THE GOVERNMENT MINUTE

IN RESPONSE TO

THE ANNUAL REPORT OF
THE OMBUDSMAN 2020

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Introduction

The Chief Secretary for Administration presented the Annual Report of The Ombudsman 2020 (the Annual Report) to the Legislative Council at its sitting on 8 July 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 exceptional caseload in 2019/20, and appreciates her team's continuous efforts in addressing grievances against alleged maladministration in the public sector. We welcome the recommendations and improvement measures suggested by The Ombudsman for raising the standard of public governance and the quality of public services.

2. The Ombudsman summarised 10 direct investigation and 240 full investigation cases in the Annual Report. This Minute responds to the 9 direct investigation and 69 full investigation cases for which recommendations were made by The Ombudsman. The vast majority of the 177 recommendations made by The Ombudsman were accepted and have been or are being implemented by the government departments and public bodies concerned. The Government will continue to strive for improvement in public services in a positive, professional and proactive manner.

3. In *The Ombudsman's Review* of the Annual Report, The Ombudsman mapped out the strategic plan for her five-year term, including enhancing community awareness of the role and services of The Ombudsman, and the transparency, efficiency and quality of the work of her Office. The Ombudsman also emphasised that direct investigations remain a very important and useful tool for her Office to look into systemic issues and foster positive changes in public administration. The Government fully supports The Ombudsman's vision, and looks forward to collaborating with her Office to identify and rectify more deep-seated problems that demand the Government's appropriate attention and decisive action.

4. The Ombudsman also highlighted that among the total number of complaints received in 2019/20, 100 of them are about access to information, which is a record high. This shows that public expectation for access to information is on the rise. The Government will continue to adhere to the principles of openness and accountability in processing information requests in accordance with the Code on Access to Information by staff who are properly trained.

Part II
– Responses to recommendations in full investigation cases

Agriculture, Fisheries and Conservation Department

Case No. 2018/2608A – (1) Delay in informing the complainant, who claimed to have been bitten by a street dog, of the investigation results; (2) Giving false information in its reply to the complainant; and (3) Shirking its duties and failing to confirm the complainant's wounds as being caused by dog bite

Background

5. In May 2017, the complainant was bitten and injured on the thigh by a dog on the street. The incident was reported to the Police and referred to the Agriculture, Fisheries and Conservation Department (AFCD) for follow-up action.

6. During the period from July to September 2018, the complainant lodged complaints with the Office of The Ombudsman against AFCD, and her allegations are summarised as follows –

(a) Staff of an Animal Management Centre under AFCD (the AMC) had delayed informing the complainant of its decision not to institute prosecution against anyone. As a result, she could not submit other evidence before the time bar for prosecution had lapsed for AFCD's re-consideration (It was not until 8 February 2018 when the complainant telephoned relevant officers to enquire about the case that she was informed of AFCD's decision not to institute prosecution due to insufficient evidence.);

(b) The written reply issued by AFCD to the complainant in August 2018 did not fully tally with what actually happened as regards the following –

(i) AFCD officers told the complainant in November 2017 that the hospital's medical reports were not sufficient proof that her injury was caused by dog bite;

(ii) The complainant learnt from the Prosecutions Unit of AFCD in January 2018 that there