examination fee upon production of a medical certificate.

741. MD maintains a replacement arrangement, i.e. the examination schedules on MD's website would be updated on an hourly basis to accept new applications upon receipt of cancellation or postponement notices from candidates.

Allegation (b): high fee for taking the examination

742. The examination fee of $1,255, as stipulated in the relevant rules, is derived on a full cost recovery basis and subject to review from time to time.

The Ombudsman's observations

743. The Office considered the complaint unsubstantiated and its analysis is set out below –

Allegation (a)

744. MD had explained the reasons for the long waiting time for taking the PVOC2 examination, especially the fluctuations in the number of candidates, which were beyond its control. To shorten the waiting time, MD had added extra examination sessions in 2018 and 2019, reduced the time slots reserved for maintenance and implemented the replacement arrangement. The Office, therefore, considered this allegation unsubstantiated.

Allegation (b)

745. The examination fee, which is subject to vetting and approval by the relevant policy bureau, is not for profitmaking. As such, the Office considered this allegation unsubstantiated.

Other Observations

746. Notwithstanding the above, the Office saw room for improvement with regard to MD's administration of the PVOC2 examination.

747. First of all, MD only required five days' advance notice for cancellation or postponement of the taking of an examination. Under the replacement arrangement, such short notice might result in a low take-up rate of the vacated seats by other candidates. MD should consider

stipulating a longer notice period (e.g. two weeks) so that vacated seats would more likely be filled.

748. In addition, an absence rate of over 22% was too high, implying a waste of valuable examination seats. When absentees reapplied to take the examination, the waiting time would be lengthened further. Besides, it was unreasonable that absentees were not held responsible for MD's administration costs. MD should consider formulating improvement measures, such as barring absentees from reapplying to take the examination within a certain period of time, or making absentees forfeit part of the examination fee.

749. The Office recommended MD to –

(a) improve the replacement arrangement and consider stipulating a longer notice period for cancellation or postponement of examination (e.g. two weeks) so that vacated seats would more likely be filled; and

(b) formulate improvement measures, such as barring absentees from re-applying to take the examination within a certain period of time, or making absentees forfeit part of the examination fee, in order to reduce the absence rate of candidates.

Government's response

750. MD accepted the Office's recommendations and has taken the following follow-up measures.

Recommendation (a)

751. MD decided to extend the minimum period for candidates to notify the Department for cancellation or postponement of examinations from five working days to 10 working days so that vacated seats would more likely be filled by other candidates.

Recommendation (b)

752. MD have implemented a new measure under which absentees without giving reasonable excuse will be barred from taking the examination for a certain period of time (with the actual period subject to the examination schedule). This restriction will apply to candidates absent

from an examination without giving prior notification to the Department at least 10 working days before the examination day, and those absent on medical ground but fail to submit medical reports.

Recommendations (a) & (b)

753. Three sets of rules, namely the "Merchant Shipping (Local Vessels) (Local Certificates of Competency) Rules", the "Examination Rules for Pleasure Vessel Operator Certificate of Competency" and the "Examination Rules for Local Certificate of Competency" were amended accordingly to implement the above new measures. The amended rules took effect on 11 October 2019 upon gazettal, which were also uploaded to MD's website for public information.

Planning Department

Case No. 2018/1940(I) – Refusing to provide digital files of an Outline Zoning Plan

Background

754. On 18 May 2018, the complainant complained to the Office of The Ombudsman (the Office) against the Planning Department (PlanD).

755. Allegedly, on 17 April 2018, the complainant made a request to PlanD, under the Code on Access to Information (the Code), for digital files of the Geographic Information System (GIS) data of an Outline Zoning Plan (OZP). On 25 April 2018, PlanD replied to the complainant, refusing the complainant's request by reason that the third party concerned, viz., the Town Planning Board (TPB) Secretariat, did not consent to release the requested information. PlanD cited paragraph 2.14(a) of the Code, which relates to third party information, to account for its refusal to provide the requested information. On the same day, the complainant requested PlanD to review its decision. On 14 May 2018, PlanD replied to the complainant, upholding its decision by the same reason.

756. The complainant took the view that –

(a) paragraph 2.14(a) of the Code primarily concerned the confidentiality of the information being requested. OZPs were not confidential as they were available to the public albeit not in digital format;

(b) digital files of OZPs were made by PlanD. PlanD, therefore, owned the files and had the authority to decide whether or not to release them; and

(c) providing digital files of OZPs was in favour of public interest.

757. The complainant considered it unreasonable for PlanD to refuse the information request.

The Ombudsman's observations

758. The Office noted that the complainant had requested PlanD to provide an OZP in a particular form (i.e. digital format). Hard copies and electronic version of that OZP were already available to the public, but not the OZP in digital format. The Office had asked PlanD for a demonstration of the Town Planning Information System (TPIS) and ArcGIS. The digital data of TPIS were hard-coded to the System. The ArcGIS data of planning scheme boundary and zone boundary of the OZP appeared as numbers, English letters, computer coding and polygons. No other planning information could be seen in the planning scheme boundary and zone boundary of the OZP.

759. Paragraph 1.14.2 of the Guidelines on Interpretation and Application of the Code (the Guidelines) stipulates that –

> "Government departments are not obliged to create a record which does not exist. However, when a record can be produced from computerised information subject to (a) the material, software and technical skill required to prepare the record being available in the department concerned and (b) production of this record not interfering with the normal operations of the department, the record thus created becomes a record to which access may be given under the Code."

760. It could be seen from the paragraph above that currently PlanD's computer systems were unable to provide statutory plans in digital format to the public. Hence, PlanD was at present unable to accede to the complainant's information request. This was in line with the Guidelines stated above.

761. Accordingly, the Office considered the complainant's complaint unsubstantiated. Nevertheless, PlanD should expedite its feasibility study on making statutory plans available in digital format to the public, so as to enable the public to use the information in a more convenient manner.

762. Moreover, while the complaint itself was unsubstantiated, the Office found inadequacy in PlanD's understanding and application of the Code. Specifically, PlanD had wrongly invoked paragraph 2.14(a) of the Code, which relates to third party information, in refusing the complainant's information request. TPB Secretariat, which holds the information, is a unit of PlanD albeit providing secretariat service to TPB. PlanD cannot regard it as a third party. If PlanD considered that a piece of information was owned by TPB, and TPB Secretariat (which is under

PlanD) was merely holding it on behalf of TPB, such that TPB's consent was necessary for its release, PlanD/TPB Secretariat should consult TPB thereon instead of PlanD/TPB Secretariat itself withholding consent straightaway.

763. The Office urged PlanD to –

(a) speed up its feasibility study on making statutory plans available in digital format to the public; and

(b) provide better training to staff on interpretation and application of the Code.

Government's response

764. PlanD accepted the Office's recommendations.

Recommendation (a)

765. TPB has agreed to PlanD's proposal on releasing planning data in digital form to the general public for free download through the Statutory Planning Portal 2 on TPB's website in July 2019. The digital format of planning data of statutory plans currently in force was eventually released for free public access at the Statutory Planning Portal 2 on 22 July 2019.

Recommendation (b)

766. To enhance awareness and knowledge of the Code, PlanD staff attended on 26 July 2019 a seminar organized by the Constitutional and Mainland Affairs Bureau (CMAB). PlanD has also invited CMAB to arrange similar briefing/seminar for PlanD staff, which will be held in April 2020, to provide training on interpretation and application of the Code.

Post Office

Case No. 2017/4082 – (1) Wrongly delivering the complainant's mail to another address; and (2) Improprieties in follow-up actions

Background

767. The complainant complained that the Post Office (PO) wrongly delivered an inward "e-Express" mail item addressed to her to another address and did not take any remedial actions.

768. The complainant indicated that PO, upon knowing the misdelivery of the mail item, claimed that they did not bear any liability to compensate. Subsequently, PO advised that they would contact the person whom the mail item had been wrongly delivered and attempted to retrieve it; and asked the complainant about the value of the mail item. The complainant enquired whether the value of the item could be submitted through email, but staff of PO insisted that the information should be submitted by the mobile application WhatsApp.

769. The complainant queried that PO did not follow the established procedures and guidelines for handling misdelivery of mail items.

The Ombudsman's observations

770. In accordance with section 7 of the Post Office Ordinance (POO) (Cap. 98), no officer of PO shall incur any liability by reason of loss, non-delivery, misdelivery, delay or damage of any postal packet, whether registered or not. However, PO has based on the relevant provisions of the Universal Postal Union Agreement, set up a compensation mechanism for loss, theft or damage of registered mail during processing; the maximum compensation is $320, plus the paid charges and fees (registration fee excluded).

771. As a general practice, compensation will be paid to the sender. It is only under special circumstances where the senders give up their rights that compensation is payable to the addressees or any third parties.

772. The mail item in question was an inward e-Express mail from the United States of America which was classified as ordinary mail by the United States Postal Service (USPS). When delivering this type of mail,

PO would not require the addressee to sign on the acknowledgment of receipt. According to the bilateral agreement between PO and USPS, USPS has not set up any compensation mechanism for e-Express mail and neither has PO put in place any compensation arrangement for inward e-Express mail.

773. The Office of The Ombudsman (the Office) concluded that the incident was an isolated incident resulting from staff negligence. PO had taken remedial actions, including tendering apologies to the complainant repeatedly, taking disciplinary action against the postman concerned and promising to enhance supervision of that postman in future.

774. When handling the compensation, PO's staff requested the complainant to submit claim through WhatsApp mobile application. It created doubt on compliance with established procedures. PO recognised the deficiencies.

775. Regarding the claim of compensation, the Office opined that risk of mail loss and damage should be expected when choosing to use ordinary mail service. Under POO, PO is not liable for any compensation in this regard. After studying the terms and conditions of e-Express service, the Office agreed that PO was not liable for compensation of this sort of mail items. Hence, PO's initial response of not being liable to compensate was made in accordance with the terms and conditions of the service. In the end, taking into consideration the merit of the case and the fact of staff negligence, PO decided to offer the complainant an ex-gratia payment.

776. Taking the view that the complaint is partially substantiated, the Office recommended that –

(a) PO should remind staff to collect information from members of the public through official channels to avoid doubts; and

(b) PO should not inordinately stock to the terms and conditions of a service if staff negligence was involved, but should exercise discretion as soon as possible.

Government's response

777. PO accepted the Office's recommendations and has taken follow-up actions as below –

(a) issued guidelines to frontline supervisors, reminding them to use official channels when collecting information from members of the public;

(b) created official email accounts for frontline supervisors; and

(c) reminded managerial staff to consider need to exercise discretion at an earlier stage should the case involve staff negligence.

Post Office

Case No. 2017/4628 – Failing to provide sufficient stock of a commemorative stamp pack for sale in post offices and online

Case No. 2017/4641 – Failing to inform the public of the sales quotas on a commemorative stamp pack

Case No. 2017/4740 –Failing to keep good order of people queuing up to purchase a commemorative stamp pack

Background

778. The Office of The Ombudsman (the Office) received three complaints against the Post Office (PO) for the improper arrangements on 20 November 2017 in relation to the sale of a memorial stamp pack (the Stamp Pack), including –

(a) failing to inform the public in advance of the sales quota allocated for each sales channel;

(b) insufficient quota allocated to Post Office A and ShopThruPost;

(c) PO's staff suspected of withholding the Stamp Pack for internal subscription or personal collection as a total of 1 000 packs were printed as commissioned by the consignor but only 800 were put up for public sale;

(d) the maximum purchase quantity of five packs per customer considered too much;

(e) failing to arrange staff to maintain the order of more than 100 subscribers queuing outside Post Office A for the Stamp Pack;

(f) failing to respond to the request of those unable to purchase the Stamp Pack for a meeting with the Postmaster of Post Office A at 9:50 a.m. as he/she had not yet reported for duty, and with those in the queue being berated by a self-proclaimed officer-in-charge of the post office; and

(g) sluggish and intermittent Internet connection to ShopThruPost, resulting in failure to order the Stamp Pack online.

The Ombudsman's observations

779. The Stamp Pack was produced as per the consignor's request and put to sale as consignment. As explained by PO, the consignor estimates the demand and decides the sales quantity for any consignment products. As in this case, PO learnt that the consignor had conducted market research and assessments beforehand and opined that the public's demand for the Stamp Pack was average. It thus decided to produce 1 000 packs and requested PO to sell this product as consignment.

780. After deliberation, the consignor and PO agreed to introduce the Stamp Pack for public sale on 20 November 2017 via ShopThruPost, the PostShop at General Post Office in Central and Post Office A.

781. The consignor was responsible for the major publicity of the Stamp Pack. To complement its efforts, PO published advertisements on ShopThruPost, disseminated posters and email to members of ShopThruPost, and put up posters at the PostShop and Post Office A. It was stated in the publicity materials that a total of 1 000 packs would go on sale, but the sales quota for each sales channel was not mentioned there.

782. On 17 November 2017, the consignor notified PO that the quantity of the Stamp Pack for public sale would be reduced from 1 000 to 800, with 200 packs reserved for the consignor's internal use. On the next day, the two parties came to the agreement on the following allocation of sales quotas for each sales channel –

- 60 packs for Post Office A;
- 570 packs for the PostShop; and
- 170 packs for ShopThruPost.

783. On 20 November, the public sale began at 8:00 a.m. on ShopThruPost and the market response was overwhelming. PO immediately requested an increase in the quantity of the Stamp Pack for sale. In response, the consignor replied that it could allocate an extra 100 packs to increase the total quantity to 900. In the meantime, PO also re-allocated 130 packs from the PostShop to ShopThruPost to meet the demand. As a result, the respective sales quotas allocated for the three sales channel became –

- 60 packs for Post Office A;
- 440 packs for the PostShop; and
- 400 packs for ShopThruPost.

All the Stamp Packs were sold out in the morning of 20 November.

784. Post Office A adopts the system of staggered working hours. On 20 November 2017, the working hours of the Postmaster began at 11:00 a.m., two officers-in-charge were responsible for supervising counter operation from 9:00 a.m. to 11:00 a.m. Prior to the start of sale at 9:00 a.m., around 100 subscribers were queuing for the Stamp Pack. After the commencement of the sale, the queuing subscribers learnt that only 60 packs were allocated to the post office, all of which were sold out within 10 minutes. With great discontent, these people cornered, abused and shoved one of the officers-in-charge, and demanded an explanation, leading to a chaos. The officer-in-charge kept making explanations and apologies.

785. Since the response was far more overwhelming than expected, the system of ShopThruPost became sluggish soon after the sale began. PO needed to exercise web access control.

786. The Stamp Pack for sale as consignment was sold out in the morning on the first day of sale, and stock of all sales channels fell short of the demand. This indeed caused inconvenience and discontent for customers wishing to purchase the Stamp Pack. The Office conducted an analysis of the responsibility of PO in this case.

787. According to the information available, the total sales quantity of the Stamp Pack was determined by the consignor with reference to its own assessment and PO was not involved in the process at all. Since the consignor predicted an average demand for the Stamp Pack, only 1 000 packs were ordered for the three points of sale. Given the unexpectedly overwhelming response, there was shortage of stock at all three points of sale, which caused inconvenience and discontent of the public wishing to purchase the philatelic product. This also impacted strongly on other customers of normal postal services at Post Office A as a result of the chaotic situation and those using ShopThruPost due to the slowdown of the system.

788. PO should certainly give consideration to its business role when launching product sale as a consignee. But as a government department, it is more important for PO not to perform the role at the expense of public postal services. If a product ordered by a consignor is not to be sold at post offices, it will then be unnecessary for PO to advise on the sales quantity. Otherwise, it is unacceptable for the department to ignore the possibility of a shortage of stock interrupting other postal services. The Office understands that PO may not have a better knowledge or be able to make a more accurate estimate of the public demand for the product than the consignor, but PO should not adopt an indifferent attitude. Instead, it should at least compare the sales quantity proposed with its own experience and offer necessary suggestions after studying the grounds given by the consignor. Where necessary, PO should risk losing the order and refuse the consignment deal.

789. While the consignor underestimated the demand for the Stamp Pack, PO maintained the usual practice to set the maximum purchase quantity as five packs per customer, instead of reducing the quota. Although the department responded to the demand at once by requiring the consignor to raise the total sales quantity and adjusting the quota allocated between two points of sale soon after the sale commenced, the increase was far from adequate.

790. Under arrangement by PO, only 60 Stamp Packs (less than 7% of the total and far fewer than the 440 packs available at the PostShop) were allocated for Post Office A. It was undoubtedly insufficient. Consequently, they were sold out in a split second and it disappointed most of the queuing customers at the post office.

791. The allocation for each sales channel and the maximum purchase quantity per customer were already determined by PO and the consignor on 18 November 2017. If the details had been announced in advance, customers would have prepared accordingly. One of the causes leading to the chaos on the date of sale and grievances and disappointment of the public was the absence of information due to the usual practice of PO.

792. After reviewing the records of the sale of the Stamp Pack, the Office confirmed that 900 packs have been sold to customers. PO also indicated that no product had been withheld for internal subscription or personal collection of its staff.

793. The Office is pleased to note that PO has taken the initiative to review and put in place improvement measures for the sale arrangements of products of similar nature: requesting consignors to assess the demand with prudence and disseminating information, namely the sales quotas of philatelic products at each sales channel and maximum purchase quantity per customer, in advance to facilitate preparation by the public. To avoid potential liabilities, PO may consider centralising the sale of this kind of consignment product but multiple points of sale will bring convenience to the public. PO should carefully appraise the situation when establishing one or more points of sale, rather than simply discarding an option for fear of making possible mistakes.

794. In the chaotic situation upon commencement of the sale at Post Office A, only one staff member was there to maintain the order and he was cornered by the disappointed customers for an explanation. This shows the unpreparedness of PO in properly handling and tackling this kind of incident. Prior to the sale commencement at 9:00 a.m., staff of the post office should have been aware of the large number of subscribers queuing outside for the purchase of the Stamp Pack. Considering the sales quota of the Stamp Pack allocated to the post office which largely fell short of the number of queuing customers (eventually only 19 out of more than 100 queuing customers were able to purchase the Stamp Pack), PO should have taken action much earlier, for example, by informing the waiting customers of the situation so that they could decide whether they would continue to wait or not, as well as assigning more staff members or security officers to help manage the very likely disorderly scene.

795. PO denied the impolite manner on the part of its staff. Owing to the lack of evidence from both sides, the Office was unable to ascertain the actual circumstances, and thus made no comment in this respect.

796. After the sale started, PO noticed at 8:05 a.m. that ShopThruPost slowed down because of the overwhelming number of subscribers. Web access control over the online shopping platform was exercised at once and the situation improved. That said, PO was deemed lacking in awareness as it realised how critical the situation was only after the website slowed down. Having learnt a lesson, PO should monitor the web traffic of ShopThruPost before the product sale starts in the future to identify the large volume of access well beforehand for the implementation of control measures in a timely manner.

797. The Office was glad to learn about the system upgrade of ShopThruPost which will enable multiple uses to access at the same time and thus lowering the chance of website slowdown.

798. To sum up, there is no evidence to prove the withholding of any Stamp Pack for internal subscription or the ill manner of PO's staff. However, the indifferent attitude of PO towards the demand of consignment product was unacceptable. Moreover, there is room for improvement on the part of PO in the handling of incidents induced by the undesirable decision on sales quota at points of sale, sales information dissemination, and failure to respond to customers' needs and monitor the ShopThruPost system. In view of the above, the Office concluded that the complaints were partially substantiated.

799. The Office made the following recommendations to PO –

(a) to satisfy customers wishing to purchase the consignment product and ensure that services provided by PO are not affected, a mechanism should be put in place for prudent evaluation of the sales quota proposed by the consignor; if a keen demand is expected, consideration should be given to lower the maximum purchase quantity per customer or adjustments should be made to other areas;

(b) upon implementation of the mechanism for the advance dissemination of sales information, PO should monitor and review the effectiveness of the mechanism, with a view to making further improvement;

(c) due consideration should be given to the ways of setting points of sale and allocating of sales quota among them, including under what circumstances should it establish only a single point of sale;

(d) measures should be drawn up to prepare for handling customers' response in similar incidents; and

(e) web traffic of ShopThruPost before and during the public sale should be kept under surveillance, so that web access control could be exercised in a timely fashion, where necessary.

Government's response

800. PO accepted all of the Office's recommendations and has established a mechanism to implement the five recommendations put forward by the Office as follows –

(a) if there is a limit on the sales quantity of a consignment product, PO will negotiate with the client and jointly evaluate whether the total quantity to be put up for sale by PO will lead to a scramble for such product, taking into account data provided by the client, such as past sales records, findings of market research on demand etc., with a view to setting points of sale, the allocation of sales quota among them and the maximum purchase quantity per customer;

(b) review of advance dissemination of information on the sales arrangement will be conducted on a regular basis and improvement measures will be introduced when necessary;

(c) as referred in Recommendation (a) above, PO will carefully evaluate the number of points of sale, the allocation of sales quota among them and the maximum purchase quantity per customer;

(d) at the time of negotiating with the client on the details in relation to Recommendation (a) above, PO's Business Development Branch will at the same time work out with the Postal Services Branch contingency plans to deal with situations of overwhelming customer response to the consignment product, such as planning in advance the crowd management arrangement to maintain the order of the queue; and

(e) PO is implementing a system upgrade for ShopThruPost, so as to substantially increase its capacity. Automatic web access control will also be introduced. When the number of customers browsing the website exceeds the system capacity, the system administrator will receive a message signalling him/her to take measures to control the web traffic and an appropriate message will be sent to customers browsing through ShopThruPost. The new system will also be able to increase its capacity when necessary in order to accommodate the traffic that is expected to go beyond the usual situation.

Post Office

Case No. 2017/5117, 2017/5119 and 2018/0030 – (1) Failing to provide sufficient 10 cents stamps to make up for the postage increment; (2) Providing improper suggestion of buying two 20 cents stamps to make up for the 30 cents postage increment; (3) Using inaccurate wordings on the "out of order" notice on the stamp vending machines; and (4) Failing to provide updated and/or accurate information about stamps availability at convenient stores

Background

801. Following the postage revision on 1 January 2018, some members of the public intended to purchase stamps of lower values, i.e. 10 cent and 20 cent stamps, to make up the postage difference arisen, e.g. the 30 cent difference due to the postage increase from $1.70 to $2 for the posting of local letters weighing 30g or less. Some members of the public lodged complaints against the Post Office (PO) for maladministration in relation to this. Allegations include –

(a) failing to supply sufficient stock of 10 cent stamps;

(b) advising the public to purchase two 20 cent stamps to make up the postage difference resulting in an overcharge;

(c) putting up on suspended stamp vending machines an "out of order" notice which was a misrepresentation;

(d) advising the public to purchase stamps of old denominations at convenience stores where those stamps were out of stock; and

(e) failing to notify 1823 about the fact that stamps of old denominations were no longer for sale at convenience stores.

The Ombudsman's observations

Allegation (a)

802. The Office of The Ombudsman (the Office) understood that members of the public wished to use up the $1.7 stamps in hand as soon as

possible before purchasing stamps of new denomination, (i.e. $2 stamps), thus resulting in a keen demand for stamps of lower values, especially the 10 cent stamps, to make up the postage difference. In this connection, PO planned ahead by placing two printing orders of 10 cent stamps and the stock was sufficient to meet the demand for 12 months. Despite that, some post offices did run out of stock temporarily during the week with the highest demand. In fact, the total stock was in surplus. After the demand turned stable, it was noted that there was an abundant supply of the 10 cent stamps. As such, the Office considered that the supply of 10 cent stamps was not insufficient.

803. The Office was of the view that it would always be possible for whatever products to run out of stock at any particular stores of a merchant, which requires replenishment of stock. This situation alone cannot be used as evidence to allege that malpractice was involved on the part of the merchant. The critical points of this case are whether PO made a detailed plan in preparing for the postage increase, and how it coped with the shortage of 10 cent stamps at particular post offices. Investigation by the Office showed no evidence of PO failing to make a detailed plan or taking immediate action in stock replenishment. As a result, the Office considered that no maladministration was involved on the part of PO.

Allegation (b)

804. With regard to the allegation that PO advised members of the public to use two 20 cent stamps to make up the 30 cent postage difference, PO explained that no time limit was imposed on any unused stamps. In the event that stamps of lower values (e.g. 10 cent and 20 cent stamps) run short of supply while the public still holds stamps of old denominations in hand, PO's staff in general would advise them to post with stamps of alternative denominations, and use the stamps of old denominations only when the stamps of denominations which can be used to make up the postage difference has been restocked. Senders who insisted on using the $1.7 stamps on hand with the shortage of 10 cent stamps may consider using two 20 cent stamps to make up the postage difference. Such a practice would result in paying an extra postage of 10 cents, but whether to do so would be the decision of the sender. PO's staff would not put forth such a proposal.

Allegation (c)

805. As for the allegation that PO put up on suspended stamp vending machines an "out of order" notice, PO acknowledged that the content of

the notice for service suspension was too general, stating only that the vending machine was under repair without giving the details. PO offered its apology on that matter.

Allegation (d)

806. Regarding the allegation that PO advised members of the public to purchase stamps at convenience stores, PO clarified that no discussion was made with convenience stores to withhold the sale of stamps of old denominations before the postage revision, neither was it informed by convenience stores of their decision to withhold the sale of such stamps. PO continued supplying convenience stores with stamp booklets of old denominations for sale until end 2017. However, sales among branch stores varied and certain stores did not request for replenishment instantly even when they ran out of stock for a short time. PO, as such, would not be able to have ready information on their supply situation of stamp booklets. Upon the receipt of a referral of enquiry from 1823 that the public could not purchase stamps from convenience stores in late December 2017, PO took immediate action to call the head offices of individual convenience stores, reminding them to continue to arrange for their branch stores to replenish stock of stamp booklets of old denominations.

Allegation (e)

807. About the allegation of failing to notify 1823 of the concerned information, PO explained that convenience stores were not instructed to withhold the sale of stamps, and neither did PO give any instruction to 1823 to disseminate such a message to the general public. The information PO provided to 1823 in relation to the postage revision included advising the public to purchase stamps at post office or convenience stores during the service suspension of stamp vending machines.

808. With regard to improvement in the areas of inaccurate content of notice put up on stamp vending machines, the lengthy service suspension of vending machines, lack of effective communication with convenience stores and providing clearer information to 1823, PO will implement the following respective measures.

809. PO is planning to replace the stamp vending machines which have been in use for over 20 years by postage labels vending machines (PLVMs) and the latter were put on trial in the end of 2018. The new system of PLVM is equipped with the automatic update by software functions,

enabling it to reset and provide new denominations of postage labels for sale in a flexible manner for postage revision in future without any service suspension.

810. PO will strengthen its communication with convenience stores and prevent the recurrence of similar incident.

811. PO could prepare clearer replies to frequently asked questions to 1823 to assist their staff in answering public enquiries.

Other Observations

812. In theory, it requires a 20 cent and a 10 cent stamp respectively to make up the 30 cent postage difference, therefore the sales of the two stamps should be similar. However, experience gained in this incident shows that the 10 cent stamps seem to be more popular.

813. In view of the above findings of the inquiry, the Office considered the complaints unsubstantiated.

814. Nonetheless, the Office recommended PO –

(a) to conduct an analysis of the reasons for the higher demand for the 10 cent stamp over the 20 cent stamp as a reference for future postage revision;

(b) to enhance the publicity for postage revision after its announcement so as to remind the public to purchase stamps of lower values in advance to make up the postage difference;

(c) to draw up relevant guidelines to ensure adequate supply of stamps of lower values before postage revision in future and instruct frontline staff to provide information to the public as far as practicable during the temporary shortage situation, such as when the stock will be available again;

(d) to set up a time frame for PLVM replacement; and

(e) to strengthen communication with the head offices of convenience stores and request them to remind their branch stores that replenishment orders should be made to their head offices when their stock of stamp booklets falls to a certain level.

Government's response

815. PO accepted all of the Office's recommendations and has implemented the recommendations as follows –

(a) after an analysis of the sales of 10 cent and 20 cent stamps, it is believed that the 10 cent stamps were in higher demand than the 20 cent stamps because the former offers greater convenience and flexibility. Members of the public thus went after the 10 cent stamps after learning about the postage revision;

(b) PO had disseminated to the public information on the postage revision through various channels, such as press release, PO website and its mobile application, radio broadcast, notices and posters displayed at postal and public facilities. In future promotional message, PO will remind the public more strongly to purchase stamps of lower values in advance to make up the postage difference;

(c) subject to the specific circumstances of postage revision in future, PO will make an estimate of the public demand for stamps of lower values to ensure their adequate supplies before and after postage revision. PO has completed procurement for the upgrading of the stamp inventory system, which is anticipated to be completed by the third quarter of 2019. By then, district managers and postmasters will be able to have a better grasp of the stock and sales of stamps of different denominations and arrange for replenishment in a timely manner, so as to maintain a stable stamp supply. PO will also update its operation guidelines and coach frontline staff in handling temporary shortage situation, as well as strengthen communication with frontline staff and officers-in-charge through briefings. Prior to future postage revision, PO will issue prepared answers to enquiries for frontline staff to give them a clear understanding of the postage revision and enable them to more effectively handle customers' enquiries;

(d) PO has completed the study of replacing existing electronic stamp vending machines with PLVMs. PLVMs can be set to sell postage labels of common denominations and its system is also equipped with the automatic update by software functions which facilitates the provision of postage labels of new denominations at the time of postage revision. Since late 2018, PO has carried out a pilot run of PLVMs at General Post Office, Tsim Sha Tsui Post Office

and Yuen Long Post Office, and the results have been satisfactory. PO plans to phase out all existing electronic stamp vending machines and replace them by PLVMs by phases starting from the latter half of 2019. The replacement project is expected to be completed by mid-2020; and

(e) PO will liaise with convenience stores on a regular basis to ascertain whether they have sufficient stock of stamp booklets and strengthen its communication with their head offices, requesting them to remind their branch stores to replenish stock as early as possible when shortage arises.

Social Welfare Department

Case No. 2017/4089(I) – Refusing to provide a copy of the manual on the Comprehensive Social Security Assistance Scheme and delay in handling an information request

Background

816. On 19 July 2017, the complainant asked the Social Welfare Department (SWD) under the Code on Access to Information (the Code) for the "Comprehensive Social Security Officers Internal Manual for Assessing Applications".

817. When replying to the complainant on 4 August 2017 (the First Reply), Officer A of SWD said that the manual on its Comprehensive Social Security Assistance (CSSA) Scheme (CSSA Manual) was voluminous, and suggested that he view SWD's webpage on the CSSA Scheme instead. The webpage, however, does not contain the CSSA Manual. On 26 September 2017, the complainant called Officer A, and reiterated that he was asking for a copy of the CSSA Manual. Officer A replied on 4 October 2017 (the Second Reply) that SWD needed more time to consider his request.

818. On 12 January 2018, SWD turned down the complainant's request (the Third Reply) for certain reasons.

819. The complainant was dissatisfied with SWD's delay in responding to his information request and its refusal to provide a copy of the CSSA Manual.

The Ombudsman's observations

820. The Office of The Ombudsman (the Office) noted that CSSA Scheme is a key social security scheme managed by SWD to provide a safety net for those who cannot support themselves financially. It is one of SWD's key areas of responsibility. Hence, the Office considered that paragraph 1.6 of the Code applies in considering a request for the CSSA Manual.

821. SWD quoted paragraph 2.9(a) of the Code as one of the reasons for declining the request. However, the Office doubted whether that was a valid reason. Surely, CSSA applications are assessed on the basis of specific eligibility criteria and calculated according to stipulated formulae, not so much by "negotiations" or "discretion". It is difficult to argue that disclosing these criteria and formulae would prejudice the fair and effective operation of the CSSA Scheme.

822. The Office agreed that SWD has a duty to uphold the integrity of its investigation work so as to prevent abuse and fraud and to safeguard the proper use of funds under the CSSA Scheme. Hence, paragraph 2.9(c) of the Code is to some extent applicable to this case. However, conceivably, there are some parts of the CSSA Manual, the disclosure of which would not affect the Department's investigation work, and they should be disclosed in accordance with paragraph 1.13 of the Code.

823. The Office noted that the Code allows government departments to defer their response beyond the target response time in exceptional circumstances, such as for seeking legal advice. However, the Office doubted SWD's need to seek legal advice in this case, as the Department is well positioned to assess for itself whether disclosure of the CSSA Manual would affect its operations. Moreover, even if the Department wanted to play safe and therefore had sought legal advice, it should have done so as soon as the complainant reiterated his information request in late September 2017, and not waited until after the Office's investigation in October 2017. The time taken by SWD to respond to the complainant's request ($3^1/_2$ months) far exceeded the target response time stipulated in the Code.

824. Based on the analysis in the preceding paragraphs, the Office considered this complaint against SWD substantiated. The Office urged SWD –

(a) to provide the complainant with a copy of the CSSA Manual, obliterating only those parts that would affect its investigative work; and

(b) to enhance staff training in application of the Code.

Government's response

825. SWD accepted the Office's recommendations and has taken the following actions.

Recommendation (a)

826. SWD provided the complainant with a copy of the CSSA Manual, obliterating the parts that would affect its investigative work.

Recommendation (b)

827. SWD organised training courses and workshops for staff on the application of the Code. Orientation programmes mandatary for newly recruited staff also include the related component. SWD would continue the above measures to do strengthen staff training in the application of the Code.

Social Welfare Department

Case No. 2017/4183(I) – Refusing to provide the bank balances of all the trust funds administered by the Department

Background

828. On 19 July 2017, the complainant asked the Social Welfare Department (SWD) under the Code on Access to information (the Code) "how much is in the trust funds" under SWD's purview.

829. When replying to the complainant on 4 August 2017 (the First Reply), Officer A of SWD provided information on only five of the trust funds under SWD's purview, namely –

(a) Li Po Chun Charitable Trust Fund;

(b) Tang Shiu Kin and Ho Tim Charitable Trust Fund;

(c) Brewin Trust Fund;

(d) Kwan Fong Trust Fund for the Needy; and

(e) Trust Fund for Severe Acute Respiratory Syndrome (SARS).

830. The information SWD gave was the total amount granted to applicants in the financial year 2015-16 for each of the five trust funds.

831. On 26 September 2017, the complainant told Officer A what he meant was the bank balances of all the trust funds under SWD's purview. Officer A replied to him on 4 October 2017, citing the annual allocations for the financial year 2017-18 for Funds (a)-(d) and the fund balance as at 31 March 2016 for Fund (e). However, those figures are still not the bank balances of all the trust funds.

832. The complainant considered SWD wrong in not disclosing the bank balances of all the trust funds.

The Ombudsman's observations

833. The Office of The Ombudsman (the Office) found the following inadequacies in SWD's handling of the complainant's request –

(a) What the complainant requested was information on "how much is in the trust funds" and "the latest balance of each of the trust funds". In response, SWD provided him with information on the amount granted to applicants in the financial year 2015-16 for Funds (a)-(e), the annual allocation for the financial year 2017-18 for Funds (a)-(d) and the fund balance as at 31 March 2016 for Fund (e). The information provided was clearly not what the complainant had asked for, and this shows that the officer(s) concerned had repeatedly failed to understand the request of the complainant;

(b) If in doubt, the officer(s) concerned should have sought clarification from the complainant at the outset;

(c) Even if SWD thought that information on other trust funds was not what the complainant wanted or needed, SWD should have explained that point to him, since the complainant was asking for information on all the trust funds;

(d) As for the three anonymous funds, SWD had not explained why it could not disclose information on such funds while keeping the donors anonymous; and

(e) SWD had not explained to the complainant why it could not disclose to him the latest balance of each of the trust funds. If the explanation provided by SWD to the Office[6] is the reason, SWD should have told him so. Since the complainant was apparently interested to know what was left in SWD's till in respect of each of the trust funds as at a certain recent date, SWD should consider what was the best available information that could be provided to answer his request.

[6] SWD explained to the Office that it is actually given an annual allocation of "social relief grant" out of each of Funds (a) – (e), and so the balance of each of those funds does not exactly reflect what is left in SWD's hands to administer.

834. Based on the analysis in the preceding paragraph, the Office considered this complaint against SWD substantiated. The Office urged SWD –

(a) to confirm with the complainant whether he still wants information on all the trust funds (including Funds (a) – (e), the seven trust funds set up for some specific groups of persons with designated purposes that SWD considered to be outside the complainant's scope of request[7], and the three trust funds whose donors would prefer to stay anonymous), and accordingly to provide him with the best available information to answer his request; and

(b) to enhance staff training concerning the application of the Code.

Government's response

835. SWD accepted the Office's recommendations.

Recommendation (a)

836. SWD has confirmed with the complainant whether he still wants information on all the trust funds and provided him the relevant information available as requested.

Recommendation (b)

837. To enhance staff training concerning application of the Code, SWD has organised training courses and workshops for staff, as well as incorporated related components in the mandatory orientation programmes that are designed for newly recruited staff. The above measures will be implemented on an on-going basis.

[7] The seven trust funds include the Traffic Accident Victims Assistance Fund, Emergency Relief Fund, Hong Kong Paralympians Fund, The Central Fund for Personal Computers, The Jockey Club IT Scheme for People with Visual Impairment, We Care Education Fund, and Social Work Training Fund.

Social Welfare Department

Case No. 2018/0285 – Failing to properly handle an application under the Traffic Accident Victims Assistance Scheme

Background

838. According to the complainant, he was injured in a traffic accident on 10 June 2017 (the accident). On 27th of the same month, he filed an application for the Traffic Accident Victims Assistance Scheme (TAVA) (the application) with the TAVA Section of SWD and submitted the required documents (including the medical reports issued by the Hospital Authority (HA)).

839. The complainant stated that the above medical reports provided the evidence to prove that he was eligible to apply for TAVA. However, the staff responsible for processing his application (Staff A) repeatedly claimed that he was not eligible and asked him to sign "a declaration of not lodging appeal". In the end, he was granted TAVA in December 2017 and January 2018.

840. The complainant considered Staff A unreasonable in claiming that he was ineligible for TAVA, and that Staff A did not handle his application seriously.

The Ombudsman's observations

841. The "Medical Certificate I" submitted by the complainant on 27 June 2017 only stated that he was required to stay in hospital and was recommended sick leave due to duodenal ulcer. It did not mention the accident, nor indicate that he was injured as a result of the accident. Therefore, the Office of The Ombudsman (the Office) considered that it was understandable for the TAVA Section to issue "Form I[8]" to the Queen Elizabeth Hospital (QEH).

[8] According to the operational guidelines of SWD, if the medical report submitted by the applicant indicates the injury is inconsistent with what the applicant has claimed, the TAVA Section should request the medical officer attending the applicant to complete and return a medical assessment form (assessment form) issued by SWD for the purpose of verification of information. "Form I" refers to the assessment form received on 3 August 2017 that SWD has requested QEH's medical officer to sign in respect of the medical certificate and discharge slip issued by the QEH on 16 June 2017 (Medical Proof I).

842. However, the TAVA Section of SWD was inadequate in handling the application, and SWD admitted that "Form I", which was received on 3 August 2017 from the QEH, already indicated that the complainant was injured on the date of the accident, and the recommended sick leave was actually related to the injury by the accident. Therefore, upon receipt of "Form I", the TAVA Section should be able to approve the application and it was not necessary to issue "Form II"[9] to the QEH. However, the TAVA Section repeatedly deliberated over the assessment and made a series of "clarifications". It was not until 11 December 2017 that the first payment of $9,047 was granted and that was clearly a delay. It was against the aim of the TAVA Scheme to provide speedy assistance to victims of road traffic accidents.

843. In addition, the Office believed that even if the forms returned by the hospital were not clear, the complainant still had the right to request clarification from the hospital. Yet, Staff A suggested that the complainant state in a "Declaration"[10] that he agreed "the assessment to be 'the doctor's final decision'", which gave rise to unnecessary doubts on the part of the complainant and that should not be the case.

844. Based on the above analysis, the Office considered that this complaint was substantiated.

845. The Office was pleased to learn that SWD had taken improvement measures to avoid similar delays. The Office recommended that SWD should implement the measures carefully and review their effectiveness in a timely manner, to decide if further improvement should be made.

Government's response

846. SWD accepted the Office's recommendation and has taken, inter alia, the following measures to prevent similar incidents –

(a) staff of the TAVA Section are reminded to pay heed to the communication between the medical staff and the applicant;

[9] "Form II" refers to the assessment form received on 14 November 2017 that the SWD has requested QEH's medical officer to sign in respect of the medical report issued by the QEH on 19 August 2017 ("Medical Proof II").

[10] "Declaration" refers to the declaration form that SWD has requested the applicant to sign in confirming that he agrees to let SWD issue to QEH an assessment form in respect of the "Medical Proof II" and the medical report issued by the QEH on 18 October 2017 ("Medical Proof III") that he submitted.

(b) the medical assessment form shall be issued by the Supervisor of the TAVA Section (S(TV)) so that a uniform set of criteria can be followed when making enquiries to the hospital for medical proof;

(c) regarding the same medical certificate, if the medical assessment form has to be issued for a third time or more, the S(TV) has to obtain the consent of the Senior Social Security Officer (Accident Compensation) (SS(AC)) and put it on record;

(d) when issuing the Form, the S(TV) will not only use standardised wording, but also make precise medical enquiries according to the circumstances of individual cases, so as to make it easier for the medical officers concerned to understand the information required by the TAVA Section; and

(e) the Assistant Supervisor (TV), Deputy Supervisor (TV), S(TV) and SS(AC) will hold a case discussion meeting every week.

847. SWD will continue to implement the above measures and will review their effectiveness in a timely manner.

Social Welfare Department

Case No. 2018/0341 – Failing to properly handle a complaint about an elderly home

Background

848. According to the complainant, his mother was admitted to a residential care home for the elderly (RCHE X) in March 2017 and her weight was measured as 46 kg (Weight A) at that time. According to the records of RCHE X, the complainant's mother weighed 42 kg (Weight B) as at 19 August 2017. According to the Dietetics Assessment Form of the complainant's mother of Hospital Y, her weight was measured as 34.2 kg (Weight C) as at 22 August 2017.

849. The complainant considered that RCHE X failed to take proper care of his mother, resulting in her weight loss of 12 kg in four months (Query (a)).

850. Moreover, the complainant found that RCHE X had the following inadequacies –

(a) there were incidents in which male resident(s) entered the female washroom to peep but RCHE X did not take any action on the matter (Query (b)); and

(b) without consent of the complainant, his mother's hands were tied up with rope one night in June 2017 (Query (c)).

851. The complainant had lodged the complaint with the Licensing Office of Residential Care Homes for the Elderly (LORCHE) of the Social Welfare Department (SWD) but the staff did not follow up the complaint proactively. The complainant was not satisfied that SWD accepted the one-sided accounts of RCHE X and did not take any enforcement action against it in respect of the subject queries.

The Ombudsman's observations

Query (a)

852. In respect of Query (a), the Office of The Ombudsman (the Office) had the following two questions –

(a) Were "Weight A", "Weight B" and "Weight C" all accurate?

(b) If affirmative, it was indeed abnormal for the weight of the complainant's mother to drop from 42 kg (as at 19 August 2017) to 34.2 kg (as at 22 August 2017) in only three days. Yet, was it caused by improper care on the part of RCHE X?

853. The Office considered it difficult to have definite answers to the above two questions. Without any solid evidence from investigation, SWD should not take any enforcement action rashly against RCHE X. The Office also considered that the LORCHE had conducted an investigation at RCHE X in respect of Query (a) and required the home to make improvement.

854. However, the Office was of the view that there were inadequacies in the scope of LORCHE's investigation. The Office pointed out that the LORCHE, after receiving the complaint, should have requested as soon as possible an interview with the complainant's mother to learn about her situation and measure her weight, or tried to make contact with the hospital, in order to understand the cause of her sharp weight loss. Nonetheless, in the incident, the LORCHE only conducted its investigation at RCHE X, without approaching the complainant's mother and the hospital concerned.

Query (b)

855. For Query (b), upon intervention by the LORCHE, RCHE X took some measures to prevent the recurrence of similar incidents. The Office considered that the LORCHE had properly followed up Query (b).

Query (c)

856. Concerning Query (c), the staff of RCHE X denied having used any item to restrain the hands of the complainant's mother to the railing of the bed. In the absence of any independent evidence, SWD was unable to confirm the case. That said, SWD had required RCHE X to improve the communication with the residents and their family members.

857. The Office considered the complaint partially substantiated.

858. The Office requested SWD to remind the staff to adapt to the circumstances when handling complaint(s) in respect of the services provided by RCHEs and interview the complainant(s) or the resident(s) concerned outside the RCHE if necessary, so as to collect evidence from multiple sources and enhance the effectiveness of the investigation work, with a view to strengthening the monitoring of the homes.

Government's response

859. SWD accepted the Office's recommendation and has taken the following follow-up actions.

860. The LORCHE has updated the Manual of Procedures of LORCHE in respect of complaints handling and has, through case sharing, reminded inspectors and their supervisors to study thoroughly the concerns of complainants when handling complaints pertaining to RCHEs; arrange interviews with the complainants or the residents concerned (including those having left the RCHE in question) as necessary to collect more detailed information directly to facilitate the investigation; and consider making contact with other related person(s) or organisation(s) for a more objective and comprehensive understanding of the actual circumstances of the complaints concerned, thereby facilitating proper follow-up. SWD will continuously strengthen staff training and supervision, so as to enhance the effectiveness of the investigation work and strengthen the monitoring of RCHEs.

Social Welfare Department

Case No. 2018/2551 – (1) Misplacing the medical certificates of the complainant, resulting in a lesser amount of payment made under the Traffic Accident Victims Assistance Scheme; and (2) Improper handling of the complainant's enquiry about the appeal channel of the Scheme

Background

861. According to the complainant, he applied to the Social Welfare Department (SWD) for the Traffic Victims Assistance Scheme (TAVA) and submitted documents such as "medical certificates" (i.e. sick leave certificates) in January 2018.

862. On 5 June 2018, the TAVA Section of SWD issued a "Notification of Successful Application for Traffic Accident Victims Assistance" (Notice of 5 June). The complainant found that the amount of assistance listed in the "Notice of 5 June" was lower than the amount he was entitled to, he then made enquiries with the staff of the TAVA Section on the 11th day of the same month. The staff said that the "medical certificates for around one month were missing" and the complainant had to submit them again. The complainant stated that he had already handed in all of the relevant "medical certificates" at the time of application. He asked the staff to explain why some of the "medical certificates" were lost. The staff failed to respond. He thus submitted the "medical certificates" again. On the 13th day of the same month, the TAVA Section issued a "Notification of Successful Application for Traffic Accident Victims Assistance" (Notice of 13 June) to inform the complainant that the review was completed and further payment was granted.

863. The "Notice of 5 June" and "Notice of 13 June" indicated that if the complainant was dissatisfied, he could lodge an appeal with the Social Security Appeal Board (SSAB). The complainant contacted the TAVA Section to enquire about the telephone number of SSAB. The staff of the Section said that SSAB did not have a telephone number.

864. The complainant accused the TAVA Section of –

(a) misplacing the "medical certificates" submitted by him, resulting in a lesser amount of payment made; and

(b) improper handling of his enquiry about the appeal channel of the TAVA Scheme.

The Ombudsman's observations

Allegation (a)

865. As to whether the TAVA Section had lost the "medical certificates" (covering the sick leave period of 11 August to 7 September 2017), the complainant and SWD had their own claims. In the absence of independent corroboration, the Office of The Ombudsman (the Office) could not confirm the facts. Therefore, the Office considered Allegation (a) inconclusive.

866. However, the Office considered that the TAVA Section could, when the complainant was submitting the application, immediately point out to him and request his confirmation that the period from 11 August to 7 September 2017 was not covered by any "medical certificate". In that case, misunderstanding could have been avoided.

867. In addition, the Office noted that both the "Notice of 5 June" and "Notice of 13 June" listed "17/07/2017 - 06/10/2017" as "sick leave period". SWD explained to the Office that the "notice" printed out from the computer system would only display the first and last days of the "medical certificates" submitted by the applicant and the period in between would be taken as "sick leave period". The Office considered it necessary for SWD to improve on this.

Allegation (b)

868. As to whether the staff of the TAVA Section had informed the complainant that SSAB did not have a telephone number, the Office could not confirm the facts in the absence of independent corroboration. Therefore, the Office also considered Allegation (b) inconclusive.

869. The Office considered the complaint inconclusive, but there was room for *improvement* on the part of SWD.

870. The Office had the following recommendations for SWD –

(a) if it is found that the applicant has not submitted the relevant "medical certificates" for the sick leave claimed, the applicant should be immediately requested to confirm whether he has any "medical certificates" not yet submitted;

(b) SWD should consider setting out precisely the eligible "sick leave period" in the "Notification of Successful Application for Traffic Accident Victims Assistance" (the Notification); and

(c) SWD should consider indicating the telephone number of SSAB in the Notification.

871. The Office was pleased to learn that SWD had accepted the above recommendations.

Government's response

872. SWD accepted and fully implemented the Office's three recommendations –

(a) SWD has reminded case staff to, when the applicant submits sick leave certificate(s), confirm with the applicant immediately whether he/she has any sick leave certificate not yet submitted, and to state the facts clearly in the officer's report;

(b) the Notification has already set out accurately the hospitalization not charge sick leave period for which the applicant submitted application, the number of eligible days and the amount of assistance granted to the applicant; and

(c) the telephone number of SSAB has already been indicated in the Notification.

Social Welfare Department

Case No. 2018/3268 – Failing to provide financial assistance to a Comprehensive Social Security Assistance recipient who required special examination arrangements in taking the Hong Kong Diploma of Secondary Education Examination

Background

873. According to the complainant, he was a secondary school social worker. A student of his secondary school who was receiving Comprehensive Social Security Assistance (CSSA) (Student A) sustained hand injuries in the 2017-18 school year. The student worried that his writing speed would be affected by the condition of the injuries when attending the 2019 Hong Kong Diploma of Secondary Education Examination. Student A asked the complainant to assist him in applying for special arrangements in the examination from the Hong Kong Examinations and Assessment Authority (HKEAA).

874. According to the requirements of HKEAA, applicants are required to submit relevant supporting documents for the application for special arrangements in the examination. Student A conducted the writing speed assessment at the Occupational Therapy Department of the Princess Margaret Hospital under the Hospital Authority (HA). HA could issue an assessment report but the fee ranged from $895 to $3,580 (report fee). Student A was unable to afford the report fee due to financial difficulties.

875. The complainant stated that he phoned the staff responsible for Student A's CSSA case (Staff X) on 15 August 2018 to request financial assistance for the report fee. Staff X replied that there was no special grant to cover the report fee and advised him to approach the Medical Social Worker of Student A for assistance instead.

876. The complainant requested the Social Welfare Department (SWD), HKEAA and HA respectively to provide assistance to Student A. However, these department/authorities all refused to provide assistance. Finally, the complainant obtained funding from the community to pay for Student A's report fee.

877. The complainant was dissatisfied that SWD did not have a mechanism in place for providing the necessary financial assistance to CSSA students who needed special arrangements in the examination (the Assistance Issue). As a result, he had to spend substantial time and effort to seek the necessary funding for Student A in the community.

The Ombudsman's observations

878. SWD clarified that although CSSA did not include a standard assistance on "report fee", SWD could disburse discretionary assistance if CSSA recipients had special needs.

879. As the complainant could not provide the name of student A or that of Staff X to the Office of The Ombudsman (the Office), the Office could not verify whether Staff X had told the complainant that CSSA did not include report fee.

880. Based on the findings above, the Office concluded that the complaint was unsubstantiated.

881. That said, the Office recommended SWD to strengthen frontline staff training to ensure that staff are familiar with the scope of CSSA and handle enquiries concerning applications for special grants properly.

Government's response

882. SWD accepted the recommendation of the Office. SWD shared this case with district heads at a Social Security Meeting held on 12 June 2019. They were reminded to step up supervision for frontline staff on the handling of special grants and the related application mechanism to enhance the quality and efficiency of the service. Besides, starting from August 2019, SWD will explain the scope of the various special grants in greater detail with illustration of this case and others in training courses for newly recruited staff. To deepen and strengthen frontline staff's working knowledge, SWD will also share this case with serving staff in its annual workshop on CSSA investigation.

Transport Department

Case No. 2017/3319 and 2017/3346 – Improper arrangement for implementation of two-way toll collection at the Lantau Link that caused serious traffic congestion

Background

883. The complainant complained that the Transport Department (TD), without sufficient preparation, insisted to implement two-way toll collection arrangement at the Lantau Link on 20 August 2017, causing serious traffic congestion in the morning of 21 August (i.e. the first working day after implementation of the new arrangement) which adversely affected the public.

884. A one-way toll collection arrangement was adopted at the Lantau Link since its opening in 1997 until 20 August 2017. Motorists were previously not required to pay when driving towards the airport, but had to pay the toll of a round trip when returning to Kowloon. However, with the expected commissioning of the Hong Kong-Zhuhai-Macao Bridge, the Lantau Link would no longer be the only vehicular access to Lantau, and thus switching to a two-way toll collection arrangement became necessary.

885. To prepare for the two-way toll collection arrangement, TD had to reinstate at the Lantau Toll Plaza the traffic facilities and toll booths on the airport-bound traffic lanes, as well as replace the entire toll collection system. From April 2016 to August 2017, the installation works for 15 of the 20 toll collection lanes had been completed in different phases. TD was of the view that upon enclosure of the remaining three free flow lanes and the two adjacent toll collection lanes on both sides for road works, it was imperative to implement the two-way toll collection concurrently for road safety reasons.

886. Based on the vehicular traffic flow data of different time slots, TD estimated that opening four manual and two Autotoll lanes would be sufficient to process 5 000 vehicles per hour and cope with the peak-hour traffic volume. Regarding the commencement date of two-way toll collection and details of the temporary traffic arrangements (TTA), TD had consulted the Legislative Council (LegCo) and the transportation sector, with no objection received.

887. From July 2017, TD had started publicising the new toll arrangement through various channels, including press releases, pamphlets, banners, and variable message signs installed on major motorways. On 9 August, TD conducted a drill simulating the operation of two-way toll collection jointly with the Police, the contractor of the Tsing Ma Control Area, the Highways Department, and the Electrical and Mechanical Services Department. In the early morning hours of Sunday, 20 August, the two-way toll collection arrangement commenced operation and the traffic situation was smooth on the whole.

888. On 21 August 2017, i.e. the first working day after implementation of two-way toll collection, TD deployed two officers to monitor the situation from 6:00 am at the control room of the Lantau Toll Plaza. At around 7:00 am, they noticed heavier traffic flow and the formation of vehicle queues. Subsequently, TD called for a meeting at the Toll Plaza with the Police and relevant parties to discuss how to adjust the TTA, and opened one more toll collection lane. Between 7:00 am and 11:00 am, TD kept the public informed of the latest traffic situation by issuing a series of 15 press releases and making announcements through radio broadcast and mobile applications, advising travellers to consider taking the MTR to the airport.

889. TD initially estimated that six toll collection lanes could handle a total of 5 000 vehicles per hour. However, on the morning of the incident, only around 2 900 vehicles passed through the six lanes per hour. After analysis, TD considered the major cause to be poor placement of water-filled barriers at the Toll Plaza, making it difficult for motorists to change traffic lanes. There was also insufficient space for vehicles to wait in line. Consequently, the vehicles queuing up for the manual toll collection lanes blocked the way leading to the Autotoll lanes, thereby reducing the capacity of the toll collection lanes. TD's preset contingency plan did not include making immediate alterations to the TTA. As critical safety considerations were involved in altering the TTA, TD had to meet with relevant parties before deciding on an alternative TTA after 9:00 am, changing the configuration of water-filled barriers. The traffic congestion gradually eased off thereafter.

The Ombudsman's observations

890. TD's decision to implement the two-way toll collection arrangement at the Lantau Link from 20 August 2017 was based on sufficient considerations and justifications, and was not a hasty one. TD

had taken an array of preparatory measures (including studying past traffic flow data, considering relevant road safety factors, formulating strategies on temporary transport arrangement (TTA), devising a contingency plan, setting up operation and coordination centres, consulting LegCo, relevant District Councils, relevant government departments and the transport trade, publicising relevant arrangement, etc.), and had conducted a drill. The Office of The Ombudsman (the Office) found no evidence that TD had implemented the two-way toll collection arrangement without adequate supporting or preparatory measures.

891. However, according to the information gathered, the TTA implemented on 21 August 2017, including the location for placement of water-filled barriers as well as the traffic signs and instructions for alerting motorists, not only failed to divert the traffic effectively, but also failed to provide sufficient space for vehicles using manual toll lanes to wait in line. As a result, those vehicles queuing for manual toll lanes blocked the way leading to Autotoll lanes and the speed of vehicles passing through both Autotoll lanes and manual toll lanes was much slower than expected. This reveals that the TTA formulated beforehand could hardly cope with the actual traffic situation during peak hours. According to TD's analysis, this was the major technical factor which led to the traffic congestion at the Lantau Link in the morning on 21 August. While the Office would not comment on TD's professional assessment and judgment in this regard, the Office opined that TD's response to the subsequent events on scene was obviously inadequate, which showed its deficiencies in administrative arrangements. This was the reason that TD failed to control and resolve the congestion problem at the soonest possible and eventually led to a major traffic gridlock.

892. The Office took the view that as it was a widely-known fact that the traffic between 7:00 am to 9:00 am on a working day was generally very busy, TD was supposed to have predicted that there would likely be heavy traffic or even traffic chaos at the Lantau Link in the morning of 21 August. If this was not the case, TD would not have deployed two officers to monitor the situation at the control room of the Lantau Toll Plaza. However, what was baffling was that the preset contingency plan had not included making immediate alterations to the TTA, rendering the two staff on site unable to make decision to adjust the TTA immediately in response to the emergency situation. It was not until the arrival of relevant officers of TD and the Police at 9 am that discussion on adjustments to the TTA was held. It can be seen that TD's preset contingency plan was inadequate and unamenable of immediate adjustments in the light of the actual circumstances.

893. While TD kept on advising motorists to travel to the airport by other means on that day, it could only help those motorists or passengers who were not stuck in the traffic queues. For those who had already been stranded, this piece of advice was really pointless. Under such circumstances, the Office considered it more appropriate for TD to consider how to provide an exit for motorists willing to make a U-turn and leave the scene, thereby dissipating the vehicle queues more quickly. Unfortunately, TD had not done anything to that effect.

894. To sum up the above analysis, the Office took the view that TD did not hastily implement the two-way toll collection arrangement at the Lantau Link without adequate supporting measures. However, there were inadequacies on the part of TD in contingency arrangements. Therefore, the Office considered the complaint unsubstantiated, but found other inadequacies on the part of TD.

895. The Office made the following recommendations to TD –

(a) learn the lessons from this incident, step up staff training on TTA strategies and enhance their ability and sensitivity in activating and adjusting contingency measures;

(b) review its staff deployment to ensure that authorised officers, who can immediately activate contingency measures and revise the TTAs in response to change of circumstances are stationed on site for the first working day upon implementation of similar TTA in future; and

(c) where appropriate, consider instituting a contingency U-turn point arrangement as one of the contingency measures such that motorists got stuck in the traffic queues can opt to leave the scene, thereby dissipating the traffic queues more quickly.

Government's response

896. TD accepted all the recommendations of the Office and has implemented, and will continue to implement the following measures.

Recommendation (a)

897. TD has taken steps to enhance training for staff responsible for approving or formulating TTAs, including organising seminars which

feature discussions on specific cases and sharing of TTA strategies employed and experience learnt during implementation of road works on major highways, to enhance staff's professional knowledge and sensitivity.

Recommendation (b)

898. On the first working day upon implementation of similar TTAs at tunnels/control areas subsequent to the incident (such as addition of Autotoll lanes at Cross-Harbour Tunnel and installation of "stop-and-go" e-payment facilities at certain tunnels), TD has arranged certain officers who are authorised to activate and adjust the contingency measures to be deployed on site or at the Emergency Transport Co-ordination Centre (as the situation warranted), so that they might promptly exercise professional judgment on the contingency measures. TD has also, with due regard to the need of individual arrangement, invited the Police to take part in the monitoring work.

Recommendation (c)

899. In this case, given the road design constraint, TD was unable to set up a "contingency U-turn point" as one of the contingency measures. When implementing similar TTAs subsequent to the incident, TD has already considered instituting a "contingency U-turn point" as one of the contingency measures. For future TTAs, if such need arises and when the road design and traffic arrangements permit, TD will institute a "contingency U-turn point" as a contingency measure. If a "contingency U-turn point" is not possible, TD will seek to divert traffic flow via existing road networks having regard to the actual circumstances and traffic conditions.

Transport Department

Case No. 2018/0295 – Failing to properly monitor the breaches of an operator of residents' bus service

Background

900. The complainant lodged complaints with the Transport Department (TD) from September to December 2017, alleging that an operator providing residents' service did not display valid passenger service licences on its buses, did not provide the services in accordance with the frequency approved by TD, and used other buses of the company as spare buses for the route concerned, etc. The complainant also made an enquiry to TD concerning the relevant licensing and statutory requirements. In December 2017, TD replied that no irregularities of the operator were found during the on-site investigations conducted in September and December 2017. However, further observations by the complainant revealed that the operator increased frequency of service on its own and deployed other buses of the company as spare buses for the route concerned; that the vehicles had not obtained the required endorsements, failed to display any passenger service licence or displayed invalid passenger service licences; and that the driving attitude of the drivers was poor, etc. The complainant pointed out that TD asserted that "no irregularities of the operator were found" after conducting only two on-site inspections in September and December 2017, but did not respond to the complainant's allegation of irregularities of the operator identified on other days. This showed that TD did not perform its duties diligently or comprehensively.

901. The complainant stated that the above-mentioned irregularities of the operator persisted during and after the period when TD issued two written replies to the complainant in October and December 2017. However, TD only repeated the same reply saying that "the operators were reminded to follow up" and "those who witnessed the irregularities committed by the operator could immediately seek assistance from the Police for prosecuting the drivers", indicating that TD did not fully exercise the statutory power conferred on it and was unable to handle irregularities of the operator. The complainant considered that TD's practice of using written and verbal reminders to deal with irregularities committed by the operator was a waste of resources. The complainant considered that the department had adopted a perfunctory and irresponsible

attitude and condoned the irregularities of the operator, leaving the problem unresolved for a long period of time.

The Ombudsman's observations

TD's follow-up actions on operator's irregularities

902. The Office of The Ombudsman (the Office) considered that the complaint made by the complainant concerned mainly concerned with TD's failure to resolve the problem of persistent irregularities committed by the operator in the course of operating residents' service. As seen from the information and photos provided by the complainant, there was no noticeable improvement in respect of the operator's irregularities, especially on the use of unauthorised vehicles and the failure to display valid passenger service licence certificates on vehicles.

903. Indeed, TD took follow-up actions upon receiving the complaints, including scrutinising the relevant records and conducting on-site investigations. TD also issued letters requesting the operator to pay attention to and improve the situation, referred the case to the Public Vehicles and Prosecutions Section for follow-up action and initiation of an inquiry, and referred cases concerning failure to display valid passenger service licences on buses to the Police for follow-up action. However, it was clear that such measures were ineffective. The Office understood that it was not possible for TD to deploy a large amount of resources to monitor the operation of the route concerned by the operator for a prolonged period. However, the information provided by the complainant showed that the operator had repeatedly used unauthorised vehicles in operating the residents' service before and after the complainant lodged the complaint. For example, except for vehicle X and Y, the other three vehicles mentioned by the complainant had not obtained the authorisation to operate on the route. Under such circumstances, TD's reply to the complainant in December 2017, which stated that TD did not find any use of unauthorised vehicles during its on-site investigations conducted in September and December 2017, not only contradicted the information stated by the complainant, but also failed to accurately reflect the findings of the TD's on-site investigation. In fact, during an on-site inspection conducted by TD on 24 November 2017, it was found that the operator deployed an unauthorised vehicle to operate on the route concerned.

904. The Office considered that there were inadequacies in TD's regulation of the residents' services of the route concerned operated by the operator.

905. On the other hand, the Office considered that since it was the Police who was responsible for regulating the display of valid passenger service licences by enforcing the Road Traffic (Public Service Vehicles) Regulations (Cap. 374D), it was appropriate for TD to advise passengers or other persons who witnessed the irregularities to report quickly to the Police, so that the Police could follow up as soon as possible.

906. The Office also agreed that the feedback of the "passenger representative" on the operator would indeed play a key role in determining whether the operator could be approved to continue operating the residents' service. Therefore, although TD has an ineluctable regulatory responsibility, it was also a reasonable practice for TD to advise residents (including the complainant) to reflect their dissatisfaction with the performance of the operator and their drivers to the "passenger representatives", so that the "passenger representatives" could consider whether to continue to engage the operator.

TD's replies to the complainant

907. TD admitted that there were inadequacies in its replies to the complainant, including the failure to immediately verify before offering a reply and the inaccuracy and incomprehensiveness of the replies. TD instructed the relevant staff to pay more attention and make improvements, and offered an apology to the complainant.

908. As regards the procedure to issue warnings mentioned in TD's reply and the speech of the then Secretary for Environment, Transport and Works at a Legislative Council sitting quoted by the complainant, the Office considered that there were no inconsistencies and no changes in the procedures. The then Secretary, by mentioning "first", meant that under the regulatory mechanism, TD would first issue a warning as a preliminary action taken after discovering irregularities, before conducting an inquiry. TD's statement that "if irregularities persist during the investigation, it will issue a warning letter to the operator concerned" also meant that warnings would be issued in the first place, before further considering suspending, cancelling or altering the relevant passenger service licences.

909. The Office considered the complaint partially substantiated and recommended that TD step up the monitoring of the operator, including

conducting on-site investigations more frequently, issuing warnings and/or conducting inquiries in a timely manner, and considering suspending or even cancelling the relevant passenger service licences held by the operator, should there be conclusive evidence.

Government's response

910. TD accepted the Office's recommendation and has stepped up its monitoring of the operator, including meeting with the operator in August 2018 and urging it to operate in accordance with the requirements of the passenger service licence. The operator committed not to use unauthorised buses for providing the service. TD conducted a follow-up on-site investigation in September 2018 and found that no unauthorised vehicles were used by the operator. However, it was found that a certified copy of the details of approved residents' bus service was not displayed on the front window of some vehicles. In this connection, TD issued a warning to the operator. TD would continue to take relevant monitoring actions. If irregularities of the operator are found, TD would take appropriate follow-up actions.

911. Furthermore, in order to improve the situation in which operators have to temporarily arrange for replacement of vehicles in case of contingency (such as vehicle breakdowns, traffic accidents, etc.), TD has approved increasing the number of spare buses of residents' service since September 2018. This would enhance the flexibility of bus deployment by operators and help to avoid the use of unauthorised vehicles.

Transport Department

Case No. 2018/1309 – (1) Failing to monitor a training course and its refresher course for trainers of the Driving Improvement Course; and (2) Failing to follow up the complainant's comments on the course materials

Background

912. The complainant alleged that he attended a training course (train-the-trainer course) and its refresher course for trainers of the Driving Improvement Course in August 2012 and March 2018 respectively. According to his observation during the courses, he felt that the course content, the institution organising the train-the-trainer course, the instructors of the train-the-trainer course, as well as the test questions of the refresher course all placed little emphasis on instilling the knowledge of safe driving, while the Transport Department (TD) had not exercised proper monitoring over them (Allegation (a)).

913. The complainant stated that he had reflected to TD that the course content regarding the laws and skills on safe driving was riddled with errors, but TD failed to follow up the matter properly and only referred his views to the institution which organised the training course for follow-up (Allegation (b)).

The Ombudsman's observations

Allegation (a)

914. The train-the-trainer course placed emphasis on class teaching and guiding skills, which sit well with the course objectives. Trainees of the train-the-trainer course were either experienced motorists or driving instructors, who should have been well acquainted with matters relating to safe driving and relevant legislation. What they needed to learn was how to teach effectively in a classroom setting, so that when they became an instructor of the Driving Improvement Course, they would be able to guide and manage the learning process of trainees, and engage the trainees in interactive learning. The Office of The Ombudsman (the Office) considered that it was not unreasonable for TD to place the focus of the train-the-trainer course on class teaching and guiding skills.

915. The Vocational Training Council (VTC) is one of the largest vocational and professional education and training providers offering pre-employment and in-service programmes in Hong Kong. It has also been maintaining close ties with the transport trade. It was therefore reasonable for TD to select VTC to conduct the train-the-trainer course. Besides, the instructors of the train-the-trainer course possessed rich experience and qualifications in driver training and were familiar with safe driving and other driving knowledge, meeting the teaching requirements set for the course. It was also evident from the feedback the trainees gave upon completion of the course that they were satisfied with both the organiser of the course and the performance of the course instructors. The Office was of the view that there was no evidence suggesting that VTC and the instructors of the course were unfit to organise or teach the course.

916. As for the refresher course, the scope of test mainly covered teaching methods, concept of safe driving, good driving attitude, etc., which fulfilled the objectives of the refresher course and were compatible with the course content. Having checked the written test questions of the refresher course, the Office confirmed that the questions had already covered the above topics. TD explained that the "50 points" threshold for passing the test was set by VTC, and TD respected VTC's professional knowledge and decision in this aspect. The Office took the view that, from the administrative point of view, there was no maladministration on the part of TD. In any case, the fact that TD increased the number of test questions to 20 in response to the complainant's view showed that it did make review and improvement.

917. To sum up, the Office considered that there was no evidence suggesting any improper monitoring by TD over the course content of the train-the-trainer course and its refresher course, the organising institution, the instructors as well as the design of test questions. In view of the above, the Office considered Allegation (a) unsubstantiated.

Allegation (b)

918. Regarding the section on safe tailing distance in the Driving Instructor Manual, the Office noted that while the first sentence adopted two-second (i.e. the time interval) driving distance to be the safe driving distance from the vehicle in front, the remaining parts of the section referred to vehicle length in calculating the safe tailing distance. Although TD subsequently confirmed with the institution publishing the Driving Instructor Manual that the formula for calculating the required time

distance was based on "one second for every three metres of vehicle length", which was applicable to general vehicles driving in good weather condition, and even though there was no error in the content of this part, it was evident that there were inconsistencies between different parts of the section before revision, rendering them incomprehensible and unclear. This would defeat the objective set by TD in ensuring the appropriateness of teaching guidelines. The fact that TD had failed to identify any problems in the content of the Driving Instructor Manual on many previous occasions when the course materials were submitted by the organising institutions prior to commencement of the course in the past also pointed to a lack of due care on the part of TD.

919. After receiving comments from the complainant in end February 2018, TD conducted a review according to established procedures and subsequently put forward suggested revisions to the relevant institution. TD further undertook to review and revise the course materials of the train-the-trainer course in collaboration with the institution. Its response was considered rather proactive and positive.

920. As the complainant had not provided TD with concrete details of his other comments, TD could be excused for not following up on them. Upon learning from the Office other comments made by the complainant, TD has already proceeded to review the content of the Driving Instructor Manual according to established procedures, and would make revision as necessary.

921. To sum up the analysis of the above, the Office considered Allegation (b) unsubstantiated, but found other inadequacy on the part of TD.

922. The Office recommended TD to critically review the course materials of the train-the-trainer course. If the course content is found to be inadequate or no longer applicable, TD should reflect to the relevant institution and ask for revision as soon as possible.

Government's response

923. TD accepted the Office's recommendation, and has reviewed the teaching materials of the train-the-trainer course and reflected to the relevant institution the course content which were found inadequate or no longer applicable. The institution has made revision and enriched relevant teaching materials including strengthening the parts on safe driving and

parking on steep roads. TD will continue to maintain liaison with the institution with a view to updating the teaching materials in a timely manner.

Transport Department

Case No. 2018/2438 – (1) Unclear requirements for installation of an additional step on minibuses; (2) Specifications of the additional step were at the discretion of vehicle examiners; and (3) Requirements for the additional step changed frequently

Background

924. The complainants lodged a complaint with the Office of The Ombudsman (the Office) against the Transport Department (TD) for making use of administrative instructions to require public light buses (PLBs) to install an intermediate step with unclear specifications and frequently changing requirements.

925. The complainants stated that their PLB was put into service in 2017 and it was only after eight months that they were told by TD that their PLB failed the vehicle examination as its intermediate step did not conform to the specifications stipulated. Subsequently, they had a new intermediate step installed based on the drawing provided by TD at their own cost. The step was still assessed to be not fully compliant with the requirements by the vehicle examiner but the examiner exercised his discretion to allow their PLB to pass the examination. The complainants were worried that TD would again say that their PLB did not comply with the requirements in the coming year, and they would have to spend time and money to retrofit the intermediate step again. To sum up, the complainants were dissatisfied with TD that –

(a) the specifications for the installation of the step were unclear;

(b) the decision whether the step was in compliance with the requirements was left to the vehicle examiners; and

(c) there were frequent changes in the specifications of the step, leaving PLB owners like them confused while suffering losses.

The Ombudsman's observations

Allegation (a)

926. TD explained that before formulating the design and specifications for the intermediate step, it had consulted the PLB trade, made reference to the design of similar steps adopted in Japan, conducted field trials on the step model and invited elderly groups to conduct a trial. Based on the findings of such work, specifications and technical requirement document for the step were drawn up for reference by vehicle owners and operators in retrofitting their PLBs. TD indicated that as PLBs came in different brands and models, there were variations in the dimensions of the default steps at the middle doors of PLBs. Hence, the relevant dimension requirements of the intermediate step were expressed in relative ratios rather than absolute figures to enable vehicle owners and operators to install the intermediate steps having regard to the actual situation of their PLBs in an appropriate and compliant manner.

927. The Office considered it reasonable for TD, in view of the variations in the dimensions of different PLB brands/models, to adopt relative ratios in the dimension requirements to ensure that the intermediate step to be installed on a PLB fits the dimensions of the vehicle. The Office understood that while vehicle owners might generally be unable to grasp the dimension requirements expressed in relative ratios, the manufacturers concerned should be able to understand the requirement documents and install the intermediate steps according to the specifications having regard to the actual dimensions of PLBs. The Office noted that TD had already passed the specifications to PLB manufacturers/local agents for reference. In view of the above, the Office considered Allegation (a) unsubstantiated.

Allegation (b)

928. When conducting vehicle examination, vehicle examiners would inspect the intermediate steps according to the requirements set out in the specification documents. The Office took the view that given that standard specifications had been formulated as the basis for the vehicle examiners to carry out their work, same as the examination of other parts of the vehicle, even if the assessment of the compliance of the step installed with the requirements was done by the vehicle examiners, the arrangement was in line with the established practice. Having reviewed the Vehicle Examination Reports and Repair Orders issued to the complainants in respect of their PLB on 21 June and 22 June 2018, the Office noted that the PLB had failed the vehicle examination on 21 June because "the

intermediate step at the passenger boarding/alighting steps was not installed", not because the intermediate step that had been installed did not comply with the requirements. On 22 June, the PLB passed the vehicle examination. In short, there was no evidence suggesting that leaving the assessment to vehicle examiners was improper. In view of the above, the Office considered Allegation (b) unsubstantiated.

Allegation (c)

929. The Office took the view that the measure in question was initially introduced to facilitate the boarding and alighting of the elderly and people in need, which was a well-intentioned one, and TD had reacted promptly to withdraw the requirement when it found that a number of passengers tripped over and were injured. Having said that, in less than one year, TD successively promulgated two different versions of specifications for the intermediate step, and subsequently withdrew them on both occasions. This inevitably gave vehicle owners and operators the impression that TD was flip-flopping in its decision, leaving them to bear the burden of retrofitting the step.

930. TD considered that as only a small number of PLBs were fitted with intermediate steps, passengers might not be fully aware of the existence of the intermediate step when alighting. The Office took the view that as the cost of installing the step was only $4,000, TD's requirement for all PLBs to install the intermediate step (except for those considered not suitable for the installation owing to physical constraints) would not be a heavy burden on the trade. On the other hand, according to TD's observation, there were quite a number of passengers (including the elderly) who did not use the intermediate step at all, while there were some who almost tripped over when using it. It could be seen that the actual operation of the intermediate step was not as effective as it was intended to be. The Office opined that TD should learn from this incident that when introducing similar measure in future, it could first conduct trials, deploy staff to make on-board observation at PLBs and ascertain the effectiveness of the measure before fully implementing it.

931. Moreover, the Office agreed with the findings of TD's review, acknowledging the importance of launching adequate publicity before implementing the installation of intermediate steps so as to alert the public to the addition of the step. In implementing the installation of the intermediate step, TD mainly relied on posters and stickers posted at PLB stands and PLB compartments as well as radio announcement of public interest for publicity. This was considered insufficient. Besides, with only

a small ratio of PLBs installed with an intermediate step, passengers would in most cases make their trips on PLBs without an intermediate step, and when they occasionally boarded a PLB with an intermediate step, passengers would not readily adapt to the new installation and thus prone to accidents. To sum up, the Office considered Allegation (c) unsubstantiated, but found other inadequacies on the part of TD.

932. The Office recommended that –

(a) when introducing similar measures in future, TD should consider conducting trials to ascertain their effectiveness before fully implementing them;

(b) TD should launch adequate publicity to enable the public to be fully prepared to the implementation of the new measure; and

(c) where possible, TD should consider introducing the measure in one go to enable members of the public to adapt to it.

Government's response

933. TD accepted all the recommendations of the Office. TD undertook that when introducing similar measures in future, TD would consider conducting trials to ensure the effectiveness of the measures before full implementation, as well as launching adequate publicity to prepare the general public adequately for the implementation of the new measure. Furthermore, TD would, where possible, consider introducing the measures in one go to enable members of the public to adapt to it.

Transport Department

Case No. 2018/2629, 2018/2630, 2018/2631, 2018/2634 and 2018/2635 – (1) Failing to monitor the service and performance of a public transport operator; and (2) Disregarding the transportation needs of Ma Wan residents

Background

934. In July 2018, the Office of The Ombudsman (the Office) received complaints against the Transport Department (TD) from Ma Wan residents (the complainants).

935. The complainants stated that, according to the Heads of Agreement signed between the Government and the developer of the Ma Wan Northeastern comprehensive development area, the developer was obliged to provide proper ferry and bus services to and from Ma Wan. At present, a public transport operator operates ferry and residents' bus services for Ma Wan. Earlier, due to the deficit incurred by its ferry services over the years, the operator applied to TD for reducing the frequency of the ferry service, and proposed to "substitute ferries with buses". The residents were strongly dissatisfied with and opposed to the proposal. Moreover, the operator also applied to TD for reducing the frequency of the bus services. The complainants reckoned that while the developer had committed to provide Ma Wan residents with proper ferry and bus services in order to secure the Government's support for the relevant development project, the applications currently submitted by the operator were seriously in breach of the original commitment to the Government and Ma Wan residents (including the residents of Park Island). The complainants also alleged that the bus and ferry services operated by the operator were unsatisfactory, riddled with lost trips and even accidents. Their allegations against TD are summarised as follows –

(a) the operator unreasonably requested to reduce the frequency of the ferry service and applied for fare increase on the grounds of deficits, contravening the conditions agreed by the developer when it applied for the development, but TD failed to regulate the situation;

(b) the operator unreasonably requested to reduce the frequency of the bus services and applied for fare increase, contravening the conditions agreed by the developer when it applied for the development, but TD failed to regulate the situation;

(c) there were often lost trips and even accidents for the bus and ferry services operated by the operator, but TD failed to regulate properly; and

(d) between 8 and 10 July in the same year, a number of bus routes for the residents' service were affected by lost trips, vehicle breakdowns and insufficient services, resulting in prolonged waiting time and long queues, but the operator failed to notify the residents and adopt any contingency measures. The complainants were dissatisfied that TD did not request the operator to maintain sufficient bus trips in accordance with the contract, and failed to issue warnings to the operator.

936. Having regard to the above, the complainants were dissatisfied that TD had failed to properly regulate the operator's operating situation, ignoring the transportation needs of the Ma Wan residents.

The Ombudsman's observations

937. The Office considered that TD had explained in detail its regulatory mechanism for the ferry and residents' bus services provided by the operator to Ma Wan residents, and the current level of these services.

Allegation (a)

938. The Office scrutinised the information relating to this complaint, which included records of the operator's applications for adjustment in a ferry service from 2008 to present. The Office found that the operator had requested five times to reduce the frequency of a ferry service of different time slots, and TD rejected two of these applications (including the one submitted in June 2018) after considering such factors as passengers' demand, the operators' financial position and performance, the impact of the proposed adjustment on passengers, and justifications for the applications. Although TD had approved the operator's applications for reducing the frequency of the ferry services before, TD's survey in June 2018 revealed that the maximum patronage of the route was 86%, meaning

the ferry service on that route can accommodate residents' demand in general.

939. Records showed that TD's latest approval for fare increase was granted to the operator in July 2015 regarding two ferry routes. The revised fares took effect from 8 May 2016 and have remained the same up till present. The Office had then received complaints from members of the public, expressing their dissatisfaction about TD's approval for the fare increase. The findings of the inquiry were that in granting the operator the approval, TD had considered a number of factors, in particular the significant deficits that the operator had incurred for years (due to the limited patronage and lack of apparent growth in patronage while operating costs were increasing), and extensive consultation had been conducted. From an administrative perspective, there was no evidence of maladministration on the part of TD. In the Office's view, fare increase has never been a popular decision, and TD could not reject an application for fare increase merely because there were objections from residents while ignoring other relevant factors affecting the ferry services.

Allegation (b)

940. TD explained that the operator should first obtain support from resident representatives if it intended to alter the schedules of service including the timetable, frequencies and fares. As regards the operator's proposal to cancel and reduce some frequencies of two residents' bus routes, and increase the fares of four residents' bus routes in June 2018, it had consulted the resident representatives in accordance with the established procedures. It was understood that the operator subsequently did not submit any application for cancelling frequencies of residents' bus service or increasing the fares. The Office considered that there was no evidence of maladministration on the part of TD.

Allegation (c)

941. The Office noted that TD had a mechanism to regularly monitor Ma Wan ferry and residents' bus services. The Office examined the statistics on lost trips, accidents and complaints in the past five years regarding the ferry and residents' bus services concerned. Putting aside a torrent of complaints from Ma Wan residents to TD in June and July 2018 subsequent to the operator's application in June 2018 for reducing the weekday frequencies of a ferry service and its proposal to reduce some frequencies of residents' bus services and increase the fares, the Office

considered that the figures on lost trips, accidents and complaints in general were at low levels.

942. As there had been a slight increase in the lost trip rates of ferry services since 2017, TD commenced its investigation into the reasons for lost trips and followed up on the operator's operation of ferry services. From the administrative perspective, the Office found that TD had properly handled the problem. As regards residents' bus services, TD had monitored the service level by conducting multiple site inspections and examining the operational records submitted by the operator. In fact, according to the records of site inspection conducted by TD in 2017, four of the six residents' bus routes provided more frequencies than those stipulated in the schedules of service in order to meet residents' needs. In conclusion, the Office considered that TD had properly monitored the operation of the operator's residents' bus service to ensure its service level.

Allegation (d)

943. Regarding the under-provision of services on individual residents' bus route from 8 to 10 July in the same year, the Office considered that TD had actively followed up on the situation. Apart from immediately demanding the operator to conduct an investigation into the reasons and provide an explanation, TD also conducted an follow-up investigation and issued a reminder to the operator. According to the findings of TD's follow-up investigation, the operator subsequently provided adequate frequencies for various routes of residents' bus services.

944. The Office considered the complaint unsubstantiated but noticed from the above incident that the operator had actually provided residents' bus services in accordance with the frequencies stipulated in the schedules of service. Nevertheless, the frequencies stipulated in the schedules of service could not meet the daily needs of residents, resulting in long queues when the operator was not able to provide additional frequencies. The operator provided additional frequencies for certain routes of residents' bus services in the past few years, reflecting that the frequencies stipulated in the schedules of service could not cope with the transportation needs of Ma Wan residents. The Office considered it necessary for the operator to engage in detailed discussion with the resident representatives (such as reviewing the need to adjust the frequencies stipulated in the schedules of service, or use bigger buses to serve the residents) and reach a consensus, before submitting the relevant proposals to TD for approval from the perspective of general transport planning.

945. The Office recommended TD to –

(a) continue monitor closely the service and operation level of the ferry and residents' bus services provided by the operator and examine how the contingency arrangement for traffic incidents in relation to Ma Wan could be strengthened in order to meet residents' transportation needs; and

(b) review the transport planning guidelines for Ma Wan, and adjust the schedules of service for ferry and residents' bus routes in accordance with residents' actual transportation needs and patterns, and the development of the local transport network, so that reliable and proper transportation services could be provided to Ma Wan residents in the long run.

Government's response

Recommendation (a)

946. TD agreed to the recommendations of the Office and would continue to monitor closely the service and operation level of the operator in providing ferry and residents' bus services. Having regard to the problem of the reliability of the residents' bus services, TD has implemented a series of improvement measures, including approving an operator of a larger scale employed by the passenger representative in June 2019 to operate one of the supplementary residents' bus services serving Ma Wan, in order to increase the overall number of spare buses and bus captains for deployment, thereby enhancing its reliability. Also, TD has worked with the operator to draw up the details of enhancing the contingency arrangements in response to the traffic incidents on Lantau Link. The enhanced contingency arrangements have been activated on a number of occasions since April 2019, where emergency ferry services were operated to effectively divert passengers of residents' bus services when the residents' bus services were affected by traffic congestion caused by traffic incidents, or when there were a large number of stranded passengers who had to be cleared within a short duration due to inclement weather.

947. TD would continue to work with the operator to follow up on other feasible improvement measures with a view to further enhancing the residents' bus services and closely monitoring the operation and service level.

Recommendation (b)

948. TD agreed that there was a need to review the transport planning guidelines for Ma Wan, and already kick-started the relevant work, including analysing the existing transportation needs, travelling patterns and views of the residents. On the other hand, having regard to the housing development plan in Ma Wan South, the Government would review the long-term traffic and transport needs of the entire Ma Wan Area and the relevant transport planning guidelines. Since the transport planning guidelines are currently set out in the explanatory statement of the Outline Plans, TD will, in accordance with the established procedures on amending the explanatory statement, consult the relevant stakeholders and then submit the amendments to the guidelines to the Town Planning Board, with a view to completing the relevant procedures as soon as possible.

Transport Department

Case No. 2018/3195 – Delay in repairing a damaged wall at a transport interchange

Background

949. In May 2017, a traffic accident took place at a public transport interchange (PTI) under the management of the Transport Department (TD), causing damage to a wall near the exit thereat. On 30 May 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against TD for leaving the damaged wall unrepaired up to the time he lodged the complaint.

950. The general day-to-day repair, maintenance and cleaning work of the PTI concerned was undertaken by relevant stakeholders according to their respective purview pursuant to the maintenance schedule agreed by the stakeholders prior to its commissioning. TD was responsible for the management of the PTI, including monitoring the public transport service operators using the PTI, as well as coordinating and arranging the respective works. TD will coordinate the division of responsibilities pursuant to the above-mentioned maintenance schedule.

951. On 11 May 2017, a bus accident occurred at the PTI, causing damage to some railings and a wall near the exit.

952. In that traffic accident, facilities damaged included some railings, a wall near the exit and a section of fire shutter track (fire track) which was adjacent to the finish of the damaged wall. The Highways Department (HyD) and Architectural Services Department (ArchSD) were responsible for the repair works for the railings and the wall respectively pursuant to the maintenance schedule. However, as the maintenance responsibility for the fire track was not included in the maintenance schedule, TD had to first clarify who was responsible for the repair before coordinating with ArchSD and the responsible department/unit to repair the wall and the fire track in one go. The inspections conducted by the stakeholders responsible for the maintenance of the external wall and repair works of the wall structure revealed that no immediate danger was caused by the damage and buses could continue to use the bus parking bays and exit passages beside the damaged wall. Hence, TD did not advance the repair works of the damaged wall.

The Ombudsman's observations

953. The Office opined that as the incident arose from a traffic accident, TD could not be faulted for taking steps to find out who should be responsible and whether the bus company would undertake the repair works on its own before deciding on the next step. Moreover, TD also conducted inspection in conjunction with relevant stakeholders to ascertain that the damaged facilities would not cause imminent danger or obstruction to the operation of the PTI, and concluded that there was no urgent need to arrange for immediate repair. Nevertheless, the Office considered that when TD found that no clear reply was given by the bus company after several months following the accident, for the sake of public interest, it should have arranged the repair works first and recovered the repair fees from the bus company later if the latter accepted the liability, rather than waiting indefinitely for a concrete reply by the bus company before arranging for the next move. In fact, from the information provided by TD, the Office noticed hat some railings damaged in that accident were first repaired by HyD in June 2017 (i.e. about one month after the accident) and the repair fees were then recovered from the bus company.

954. TD, being the department responsible for the overall management of the PTI, needed to secure the cooperation from all stakeholders in clarifying the division of responsibilities. The Office understood that as the said fire track had not been listed in the maintenance schedule, TD needed to contact various departments and stakeholders to seek their assistance, which was unavoidably time-consuming. It could be observed from the incident that TD had encountered quite a lot of difficulties when it was in the process of finding the responsible unit, in particular when the property management refused to carry out the repair works after several months. The Office considered that TD should learn from this case and ensure that all facilities would be covered in any maintenance schedule drawn up in future to avoid dispute. In addition, TD, upon review, acknowledged that there was room for improvement in its handling, including improved communication, more active arrangements for on-site inspections and attempts to save time by comfirming works items with the stakeholders through other means.

955. Based on the above analysis, the Office considered the complaint partially substantiated. The Office recommended that –

(a) should TD come across similar cases in future, it should consider arranging for the repair works first as appropriate and then recover the repair fees from the responsible party after confirming who should be responsible, so as to avoid delay in the repair works;

(b) TD should expeditiously review the maintenance schedule for the PTI to identify the facility items left out from the schedule and discuss with relevant stakeholders to confirm who should be responsible for the maintenance of such items; and

(c) in preparing similar maintenance schedule in future, TD should consider adding a column of "Others" for which the maintenance and repair are to be undertaken by the facility owner or the responsible units, so as to avoid the situation where there are facilities under no one's responsibility.

Government's response

956. TD accepted the Office's recommendations and has taken the following actions.

Recommendation (a)

957. In future, when TD comes across similar cases, TD will consider arranging for the government departments/stakeholders with relevant experience and expertise to carry out the repair works first and then recover the repair fees from the responsible party to avoid delay in repair works.

Recommendation (b)

958. TD has worked with relevant government departments to thoroughly review the maintenance schedule for the PTI, revise the items for which the maintenance responsibility has not been clearly defined, update the division of responsibilities regarding some items, and provide more detailed descriptions for the scope of some existing items to facilitate identifying the departments responsible for the maintenance. To make the maintenance schedule for the PTI more comprehensive, some maintenance items which come under the responsibility of non-government organisations (such as bus companies) have also been incorporated into the maintenance schedule.

Recommendation (c)

959. TD has demanded adding a column of "Others" in the maintenance schedules when TD took part in the discussions and formulation of the maintenance schedules for new PTI in recent years in order to cover items not exhaustively listed out or not clearly defined. The maintenance responsibility for such items will fall onto the property developer to avoid the situation where there are facilities under no one's responsibility. TD will continue to adopt such arrangement.

Transport Department

Case No. 2018/3248 – (1) Transferring the ownership of the complainant's vehicle to another person without the complainant's consent; and (2) Refusing to renew the registration of the vehicle

Background

960. The complainant alleged that, according to the requirement of the Transport Department (TD), to make an application for transfer of vehicle ownership, the original vehicle owner had to be present at TD's office in person. However, on 26 October 2015, without her authorization or her making the transfer of ownership application at TD's office in person, TD transferred the ownership of a private car registered under her name (the involved vehicle) to another person (the involved vehicle was still in the complainant's possession). The complainant had reported the case to the Police, but the Police did not arrest any person at that time. The case happened three years ago from the time when the complainant approached the Office of The Ombudsman (the Office), and the complainant was worried that if she did not make an application to renew the vehicle licence of the involved vehicle, TD would cancel the registration of the vehicle together with its registration mark. Yet TD pointed out that she had to obtain the Court's judgment before she could make an application to renew the vehicle licence of the involved vehicle. Because of the above, the complainant was dissatisfied with TD in –

(a) processing the application for the transfer of ownership of the involved vehicle to another person without her consent; and

(b) refusing to renew the registration of the involved vehicle.

The Ombudsman's observations

Allegation (a)

961. TD clarified that, when making an application for transfer of vehicle ownership, the new vehicle owner is only required to bring along the Notice of Transfer of Vehicle Ownership signed by the registered owner and the required documents (including the original Vehicle Registration Document), and make the application in person at TD's office.

The registered owner (the original vehicle owner) does not have to be present in person when making the application.

962. The Office agreed that Vehicle Registration Document is an important document to verify the identity of the owner of a vehicle. Vehicle owners are responsible for the safekeeping of and signing on the Vehicle Registration Documents to safeguard their interest. According to the statement of the complainant made to the Police on 31 March 2016, she handed over the original Vehicle Registration Document of the involved vehicle in September 2015 to her agent, who handled all matters in relation to the involved vehicle for her all along, so that the agent could handle the renewal of vehicle licence and insurance matters on behalf of the complainant. However, the agent could no longer be reached since then. The complainant stated that she had no recollection as to whether she had signed on the original Vehicle Registration Document or not. On the copy of the Vehicle Registration Document she later provided to the Office, no signature was found in the field for signature of registered owner. The Office was of the view that the crux of the case was whether the person making the application for the transfer of vehicle ownership on that day was able to produce the original Vehicle Registration Document of the involved vehicle, and whether the signature on the Notice of Transfer of Vehicle Ownership tallied with the signature on the Vehicle Registration Document. For the first issue, TD had already disposed of the relevant documents of the transfer of vehicle ownership of the involved vehicle in accordance with established procedures with reference to the records retention and disposal schedule, and thus was unable to provide the Office with the Vehicle Registration Document. Yet according to the complainant's statement, her Vehicle Registration Document had already been handed over to another person, and thus it was possible that the person concerned had produced the original Vehicle Registration Document. For the second issue, the Office found that the signature on the Notice of Transfer of Vehicle Ownership was totally different from the complainant's signature on the complaint form. However, since the complainant was unable to confirm whether she had signed on the original Vehicle Registration Document, even though the copy of the document provided by the complainant to the Office had not been signed, the Office was unable to confirm the time when the copy of the document was made, and whether she had signed on the original document after making the copy. Under such circumstances, the Office was unable to verify whether the signature of the registered owner (i.e. the complainant) on the Notice of Transfer of Vehicle Ownership tallied with the signature on the original Vehicle Registration Document, and whether the signature on the original Vehicle Registration Document had been forged. Therefore, the Office

was unable to confirm whether the staff of TD had followed the established procedures to verify whether the signatures of the registered owners on the two documents tallied with each other.

963. On the other hand, after scrutinizing the Notice of Transfer of Vehicle Ownership, the Office discovered that one letter in the English name of the registered owner on the Notice was obviously different from the name of the complainant. According to the established procedures in processing applications for transfer of vehicle ownership, counter staff would verify whether the registered owner's information on the Notice of Transfer tallies with the record of the departmental computer system, and then the information would be counter-checked by another staff. The Office was of the view that approving the transfer of vehicle ownership after double verification of information should be reliable and proper. However, the Office was surprised to note that TD was unable to spot the error after being verified by two staff members as well as reviewed by the staff investigating the case.

964. The Office was of the view that, as the transfer of vehicle ownership involves the transfer of valuable assets, the process must be handled with extreme care. TD must address the above problem positively with serious instruction given to the staff, and review whether the prevailing procedures for processing applications for the transfer of vehicle ownership should be improved.

965. In summing up the above, the Office concluded that Allegation (a) was unsubstantiated, but TD had other inadequacies found. In any case, the complainant had already reported the alleged illegal transfer of ownership of the involved vehicle to the Police, and the case should continue to be handled by the Police. As to how the Police would investigate the case, the Office had no power to intervene and comment.

Allegation (b)

966. TD had already explained, according to the Department's record, the ownership of the involved vehicle had already been transferred to another person, and the complainant was no longer the registered owner. Therefore, before the Police or the Court could confirm the ownership of the involved vehicle had been illegally transferred, TD was unable to accept an application to renew its vehicle licence made by the complainant. The Office was of the view that the explanation of TD was reasonable. Therefore, Allegation (b) was unsubstantiated.

967. Nonetheless, in view of the other inadequacies found, the Office recommended TD –

(a) to remind staff that, when handling transfer of vehicle ownership, all information in the application must be carefully verified. If anything inaccurate or suspicious is found, it should be confirmed with the registered owner direct as appropriate; and

(b) to conscientiously review the prevailing procedures in processing the applications for the transfer of vehicle ownership to identify any room for improvement, so as to ensure the checking process is accurate.

Government's response

968. TD accepted the recommendations of the Office and has taken the following actions.

Recommendation (a)

969. TD has instructed staff that when processing applications for transfer of vehicle ownership, they must verify all the information in the applications carefully, and double-check the information in the Notice of Transfer of Vehicle Ownership (except Taxi) (the Notice) against the supporting documents.

Recommendation (b)

970. TD conducted a review in 2019 and issued a set of updated guidelines to licensing staff to set out the standard procedures for handling transfer of vehicle ownership applications. Under TD's two-tier checking system, the staff are required to pay special attention to letters and numbers in the applications that may be easily confused, double-check the signature of the vehicle owners in the Notice against that in the Vehicle Registration Document, and verify the application details with the registered owner and/or new owner directly as the case so warrants. All staff concerned have been reminded to closely observe the requirements as stipulated in the guidelines. The guidelines are circulated amongst frontline staff in the licensing offices every six months and incorporated into the training materials for new staff. TD has also reminded registered owners through various promotion channels (e.g. affixing notices in licensing offices and handing out promotion pamphlets, giving verbal reminders to applicants

(or their agents) by counter staff, etc.) that they must sign on the vehicle registration documents, and keep the documents in safe custody.

Transport Department

Case No. 2018/3343(I) – Refusing to provide the Code of Practice in relation to the annual examination of private cars and light goods vehicles

Background

971. In August 2018, the complainant submitted an application for access to information to the Transport Department (TD), requesting for a copy of the current version of the Code of Practice for Designated Car Testing Centres (COP) issued by TD under section 88F(1)(a) of the Road Traffic Ordinance (Cap. 374) in relation to the examination of private cars and light goods vehicles at car testing centres (the Examination), which sets out the practice and procedure to be followed and specifies the equipment to be used for the examination. From time to time, TD would issue new guidelines or requirements in the form of advisory letters for compliance by the designated car testing centres (DCTCs). Moreover, the Tester's Inspection Manual (the Manual), which is a detailed guide to the inspection procedures to be adopted for the Examination, is attached to the COP.

972. TD replied to the complainant refusing his request by invoking paragraph 2.9(c) of the Code on Access to Information (the Code), claiming that the disclosure of the COP would harm or prejudice the proper and efficient conduct of the operations of the DCTCs, for which the operations and services provided to the public are authorised by TD. The complainant lodged a complaint to the Office of The Ombudsman (the Office) against TD for its refusal of his application.

The Ombudsman's observations

973. The objective of the examination is to ascertain the roadworthiness of vehicles. As long as a vehicle has met all standards of the Examination set by TD, it should be considered to be roadworthy. The Office did not see how disclosure of the requirements and testing methods would prejudice the effectiveness of the Examination or attainment of its objective. On the contrary, disclosing such information would enhance the transparency, and public understanding, of the Examination. In fact, similar schemes of vehicle examination are very common overseas. In

many other countries such as Australia, Canada, the United Kingdom and the United States, the inspection manuals for vehicle examinations, which contain the details of the requirements and testing methods, are publicly accessible. Strictly speaking, Approved Car Testers (ACTs) and Responsible Persons (RPs) in Hong Kong are currently under no obligation to keep the COP and associated documents to themselves.

974. Although TD emphasises that the COP is designed for internal use and not for vehicle owners to prepare for the vehicle examination, paragraphs 1.9.2 and 1.10.2 of the Guidelines on Interpretation and Application of the Code clearly state that in general the identity of the requestor (e.g. a vehicle owner) and the purpose of the request (i.e. preparation for the vehicle examination) should have no bearing on the decision to release the requested information or not. The fact that the purpose of the COP does not match with the purpose of the request is in itself not a valid reason under the Code to refuse disclosure.

975. Furthermore, TD has reiterated that information contained in the COP/the Manual is sensitive and might be misinterpreted by the general public. These are, however, not valid reasons under Part 2 of the Code for withholding the requested information.

976. As regards the corruption prevention measures, the Office has scrutinised those relevant advisory letters. They mainly lay down the practice and procedure in handling bookings and conducting tests for the Examinations. The Office did not consider the disclosure of any of those advisory letters would attract collusion or affect the effectiveness of corruption prevention measures as alleged by TD.

977. All in all, the Office did not accept TD's invoking paragraph 2.9(c) of the Code to deny the complainant's access to the current version of the COP and its attachments.

978. In the light of the above, the Office considered this complaint against TD substantiated. Nonetheless, the Office appreciates TD's initiative to conduct a full review of the COP with a view to publishing it on the Department's website.

979. The Office noted that the current version of the COP contains a lot of communications between TD and the DCTCs in the form of advisory letters over the past years and becomes quite difficult for the general public to comprehend. It is not user-friendly even for ACTs and RPs. Moreover,

it would incur a significant charge for the complainant to obtain a full copy of the COP with its attachments which contains hundreds of pages.

980. In view of the bulk volume of the current version of COP and its updated version is scheduled to be made available free of charge on TD's website by mid-2019, the Office has recommended TD to further clarify the information request with the complainant. If the complainant still wants a full copy of the current version of the COP, or simply the COP without the attachments, TD should accede to his request. If TD considers that any part of the information in the COP has fallen within Part 2 of the Code and should not be disclosed, TD may obliterate such information and explain to the complainant accordingly.

Government's response

981. TD accepted the Office's recommendation and had contacted the complainant, informing him of the total number of pages of the current COP and its attachments, the approximate photocopying fee and TD's schedule of uploading the updated COP and attachments to the Department's website which would be made available to the public free of charge. The complainant responded that he would download the updated version of COP and its attachments by himself when available at TD's website and decided not to request for a hard copy of the current version of COP.

982. TD completed updating of the COP and its attachments, and uploaded it to TD's website on 9 May 2019. Subsequently, TD has also informed the complainant that the updated version of COP is available on TD's website.

Vocational Training Council

Case No. 2017/5154 – Providing misleading information and unreasonably refusing to refund an enrolment deposit

Background

983. Ms. A was the complainant in this case. Based on the website information and the programme prospectus of the Vocational Training Council (VTC) and the advice given by the admissions office staff of the Youth College under VTC, Ms. A's daughter had been made to believe that she could progress to VTC's Higher Diploma (HD) in Child Care and Education (HD (CCE)) programme after acquiring the Council's Diploma of Vocational Education (DVE) in Print Media (DVE (PM)). Consequently, the daughter applied for enrolment in the DVE (PM) programme as her academic attainment did not meet the entrance requirements for the HD (CCE) programme. Ms. A paid $5,000 as enrolment deposit for her. Afterwards, Ms. A learned that there was in fact no articulation arrangement between the two programmes. She, therefore, asked the Youth College for a refund of the enrolment deposit. Her request was rejected.

984. VTC explained that DVE holders were only eligible for some of the HD programmes, and holders of DVE (PM) were not eligible for the HD (CCE) programme. Such information was clearly provided on VTC's website and in the prospectus, and applicants were reminded to refer to the entrance requirements of specific programmes. VTC also denied that its staff had provided Ms. A's daughter with misleading information.

The Ombudsman's observations

985. In the absence of corroborative evidence, the Office of The Ombudsman (the Office) was unable to ascertain whether the admissions office staff had given Ms. A's daughter wrong advice. However, it was indeed stated in the general information of the DVE (PM) programme that "DVE graduates can apply for HD programmes offered by VTC". That sentence might have misled Ms. A's daughter to believe that upon acquiring DVE (PM), she would be eligible for any of the HD programmes offered by VTC. The Office, therefore, considered the complaint substantiated.

986. The Office recommended that VTC –

(a) expeditiously review the introductory information of all its DVE programmes and revise any misleading information; and

(b) refund the enrolment deposit to Ms. A.

VTC's response

987. VTC accepted the Office's recommendations. VTC has revised the relevant information immediately and arranged for the refund of the enrolment deposit to Ms. A.

Water Supplies Department

Case No. 2018/0144 – (1) Officers unreasonably refusing to provide information to the complainant for registration before entering the building for site inspection; and (2) Damaging the cover of a water tank

Background

988. In the morning of 27 October 2017, the Chairman of the Owner's Corporation (OC) of Building X received an email from the Home Affairs Department, stating that the Water Supplies Department (WSD) would like to visit Building X for checking the water quality of the building and asked the OC to contact WSD. At around 6 p.m. of the same day, the Treasurer of the OC (i.e. the complainant) called WSD. He gave his telephone number to the WSD staff and scheduled a visit to Building X for 30 October 2017.

989. In the morning of 30 October 2017, the complainant received a telephone call from a WSD staff informing him that some WSD staff members were on their way to Building X. The complainant therefore waited outside the entrance of Building X. Soon, four people who were not in uniform (whom the complainant believed were WSD staff) arrived. The complainant asked them to provide their identification papers for registration purpose but they refused. The complainant therefore contacted the Chairman of the OC and called the Police for assistance. When the OC Chairman arrived, the WSD staff still refused to provide their identification papers. Not until the Police attended the scene did three of them show their identification papers and entered into the building.

990. After the WSD staff had entered the building, they went to the podium on their own. They damaged the locked cover of the sump fresh water tank for conducting inspection and caused the cover to go missing. The complainant alleged that the staff of WSD were rude and damaged the water supply facility of the building. He thus complained to the Office of The Ombudsman (the Office) that –

(a) WSD officers had unreasonably refused to provide proof of identity for registration when entering Building X to carry out duty; and

(b) WSD officers damaged the cover of the fresh water tank on the day of inspection.

The Ombudsman's observations

Allegation (a)

991. WSD admitted it was unsatisfactory that its staff failed to provide their identity information for registration on the day of site inspection. The Office considered that the incident had showed that there were inadequacies in the internal communication among WSD staff and in the inspection arrangement.

Allegation (b)

992. Having examined the relevant photos provided by WSD, the Office considered WSD's description of the cover and the hinge credible (i.e. during the inspection on 11 October 2017, it was found that the hinge of the water tank cover was broken and the water tank was not locked. The whole cover could therefore be taken away. During the second inspection on 30 October 2017, the cover of the water tank was found missing). In any event, if the OC still considered that WSD should be held responsible for the damage to the water tank cover, it might consider seeking legal advice and resolving it through legal means.

993. The Office considered that Allegation (a) substantiated and Allegation (b) unsubstantiated. In conclusion, the complaint was partially substantiated and the Office's recommendations were as follows –

(a) WSD should offer a written apology to the complainant for the impropriety of its staff during the inspection; and

(b) WSD's proposed workshops on enhancing customer service should be conducted as soon as possible in order to reduce the complaints arising from communication problem.

Government's response

994. WSD accepted the Office's recommendations.

Recommendation (a)

995. WSD has apologised to the complainant for the inadequacy of its staff when handling the complainant's request for providing staff cards for registration.

Recommendation (b)

996. WSD has organised workshops on enhancing customer service for frontline staff so as to strengthen their skills and knowledge of communication with the customers. WSD has also commissioned the Civil Service Training and Development Institute to organise a series of tailor-made customer service training courses focusing on the daily operation of WSD for the frontline staff with a view to further improving the quality of customer service.

Water Supplies Department

Case No. 2018/2704A – (1) Giving unjustified comments about the safety of the structures above a service reservoir without providing any relevant live load data; (2) Providing inconsistent information on whether there are structures above a service reservoir; (3) Failing to answer the complainant's enquiries about potential pollution of the water in the service reservoir; and (4) Failing to maintain the condition of the land above the service reservoir

Background

997. The complainant was discontent as the Water Supplies Department (WSD) failed to give satisfactory response on the land use of the roof of Fresh Water Service Reservoir (FWSR) A and B and related enquiries. The complainant's allegations are as follows –

(a) It was unreasonable for WSD to have claimed that the structures erected on the roof of FWSR A and B were structurally safe while failing to produce any relevant design live load;

(b) WSD denied in its reply to the complainant's enquiry that additional structures had been built on the roof of FWSR B. However, WSD mentioned in the letter dated 17 May 2018 to the Concern Group represented by the complainant (Concern Group) that structures not belonging to WSD had been built on the service reservoir roof. The complainant challenged that WSD was inconsistent in its replies;

(c) The complainant claimed that, as lead bullets would be used in shooting, any shooting range built on the roof of service reservoir would generate large amount of lead pollutant. The complainant also opined that the fresh water inside the service reservoir would be polluted if the ventilation openings were damaged. On 30 May 2018, the complainant raised an enquiry to WSD pointing out WSD should not sub-allocate the roof of service reservoirs for use as shooting range for ball firing. However, there was no direct response with respect to pollution by lead (e.g. pollution of ground soil) in the reply dated 3 August 2018 by WSD; and

(d) The complainant opined that WSD failed to maintain FWSR A properly. As a result, the ventilation openings on the ground were overgrown with weeds and more than one insect nests were found under the eaves of the structures on the service reservoir roof.

The Ombudsman's observations

Allegation (a)

998. Regarding Allegation (a), WSD was unable to provide the design live load of FWSR A since it was built long time ago. Yet it produced justifications demonstrating the structures erected on its roof were structurally safe. The Office of The Ombudsman (the Office) accepted the explanations by WSD. WSD had also provided the design live load of FWSR B documented in design records, and made clarifications that the association concerned had not built any structure on the roof of the service reservoir. The Office therefore considered Allegation (a) of the complaint unsubstantiated.

Allegation (b)

999. Regarding Allegation (b), WSD had made clarifications regarding the structures not belonging to the Department mentioned by the Concern Group that they did not belong to the Department. Nonetheless, it was noticed in the information provided by the complainant that, while WSD had stated in its reply to her enquiry that no design live load of FWSR B was available, the Department was in fact able to provide the Office with such data later on. The Office considered such situation unsatisfactory. Therefore, while the Office considered Allegation (b) of the complaint unsubstantiated, WSD did have other inadequacies. The Office urged WSD to be prudent in providing accurate information when responding to public enquiries or complaints.

Allegation (c)

1000. Regarding Allegation (c), WSD had already given detailed explanations on the extremely low risk of lead pollution to the fresh water at FWSR B. In addition, all the fresh water samples tested in the past met the relevant standards. The Office therefore opined that there was no evidence showing WSD's failure to duly consider or monitor the risk of pollution of water stored in the service reservoir arising from the shooting activities on its roof. The Office had scrutinised WSD's reply on

12 June 2018 to the complainant's concern on the large amount of lead pollutants generated by shooting activities. WSD stated in its reply that water samples were taken at regular intervals for water quality tests, including metal content, and that all test results in the past revealed that water quality met relevant standards. The Office opined that such reply had already adequately addressed the complainant's concern about water quality. The Office believed that if WSD could provide more details in its explanation, such as the equipment/facilities used by the association concerned and the anti-pollution design of the service reservoir, etc., it would further alleviate the complainant's doubt. In conclusion, the Office considered Allegation (c) of the complaint unsubstantiated.

Allegation (d)

1001. Regarding Allegation (d), WSD had made it clear that the land on the roof of FWSR A was currently under the management of the relevant District Lands Office, instead of WSD. Notwithstanding this, WSD had been following up with issues of the service reservoir in accordance with its terms of reference. Therefore, the Office considered Allegation (d) of the complaint unsubstantiated.

1002. The Office was in the opinion that, on the whole, the complainant's complaint against WSD was unsubstantiated. However, WSD did have other inadequacies. Although the design records of FWSR B were more than 30 years old, and the staff of WSD might need to spend more time digging into files and collections to retrieve the design live load of the service reservoir, WSD's reply to the complainant, saying that there was no such data, was not the fact after all.

1003. WSD should instruct their staff members to carefully check and confirm the accuracy of information before replying to enquiries/ complaints from the public. If more processing time is anticipated, the enquirer/complainant should be informed of the situation in a timely manner.

Government's response

1004. WSD accepted the Office's recommendation, and has recirculated the relevant Departmental Instruction to remind its staff members to observe the stipulated procedures when handling requests for information; carefully check and confirm that the relevant information is correct before making a reply. If more time is required to handle a case, the

enquirer/complainant should be notified in a timely manner. WSD will also arrange recirculation of the concerned Departmental Instruction every six months.

Part III
– Responses to recommendations in direct investigation cases

Buildings Department and Food and Environmental Hygiene Department

Case No. DI/414 – Government Departments' Handling of the Problem of Air-conditioner Dripping

Background

1005. Every year, the Office of The Ombudsman (the Office) receives many complaints against the Food and Environmental Hygiene Department (FEHD) for failing to properly follow up on cases of air-conditioner dripping.

The Ombudsman's observations

Regarding FEHD

1006. The Office's direct investigation has identified five inadequacies in FEHD's handling of complaints about air-conditioner dripping.

Inadequacy (a): Failing to conduct test on air-conditioner after issuance of nuisance notice

1007. In the course of investigating/following up on cases of air-conditioner dripping, FEHD staff tend not to test the air-conditioners concerned when the weather turns cooler and the air-conditioners are not in use then. The dripping problem is actually not fixed and would recur in the following summer. The complainant will then have to lodge a complaint again and FEHD to start its investigation afresh. Handled in this manner, a dripping problem could remain unresolved for years.

Inadequacy (b): Failing to set a standard duration for testing air-conditioners

1008. FEHD had not set any standard duration for testing air-conditioners.

1009. The Office understands that the time needed for an air-conditioner test to produce a valid result may vary from case to case. FEHD should, nevertheless, set a reasonable standard duration for testing in order to produce more accurate and convincing test results. For cases where water dripping occurs shortly after a test begins, there is of course no need to carry on testing. Otherwise, the test should continue, say, for 30 minutes. If after assessing the circumstances the FEHD staff decide that the test should continue even further, they could certainly extend the duration of the test according to their judgement.

Inadequacy (c): Failing to conduct inspections at the usual time of the dripping as reported by the complainant

1010. In some cases, FEHD had failed to conduct inspections at the usual time of dripping as reported by the complainant. As a result, no dripping from air-conditioners had been found. Such inspections were not only futile and a waste of efforts, but also did not conform to FEHD's own operational guidelines.

Inadequacy (d): Failing to take follow-up actions in accordance with the operational guidelines after issuing notices of appointment

1011. In some other cases, FEHD had failed to take actions according to its operational guidelines. After issuing a Notice of Appointment, it did not follow up in a timely manner to enter the premises concerned to test if the air-conditioner had a dripping problem.

Inadequacy (e): Failing to properly record observations made in inspections

1012. Some cases have revealed that FEHD staff did not always record whether they had conducted any air-conditioner test during inspections. That not only reflects negligence on the part of the inspection officers; their supervisors and the senior management should also be held accountable.

Regarding the Buildings Department (BD)

1013. The Office also noted that installation of communal drainage pipes for disposing of condensate from air-conditioners (Communal Drainage Pipes) would better resolve the problem of air-conditioner dripping. Currently, there is no law that requires buildings to install Communal Drainage Pipes and old buildings are generally not fitted with such pipes. In this light, the Office has in this direct investigation explored

with BD whether there are ways to prompt/encourage the inclusion of installation of Communal Drainage Pipes in the comprehensive maintenance programmes of buildings.

1014. BD agreed that it would be opportune and cost-effective to install Communal Drainage Pipes when repair works on external walls are carried out.

1015. The Office recommended that FEHD –

(a) In the course of investigating/following up cases of air-conditioner dripping (including cases where a Nuisance Notice (NN) has been issued), FEHD should require its staff to enter the premises to test the air-conditioners concerned, unless they could observe clearly from the outside that the air-conditioners are dripping. Where necessary, they should issue to the owners/occupiers of the premises notice for entering the premises, or even apply to the court for a Warrant of Entry;

(b) For cases not yet concluded by late summer/early autumn, FEHD should always continue its investigations, so as to obviate the need for the complainants to lodge further complaints when summer comes again and for FEHD to spend extra resources to conduct investigations afresh;

(c) Set a reasonable standard duration for testing air-conditioners for its staff to observe;

(d) Deploy staff flexibly and conduct inspections as far as possible at the occurrence time of dripping as reported by the complainant, and remind its staff to adhere strictly to the guidelines in handling complaints about air-conditioner dripping;

(e) Provide a proforma in its Complaints Management Information System (the system) for its staff to record observations made in inspections, and examine how to make use of the system to enhance its efficiency in following up complaints about air-conditioner dripping; and

(f) Consider publicising through the media the benefits of installing communal drainage pipes at buildings and consult BD on the content of the publicity materials if necessary.

1016. The Office recommended that BD –

(g) Prompt/encourage building owners, through its Building Safety Loan Scheme (BSLS), to include installation of communal drainage pipes for disposing of condensate from air-conditioners in the comprehensive maintenance programmes of their buildings; and

(h) Issue Practice Note to remind Authorized Persons involved in external wall repairs to recommend to building owners taking the opportunity to install such pipes.

Government's response

1017. FEHD and BD accepted the Office's recommendations.

FEHD

Recommendations (a), (b) and (d)

1018. In response to Recommendations (a), (b) & (d), FEHD issued relevant operational guidelines to its staff concerned in July 2018.

Recommendation (c)

1019. For Recommendation (c), FEHD has arranged its staff to collect from actual investigation cases relevant data on the time needed for testing air-conditioner dripping for analysis purpose. Based on the analysis of the data collected, FEHD set the reasonable time for testing air-conditioners as 20 minutes. An operational guideline was issued in April 2019 to require the staff concerned to continue the test for 20 minutes if dripping is not observed at the initial stage of the test.

Recommendation (e)

1020. As regards Recommendation (e), FEHD has made available a proforma in the system since August 2018 and issued guidelines to the staff concerned in a bid to clearly record the relevant information during investigation of complaints about air-conditioner dripping. In addition, FEHD examined the feasibility of enhancing its efficiency in following up air-conditioner dripping complaints through the alert function of the system. The system issues reminders and alerts to the investigation

officers and/or their supervisors by phases in case the officers concerned have failed to input dates for interim reply and substantive reply to complainants prior to the stipulated deadlines. If the reminder and alert function of the system is further enhanced, such as including information about whether investigation officers have tested the air-conditioners allegedly involved in cases and monitoring each follow-up stage after the issue of any Notice of Intended Entry or NN, it can be anticipated that the investigation officers and their supervisors would consistently receive an incessant amount of reminders and alerts for different cases or for one single case. FEHD was of the view that issuing excessive reminders and alerts would only produce counter effect on the alerting function. In this regard, FEHD issued an email in November 2018 to remind investigation officers that apart from recording clearly the relevant information during investigation of air-conditioner dripping complaints, they and their supervisors should also utilise the existing function of the system of issuing reminders as well as generating alerts and reports for overdue cases in order to monitor outstanding and ongoing work (including following up cases in which advisory letters, Notices of Intended Entry and NNs have been issued). This should help to address the problems leading to overdue cases in a timely manner and enhance the efficiency in following up complaints about air-conditioner dripping.

Recommendation (f)

1021. For Recommendation (f), FEHD displayed a series of advertisements between June and August 2018 to remind the public to check and maintain their air-conditioners at home. It also publicised the benefits of installing communal drainage pipes at the external wall of buildings for disposal of condensate from air-conditioners to prevent nuisance caused by dripping air-conditioners. Posters and promotional leaflets were produced for reference of residents of housing estates and private buildings. FEHD also conducted similar publicity work in 2019. In April 2019, posters were displayed in advertising spaces along railway lines (including MTR, MTR East Rail Line, West Rail Line and Ma On Shan Line). Between April and October 2019, publicity campaigns were conducted on free and pay television channels. FEHD will continue to disseminate to the public the message of regular maintenance and repair of air-conditioners to avoid nuisance caused by dripping.

1022. FEHD wrote to the Office on 10 July 2018, 10 December 2018 and 6 May 2019 to account for the above follow-up actions. The Office confirmed on 20 June 2019 that FEHD had implemented the

recommendations and its follow-up to this direct investigation had come to an end.

BD

Recommendation (g)

1023. BD has updated its webpage and the Application Notes of BSLS to indicate that installation of communal drainage pipes is within the scope of BSLS. This will encourage building owners to take the opportunity to apply for additional funding for installation of such pipes upon their application for loan under BSLS when undertaking comprehensive maintenance programmes.

Recommendation (h)

1024. BD has revised Practice Note for Authorized Persons, Registered Structural Engineers and Registered Geotechnical Engineers APP-112 on disposal of condensate from air-conditioners to remind Authorized Persons to advise building owners to install communal drainage pipes when carrying out external wall repairs.

Department of Health
and Government Secretariat – Education Bureau

Case No. DI/411 – Government's Follow-up Mechanism Regarding Psychological Health Assessment of School Children

Background

1025. To safeguard the physical and psychological health of school children, the Department of Health (DH) launched the Student Health Service Programme (StHS), under which students are given an annual health assessment at a Student Health Service Centre (SHSC), including psychological health assessment, that matches their different stages of development.

The Ombudsman's observations

1026. The Office of The Ombudsman (the Office) conducted a direct investigation and found inadequacies in the implementation of StHS in the following three areas.

Inadequacy (a): Failing to adopt specific measures to boost low student attendance rate

(i) Failing to examine the reasons for absence from the annual assessment sessions

1027. In the past few years, only around 65% of the enrolled students attended their annual assessment sessions. The attendance rate of secondary students was even as low as 50%. Nevertheless, DH has never looked into the reasons behind their absence. Such low attendance rate would not only undermine StHS' effectiveness, but also cast doubt on whether the resources have been properly utilised.

(ii) Failing to provide schools and the Education Bureau (EDB) with information on student attendance rate

1028. At present, DH would not notify the schools/EDB about students' attendance of the annual assessment. The Office recommended DH to release to each school information on the attendance rates of its students, and release to EDB the overall attendance rate of each school. If any

school is found to have a persistently low attendance rate, EDB should work with the school concerned to take improvement measures.

(iii) To enhance the appeal of StHS

1029. DH may consider providing among its online services more basic health information and medical records of students (such as vaccination records), transforming StHS into records of students' personal growth and physical development/health, thereby increasing the appeal of StHS and boosting its attendance rate.

Inadequacy (b): Failing to ensure that parents know their children's assessment results

(i) Failing to effectively notify parents who have not attended their children's annual assessment of the assessment results

1030. The Office's investigation found that many students were not accompanied by their parents when attending assessment sessions. For students who had been assessed to have psychological health issues that required attention, but were not accompanied by parents when attending assessments, SHSCs would only ask the students to deliver the assessment reports to their parents. Nevertheless, the Office is concerned about whether young students are capable of accurately conveying to their parents the explanation and recommendations of the medical staff. DH should consider more reliable ways to notify parents of their children's assessment results.

(ii) Psychological health assessment reports fail to reflect details of students' assessment results

1031. The report on "Personal Health Assessment Results and Recommendations" prepared by SHSCs includes only some general advice on health, such as "develop good hobbies", without reflecting any details about any particular issues or areas of concerns of the students. In the Office's view, DH should review the contents of the report and set out the areas of concern and causes in a clearer manner.

Inadequacy (c): Insufficient follow-up action on case referrals

(i) Undesirable practice of "Reviewing Case Referrals by Next Annual Assessment"

1032. Currently, when an SHSC considers that a student has a psychological problem and follow-up action is required, it will refer the case to different specialist units/organisations based on the nature of the problem. Once a case is referred, the SHSC will suspend its follow-up action until the student's next annual assessment. Nevertheless, DH's data show that quite many of the students referred did not attend the next annual assessment. In such circumstances, SHSCs simply would not know how those students are doing.

1033. Upon our investigation, DH and the Hospital Authority (HA) launched a pilot scheme at four SHSCs to enhance its supports for students referred to psychiatric specialists of HA. The Office considered that SHSCs should actively follow up and offer assistance if the students referred do not show up for their next annual assessment.

(ii) Inadequate communication with organisations referred

1034. At present, only a small number of organisations receiving case referrals from SHSCs would keep the SHSCs concerned updated on the condition of the students referred. DH should consider setting up a reminder system to actively remind the organisations referred to provide such information as appropriate.

(iii) Better compilation and utilisation of statistics

1035. The Office considered that DH should make good use of the rich database of StHS, which is a student health service with the widest coverage in Hong Kong, to assist the Government in formulating appropriate policies and deploying resources.

1036. In the light of the above, the Office made the following recommendations to DH and EDB –

(a) DH to gather information on the reasons for students being absent from their annual assessment in a bid to formulate specific measures to boost the student attendance rate;

(b) DH to provide schools and EDB with information on student attendance rates, while EDB should pay attention to those schools with a consistently lower attendance rate;

(c) DH to provide more information about the health condition and medical records of students online so as to increase the appeal of the Programme;

(d) DH to allow parents to fill in the questionnaire about their children's psychological health online;

(e) DH to review the content of the "Personal Health Assessment Results and Recommendations" to set out more clearly the students' problems and concerns;

(f) DH to monitor closely the effectiveness of the pilot scheme implemented jointly with Hospital Authority (HA) for strengthening support for students referred, and extend the new measure to other SHSCs as soon as possible;

(g) DH should contact the students/parents if the student, after being referred for follow-up action, is found to have missed the next annual assessment;

(h) DH to set up a reminder system to regularly remind organisations referred to update the situation of the referred cases; and

(i) DH to compile more useful statistics on students' psychological condition, with a view to assisting the Government in formulating relevant policies and deploying resources.

Government's response

1037. EDB and DH accepted the Office's recommendations and had taken the following actions –

Recommendation (a)

1038. According to the results of a random sample questionnaire survey conducted by DH in December 2018 on students absent from their annual health assessment (the annual assessment) and their parents, the main reasons for not showing up for the annual assessment are that they forgot

the appointment time (58%), left Hong Kong (15%) or were not available (8%), etc., which in turn accounts for the absence of 81% of the respondents. To encourage and remind students to attend their annual assessment, DH has adopted a general measure to send SMS reminders to them since 20 May 2019. Preliminary analysis of data showed that, from 23 May 2019 to 31 July 2019, the number of students attending their annual assessment increased by 6 732 (7%), from 88 369 (60% attendance rate) to 95 101 (67% attendance rate) over the same period last year. To further canvass the opinions of students and their parents about StHS, DH has conducted another random sample questionnaire survey on students' absence from their annual assessment in December 2019 so as to formulate improvement measures to boost the student attendance rate.

Recommendation (b)

1039. DH will provide schools and EDB with information about students' attendance of their annual assessment. Starting from January 2020, StHS will inform schools and EDB of the number of students attending their annual assessment and the overall attendance rates by grade in the previous school year (i.e. 2018/19 school year). EDB is also discussing and examining with DH feasible ways to assist DH in implementing the StHS more effectively.

Recommendation (c)

1040. StHS is enhancing its online services by introducing a new function through which parents and students who have registered for online services can access reports of their annual assessment. The addition of this new function will be completed within the 2019/20 school year. Besides access to their reports, relevant medical records and health information will be provided online for students and parents as another enhanced function. Related work for this initiative will commence in 2020 and is expected to be completed by 2021.

Recommendation (d)

1041. DH is improving online service to allow parents who cannot accompany their children to attend the assessment to fill in the questionnaire about their children's psychological health in advance. It will be completed in the 2019/20 school year.

Recommendation (e)

1042. After reviewing the content of the Personal Health Assessment Results and Recommendations, DH is preparing a revised version, in which students' psychological health problems and concerns are set out in a more appropriate manner.

Recommendation (f)

1043. StHS has launched a pilot scheme in four SHSCs for follow-up and support in relation to case referrals to the psychiatric specialist outpatient clinics (SOPCs) of HA since May 2018. New measures include attaching an acknowledgement slip to the referral letter, calling parents to follow up on students' condition after the referral to learn about their appointment status with regard to the psychiatric specialist services, and arranging students in need to return to the SHSCs for follow-up and provide appropriate support for them. Starting from April 2019, the pilot scheme has been rolled out to all 12 SHSCs. StHS has reviewed the pilot scheme in late October 2019 and is making appropriate revisions and drawing up guidelines as appropriate. The new measures could be regularised and fully implemented in all SHSCs in the 2019/20 school year. Besides, StHS has enhanced its computer system to compile a list of cases referred to the psychiatric specialists of HA. There is an additional alert function to remind clinical staff to ask students about their current follow-ups in the psychiatric SOPCs of HA when they attend their annual assessment.

Recommendation (g)

1044. Starting from the 2019/20 school year, follow-up work has been stepped up for cases with previous psychiatric referrals to HA, and parents will be contacted by phone for an annual assessment appointment. Where necessary, DH will seek assistance from schools to follow up on these cases.

Recommendation (h)

1045. Regarding referrals to schools, non-government organisations and the Social Welfare Department for psychological health problems, there is currently an established mechanism whereby designated health care professionals will contact referral organisations which have yet to reply to remind them to reply to StHS on the cases referred to them. This mechanism is operating smoothly. Regarding referrals to the psychiatric

SOPCs of the HA, StHS of DH conducted a working-level meeting with HA over mental health issues in July 2019 and discussed how to enhance the follow-up work with regard to referred cases for which no reply had been received. StHS has once again reminded HA to reply to StHS concerning the referrals, which will help StHS get a clearer picture of students' appointment and attendance status. StHS will continue to have regular working-level meetings with HA and further discuss ways to strengthen the exchange of information and improve referral and follow-up arrangements.

Recommendation (i)

1046. StHS of DH has launched a two-year Health Promoting School (HPS) Programme in 30 primary and secondary schools in the 2019/20 school year to assist schools to develop school-based health promotion action plans by making reference to the health needs of their students, and works towards the goal of building a healthy campus. StHS has analysed the health assessment and psychosocial health questionnaires (Culture-free Self-Esteem Inventory) completed by students attending the SHSCs. It has also provided schools participating in the HPS Programme with the overall health status assessment of their students for reference as well as recommendations on the schools' HPS development. From time to time, StHS collaborates with local universities and shares with them service data (including data on psychological health) for research purposes. The research findings can provide useful information for the Government on promoting the health of children and adolescents. In addition, the Director of Health or her representative is currently member of the interdepartmental and cross-sectoral Advisory Committee on Mental Health (the Advisory Committee) and the Commission on Children (the Commission), as well as member of various working groups under the Commission, namely the Working Group on Research and Public Engagement, the Working Group on Promotion of Children's Rights and Development, Education and Publicity, the Working Group on Children with Special Needs and the Working Group on Children Protection. Amongst them, the terms of reference of the Working Group on Research and Public Engagement includes kick-starting and overseeing two important studies on developing a central databank on children and children-related indices respectively. DH will, through collaboration with the Advisory Committee, the Commission and its related working groups, provide professional advice and service-related data to assist the Government in formulating relevant policies and deploying resources.

Department of Health
and Government Secretariat – Food and Health Bureau

Case No. DI/402 – Government's Regulation of Proprietary Chinese Medicine

Background

1047. Since the provisions in the Chinese Medicine Ordinance (CMO) (Cap. 549) covering registration of proprietary Chinese medicine (pCm) took effect in 2003, only a small portion of applications for registration of pCm has been issued the Certificate of Registration (HKC). Meanwhile, many purported "health food products" have appeared in the market, their main ingredients being Chinese herbal medicines. However, as long as other non-Chinese medicine ingredients such as wheat and minerals are added to these products, they can be on sale in the market without registration under CMO. People are thus concerned about the quality and safety of such "Chinese medicine health food products" (CM health products).

The Ombudsman's observations

1048. The Office of The Ombudsman (the Office)'s direct investigation has revealed inadequacies on the part of the Food and Health Bureau (FHB) and the Department of Health (DH) in the following four areas.

Inadequacy (a): Definition under CMO leaves loopholes in regulation

1049. In CMO, the words "composed solely of" were added to the definition of pCm, which has caused loopholes in regulation. We have compared a number of registered pCm in the market with "CM health products" bearing similar names but are not required to be registered. The Office found that with identical names, similar ingredients and purported effects, and even the same manufacturer as pCm, those "CM health products" can circumvent regulation under CMO as long as ingredients other than Chinese medicines (e.g. grape seed) are added to the products, regardless of their composition and efficacy. Moreover, some of those products contain Chinese herbal medicines with strong toxicity listed in Schedule 1 to CMO, which may be hazardous to people's health.

1050. The Government agrees that there should be more stringent regulation of those purported "CM health products". In this light, the Medicines Board under the Chinese Medicine Council of Hong Kong (CMCHK) has set up a task force to conduct a comprehensive review and give comments regarding amendment to the definition of pCm (including its scope).

Inadequacy (b): Slow progress of registration

1051. There are three types of certificate/notice in the registration of pCm, namely: (1) HKC; (2) the Notice of confirmation of transitional registration of proprietary Chinese medicine (HKP); and (3) the Notice of confirmation of (non-transitional) registration application of proprietary Chinese medicine (HKNT). HKP and HKNT are intended to be transitional arrangements for the registration system. Since the provisions requiring mandatory registration of pCm under CMO took effect in 2010, these transitional arrangements have been in place for eight years already. As at 30 June 2018, there were over 18 000 applications for registration of pCm, but only less than 10% succeeded in obtaining HKC. More than one-third are still holding transitional registration (i.e. HKP or HKNT). For HKP, only those pCm manufactured, sold or supplied for sale in Hong Kong on or before 1 March 1999 can apply. In other words, most of the HKP holders have been on sale for nearly two decades and yet they still could not get HKC.

1052. In the Office's view, that so many applicants are still holding HKP and HKNT after a long period indicates that the Government has not set any clear objective and time schedule for transforming the transitional cases into HKC.

Inadequacy (c): Inadequate support and lack of communication with the trade

1053. People in the Chinese medicine trade have expressed a lot of opinions regarding the current regulatory system and registration requirements, notably shortage of qualified laboratories, harsh registration requirements, and the high costs involved. Although DH has adopted a number of measures to support the trade, the traders generally consider the technical support from the Government still inadequate. The Government's failure to address this issue may hinder the long-term development of pCm.

Inadequacy (d): Consider setting up a certification system for Chinese medicine pharmacists

1054. Several universities in Hong Kong offer programmes in Chinese medicine. However, Chinese medicine pharmacist has not been recognised as a professional qualification. There is currently no registration or certification system for Chinese medicine pharmacists in Hong Kong. Meanwhile, our neighbour Macao will soon set up a new registration system for Chinese medicine pharmacists to establish their legal status and professional recognition. Its development is ahead of Hong Kong.

1055. On the other hand, more than 6 000 HKP holders are still in the process of transforming into HKC. It is essential for the Government to review the manpower arrangements to expedite the process.

1056. CMO was enacted with the intent of preventing unregistered pCm from spreading in the market and thus endangering people's health. Regrettably, since its enactment in July 1999, nearly two decades have passed and yet over 80% of the registered pCm have not been issued HKC, while pCm holding transitional registration are still available for sale. FHB and DH should be held accountable for the slow progress. What is more worrying is that some manufacturers have taken advantage of the legal loopholes by adulterating certain pCm, which are required to be registered, with non-Chinese medicine ingredients. As a result, the pCm was "transformed" into health food products, thereby circumventing regulation under CMO. This loophole must be blocked as soon as possible, otherwise, the proliferation of "CM health products" in the market may become a threat to people's health.

1057. The Office made the following recommendations to FHB and DH –

(a) Review of current legislation

FHB should quickly review whether any amendments to the relevant provisions of CMO are necessary, covering the following areas –

(i) to plug the legal loopholes in the definition of pCm as soon as possible;

(ii) to impose more stringent regulation on those health food products containing Chinese medicines with stronger toxicity listed in

Schedule 1 to CMO, making it mandatory for these products to obtain registration;

(iii) to restrict CM health products from using the same names as pCm;

(iv) to require all products containing Chinese medicine to adopt the Chinese and English names given in the Schedules to CMO when listing out their ingredients; and

(v) to regulate the efficacy claims of CM health products.

(b) Addressing the registration system

(vi) DH should help CMCHK in reviewing the current registration system, explore why a large number of applicants are still holding transitional registration after such a long period, and implement effective measures focusing on assisting those applicants to obtain full registration as soon as possible;

(vii) DH should help the CMCHK to set a target timeframe for transforming the more than 6 000 transitional registrations into full registration, and review any need for more staff to handle the vetting and approval work; and

(viii) DH should consider engaging more specialists in Chinese medicines to assist the CMCHK in devising the registration system and vetting applications.

(c) Strengthening communication with the trade and offering more support

(ix) DH should strengthen its communication with the trade and various stakeholders (including academics and laboratories);

(x) DH should provide more assistance to the trade in resolving the problems in pCm registration, such as expanding the number of accredited Mainland drug testing institutes; and

(xi) FHB should take reference from the experience of other cities and consider establishing a registration/certification system for Chinese medicine pharmacists, so as to enhance their professional status and recognition; and

(d) Publicity and Public Education

(xii) DH should step up its publicity efforts to educate the public to differentiate between pCm and CM health products.

Government's response

1058. FHB and DH accepted the Office's recommendations.

Recommendation (a)

1059. Regarding recommendation (a)(i), the Government has initiated the legislative amendment exercise relating to the definition of pCm under CMO, and will put forward the amendment proposals to the Panel on Health Services of the Legislative Council in due course.

1060. Regarding recommendation (a)(ii), relevant measures have been included in the preliminary legislative amendment proposals concerning the definition of pCm. It is the Government's intention that any products formulated in a finished dose form that contain any of the Chinese herbal medicines listed in Schedule 1 to CMO will be regulated as pCm under CMO.

1061. Regarding recommendation (a)(iii), relevant measures have been included in the preliminary legislative amendment proposals concerning the definition of pCm. It is the Government's intention that any products formulated in a finished dose form that take a pCm preparation name, which is relatively unique to pCm as listed in the Pharmacopoeia of the People's Republic of China (2015 Edition), will be regulated as pCm under CMO. In addition, any products formulated in a finished dose form that contain Chinese herbal medicines which have stronger toxicity or side-effects, or will not be consumed as food by the people in general, will also be regulated as pCm under CMO.

1062. Regarding recommendation (a)(iv), currently, registered pCm must have its active ingredients listed in accordance with CMO. Moreover, according to the Guidelines on Labels of Proprietary Chinese Medicines drawn up by CMB under CMCHK, active ingredients should be displayed in their official names under the sequence of CMO, the Pharmacopoeia of the People's Republic of China and works of ancient literature such as Zhonghua Bencao.

1063. Regarding Recommendation (a)(v), currently, there are measures in place to regulate claims about the functions and indications of registered pCm. According to the "Technical Guidelines – Product Efficacy Documents" drawn up by CMB, the functions and indications of pCm must be supported by documents and information that comply with the requirements set out by CMB. Any person who gives false trade descriptions or false, misleading or incomplete information or makes misrepresentations in respect of goods provided in the course of trade violates the Trade Descriptions Ordinance (Cap. 362). Moreover, the Undesirable Medical Advertisements Ordinance (Cap. 231) prohibits the publication of advertisements likely to lead to the use of any medicine, surgical appliance or treatment for the purpose of treating human beings for, or preventing them from contracting diseases or conditions specified in the Schedules to that Ordinance.

Recommendation (b)

1064. Regarding Recommendation (b)(vi), to expedite the processing of applications for migration from transitional to formal registration of pCm, the Chinese Medicine Division (CMD) of DH has engaged 18 additional Assistant Chinese Medicine Officers since July 2015. In view of the comments from the trade, the CMB and DH have introduced various measures since 2016 (e.g. providing technical support consultancy services, adjusting relevant technical requirements, allowing the use of statutory declarations to confirm information that is inconsistent with the registration applications, increasing the number of laboratories providing testing services etc.) to assist the trade to prepare the reports and other information required for registration. In addition, the Government has established a $500 million Chinese Medicine Development Fund (CMDF) to provide financial support for Chinese medicine practitioners and the Chinese medicine drug sector to jointly promote the development of Chinese medicine with a view to (among other things) assisting local Chinese medicine traders in the registration of pCm. The CMDF has rolled out various subsidy programmes progressively since mid-2019 to provide technical support to the trade and further expedite the pCm registration process.

1065. Regarding Recommendation (b)(vii), to expedite the processing of applications for migration from transitional to formal registration of pCm, CMD has engaged 18 additional Assistant Chinese Medicine Officers since July 2015. Seven Chinese Medicine Assistants were further engaged in July 2019 to help clear backlog of vetting product labels and

package inserts, which is the final procedure before approval of the applications for migration to formal registration.

1066. Regarding Recommendation (b)(viii), as at 30 April 2019, there are 49 staff members in CMD responsible for the processing of pCm registration applications. Among them, 94% come from a Chinese medicine background and 82% have a bachelor's degree or above in Chinese medicine. The Government will continue to proactively explore ways to expedite the processing of pCm registration applications.

Recommendation (c)

1067. Regarding Recommendation (c)(ix), to enhance the understanding of the trade of the requirements for pCm registration, CMD organises seminars on a monthly basis. From 1 January 2012 to 30 April 2019, a total of 114 forums/technical exchange seminars/briefings were held. CMD also holds meetings with the local laboratory trade from time to time to introduce the product quality documents to be submitted for converting transitional registration to formal registration and the latest requirements. From 1 January 2012 to 30 April 2019, a total of nine meetings were conducted. DH will continue to strengthen its communication with the trade and various stakeholders via regular exchange seminars and forums to discuss with them their concerns.

1068. Regarding Recommendation (c)(x), the demand of the Chinese medicine trade for pCm testing services has been growing. From October 2016, the number of Mainland drug testing institutes that are recognised by CMB has increased from 10 to 27. DH will closely review the situation and if necessary, explore the feasibility of increasing the number of such institutes with the relevant drug administration authority in the Mainland. Moreover, CMDF has rolled out various subsidy programmes progressively since mid-2019 to provide technical support for the trade and further expedite the progress of pCm registration.

1069. Regarding recommendation (c)(xi), FHB will support the study on the accreditation system for Chinese medicine pharmacists via CMDF. The scope of the study will include the qualifications and academic requirements of Chinese medicine pharmacists, their scope of duties and functions, local training and employment situation etc. Moreover, FHB will consult the trade and relevant stakeholders on the relevant topics.

Recommendation (d)

1070. Regarding recommendation (d)(xii), the legislative provisions regarding the mandatory registration of pCm came into effect on 3 December 2010. Since then, DH has been making publicity and education efforts (e.g. visits by "ambassadors", consultation and briefing sessions, 18-district roving exhibitions, publicity letters and pamphlets, television and radio Announcements in Public Interest, information on websites, etc.) to enhance the understanding of the public, the trade and other stakeholders of the relevant provisions.

1071. Since February 2019, DH has been organising seminars and publicising on the radio and newspapers to educate the public on how to differentiate between pCm and unregistered CM health products. It also updated the content of existing exhibition panels in April 2019 for display in 18-district roving exhibitions. In addition, it posted relevant Internet information on social media between May and August 2019. In June 2019, it published new educational pamphlets and produced a 90-second video for playing on MTR trains to enhance the public understanding of the pCm registration system. It will continue to organise related publicity and education activities.

Food and Environmental Hygiene Department

Case No. DI/403 – Food and Environmental Hygiene Department's Rental Management of Market Stalls

Background

1072. There are 99 public markets managed by the Food and Environmental Hygiene Department (FEHD). The overall occupancy rate of stalls in those markets stands at 90%. However, there are in reality serious problems of idling stalls. Many stalls are either not operating or only used for storage, without selling foods or commodities to the public.

The Ombudsman's observations

1073. The Office of The Ombudsman (the Office)'s direct investigation has identified five inadequacies regarding FEHD's rental management of market stalls.

Inadequacy (a): Low level of and great disparity among stall rentals result in an unfair level playing field for tenants

1074. Markets stalls have been let through different means: some stalls have been let to previous itinerant hawkers at concessionary rentals at a very low level while some are let out through auctions where the upset prices are below the reference open market rental (OMR) as assessed by the Rating and Valuation Department (RVD). Hence, there could be a great disparity in rentals among stalls. A case revealed that the disparity in rentals among stalls in the same market, selling commodities at more or less the same price levels, could be up to 90 times. In other words, the benefits of low rentals are actually not passed on to consumers.

1075. The Office considered that FEHD should devise an effective and step-by-step rental adjustment mechanism in a comprehensive manner, with a view to resolving the problems relating to market stall rentals, so as to foster a healthier business environment enabling fair competition.

Inadequacy (b): Automatic tenancy renewal diminishes chances for others to rent stalls

1076. Under the current tenancy renewal system, FEHD generally allows a tenant to renew his/her tenancy if he/she so wishes upon expiry of an existing tenancy. This means that the stall concerned would not be put up for open auction. Such a system of automatic tenancy renewal, diminishing the chance for others to secure market stalls by open auction, may also undermine the motivation of stall tenants to improve their performance. This would in turn affect the competitiveness of public markets. FEHD should review this system of perpetual renewal of tenancy.

Inadequacy (c): Succession still allowed for most stalls, thus affecting other people's right to bid for those stalls

1077. Currently, there are four versions of tenancy agreements (TAs) for stalls in public markets. Three of them stipulate that if a tenant passes away during the tenancy period, his/her designated successor or next of kin can apply to FEHD for succession of tenancy of the market stall concerned. The Office considered that this affects the public's right to bid for the operation of market stalls. FEHD should set up a database on the records of approved succession applications, so as to assess how much the tenancy succession system actually affects people's right to bid for the operation of market stalls. FEHD should also review its processing of tenancy succession applications and consider the need to make suitable adjustments to keep up with the times.

Inadequacy (d): No limit on the number of stalls to be rented by a single tenant gives rise to abuses and reduces consumers' points of purchase

1078. FEHD sets no limit on the number of stalls that can be rented by a single person. This allows a tenant to rent multiple stalls in close proximity and/or sell the same category of commodities, within the same market. In one case, a tenant rented as many as 23 stalls but used them only for storage. There was another case where two tenants occupied 45% of the wet goods stalls of a market all for floral business. Such practice has indeed given rise to abuse of stalls and reduced customer choice.

Inadequacy (e): "Frozen Stalls" left idle for years, resulting in serious wastage of public resources

1079. About 8% of public market stalls are withheld by FEHD for such reasons as relocation of existing tenants who are affected by large-scale

works being carried out in markets. Some of those stalls have been thus "frozen" for as long as 23 years. Cases show that FEHD could not successfully carry out improvement works in certain markets because the tenants had refused to relocate to other stalls. However, it is in fact stated in three versions of TAs that when the Government carries out maintenance, repairs or improvement works in public markets, tenants should at the Government's request close their stalls or relocate to other stalls. In the Office's view, if a tenant unreasonably refuses to relocate to another stall, FEHD is obliged to take enforcement action in accordance with the tenancy conditions so as to avoid wastage of public resources.

1080. The Office has made the following recommendations to FEHD –

(a) to review the practice of setting upset prices below OMR level at auctions;

(b) to devise a comprehensive and effective rental adjustment mechanism;

(c) to review the current tenancy renewal system to allow more opportunities for the public to bid for stall tenancies, at the same time giving priority to existing tenants with satisfactory performance;

(d) to set up a database to keep records of tenancy succession applications and review the processing of such applications;

(e) to set a reasonable limit to the number of stalls that a tenant can rent in a market, taking into account the actual situation of individual markets; and

(f) to include the same clause in all versions of TAs to spell out the Government's power and responsibility for carrying out works in public markets, and set out the requirements and rules for tenants.

Government's response

1081. FEHD accepted the Office's recommendations and has taken the following follow-up actions.

Recommendation (a)

1082. Conducting restricted auction with upset prices of market stalls below the reference rental (RR) assessed by RVD aims to assist tenants of market stalls who are affected by relocation of stalls, and hawkers who surrendered their itinerant hawker licences and bid for market stalls. Using upset prices of market stalls below the RR for open auction aims to improve the situation where stalls have been left vacant for a prolonged period of time. If these stalls could not be let out for a long time, it means that the market does not agree with the RR assessed by RVD. If the occupancy rate is to be boosted, it is necessary for FEHD to lower the upset prices of the stalls concerned to attract interested parties to rent them, so as to ensure that the land resources are fully utilised.

1083. FEHD is conducting a comprehensive review of public markets, which covers a study on an effective rental adjustment mechanism, and will fully consider the Office's views during the review.

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

1084. FEHD submitted various proposals on rental adjustment for market stalls to the relevant Panel of the Legislative Council (LegCo) in 2001, 2009, 2010 and 2013, but the proposals were not supported by the Panel. Since it takes time to conduct the comprehensive review on rental adjustment mechanism for public markets, the Government has implemented a transitional arrangement to annually adjust the rental level since 1 July 2017 with a view to catching up with inflation.

1085. FEHD has formulated principles and initial directions for the management reform of public markets. FEHD confirmed that public markets should be one of the major sources of shopping fresh food provisions for the general public, which should be kept reasonably decent, clean, neat and tidy without being unduly upmarket.

1086. FEHD's initial plan is to pursue a new operation mode on rental adjustment mechanism, tenancy renewal mechanism and single tenant holding multiple tenancies along the following directions –

(i) Rental adjustment mechanism – To devise a healthy rental adjustment mechanism that would ensure a level reflecting the full economic value of stalls, thereby encouraging active operation among tenants;

(ii) Tenancy renewal mechanism - Renewal of tenancy should not be taken for granted and should be underpinned by a fair mechanism to promote healthy turnover of tenants and admission of new small traders, taking into account past performance of sitting tenants; and

(iii) Single tenant holding multiple tenancies - Tenancy should continue to be open to individuals as small traders, but multiple tenancies should in general be disallowed.

1087. At the meetings of the Subcommittee on Issues Relating to Public Markets (Subcommittee) under the LegCo Panel on Food Safety and Environmental Hygiene held in November 2018 and January 2019, FEHD briefed members on the reform principles and initial directions.

1088. The Subcommittee stressed that the Government should give due consideration to the social functions of public markets. Members were of the view that as public markets could serve the function of providing fresh provisions for the general public at affordable prices, the Government should regard the provision of public markets as public services and subsidise the operation of market stalls. Members did not fully subscribe to the direction of management reform of public markets in respect of rental adjustment mechanism. Some members held the view that rental concessions should be provided to stall tenants who operated small business activities, thereby preventing large corporations from gaining a predominant market presence in fresh provision retail outlets and ensuring that fresh food in public markets would be sold at affordable prices. Some members also considered that when contemplating the rental adjustment mechanism for public market stalls, due consideration should be given to the relevant historical background of public markets and the livelihoods of stall tenants.

1089. Besides, some members expressed concern about the direction of management reform of public markets in respect of tenancy renewal mechanism and TA. Some members considered it more appropriate that due regard should be given to the livelihood of small operators and that tenancies should be renewed as long as the stall operators did not commit any serious malpractices.

1090. While taking into account the views of the Subcommittee, FEHD considered that improvement of facilities in existing public markets through the Market Modernisation Programme (MMP) would only be effective if proceeded together with management improvement measures

and new operation models. The dedicated team set up in FEHD for improving the operating environment of existing public markets is conducting the review and will come up with initial views on the management measures that would serve the best overall interest of the community, including the existing mechanisms for allocation of stalls and determination of rental level.

1091. FEHD intended to pursue along the reform directions and press for a management package grounded on firm principles in both the new generation of public markets and markets selected for inclusion in the MMP, with a view to bringing significant and real changes for tenants' own good and benefitting the community at large. FEHD announced in October 2019 the establishment of a temporary market in Tin Shui Wai and plan to pilot a new operation model in the market. The aim is to make the market vibrant and meet the needs of the community, including the grassroots. FEHD will finalise the details after listening to the views of the stakeholders.

1092. For other existing public markets, as a matter of principle and fairness, management reform should not be confined to those joining the MMP. FEHD will consider suitable management measures that are feasible for implementation and proceed with prudence, care and reason.

1093. FEHD does not control the price of the products sold in public markets. Tenants are free to determine and adjust the prices of their goods having regard to market forces and their operating costs. The general perception that products sold in FEHD markets must be cheaper than other outlets may not be true. FEHD commissioned a consultant to conduct a price survey in 2016, the findings of which suggested that prices of some products in FEHD markets were higher than other markets or retail outlets.

1094. FEHD will not underestimate the difficulty of formulating a new management model and rental adjustment mechanism that would be widely accepted by stakeholders. Nevertheless, this is an integral part of effective market management. FEHD will seek stakeholders' views through different channels, so as to formulate a practical and feasible new management model for maintaining the competitiveness and vibrancy of public markets. At the same time, FEHD will look into ways to enhance the social functions of public markets and review the functions of the Market Management Consultative Committees to improve both the facilities and management of public markets.

Recommendation (d)

1095. Since August 2010, FEHD has disallowed the succession arrangement for market stalls among new tenants to foster the natural turnover of tenants. At present, the database of FEHD already keeps information on whether a particular stall is entitled to succession rights. FEHD will explore how to enhance the database to collect more relevant information to facilitate the monitoring of the situation of the succession arrangement.

1096. Regarding the succession and transfer of market stalls, FEHD's initial view is that there should be no succession or transfer of tenancies based on family ties or otherwise. FEHD will consider and follow up the recommendations of the Office on reviewing the arrangement for handling applications for succession during FEHD's on-going comprehensive review.

1097. Having said that, if restriction is to be imposed on those existing stalls having succession rights, FEHD will need to thoroughly consider and conduct consultation on the way and suitable timing for implementation (for instance, through the MMP) as this may fall short of the expectation of the existing tenants. FEHD will seek stakeholders' views on the management reform of public markets through different channels, so as to formulate a practical and feasible new management model.

Recommendation (f)

1098. FEHD in-principle agreed to the recommendation. Yet having regard to the historical background of public markets, it may not be easy to achieve the goal in one step. Taking the alignment of TAs as an example, FEHD introduced the "FEHD Old TAs" with strong justifications in June 2009 but it was not accepted by the tenants. After several rounds of discussion at the relevant LegCo Panel, FEHD introduced the "FEHD new TAs" in August 2010 eventually, which significantly weakened the specific enforcement power of FEHD in public markets. The "FEHD old TAs" signed during that period were not affected.

1099. FEHD is conducting a comprehensive review of public markets and will handle the issues of the terms of TAs and enforcement in a practical manner having regard to the reform principles and specific historical background of different public markets. Some members of the Subcommittee also raised concerns about the direction of the management

reform of TAs. FEHD will fully take into account the views of the Office and relevant stakeholders during the review.

Food and Environmental Hygiene Department

Case No. DI/416 – Food and Environmental Hygiene Department's Regulation of Market Stalls

Background

1100. In recent years, the Office of The Ombudsman (the Office) has received from time to time public complaints about serious irregularities at public market stalls managed by the Food and Environmental Hygiene Department (FEHD). Many of those irregularities are perennial or recurrent.

The Ombudsman's observations

1101. Stall tenants in public markets must abide by the relevant legislation and their tenancy agreements. FEHD is empowered to terminate the tenancy of a stall if the tenant has been convicted of market offences for four times within a period of 12 months, or is found in breach of the tenancy agreement for the fourth time after having already received three warning letters for breaching the tenancy agreement within a period of six months.

1102. The Office's direct investigation has identified four common types of irregularities at public market stalls, and inadequacies in FEHD's enforcement actions.

Irregularity (a): Occupation of public passageways

1103. Both the legislation and tenancy agreements prohibit occupation of public passageways. In most public markets, stall boundaries are marked by yellow lines or display counters in front of or on one side of the stall. Any tenant who places commodities beyond the boundaries violates the rule.

1104. However, owing to FEHD's lenient enforcement, tenants have developed a misconception that there is nothing wrong with violation of such rule. A case showed that FEHD staff had been issuing two verbal warnings to a tenant almost every day for several months. Notwithstanding that, the tenant still occupied the public passageway and the breach persisted.

Irregularity (b): Unauthorised change of use of stalls

1105. It is stipulated in the tenancy agreements that tenants, without prior permission, shall not use their stalls for purposes other than the prescribed use. Besides, the legislation provides that tenants, without prior permission, shall not carry out alterations to their stalls or any fixtures or fittings of their stalls.

1106. Some tenants had altered their stalls designated for selling food into office, cold storage and workshop. However, FEHD's frontline staff turned a blind eye to such obvious irregularities. Some tenants just used a small part of their stalls for displaying prescribed commodities and/or trading counters, and FEHD easily accepted the irregularities as having been rectified. Moreover, some tenants who changed the use of their stalls had also made unauthorised alterations to stall fixtures or fittings, such as setup of electrical connections or installation of ceiling boards, but FEHD staff did not take any action.

Irregularity (c): Inadequate business hours

1107. It is stipulated in the tenancy agreements that tenants shall not close the stall or suspend operation for seven days or more in any month unless written permission from the Government is obtained. A case revealed that FEHD did not take any enforcement action against quite a number of stalls that had violated the above clause of the tenancy agreement. Furthermore, FEHD had failed to formulate guidelines on enforcement against fake operation of stalls, for example, displaying only a small quantity of commodities outside the stalls without any person selling them. It had also failed to deal with the problem of inadequate business hours arising from the "single tenant, multiple stalls" scenario.

1108. The current tenancy agreements do not stipulate the number of daily business hours for stalls. FEHD had once proposed to add a clause to the tenancy agreements prescribing the number of daily business hours for stalls. Owing to strong objections from tenants, FEHD subsequently dropped the proposal. The Office considered that FEHD should continue exploring the feasibility of introducing such a clause into the tenancy agreements, and must eradicate the problem of idling stalls.

Irregularity (d): Subletting of stalls

1109. It is stipulated in the tenancy agreements that tenants shall not sublet their stalls. Besides, tenants who engage assistants to carry on business at their stalls must have them registered with the Government. Nevertheless, FEHD has not set any restrictions on the number and identity of registered assistants. This has created a systemic loophole as tenants may simply sublet their stalls and the sublessees then operate the stalls in the guise of registered assistants (RA).

1110. FEHD primarily relies on the registered name on the business registration (BR) certificate to judge whether a stall has been sublet. However, two of the four versions of tenancy agreements for public market stalls do not include any requirement on tenants to display BR certificates at their stalls. This has caused difficulties to frontline staff in detecting any irregularities in their daily inspections.

1111. In view of the above, the Office identified the following inadequacies in FEHD's regulation of public market stalls –

(a) inspections are too lax to effectively ensure tenants' compliance with the rules and regulations;

(b) proactive follow-up actions are infrequent, thereby allowing irregularities to persist;

(c) enforcement actions are too lenient to produce any deterrent effect;

(d) incomplete enforcement actions fail to tackle all related irregularities; and

(e) inadequate supervision of contractors leads to ineffective regulation of tenants.

1112. The Office made the following recommendations to FEHD –

(a) review the existing items for daily inspection and re-determine a suitable inspection frequency for each item, and step up its monitoring of frontline staff;

(b) strictly instruct market management staff at all levels to actively tackle and diligently follow up on all irregularities found at market stalls;

(c) fully review the *modus operandi* of its staff and those of the contractors, and require all staff to rigorously inspect and pursue cases of tenants persistently and/or seriously in breach of the rules and regulations, and to strictly adhere to the established enforcement guidelines;

(d) strengthen supervision of and remind market management staff at all levels to carry out thorough enforcement actions against all irregularities detected at the same stalls;

(e) continue studying the feasibility of stipulating minimum daily business hours of stalls in tenancy agreements;

(f) study why some stalls have been idling for prolonged periods and formulate a strategy to tackle the problem;

(g) review the RA system and consider setting suitable conditions and restrictions on the identity of registered assistants; and

(h) by way of revising the tenancy agreements, require all tenants to display their business registration certificates at their stalls.

Government's response

1113. FEHD accepted the Office's Recommendations (a) to (d) and (f) to (h), whilst maintaining reservations for Recommendation (e), and has taken follow-up actions as follows.

Recommendation (a)

1114. Depending on the manpower and resources available, FEHD will consider re-determining a suitable market inspection frequency where staffing and resources permit. Public markets are now positioned to be one of the major sources of shopping fresh provisions for the general public, which should be kept reasonably decent, clean, neat and tidy without being unduly up-market. In view of the fact that public markets basically operate from morning till night throughout the year and they are the major venues where people will go for fresh food supply every day, lighting and ventilation facilities as well as the sewerage system of markets should be maintained in good conditions, passageways should be kept unobstructed and pest control measures taken at a reasonable level, so that the markets

can be kept reasonably decent, clean, neat and tidy to serve the public. In addition, according to FEHD's observations, public markets are overcrowded due to historical reasons. Stall tenants have built up a lot of undesirable practices over the years. It is essential to monitor the stall tenants on a daily basis to rectify such undesirable practices and ensure the smooth operation of markets. At present, the items (including areas governing the execution of tenancy agreements) that are required to be inspected daily by contractors or FEHD staff are to ensure that the aforesaid items are being kept at a reasonable standard, maintaining the quality of service required by the public. Where necessary staffing and resources permit, FEHD will review the existing items of inspection according to their nature and re-determine a suitable inspection frequency for each item. In addition, FEHD will step up monitoring of irregularities at market stalls in the following manner –

(i) FEHD will examine the effectiveness, terms of reference, work arrangements and staff deployment of the Market Task Force (MTF), and explore ways to enlarge its scale and realign its structure, so that MTF can further assist staff of all districts in taking law/tenancy enforcement actions inside public markets. By doing so, more manpower from market frontline staff of all districts can be released to inspect other significant items and ensure that the public markets are kept reasonably decent, clean, neat and tidy; and

(ii) FEHD has introduced an e-Inspection System (the system) since August 2018 for use by contractors' staff and market frontline staff to check the identity of stall operators and appointed RAs, sale of commodities not allowed in the tenancy agreement, inadequate business hours and the precautionary measures taken by live poultry stalls against avian influenza. After conducting on-site inspection of stalls, market frontline staff of all districts are required to upload the inspection results to the system via mobile devices. Based on the inspection results, the system will timely prompt follow-up reminders or warnings to relevant users in accordance with the procedures set out in the policy for taking appropriate follow-up actions in a timely manner. FEHD will explore means to enhance the system as to extend the reminder/warning functions to supervisory officers, so that they can check whether frontline staff have followed up and overseen every case in accordance with the established procedures as to avoid delays.

Recommendations (b) to (d)

1115. FEHD has reminded market staff of all districts to comply with all requirements of the Operational Manual for Markets, remain vigilant in conducting supervisory checks and ensure the compliance of the relevant provisions in law and tenancy agreement by market tenants.

1116. FEHD has also reminded the management of District Environmental Hygiene Offices to instruct staff to actively tackle and diligently follow up on all irregularities found at market stalls, and take comprehensive enforcement actions. In particular, inspections should be conducted from time to time to better understand the operation of markets, as well as the enforcement actions taken by the contractors and frontline staff. If any inadequacy is found, they should inform the contractor staff or frontline staff concerned and urge them to follow up or initiate relevant enforcement actions.

1117. In formulating the tender for market management services contracts, FEHD has specified clearly and in detail the duties and service requirements of the contractors, including the specific work and frequency of inspection and regulation of stalls, as well as the relevant monitoring and sanction mechanism, which form part of the terms and conditions of the contract. In addition, working guidelines on handling breaches of tenancy agreement or relevant legislation by tenants or operators have been issued to contractors. If any contractor is found to be in breach of contract terms, staff of FEHD market teams will take appropriate follow-up actions, including the issue of verbal warnings, written warnings and/or default notices with withholding/deduction of monthly payment of service charge. Such performance record will affect the tenderer's future scoring in bidding for FEHD's outsourced services contracts.

1118. Over the past two years, staff of FEHD and contractors have stepped up their efforts to tackle and diligently follow up on all irregularities found at public market stalls. To tackle all irregularities (in particular occupation of public passageways at markets), a total of 2 649 prosecutions were instituted against stall tenants who were in breach of the Public Health and Municipal Services Ordinance (Cap. 132) or other subsidiary regulations between 2018 and the end of June 2019. During the above period, a total of 1 453 verbal warnings and 1 693 written warnings were issued to tenants who were in breach of the tenancy agreements under the Warning Letter System (i.e. the tenancy agreement of a market stall can be terminated on account of breach of agreement terms if three warning letters have been registered against a tenant within

six months and the tenant fails to rectify the irregularity). As regards the above law/tenancy enforcement actions, FEHD has terminated the tenancy agreements with 57 stall tenants who were repeat offenders.

Recommendation (f)

1119. FEHD agreed to investigate the reasons for the prolonged idling of market stalls. Based on the current situation and prospect of future development of the markets concerned, FEHD is expediting the enforcement actions against stalls which have been left idled for a prolonged period or are not in active operation. From 2018 to the end of June 2019, staff of FEHD and its contractors issued 1 448 verbal warnings and 1 678 written warnings in respect of breaches of tenancy terms in relation to prolonged idling or inactive operation of market stalls (including to use the stall for non-permitted purpose and inadequate business hours of stalls), resulting in termination of tenancy agreement of 51 market stalls by the Department. In addition, the enhanced enforcement of the relevant tenancy terms by FEHD staff has led to the surrender of tenancies by 460 stall tenants when warning letters were issued to them by FEHD. FEHD will continue to actively follow up on the prolonged idling or inactive operation of market stalls and enforce the tenancy terms.

1120. FEHD took the view that the long-standing low level of rentals might lead to shortened business hours and idling of market stalls. A review of the stall rental adjustment mechanism is the fundamental solution to the problem of idling stalls. The ways of formulating relevant policies are detailed in the response to Recommendation (e) below. In short, FEHD hoped to nurture a fair business environment and encourage active operation of tenants through review and formulation of a healthy rental adjustment mechanism.

Recommendation (g)

1121. FEHD has completed a review and concluded that the established regulatory mechanism can effectively prevent the abuse of the RA system. When market stall tenants apply to appoint RAs, to ensure that tenants and their RAs fully understand their roles and status in conducting business at the market stalls, both parties are required to sign and submit to FEHD undertakings to certify that the RAs are only the tenants' authorised employees/agents, but not the owners, assignees or sub-letees of the market stalls concerned. In addition, the undertakings require the tenants and RAs to keep a proper employment record of RA such as wage bills and other employment information. When called upon by FEHD, they need to

provide such employment record within 14 days to FEHD for checking and making of copies. Any breach of the above undertakings by the tenant shall render the tenancy agreement terminated by FEHD. This measure can prevent the abuse of the RA system and deter people who conduct business at a stall on the pretext of being a RA from avoiding investigation on sub-letting market stalls. According to the legal advice of the government, the tenancy agreement can be terminated once the tenant or RA fails to comply with the commitments stated in the undertakings. For suspected cases, FEHD may consider terminating the stall tenancy when the tenant or RA fails to provide the relevant information within the specified period. FEHD will instruct market management staff of all levels to pay attention to the above points. In addition, FEHD will also enhance the regulation of cooked food market stalls. It will conduct proactive investigations, including inspection of the business registration certificates registered in accordance with the relevant tenancy requirements and the documents relating to the RAs, with a view to deterring sub-letting of stalls.

1122. In addition, the clause of rental adjustment has been introduced in the tenancy agreement of market stalls since 1 July 2017. Although the mechanism concerned is only a transitional arrangement, stall tenants are nevertheless required to attend and sign the new tenancy agreement in person upon renewal of tenancy. This will help FEHD staff verify the identity of stall tenants.

Recommendation (h)

1123. In the first quarter of 2019, FEHD completed the consultation on this recommendation with the Market Management Consultative Committees (MMCCs) of various public markets and sought views from tenants and stakeholders. FEHD will analyse the views collected and consider how the clause relating to the business registration certificate can be incorporated to the tenancy agreements which are formerly Urban Council's tenancy agreement and Regional Council's tenancy agreement.

Recommendation (e)

1124. FEHD had reservations over Recommendation (e) of the Office. However, it will use the review on the stall rental adjustment mechanism as a way to solve the problem of inactive operation of stalls in markets. The reasons are detailed in the following paragraphs.

1125. In order to improve the issue of inactive market stalls, FEHD sought legal advice on the imposition of a term to the tenancy agreement mandating a minimum daily business hours. FEHD has also planned to amend the clauses in the tenancy agreement to require stall tenants to operate not less than a total of six hours per day; otherwise, it will be regarded as cessation or suspension of business at the stall on that particular day.

1126. In 2017, FEHD conducted consultations through the platforms of various MMCCs. In the course of consultation, members of various MMCCs, including District Councillors, stall operators' representatives and traders associations, actively expressed their views. After examining the views collected, FEHD considered that the proposed implementation of minimum daily business hours was rather controversial and could not cope with the actual operation of certain stalls. For example, stalls selling local vegetables or seafood are subject to limited supply from local farms or fisherman catches and their business hours may need to be started early in the morning but the duration is shorter. In addition, it is unnecessary for market stalls selling live chickens to operate all day as the supply of live chickens is limited. These objective facts cannot be controlled by stall tenants. Therefore, it may not be reasonable to set the minimum daily business hours for market stalls.

1127. In addition, it will be practically difficult to enforce the proposed tenancy term because it requires a large number of officers to monitor the actual business hours of each stall on a daily basis.

1128. The consistently low rentals for market stalls is believed to be the main reason for the shortened business hours by stalls. At present, about 80% of the stall rentals are below the reference rental assessed by the Rating and Valuation Department. Nearly 25% are even at a level below 50% of the reference rental. The relatively low rentals provide a bigger incentive for stalls tenants to shorten their business hours and change the uses of stalls. FEHD considered that a review on the stall rental adjustment mechanism will be a fundamental solution to such problems. Owing to historical background, market stall rentals are consistently low. In 1998, the two former Provisional Municipal Councils, taking into account the economic situation at that time, reduced the rentals of public market stalls by 30% across-the-board. The rentals had then been frozen at that level for about 20 years. In the period, the Government had, on several occasions, put forward different rental adjustment proposals for consulting the Panel on Food Safety and Environmental Hygiene of the Legislative Council (the Panel). However, all of these proposals were not supported

by the Panel. In March 2017, the Government put forward a transitional mechanism to adjust the rental level of market stalls. In spite of the lack of support from the Panel and opposition from market tenants, the Government put in place the transitional arrangements to adjust market stall rentals with effect from 1 July 2017. Under such arrangements, stall rentals will be adjusted annually upon renewal of tenancy agreement or on the due date for rental adjustment as specified in the tenancy agreement, in line with the average of the year-on-year rates of change in Consumer Price Index (A) in the past 12-month period six months before tenancy renewal or preceding the due date for rental adjustment.

1129. FEHD emphasised that the above mechanism was merely of a transitional nature. It has stated clearly to the Subcommittee on Issues Relating to Public Markets of the Panel that the rental adjustment mechanism will be reviewed with a view to nurturing a fair business environment which encourages active operation of tenants.

1130. In response to FEHD's reply on this proposal, the Office noted FEHD's explanation in its letter dated 14 June 2019 and suggested another alternative, i.e. instead of standardizing the daily operating hours of all kinds of market stalls, FEHD can stipulate the minimum operating hours for different kinds of market stalls in accordance with their respective nature and the need of the trade. FEHD is now studying the latest recommendation of the Office and considering its feasibility.

Government Secretariat – Development Bureau (Tree Management Office), Home Affairs Department and Lands Department

Case No. DI/423 – Government's Handling of Two Trees in front of Tang Chi Ngong Building of University of Hong Kong

Background

1131. There were originally two banyan trees (thereinafter referred to as the Trees) on the pavement in front of Tang Chi Ngong Building of the University of Hong Kong (HKU) on Bonham Road in the Central and Western District. Adjacent to the Trees was a low wall of the Building (the Wall), where part of the roots of the Trees were exposed and tangled. The Trees were located within unleased and unallocated Government land, and their non-routine maintenance was taken care of by the Lands Department (LandsD). On 20 May 2018, LandsD removed the Trees. The incident attracted wide media coverage and public debate. Some criticised that there was impropriety on the part of the departments concerned as they had neither taken due care of the health conditions of the Trees, nor sufficiently consulted relevant experts and the local community prior to the removal.

1132. In this light, the Office of The Ombudsman (the Office) initiated a direct investigation to examine whether the decisions and actions of LandsD, the Tree Management Office (TMO) of the Development Bureau (DEVB) and the Home Affairs Department (HAD) were in line with the relevant policies and procedures.

The Ombudsman's observations

1133. Overall, the Office found LandsD's decision to remove the Trees not unreasonable from an administrative perspective. The Trees are trees of particular interest. Before removing the Trees, LandsD, TMO and HAD had conducted Sensitivity Analysis and notified Central and Western District Council in accordance with the existing mechanism and procedures.

1134. Nevertheless, the purpose of Sensitivity Analysis is to increase the transparency of decisions to remove trees as well as to address the public's concerns about tree removal. In this incident, many people were still surprised and shocked by the removal of the Trees. This reflected that

the mechanism of Sensitivity Analysis was not entirely effective in achieving its purpose. While LandsD and TMO had asserted at the Food, Environment, Hygiene & Works Committee (FEHW Committee) meeting that it was necessary to remove the Trees and proposed to do so quickly before the typhoon season, they fell short of mentioning the date of the removal works at the meeting. Yet, the removal works were taken three days after the meeting. It came as a surprise to many people. With hindsight, had LandsD obtained the weather forecast information and agreed on the most suitable date for the removal works with the Transport Department, the Hong Kong Police Force and the contractor before the FEHW Committee meeting, and then proposed to TMO and Central & Western District Office (DO) at the meeting the date for the removal works with reasons to members at the FEHW Committee meeting on 17 May, it would have allowed members to get prior information for discussion. This would have further increased the transparency of the whole decision-making process and predictability of the removal works, and hence better handling of the incident.

1135. The Office urged the Government to take reference from this incident. When notifying the public about tree removal works in the future, it should as far as practicable provide detailed information to the public and stakeholders in an open and accountable manner, so as to further enhance the transparency of its decision-making process.

Government's response

1136. The Government accepted the Office's recommendation.

1137. The Government cherishes trees, but is also mindful of the threats that unhealthy trees may pose to life and property. Noting from past cases, tree collapses are always sudden, and there is no way that pedestrians and vehicles can escape when it occurs. Therefore, when a tree becomes an overwhelming risk to the public, the Government is obliged to remove them as soon as possible to ensure public safety. The Government appreciates the community's concerns about tree removal, and hence the need to allow sufficient lead time for the public and relevant stakeholders to learn about tree removal proposals as far as practicable. To notify relevant stakeholders on the tree removal arrangement in a timely manner so as to further enhance the transparency of its decision-making process and to address the public's possible concerns over the removal of trees, the Government has since enhanced the protocol for removing trees of particular interest as follows –

(a) A tree removal proposal should be thoroughly considered on the basis of sufficient documentation and records showing deterioration in tree health (e.g. figures and photos) and ineffectiveness of conservation methods and mitigation measures over time;

(b) Advice from the Greening, Landscape and Tree Management Section of DEVB, relevant experts and, if possible, the Urban Forestry Advisory Panel should be sought to confirm that the tree in question cannot be preserved with practicable measures;

(c) A comprehensive plan to engage members of the relevant district council, local residents, concern groups and other stakeholders in the affected community should be formulated with the assistance of HAD. For instance, DO has established a dedicated website on tree management information and tree removal cases to further enhance information dissemination; and

(d) Where appropriate, suitable initiatives to commemorate the tree (e.g. a community involvement event, memorabilia, replanting, etc.) should be considered together with the local community.

Government Secretariat – Education Bureau

Case No. DI/422 – Government's Support for Non-Chinese Speaking Students

Background

1138. According to the *Thematic Report: Ethnic Minorities*, published by the Census and Statistics Department in December 2017, the number of ethnic minority[11] residents aged 0 to 15 in Hong Kong had increased from 32 289 to 52 860 during the decade between 2006 and 2016, an increase of 64%. In 2016, there were in total 52 129 ethnic minority students studying full-time in Hong Kong and they were mainly at early childhood education to primary and secondary levels.

1139. In general, Chinese is not the usual spoken language and mother tongue of ethnic minorities residing in Hong Kong. Given the increasing number of non-Chinese speaking (NCS) students[12], the Government has in recent years introduced enhancement measures to support NCS students in learning Chinese in early childhood education as well as in primary and secondary schools, and assist schools in creating an inclusive school environment so that NCS students can quickly adapt to the local education system, learn the Chinese language better and integrate into the society. Nevertheless, there have been criticisms that the Education Bureau (EDB) has not adequately catered for NCS students' needs in learning Chinese. Concern groups also pointed out that due to lack of resources and experience, some schools even arranged separate classes for NCS students and Chinese-speaking students, making it difficult for the NCS students to integrate into the local language context of learning Chinese.

1140. Meanwhile, there were media reports from time to time about the difficulties encountered by many NCS children when applying for enrolment in kindergartens (KGs) and choosing primary schools. They alleged that EDB had failed to provide sufficient information about choice of schools and allocation of places, or appropriate support for NCS children and their parents. Some concern groups also pointed out that under the Primary One Admission (POA) System, most of the NCS children were grouped together and allocated places in around 30 primary

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[11] According to the Definition of Terms in the Thematic Report: Ethnic Minorities published by the Census and Statistics Department, "Ethnic Minorities" refer to persons of non-Chinese ethnicity.

[12] For the planning of education support measures, students whose spoken language at home is not Chinese are broadly categorised as non-Chinese speaking students.

schools, which meant that they were in effect "segregated" in their learning at the school level. Such practice would affect NCS students' integration with Chinese-speaking students and their performance in learning Chinese.

1141. As many members of the public and stakeholders are becoming more concerned about the Government's support for NCS children and students in learning Chinese, applying for enrolment in KGs and POA, the Office of The Ombudsman (the Office) initiated a direct investigation on 9 May 2018 to identify any inadequacies of EDB's support for NCS students with a view to making recommendations for improvement.

1142. The scope of this direct investigation covers –

(a) EDB's support and relevant measures for NCS students in learning Chinese and for creating an inclusive school environment;

(b) EDB's support for NCS children in applying for enrolment in KGs; and

(c) the arrangements for NCS children in the allocation of Primary One places.

The Ombudsman's observations

1143. In the light of the continued increase of NCS students, the Government has in recent years allocated more resources to support them, with a view to assisting their integration into the local school system and learning the Chinese language. In particular, a wide range of support services are provided for NCS students from early childhood education to the primary and secondary levels, which include providing additional funding for KGs and primary and secondary schools admitting NCS students, as well as implementation of the "Chinese Language Curriculum Second Language Learning Framework" (Learning Framework) in primary and secondary schools. Regarding NCS children's application for enrolment in KGs and POA arrangements, EDB has also adopted a number of measures in recent years to provide more information and support. Implementation of the Learning Framework and other support measures has begun since the 2014-15 school year. It is necessary for EDB, the education sector and relevant stakeholders to accumulate experience and conduct review in a timely manner for further improvement. As regards EDB's current support measures, the Office lists below four areas that EDB should pay attention to and make improvements.

Area (a): Support measures for primary and secondary schools should not just be on funding, but require coordination of various sectors and encourage school participation

1144. It has been four school years since EDB's implementation of the Learning Framework in 2014-15. The effectiveness of implementing the Learning Framework hinges on the coordination of various sectors such as school administration, teacher qualifications, and school-based "learning and teaching" resources development. Learning a language (especially becoming proficient in a second language) is not something that can be achieved overnight. Besides, the Government's support measures also need time to take root. Therefore, EDB must closely monitor the implementation of various measures. Apart from funding, it must continuously sum up the experience in implementing those measures, and strive to improve and enhance the support measures, such as strengthening the support for school administration and teacher training.

1145. Information showed that on average, 48 primary schools and 31 secondary schools each year received the School-based Professional Support (SBPS) services provided by EDB. Over the past four school years, as for the "Professional Enhancement Grant Scheme for Chinese Teachers (Teaching Chinese as a Second Language)" (PEG Scheme) implemented by EDB in teacher training, merely 24 teachers, i.e. an average of six per year, completed the relevant professional programmes. The Office considered that EDB should step up its efforts in encouraging those public sector and Direct Subsidy Scheme (DSS) primary and secondary schools which have admitted NCS students to participate in the SBPS services and the PEG Scheme, in order to further strengthen the support for schools in the areas of school administration and teacher training.

Area (b): The additional funding mechanism for admission of NCS students needs review

1146. Under the current additional funding mechanism, public sector and DSS primary and secondary schools that offer local curriculum admitting 10 or more NCS students are granted an additional funding ranging from $0.8 million to $1.5 million, while those admitting nine or less are granted $50,000 only.

1147. The above situation shows that the difference of only one NCS student (whether admitting nine or ten students) could mean a difference

of 16 times in additional funding to primary and secondary schools (i.e. $50,000 for admitting nine students and $0.8 million for admitting 10 students). The Office believed that EDB should consider increasing the funding allocated to primary and secondary schools admitting less than 10 NCS students in order to encourage more primary and secondary schools to admit NCS students and enhance their teaching.

Area (c): Inadequate support for KG admission

1148. While EDB has reminded KGs by such means as circulars and guidelines that they should provide enrolment application forms and other information in both Chinese and English, there have been media reports from time to time that parents of NCS children encountered communication problems due to the language barrier. Some stakeholders also indicated that a lot of KGs used only Chinese in their websites, making it impossible for parents of NCS children to access an English application form and other related information.

1149. The Office has looked at the websites of some KGs and found that many of them were all prepared in Chinese. Although some websites provided headings in both Chinese and English, the contents and details under the respective headings were in Chinese only. Furthermore, while the enrolment application form in bilingual format (Chinese and English) were available for downloading on some KGs' websites, the links to download the form were written in Chinese, rendering it difficult for parents of NCS children to find the enrolment application forms on those websites. While EDB claimed that it had never received from parents of NCS children any views reflecting difficulties in finding KG places for their children, the Office considers that EDB should strengthen its communication with the stakeholders (including parents of NCS children and groups concerned about the learning of NCS students) in order to have a deeper understanding of the problems faced by parents of NCS children and applicant children. It should also take heed of the stakeholders' views and suggest that KGs adopt corresponding support measures (such as providing information in English on their websites) as far as practicable. If KGs need support, EDB should provide active assistance.

1150. Meanwhile, in order to strengthen the support for parents of NCS children and applicants, the Office also considered that EDB should, apart from sending reminders to KGs, initiate more inspections and checks on whether KGs have implemented the measures it proposed, including the provision of enrolment application forms and related information in English. Besides, EDB should step up further the publicity of KG

admission information and encourage KGs to provide on their websites hyperlinks to EDB's website links to the KG profile it compiled in Chinese and English, the KG admission information prepared in seven major ethnic minority languages, as well as such other information as translation/interpretation services available to parents of NCS children, so that they can readily access those pieces of information and services. For KGs in breach of the guidelines, EDB should advise them to make appropriate rectifications.

Area (d): Discrepancy between information about schools on the list and the actual situation

1151. The Office understands that EDB's policy objective is the ultimate integration of NCS students into mainstream schools and their proficiency in the Chinese language. Nevertheless, the mechanism in which a list of primary schools that traditionally admitted a larger number of NCS students is provided to NCS students (Schools on the List mechanism) has been maintained as a contingency practice to cater for the needs of NCS students and their parents. For many years, the mechanism has been in use, and EDB would notify parents of NCS students in Annex III to the Notes on How to Complete the Application Form for Admission to Primary One that the Schools on the List are "primary schools traditionally admitting more NCS students". In reality, however, many NCS students are now studying in schools outside the List. Some schools not on the List actually have admitted more NCS students than some Schools on the List.

1152. EDB has not revised the List for years since it was compiled. This may make it impossible for NCS children and their parents to get the picture of the actual situation and choose the primary schools that actually admit more NCS students. In keeping with EDB's policy objective, the Office's view is that in the long run, EDB should consider abolishing the Schools on the List mechanism.

1153. The Office mades the following recommendations to EDB –

Support for primary and secondary schools admitting NCS Students

(a) to conduct prompt and regular reviews on the effectiveness of the Learning Framework, and strengthen the support for school administration and teacher training in order to enhance the effectiveness of NCS primary and secondary students in learning Chinese;

(b) to review the additional funding mechanism and consider increasing the subsidies for primary and secondary schools that admit less than ten NCS students;

Support for KGs admitting NCS students

(c) to strengthen the publicity of admission information and the communication with stakeholders in order to gain a deeper understanding of the problems encountered by NCS children and their parents in applying for KG admission, so that EDB can help KGs to provide appropriate support measures for these parents and children;

(d) to actively inspect and check KGs' implementation of the measures promulgated by EDB, which include the availability of English enrolment application form and related information; and

POA arrangements

(e) to reconsider whether to retain, and ultimately abolish, the Schools on the List mechanism.

Government's response

1154. EDB accepted all of the Office's recommendations.

Recommendation (a)

1155. Since the introduction of the "Learning Framework" in the 2014 - 15 school year, EDB has been soliciting teachers' views for continuous improvement of the "Learning Framework" and the revised "Learning Framework" was released in January 2019 accordingly. In tandem, EDB will continue developing diversified learning and teaching resources, strengthening teacher training and school-based support services to enhance the effectiveness of learning and teaching. In the three school years from 2019-20 to 2021-22, EDB will continue to commission post-secondary institutions to provide intensive school-based support services for about 200 KGs, primary and secondary schools admitting NCS students to enhance the professional competency of teachers. EDB launched the PEG Scheme on a pilot basis under the Language Fund in the 2014-15 school year to encourage Chinese Language teachers at the

primary and secondary levels to take structured part-time programmes, and has further extended it up to the 2021/22 school year. To further encourage qualified teachers to apply for the grant, the maximum reimbursable basic grant rate has been increased from 30% to 50% of the tuition fee and the maximum grant level has been increased from $34,000 to $64,000 per teacher starting from the 2019-20 school year. The recognised programme framework of the PEG Scheme has also been fine-tuned so that the programmes can better meet the teachers' needs and enhance their pedagogical knowledge and skills in teaching Chinese to NCS students. EDB reviews and evaluates the effectiveness of various support measures for NCS students on an ongoing basis. Relevant information and data, such as teachers' feedback on the professional development programmes, NCS students' performance in language ability and learning motives, and schools' feedback on the effectiveness of SBPS services, etc., are collected. In light of the findings of the review and evaluation, EDB will refine the relevant support measures as necessary.

Recommendation (b)

1156. EDB has been collecting views from the school sector on the use and funding model of the additional funding by various means, including school reports and school plans submitted by the schools concerned, supervisory school visits, questionnaire surveys and focus group interviews with these schools. Based on the actual experience gained since the introduction of the current funding arrangements and views of stakeholders, in particular the school sector, EDB will review and refine the relevant measures in a timely manner as necessary so as to better support schools in helping their NCS students learn Chinese.

Recommendation (c)

1157. EDB has implemented various measures for strengthening publicity of admission information and communication with stakeholders. In EDB Circular Memorandum No. 102/2019 issued in June 2019, KGs have been reminded to provide both the Chinese and English versions of the enrolment application forms and other information on admission; and to create an icon, or provide a simple message in English at a prominent location on the homepages of their school websites so that the English version of the information is made readily available to the parents when browsing the homepages. KGs are also required to provide a hyperlink to EDB's website on their school websites to help parents of NCS children access the relevant information published by EDB. These messages have

been further highlighted in the series of briefing sessions held for KGs in June 2019.

1158. For Nursery (K1) admission, EDB annually organises dedicated briefing sessions in English (with interpretation services in major ethnic minority languages provided on a need basis) for parents of NCS children. EDB also organises briefings in collaboration with the Support Services Centres for Ethnic Minorities funded by the Home Affairs Department with a view to better reaching out to parents of NCS children, and organises briefing sessions on K1 admission together with or targeted at the non-governmental organisations which have established networks with the NCS communities so as to disseminate information on admission arrangements and KG education policy to parents of NCS children. On this basis, EDB will further strengthen communication with these organisations to better understand the needs of parents of NCS students and to disseminate information on KG admission and support for NCS students through their networks to parents. Separately, the KG Profile, with online and printed versions available, is published every year in both Chinese and English to provide information on every KG for parents' reference when making school choices. Starting from 2018, a new column "Support to NCS Students" has been included in the KG Profile, in which KGs can set out the support measures provided to their NCS students. In addition, the leaflet on support for NCS students in KGs has been revised with highlights on admission matters, which has been distributed to KGs and parents of NCS children. EDB has set up a hotline for parents of NCS children applying for enrolment in KGs (telephone number: 2892 6676) since September 2018 for handling enquiries from these parents about intake of students and admission to KGs. Should individual NCS children encounter difficulties in applying for admission, EDB will, where appropriate, make referral for them to KGs joining the KG education scheme with vacancies.

Recommendation (d)

1159. EDB conducts an annual survey on details of KGs' arrangements in K1 admission, including provision of bilingual application forms and school information as well as an icon or a message in English on the school webpages to facilitate access to English information by parents of NCS children, etc. For suspected non-compliance cases, EDB will ask the KGs concerned to rectify the situation. The KGs' applications for joining the KG education scheme for the next school year will only be considered when they meet all the requirements on admission arrangements. To ensure their compliance with the guidelines on handling admission, EDB

conducts random checking on KGs' webpages. It is noted that there is a diversity of KGs' practices in provision of an icon or a message in English. While some KGs have placed the icon or a simple message about English information on their homepages and some even have the English version of their websites, some have placed the icon or the message at an inconspicuous location or at the second level of their webpages (i.e. available only after clicking on an icon on the homepage). In this connection, EDB has, through the circular memorandum issued and a series of briefings held for KGs in June 2019, reminded them to place the icon or the message at a conspicuous location on their homepages. Besides, EDB officers will also collect relevant documents, such as Chinese and English application forms and related information, during school inspections.

Recommendation (e)

1160. EDB learnt that at present, some parents of NCS children still have concern about sending their children to general "mainstream" schools. Hence, they wish to retain the Schools on the List as additional choices. EDB will closely keep in view the needs of parents of NCS children in respect of making school choices, and will continue to listen to the views of various parties on the POA mechanism, including collecting views from parents of NCS students through questionnaires on whether to retain the Schools on the List, and review this arrangement in a timely manner as appropriate. EDB consulted the Primary One Admission Committee about the arrangement regarding the Schools on the List as well as the comments and suggestions of the Office at the committee's meeting on 27 May 2019. Members considered that the existing arrangement facilitated parents of NCS children in making school choices and recommended EDB to collect more views from the parents concerned before considering whether the existing arrangement should be abolished.

1161. EDB will continue actively promoting parent education and encouraging parents (including parents of NCS students) to take into account the aspirations and needs of their children when making school choices, and encouraging parents of NCS students to consider arranging for their children to study in schools which provide an immersed Chinese language environment to facilitate their Chinese learning. To provide parents with more comprehensive information on making school choices, starting from the 2018-19 school year, a separate column on "Education Support for NCS Students" has been added to the School Profiles for schools to provide information on their support for NCS students. All public sector schools and DSS schools offering the local curriculum which

admit NCS students and are provided with the additional funding are required to specify that additional support, including after-school support, is provided for their NCS students in learning of the Chinese language. The new column will be further enhanced from the 2019-20 school year onwards, under which the schools concerned are required to provide more details on their support measures.

Home Affairs Department and Lands Department

Case No. DI/417 – Regulation of Illegal Burials Outside Permitted Burial Grounds by the Home Affairs Department and the Lands Department

Background

1162. In 2015, the Office of the Ombudsman (the Office) published a direct investigation report on "Management of Permitted Burial Grounds". In that report, the Office criticised the Home Affairs Department (HAD) and the Lands Department (LandsD) for being too lax in taking enforcement action against burials of deceased indigenous villagers outside Permitted Burial Ground (PBG) boundaries (hereinafter referred to as "burials outside PBGs") and also made a number of recommendations for improving the management of PBGs.

1163. However, from the complaints the Office received subsequently and media reports, the Office noticed that the problem of burials outside PBGs was still prevalent. Against this background, the Office initiated another direct investigation against HAD and LandsD in January 2018 to probe any inadequacies in the regulation of burials outside PBGs by the two departments.

The Ombudsman's observations

1164. While examining the cases of burials outside PBGs, the Office noticed that some graves were located near the boundaries of PBGs. The persons involved might have made an inadvertent mistake in burying the deceased outside PBGs. However, some graves, located a long distance from PBGs, in certain cases over 300 metres, could hardly be excused as inadvertent mistakes. If the departments concerned fail to rectify such irregularities, it will not only cause damage to the natural environment, but also encourage other people to follow suit and aggravate the problem of burials outside PBGs. The Office considered that the departments concerned have the following three major inadequacies in the regulation of burials outside PBGs.

Inadequacy (a): Failing to formulate comprehensive and effective measures to ensure that the burial locations are correct

1165. It is unlikely to eradicate the problem of burials outside PBGs if the departments concerned do not inspect the locations of burial sites before approval of the burials.

Inadequacy (b): A lax attitude in following up on cases of burials outside PBGs

1166. The Office appreciated the traditional idea of "rest in peace upon burial". This is exactly the reason why the problem of burials outside PBGs is so difficult to rectify within a short time after the mistake occurred. The departments concerned should understand this and try to tackle the problem at its source. Hence, the Office recommended that before extending the Pilot Scheme to all PBGs, the departments concerned should take other measures to ensure that villagers, before burying the deceased, clearly know about the boundaries of PBGs and the consequences of burials outside PBGs. In addition, both HAD and LandsD (which has the expertise in surveying) should deploy staff to visit a PBG together with a certificate holder to confirm the location of a burial site prior to the burial, and conduct a follow-up inspection afterwards. In view of the problem of burials outside PBGs over the years and the protracted period needed for rectification (usually more than seven years) once the problem emerges, it is worthwhile to put in such extra resources.

Inadequacy (c): Allowing offenders to continue to violate the stipulated conditions at no cost

1167. If the departments decide to temporarily tolerate burials outside PBGs out of respect for traditional village customs (which is exactly the Government's current practice), they should consider taking punitive measures (such as imposing a fine) against offenders so that they have to pay a certain price for their offences. It is indeed a matter of justice and fairness.

1168. The Office considered that the departments concerned should devise a plan for punitive measures against offenders. The principle is that while the Government temporarily tolerates those irregularities on the basis of traditional customs and does not require immediate rectification, the offenders must pay a certain price. That should avoid giving the public an impression that some burials outside PBGs are given preferential

treatment and those offenders need not pay any price for illegal occupation of Government land.

1169. The Office made the following recommendations to HAD and LandsD –

(a) to solve the problem at its source by introducing specific measures to ensure that villagers, before burying the deceased, are fully aware of the boundaries of PBGs and the consequences of violating the conditions;

(b) to deploy staff to conduct a site inspection with the certificate holder before a burial takes place in order to confirm the location of burial site, and conduct a follow-up inspection after the burial; and

(c) to explore the introduction of punitive measures to make those who illegally occupy Government land pay for their misdeeds.

Government's response

1170. HAD and LandsD accepted the Office's Recommendation (a) but had reservations for Recommendations (b) and (c).

Recommendation (a)

1171. The boundaries of PBGs have been uploaded to the website of GeoInfo Map (https://www.map.gov.hk) since September 2019. Applicants can make use of desktop computers and smart phone devices to check the boundaries of PBGs on the GeoInfo Map. In addition, users of the GeoInfo Map can also use the real-time positioning function of the smart phone device to check the distance between the location of the proposed burial site and the PBG boundary. Following the launch of the abovementioned service, HAD will publicise the service to indigenous villagers and undertakers to encourage their use. HAD and LandsD will also explore the feasibility of requiring applicants to submit a photo of the proposed burial site with the assistance of information technology and GeoInfo Map, so that it could be confirmed that the burial sites are situated within PBGs.

Recommendation (b)

1172. HAD and LandsD appreciated the purpose behind the recommendation of the Office. Prevention is preferred to remedy. Detailed deliberation is nevertheless required to devise a feasible arrangement that takes account of practical considerations. Certificates, by necessity, cannot be issued in advance. There are on average close to 1 000 burials in PBGs annually but their occurrences are not evenly spread out and defy advance planning. The justification for a dedicated team is therefore not strong, given the competitive demands on limited manpower resources. Of note is that surviving relatives often want burials to take place very soon after the after-death arrangement has been decided upon and often on a specified conspicuous date. Depending on the complexity of the circumstances, a few days to a few weeks are required to complete investigation of a case. While the above are the reasons for the departments' current act-on-complaint approach, the departments see merits in the Office's recommendation and would continue to identify ways to put in place a feasible arrangement to better forestall burials outside the boundary of PBGs.

Recommendation (c)

1173. HAD and LandsD agreed that there is a need to consider ways to better enforce burials only in permitted burial grounds. The formulation of ways to deal with offenders of burials outside PBGs would need to take into account the interface among the objectives and implementation of policies relating to burial, planning and occupation of Government land. While identifying a practical way forward, the departments will also consider the feasibility of incorporating measures to help deter such illegal practices in the context of the review of the effectiveness of the Pilot Scheme.

Recommendations (b) & (c)

1174. Although Recommendations (b) and (c) were not accepted by the departments, HAD and LandsD proposed alternative ways of addressing the Office's concerns in the two progress reports submitted to the Office in February and September 2019. The Office noted the Government's stance set out in the first progress report and requested supplementary information. The Office has yet to comment on the second progress report.

Housing Department

Case No. DI/413 – Housing Department's Arrangement for Using Idle Spaces in Public Housing Estates

Background

1175. The building designs of some public housing estates (PHE) completed in earlier years have often included idle spaces scattered around the estate buildings. Over the years, the Housing Department (HD) has used those idle spaces as storerooms for letting out to public housing tenants, service providers or mutual aid committees for storage purposes.

1176. The Office of The Ombudsman (the Office)'s investigation found that as at 31 August 2017, there were a total of 959 vacant storerooms in 87 PHE throughout the territory, representing a vacancy rate of 39%. Some of those vacant storerooms have a large area of more than 700 square feet.

The Ombudsman's observations

1177. The direct investigation of the Office revealed inadequacies on the part of HD and room for improvement in three areas: conversion of storerooms into public housing units (PHU), use of storerooms for other purposes, and provision of information.

Area (a): Actively study conversion of storerooms into PHU

1178. In view of the deteriorating living area and environment of many people in Hong Kong over the past years, HD should accord top priority to converting those idle spaces into PHU where possible. Nevertheless, it was not until early 2015 that HD started a feasibility study. This showed that HD had failed to actively convert those storerooms into PHU.

1179. The Office understood that not all the storerooms are suitable for conversion into PHU. However, based on the advice the Office has sought from professionals in building and architecture, HD can consider taking remedial measures for storerooms with only minor inadequacies (such as slightly insufficient natural lighting or ventilation). In fact, since HD had adopted this practice, eight applications for conversion of storerooms previously rejected have been reviewed and converted to PHU successfully.

HD expects that the revised principle could be applied to 42 more storerooms for conversion into PHU.

1180. Moreover, the Office found in some PHE buildings a large number of empty bays with sizes and conditions similar to their adjacent PHU. Upon intervention, HD successfully converted three empty bays into PHU. Yet HD has not compiled any records or statistics on their quantity, size and distribution of such empty bays.

1181. The Office considered that HD should carefully review the current conditions of all storerooms and proactively explore ways to remedy their inadequacies so that they could be converted into PHU. HD should also take stock of and compile records on the empty bays in all PHE, and actively explore the possibility to convert them into PHU.

Area (b): Explore other possible uses of storerooms

1182. For those storerooms that are not suitable for conversion into PHU, if the storerooms are located within the domestic area (i.e. those inside the security gate) HD will only rent them out to tenants of the same building for security and management reasons. Under such constraints, only a limited number of tenants would be eligible to rent those storerooms, and such storerooms will probably remain vacant, resulting in undue wastage of precious land resources.

1183. The Office has received suggestions from a number of social welfare agencies and building professionals on how to better utilise those vacant storerooms located within the domestic area (such as using them for social welfare purpose or open space). In the Office's view, HD should review whether those storerooms can be put to other uses (including renting to social welfare agencies/organisations) for the benefit of the community.

Area (c): Enhance transparency and provision of information

1184. Currently, where there are vacant storerooms available for renting, HD would only put up notices in the Estate Offices or at the lobby of the estate buildings to invite applications. As HD provides little information and the channels disseminating such information are very limited, it is difficult for interested agencies/organisations to have a comprehensive picture of the vacant storerooms in different PHE.

1185. The Office considered that enhanced transparency in the information about storerooms would help encourage stakeholders and interested parties to put forward more innovative proposals to the Government. With collective wisdom, idle spaces in PHE can be better utilised for more diversified purposes.

1186. The Office made the following recommendations to HD –

(a) to follow up closely the conversion progress of those storerooms and empty bays already approved by the Independent Checking Unit for converting into PHUs, and examine as soon as possible the feasibility of applying similar principles to other suitable storerooms for conversion into PHUs;

(b) to review the conditions of all storerooms, both vacant and rented, with a view to actively examining whether there are alternative ways to surmount or compensate their inadequacies in satisfying the requirements under the Buildings Ordinance (BO) (Cap. 123) for conversion into PHUs;

(c) to record and compile statistics about all the empty bays within the domestic areas of public housing estates, and vigorously examine the feasibility of converting these empty bays into PHU;

(d) to proactively review the feasibility of putting the vacant storerooms which cannot be converted to domestic use to other uses (such as social welfare purposes or used as open spaces), and provide adequate assistance to interested social welfare agencies/organisations in renting those storerooms; and

(e) to enhance the transparency and dissemination of specific information about vacant storerooms so that interested residents or non-domestic tenants can apply for renting those storerooms to suit their needs with a view to reducing the vacancy rate.

Government's response

1187. HD accepted the Office's recommendations.

Recommendations (a) and (b)

1188. HD has been reviewing the use of storerooms, actively following up the progress of conversion of storerooms and exploring various ways for better utilisation of storerooms from time to time. After overcoming the headroom issue by enhanced provisions of natural lighting and ventilation, we have been carrying out or completed works to convert some storerooms and empty bays into 70 PHUs.

1189. Conversion of storerooms to domestic use may not be always possible due to various constraints such as non-compliance with BO and related regulations as well as other environmental factors. Examples of such constraints include new windows cannot be created due to proximity to adjacent carparks, slopes or retaining walls; the headrooms are too low; the units are suffering from hygiene and noise problems as the windows open on to a wet market; and failing to meet natural lighting and ventilation requirements as the windows are overshadowed by a podium above. After identifying a suitable storeroom feasible for conversion, we have to go through relevant statutory, land administration, technical as well as consultation process and obtain necessary consents or approvals prior to conversion works. As a result, the conversion process may take considerable time and some proposed conversion works may not be successful. Nevertheless, HD will continue to review the feasibility of converting storerooms within domestic areas to domestic use and explore possible ways for better utilisation of these storerooms.

Recommendation (c)

1190. The further studies that HD conducted for the conversion of storerooms to domestic use included identifying empty bays within domestic areas and recording the relevant information. Subject to compliance with relevant legislations and where technically feasible, we will examine whether the empty bays can be converted into PHUs as appropriate, having regard to the original functions of the empty bays (such as for ventilation or access purposes) and the views of residents. HD will continue following up on the work.

Recommendation (d)

1191. When the letting policy for storerooms was reviewed and realigned in 2010, the Commercial Properties Committee of the Housing Authority had fully considered it from different aspects including planning approval and regulatory requirements, estate management and residents'

concerns. It was decided that minor storerooms within domestic areas would only be let to local residents so as to ensure their enjoyment of a quiet living environment and avoid causing inconvenience and nuisance to them.

1192. HD is aware of the keen demand for spaces in public housing estates from social welfare organisations for provision of services. However, the views of residents should be handled and considered carefully so as to strike a balance between ensuring a quiet living environment for residents and meeting the demand for other uses. Hence, HD will focus our study on the conversion of storerooms within domestic areas to domestic use.

1193. In addition, HD will continue to study the conversion of storerooms outside domestic areas into welfare premises or other non-domestic uses on a need basis. In recent years, HD has converted some storerooms and spaces outside domestic areas into 19 welfare premises and three retail premises in response to demand. HD will continue with our efforts in this respect to optimise resources.

Recommendation (e)

1194. HD has issued guidelines to estate management staff on enhancing dissemination of information about storerooms available for letting in the estates, such as providing more detailed information about the storerooms available for letting, including address, size, condition and licence fee. Meanwhile, HD has also strengthened the publicity channels by putting up notices outside the door of the storerooms available for letting to invite applications; publicising leasing information via the Housing Channel installed at the ground floor lobby of domestic blocks; disseminating information about vacant storerooms at the meetings of the Estate Management Advisory Committee; and providing such information to residents via Estate Newsletter.

Immigration Department

Case No. DI/391 – Immigration Department's Mechanism for Following up Cases of Unregistered Birth

Background

1195. A tragedy happened in Hong Kong in which a 15-year-old girl plunged to her death from a building. It was later discovered that the girl and her younger sister were born in Hong Kong, but their parents had never registered their births. The incident aroused public concern about whether the well-being of children without a birth registration are adequately protected, as well as the social problems (such as child abuse, illegal immigration and human trafficking) that may arise as a result. In this connection, the Office of The Ombudsman (the Office) decided to launch a direct investigation against the Immigration Department (ImmD).

1196. Under the Births and Deaths Registration Ordinance (Cap. 174), the father or mother of a newborn have a duty to register the birth within 42 days at a births registry (the registry) of ImmD. Besides, all public and private hospitals must furnish the registry with a birth return of any newborn within 42 days upon delivery.

1197. Prior to the tragic incident in April 2015, ImmD handled cases of unregistered birth by sending, at three months after birth, the first reminder to the parents via surface mail. If the birth remained unregistered six months after birth, a second reminder would be issued, to be followed by a third one via registered mail if the birth remained unregistered nine months after birth. ImmD would also contact the parents by telephone if their contact numbers were available. In case a reminder was returned, ImmD would try other means to contact the parents.

1198. In the wake of the tragic incident, ImmD introduced a new mechanism on 27 May 2015. In addition to sending three reminders under the old mechanism to the baby's parents and contacting them by telephone, ImmD would input the parents' particulars into its computer system nine months after the baby's birth, such that when they use ImmD's services (such as applying for an identity card or a travel document), ImmD can take the opportunity to further follow up on their failure to register the birth of their baby. If a birth registration remains outstanding 15 months after birth, the registry would refer the case to ImmD's Investigation Division, and the parties involved may be prosecuted. Should anything unusual be

discovered in the course of checking (e.g. the parents concerned having breached the conditions of stay), the registry would refer the case to the Investigation Division direct for follow-up action.

1199. After the tragic incident, ImmD searched its records between 1 January 1990 and 26 May 2015, and found 151 cases in which a baby's birth remained unregistered after more than 12 months. ImmD had issued three reminders as required only in 49 cases (about 32.5%), two reminders in 19 cases (about 12.6%), one reminder in 13 cases (about 8.6%), and none at all in 70 cases (about 46.4%). Regarding the parents' addresses on the birth returns, 120 were complete, and the remaining 31 were incomplete or even entirely missing.

1200. In the aforementioned 151 cases, except for one case in which the mother was no longer traceable and the child's birth was subsequently registered by a social worker, all other 150 cases had been referred to the Investigation Division for follow-up action. Nevertheless, those referrals were all made in or after May 2015. In other words, under the old mechanism, ImmD had never investigated these 151 cases of unregistered births for over 12 months, let alone instituting prosecution.

1201. Since the new mechanism had come into effect, up to 31 December 2017 and after discounting the 47 cases in which the birth registrations had been completed earlier or the babies had died prematurely, ImmD conducted investigations into the remaining 104 cases and completed 52 cases. In 35 of those cases, ImmD instituted prosecution against either the father or the mother. Except for one acquittal case, the defendants in all the other 34 cases were convicted. ImmD decided not to bring prosecution for the remaining 17 cases due to lack of evidence or after obtaining legal advice from the Department of Justice. Meanwhile, 52 cases are still under investigation.

1202. Since the coming into effect of the new mechanism on 27 May 2015 and up to 31 December 2017, there were 401 cases of unregistered birth (six months or longer after birth). Of those cases, 352 had been subsequently registered, while the parents in another 17 cases had been located and they were completing the formalities of birth registration. The remaining 32 cases had been or would be input into ImmD's computer system and/or referred to the Investigation Division for follow-up action.

The Ombudsman's observations

1203. In this direct investigation, the Office has found inadequacies in the following aspects on the part of ImmD as set out below.

Inadequacy (a): Follow-up procedures under old mechanism tantamount to inaction - some youngsters only had their births registered at the age of 20

1204. Under the old mechanism, ImmD's follow-up procedures were no more than issuing reminders in a routine manner. Between 1990 and 2015, there were an astounding 151 cases of unregistered births (12 months or longer after birth). For nearly half of those cases, no reminders had ever been issued. The situation was appalling.

1205. Moreover, under the old mechanism, ImmD had never referred such problem cases to the Investigation Division, let alone instituting any prosecution. In certain cases, the birth was only registered more than/nearly 20 years after the birth of a child. It is indeed worrying to think about what those innocent children had gone through in childhood and the first 20 years of their lives, how they received education and participated in group activities, and what their future would be. ImmD's senior management had all along failed to perform the monitoring duties diligently. They can hardly escape the blame for failing to step in and rectify such malfeasance of inaction.

Inadequacy (b): Missing the opportunity to intervene at an early stage

1206. Of the aforementioned 151 cases, in 30 cases the mother was in breach of the conditions of stay. Since under the old mechanism there were no established procedures for verifying whether the parents were overstayers, ImmD had never been alerted about such cases and thus failed to take action at an early stage.

1207. Furthermore, there were seven mothers who failed to register the births of more than one child, and these cases involved 16 children in total. In other words, when the birth returns of their second and third newborns were received from the hospitals, ImmD did not realise that the same mothers had not yet registered the births of their elder children and thus missed the opportunity to initiate an early intervention.

Inadequacy (c): Problems of incomplete address on birth returns need to be resolved

1208. Under the new mechanism, there were still many cases whereby the residential address of parents on their birth returns was either incomplete or missing. Many of those cases concern public hospitals. It should be noted that obtaining accurate and complete residential addresses and contact telephone numbers is a key factor to successfully locating the parents. ImmD should collaborate with the Hospital Authority (HA) and private hospitals with a view to formulating improvement measures to resolve the problem of incomplete residential addresses on the birth returns.

Inadequacy (d): Early intervention

1209. The Office was of the view that one reminder is sufficient to alert busy parents who forget to register the birth of their newborns, or those who do not understand the requirement under the law. In fact, most of those unregistered birth cases involved complicated family problems; some mothers were afraid of revealing their identities as overstayers, some even denied having given birth to their babies. The later the problem cases are identified, the more difficult it would become to locate the parents concerned.

1210. To enable early intervention, the Office recommended that ImmD consider reducing the number of reminders to two. When the parents still fail to register the birth of their newborns after the second reminder is issued (i.e. after six months), ImmD should take more proactive follow-up actions through its computer system and referring such cases to its Investigation Division.

Inadequacy (e): Exploring the feasibility of establishing a mandatory notification mechanism

1211. The Office has explored the feasibility of establishing a mandatory notification mechanism to require relevant organisations (such as social services units) to submit reports on suspected cases of unregistered births. While the Office understands that in-depth research, wide consultation with stakeholders and legislation are necessary before such a mandatory mechanism can be implemented, the Office hoped that this direct investigation can help instill the idea for the Government to start conducting research and consultation on the feasibility of establishing a mandatory notification mechanism.

Inadequacy (f): Publicity and public education

1212. Most parents should know the importance of birth registration for their children. Hence, apart from giving basic information such as the procedures and required documents for birth registration, ImmD should also emphasise in its publicity and public education campaign how parents' failure to complete birth registration promptly can cause harm to their children, and what legal consequences the parents may face.

1213. The Office made the following recommendations to ImmD –

(a) strengthen its communication and coordination with hospitals with a view to solving the problem of incomplete address on birth returns;

(b) initiate early intervention in cases of unregistered birth;

(c) enhance its public education campaign to emphasize how failure to complete birth registration promptly can cause harm to children, and what legal consequences the parents may face; and

(d) take the lead to study with other relevant departments (such as the Social Welfare Department (SWD), the Department of Health and the Police) possible ways to strengthen the existing follow-up mechanism, including the feasibility of establishing a mandatory notification mechanism.

Government's response

1214. ImmD accepted all of the Office's recommendations and has taken the following actions to enhance the mechanism for following up on unregistered birth cases. Details are as follows.

Recommendation (a)

1215. Since January 2018, ImmD has established a direct communication channel with HA and all private hospitals with obstetrics departments to enhance coordination and cooperation with regard to the submission of birth returns. ImmD would vet the birth returns immediately upon receipt. If the parents' addresses on the birth returns were found incomplete or missing or other irregularities were spotted on the birth returns, ImmD would follow up with the hospital concerned immediately.

Recommendation (b)

1216. On 26 February 2018, ImmD set up a new dedicated team to follow up on all cases of birth which remained unregistered after 42 days upon delivery. Having regard to the Office's recommendation, ImmD has enhanced the new follow-up mechanism. For a birth registration which remained outstanding after 42 days of delivery, the dedicated team would issue the first reminder to the parents and contact the parents by telephone. If it failed to reach the parents, the dedicated team would input the parents' particulars into the ImmD's computer system. If the birth registration remained outstanding three months after delivery, the dedicated team would issue the second reminder to the parents and pay a home visit. If the birth registration remained outstanding six months after delivery, the dedicated team would refer the cases to ImmD's Investigation Division for follow-up. Under the enhanced follow-up mechanism, ImmD has reduced the number of reminders to two and the time period for referring cases for full investigation by the Investigation Division has been reduced from 12 months previously to six months.

Recommendation (c)

1217. ImmD has actively enhanced its efforts in public education through various channels. These include reinforcing the relevant message on ImmD's website and GovHK Website, videos on ImmD's "YouTube" channel as well as posters, pamphlets and notices on birth registration, etc. The key message is to remind parents of their obligations under the law to register the birth of a child and the legal consequence of failure to do so. The parents are also reminded of the possible impact on the rights to medical treatment, education and welfare benefits, to which their children are entitled, as a result of the delay in following the relevant procedures for birth registration. The relevant videos are regularly broadcast in ImmD offices, maternal and child health centres and obstetrics departments of hospitals/clinics. ImmD also from time to time issues press releases on successful prosecution and conviction cases to arouse the public's attention to the legal consequence of failure to register the birth of a child in a timely manner

Recommendation (d)

1218. As noted above, ImmD has set up a new dedicated team to follow up cases of birth which remained unregistered and the dedicated team is also tasked to establish close liaison with relevant parties including HA

and private hospitals, SWD, the Correctional Services Department and the Police so as to take prompt actions on special and suspicious cases. In relation to the Office's recommendation on exploring the feasibility of establishing a mandatory notification mechanism, ImmD has assessed the recommendation in consultation with relevant parties. Having considered that the enhanced communication and follow-up mechanism has been operating smoothly and has been effective in assisting ImmD in handling unregistered birth cases in a timely manner, ImmD is of the view that there is no strong need to introduce a mandatory notification mechanism at present. Having said that, ImmD keeps in view the effectiveness of the follow-up mechanism and makes necessary adjustments to cater for changing circumstances as appropriate, so as to ensure the timely registration of all births in Hong Kong.

Marine Department

Case No. DI/418 – Marine Department's Arrangements for Private Vessel Moorings

Background

1219. The Marine Department (MD) has designated 43 areas for private vessel moorings (PM areas) within Hong Kong waters. Vessel owners may apply for written permissions from MD for laying private moorings (PMs) in those areas as fixed spaces (PM spaces) for mooring their private vessels.

The Ombudsman's observations

1220. The Office of The Ombudsman (the Office)'s direct investigation has found inadequacies on the part of MD in regulating the subletting activities of PMs, and in its arrangements for allocation of PM spaces. As the demand for PM spaces exceeds the supply, it has indirectly engendered other problems such as illegal mooring buoys, occupation of typhoon shelters and berth renting business of shipyards.

Problem (a): Problems in regulation of PM subletting

(i) Lack of enforcement action resulting in 40% of unauthorised PMs

1221. Before December 2017, the written permissions issued by MD (except for those issued to yacht clubs) contained a standard clause stipulating that the PM was for the exclusive use of a "designated vessel". In other words, the PM could not be sublet/lent for use by another vessel. However, MD's investigation in 2013 found that more than 40% of PMs (excluding those laid by yacht clubs) were not used for mooring the PM owners' vessels. It reflects that subletting/lending is quite common. Nevertheless, between 2008 and 2013, MD had taken no enforcement action against the subletting cases.

(ii) Inability to regulate subletting activities under existing legal framework

1222. In 2013, after seeking legal advice, MD held that its former condition of "designated vessel" is ultra vires. Consequently, MD

removed the relevant condition in December 2017. The Office considered that the locations in the waters available for laying PMs are limited public resources. If MD allows subletting of PMs, precious public resources will be abused by the PM owners for profits and the original "first-come, first-served" system for allocating PM spaces will be disrupted. In the Office's view, what is "legal" is not necessarily "reasonable". If subletting of PMs is not illegal under the existing legal framework, MD should review and consider amending the relevant legislation.

Problem (b): Arrangements for allocation of PM spaces and waiting list

(i) Low turnover rates with cases waiting for over 10 years

1223. As at 30 June 2018, 41 of the 43 PM areas had been fully occupied, and there were more than 500 outstanding cases on the waiting list. In eight PM areas, the applicants at the top of the waiting lists had been waiting for more than a decade, with the longest waiting time being 14 years. The Office considered that MD should examine its arrangement in allocating PM spaces with a view to increasing their turnover. MD should also explore other methods in allocating PM spaces (such as balloting and tender).

(ii) Administration fee not adjusted for 24 years

1224. MD has not adjusted the administration fee for laying PMs since 1995. The existing administration fee is far below the market rates of PMs, making subletting of PMs a profitable business. In the Office's view, if MD cannot increase the administration fee under the existing legal framework, it should explore other possible charging mechanisms and modes.

(iii) Yacht clubs allowed to lay large number of PMs for profits

1225. Four yacht clubs (together they hold more than 800 PM spaces) have been allowed to lay and rent out large numbers of PMs for profits. MD is in effect subsidising the PM renting business of those yacht clubs with precious public resources. The Office considered it necessary for MD to review whether the existing arrangements are appropriate. For example, it should consider whether periodic open tenders are necessary.

(iv) Unclear targets for inspections

1226. MD has not set any targets for inspection of PMs. As a result, the number of spot checks conducted every year fluctuated significantly. Between 2014 and 2016, MD inspected only 121 to 449 PMs each year. Given that there are nearly 2 000 PMs throughout the territory, the number of inspections was hardly adequate.

Problem (c): Enforcement against illegal mooring buoys lacked deterrent effects

1227. The Office found that MD's enforcement against illegal mooring buoys lacked deterrent effects. Offenders could get away without any consequences so long as they temporarily removed the buoys in question before the date specified on the Removal Notice. Moreover, because of difficulties in gathering evidence, MD had never instituted any prosecutions in the past. The Office considered that MD should review its enforcement strategies and consider shortening the notice period and exploring other methods (e.g. deploying decoys) to track down the owners of illegal buoys. It should also examine the viability of detaining the vessels moored to illegal buoys or prosecuting the vessel owners.

Problem (d): Pontoons "Occupying Berthing Spaces" at typhoon shelters for profits

1228. There had been media reports that pontoons were being used to occupy berthing spaces at Kwun Tong Typhoon Shelter for providing berthing services to yachts for a fee. The Office's field observations also discovered a number of yachts berthing at pontoons. MD asserted that it was not illegal for pontoons to provide water, electricity and berthing services to yachts for a fee. The Office's concern was whether the right of other vessels to the fair use of typhoon shelters had been affected.

Problem (e): Shipyards profiteered by renting out berthing spaces against regulations

1229. The sites of local shipyards are leased out by the Lands Department (LandsD) in the form of short term tenancies. There were media reports that several shipyards allegedly violated the land use conditions by renting out slipways for yachts to berth. While enforcement of short-term tenancies is LandsD's responsibility, the Office is concerned that if shipyards often rent out their slipways, maintenance and support services for local vessels would suffer in the long run.

1230. The Office made the following recommendations to MD –

(a) to review and consider amending the relevant legislation so that MD can re-enforce the requirement that restricts the use of PMs to only "designated vessels";

(b) to review the waiting situation and examine ways to expedite the turnover of PM spaces (e.g. specifying a validity period in permissions);

(c) to review the allocation arrangement for PM spaces and explore whether other methods (such as balloting) should be used to allocate PM spaces;

(d) to review the charging mechanism and mode for laying PMs;

(e) to review the situation in which yacht clubs hold for a long time a huge number of PM spaces for profits, and consider the need for periodic public tenders;

(f) to review the current arrangement for conducting spot checks of PMs and consider setting inspection targets;

(g) to review the current enforcement strategies against illegal mooring buoys and consider shortening the notice period;

(h) to take active measures to track down owners of illegal mooring buoys (such as by deploying decoys), and examine the viability of detaining vessels berthed at illegal buoys or prosecuting the vessel owners;

(i) to closely monitor whether the fair chance of using typhoon shelters would be affected by those fee-charging pontoons for berthing; and join forces with the Police to combat illegal activities to drive away other vessels; and

(j) to discuss further with LandsD long-term measures to monitor shipyards and stop them from renting out berthing spaces.

Government's response

1231. MD generally accepted recommendations made by the Office in the direct investigation report.

Recommendations (a) – (e)

1232. Regarding Recommendations (a) to (e), the Transport and Housing Bureau and MD are currently undertaking an internal review on the policies and the management arrangement related to PMs. The Office noted that relevant recommendations of the Office would be considered in the internal review, with a view to enhancing the management of PMs.

Recommendation (f)

1233. MD accepted Recommendation (f) in the Office's Report. MD has reviewed the existing arrangement for conducting spot checks of PMs and, as a pilot scheme, has set an inspection target of 500 PMs per year. MD will review the effectiveness of the pilot scheme after its implementation.

Recommendations (g) and (h)

1234. MD accepted Recommendations (g) and (h) in the Office's Report. MD is exploring measures to enhance enforcement against illegal mooring buoys.

Recommendation (i)

1235. MD accepted Recommendation (i) in the Office's Report. MD will continue to work closely with the Marine Police to combat illegal activities found in typhoon shelters, so as to ensure that the berthing needs of local vessels in sheltered spaces are adequately addressed.

Recommendation (j)

1236. MD accepted Recommendation (j) in the Office's Report. MD will continue to provide full support to LandsD in its enforcement action.

Social Welfare Department

Case No. DI/398 – Social Welfare Department's Monitoring of Services of Residential Care Homes for the Elderly

Background

1237. There have been media reports from time to time alleging that some residential care homes for the elderly (RCHEs) treated residents with neglect or even uncovering incidences of elder abuse in RCHEs. The society at large demands that the Government strengthen its monitoring of RCHEs and improve the existing legislation to prevent recurrence of such problems.

The Ombudsman's observations

1238. In this direct investigation, the Office of The Ombudsman (the Office) has found inadequacies in the following four aspects on the part of the Social Welfare Department (SWD) in monitoring the services provided by RCHEs.

Inadequacy (a): Current laws antiquated, incomprehensive and with limited effects

1239. Since the enactment of the Residential Care Homes (Elderly Persons) Ordinance (the Ordinance) (Cap. 459) and the Residential Care Homes (Elderly Persons) Regulation (the Regulation) (Cap. 459A), for over 22 years, no amendments have ever been made to the important requirements specified therein regarding staffing level and other operational matters of RCHEs. The various serious breaches by some RCHEs (such as infringement of the residents' privacy, wrong administration of drugs, improper use of restraints, etc.), which may result in physical and mental harm in residents, are not indictable offences under the Ordinance and the Regulation. Besides, the scope of monitoring under the current legal framework does not cover such regular services as escorting residents and accompanying them to attend medical consultations outside the RCHE premises. The Officer considered that SWD should also review this issue with a view to ensuring that residents are properly taken care of by RCHE staff when they go out for medical consultations.

Inadequacy (b): Lax enforcement

1240. SWD's enforcement against under-performing RCHEs or those RCHEs committing the offences under the Ordinance has been lax –

(i) During the four years between 2014-15 and 2017-18, SWD had given advice to RCHEs for 2 000 to 3 000 times and issued 100 to 400 warnings each year on average. Yet it had not cancelled any RCHE licence;

(ii) Although the number of conviction cases had increased from zero to 23 during the aforesaid four years, the prosecution and conviction rates were still rather low;

(iii) SWD has not set any deadline for implementing improvement measures, nor a timetable for conducting follow-up inspections after issuing a warning for a case of a serious nature (such as failing to meet staffing requirement);

(iv) Another case revealed that SWD issued a warning to an RCHE for failure to meet staffing requirement more than five months after an inspection. Besides, SWD had not conducted an in-depth investigation into the suspected falsified staff duty roster submitted by the RCHE in question; and

(v) Currently, elder abuse is not an offence under the Ordinance/Regulation. Nevertheless, SWD can issue a "direction on remedial measures" (DRM) to the RCHE in question, requiring the latter to improve or rectify the situation. SWD can institute prosecution should the RCHE fail to comply with the DRM. Moreover, under the Ordinance, SWD may take enforcement action against an RCHE on the ground that its licence holder has been convicted of an offence under the Ordinance or any indictable offence. In one suspected elder abuse case where an RCHE resident died, there was no record showing that SWD had actively enquired of the Police and the coroner's court of their findings so as to decide what enforcement action should be taken against the RCHE in question.

Inadequacy (c): Inspection mechanism

1241. The Licensing Office of Residential Care Homes for the Elderly (LORCHE) under SWD is responsible for processing all applications for

and renewal of RCHE licences as well as conducting inspections to examine all aspects prescribed in the licences. The inspection mechanism has the following inadequacies –

(i) The comprehensive inspections of RCHEs conducted by LORCHE involve a number of aspects, but they are usually carried out by one or two inspectors and completed within half a day or one day. It is questionable whether the inspectors can conduct a comprehensive, in-depth and effective inspection of an RCHE's operation within such a short period of time; and

(ii) For subvented RCHEs, LORCHE's inspections in the aspects of social work and health care and hygiene used to be only at least once every three years. Since April 2017, LORCHE has increased the frequency of inspections of subvented RCHEs to at least once a year. Yet, it is still less frequent than the inspections of private RCHEs, which is at least three times a year.

Inadequacy (d): Provision of information on non-compliance by RCHEs

1242. In the past, SWD only posted on its website the conviction records of RCHEs in breach of the Ordinance/Regulation. Since April 2018, SWD has started to upload on its website the records of warnings and DRMs issued to RCHEs with irregularities for public viewing. In our view, the information released is not comprehensive, and SWD should also disclose to the public its licence enforcement actions taken, including suspension of RCHE licence and refusal to renew the licence.

1243. The Office made the following recommendations to SWD –

(a) SWD, jointly with the policy bureaux concerned, should initiate amendments to the Ordinance as soon as possible, including considering extension of the legislative scope to cover offences currently not within the purview of the Ordinance and the Regulation (such as infringement of the privacy of residents, wrong administration of drugs, improper application of restraints, and elder abuse, etc.), and explore the viability of bringing under its supervision the services of escorting residents and accompanying them to attend medical consultations provided by the staff of RCHEs;

(b) SWD should strengthen its enforcement actions, including taking enforcement actions in a timely and rigorous manner against RCHEs with irregularities. It should also step up prosecution and/or licence enforcement actions, such as cancellation of licence, against those RCHEs which have repeatedly and seriously violated the relevant legislation/licensing requirements;

(c) all suspected elder abuse cases should be followed up diligently. For serious incidents (such as death of residents), SWD should actively and regularly follow up on such cases with the Police and/or the court, so as to take timely and corresponding action against RCHEs in question once the Police or the court has reached a conclusion;

(d) the operation and effectiveness of comprehensive inspections should be reviewed. Where necessary, SWD should augment and/or deploy manpower resources to conduct comprehensive inspections to ensure that its inspections of RCHEs are truly comprehensive, in - depth and effective;

(e) SWD should continue to strengthen its follow-up inspections after issuing warnings and DRMs, and set a deadline for RCHEs with warnings issued to rectify the relevant irregularities and a timetable for the LORCHE to conduct follow-up inspections at those RCHEs;

(f) the inspections of subvented RCHEs should be further strengthened; and

(g) apart from publishing its records of warnings and DRMs issued and convictions of RCHEs, SWD should also post on its website information about other enforcement actions (such as suspension of RCHE licence, refusal to renew the licence, or decision to amend any licensing conditions), both for public reference and to urge RCHEs concerned to improve their services.

Government's response

1244. SWD accepted the Office's recommendations. Pertinent to the cases which happened from 2015 to 2016 as mentioned in the investigation report, SWD, with increased resource allocation and manpower during the same period, has been continuously implementing a series of measures to

strengthen the monitoring and enhance the service quality of RCHEs, covering most of the recommendations made by the Office as set out below.

Recommendation (a)

1245. The Working Group on the Review of Ordinances and Codes of Practice for Residential Care Homes (the Working Group), chaired by the Director of Social Welfare, was set up in June 2017, comprising Legislative Council Members and other members from non-governmental organisations and the private sector operating RCHEs and residential care homes for persons with disabilities, the Elderly Commission and the Rehabilitation Advisory Committee, academics, service users/carers, independent members and representatives from the Hong Kong Council of Social Service and the Labour and Welfare Bureau (LWB). The Working Group conducted 19 meetings, including 12 Working Group meetings and seven focus group discussions, to examine in depth various key aspects under the Ordinance, the Residential Care Homes (Persons with Disabilities) Ordinance (Cap. 613), the Code of Practice for Residential Care Homes (Elderly Persons) and the Code of Practice for Residential Care Homes (Persons with Disabilities), and made 19 specific recommendations.

1246. In respect of the inclusion of penalties concerning the provision of health care services, the Working Group suggested that provisions should be added to the Regulation to require RCHEs to: (i) administer medicines properly and assist residents in using medicines in strict compliance with medical prescriptions; (ii) apply restraints only after seeking the consent of medical practitioners and family members, and conduct regular reviews and follow the relevant procedures to ensure safe application of the minimum restraint; and (iii) take appropriate measures to safeguard the privacy of the residents.

1247. The Working Group Report was submitted to LWB for consideration in late May 2019. The Government will study the report and proceed with the law drafting work and commence the legislative process after consulting different stakeholders and ascertaining the various amendment proposals.

1248. Concerning the services of escorting residents and accompanying them to attend medical consultations provided by RCHE staff, SWD will add the relevant provisions to the Code of Practice for Residential Care Homes (Elderly Persons) to remind RCHEs of the points to note in arranging escort service and company for residents to hospital(s)/clinic(s)

for treatment. RCHEs will also be required to set out the working guidelines for the arrangements concerned.

Recommendation (b)

1249. In the LORCHE of SWD, the number of inspectors responsible for conducting inspections has been increased from 44 in 2015 to 68 currently. Starting from February 2017, SWD has employed, under contract terms, retired disciplined service officers to assist LORCHE inspectors in conducting inspections at RCHEs, investigating suspected non-compliance cases, collecting evidence and taking prosecution actions.

1250. On top of the normal inspection mechanism, the dedicated team of the LORCHE will, having regard to the nature and items of non - compliance of individual homes, formulate individualised, concrete and targeted strategies and action plans. With respect to the irregularities of individual homes identified, the dedicated team will conduct surprise inspections flexibly at different times during office and non-office hours to closely monitor whether the homes have continuously complied with existing regulations and taken timely remedial measures. Depending on the nature and/or severity of the non-compliance, the LORCHE will issue written advice, warnings or DRMs to the homes, and even initiate prosecution. For those RCHEs with extremely poor operations, the LORCHE will consider cancelling, suspending, or refusing renewal of the licence.

1251. SWD has strengthened the prosecution against non-compliant RCHEs. In the past 3 years (from 2016-17 to 2018-19), the number of prosecution cases initiated by SWD against such RCHEs has increased, with 12, 23 and 42 cases initiated respectively.

Recommendation (c)

1252. SWD has been handling all suspected elder abuse cases in a serious and diligent manner, making every possible effort to follow up on each case. This includes handling the cases in accordance with the "Procedural Guidelines of Handling Elder Abuse Cases" (the Guidelines), taking appropriate measures to protect elderly persons, and referring cases to the Police for criminal investigation subject to the circumstances of individual cases.

1253. In respect of the particular case mentioned in the investigation report, SWD, apart from having contacted the Police immediately at that time, also convened a "multi-disciplinary case conference" (MDCC) according to the Guidelines. At the MDCC, the members (the attending medical officer, medical social worker and representatives of the Police and the LORCHE) considered that there was no evidence in the incident pointing to elder abuse.

1254. SWD will strengthen liaison with the Police in case handling, with a view to taking timely and corresponding follow-up actions against the RCHEs in question.

Recommendation (d)

1255. SWD, which increased the manpower of the LORCHE in 2016 - 17 with additional resource allocation, has been implementing a series of enhancement measures to strengthen the inspection strategies and support. In order to conduct the inspections more effectively, the LORCHE has updated the inspection items. Moreover, when conducting inspections, the inspectors of the LORCHE, apart from making observation on site, also review the records of the RCHEs and conduct interviews with the staff, residents and/or their family members, in order to ascertain the service quality of the RCHEs.

Recommendation (e)

1256. SWD has comprehensively revamped the criteria and arrangements whereby warnings and DRMs are issued to RCHEs with a view to upholding an open and binding monitoring system. Depending on the nature and circumstances of the non-compliance of the RCHEs, SWD will generally issue to the RCHEs DRMs to be taken within a specified period ranging from 14 to 30 days, and conduct follow-up inspections upon the expiry of the specified period.

1257. In respect of the warnings issued for non-compliant items (for example, insufficient staff attendance), SWD will, in general, require the RCHEs to make rectification immediately, and therefore may not specify or state in the written warnings a period for improvements to be made. The LORCHE will conduct follow-up inspections closely, in order to ensure that the RCHEs have made immediate improvements on the non-compliant items.

Recommendation (f)

1258. SWD, according to the principle of risk management, has been prudently using and deploying the resources for conducting inspections at private and subvented RCHEs. Starting from April 2017, the LORCHE has stepped up inspections at subvented RCHEs, with the inspection frequency increased from a minimum of four times every three years to four times every year.

Recommendation (g)

1259. SWD launched the SWD Elderly Information Website (https://www.elderlyinfo.swd.gov.hk) on 13 February 2017, offering one - stop information on the services of over 700 RCHEs throughout the territory for increasing transparency. The website provides search and comparison functions that can be used easily, and also information on services, fees, licences, staffing, facilities, service performance (including records of conviction and warning), accreditation, participation in the Service Quality Group Scheme, etc. of RCHEs.

1260. In order to enhance the transparency of the monitoring mechanism of RCHEs, SWD has, since 1 April 2018, begun uploading warning records of non-compliant RCHEs onto the SWD website and the SWD Elderly Information Website, where such information is kept for 12 months.

1261. SWD has been uploading all RCHEs' licences including the conditions attached onto the SWD website. Moreover, SWD also uploads the records of other licence enforcement actions (for example, suspension of the licence, refusal to renew the licence, etc.) onto the SWD website and the SWD Elderly Information Website for public reference.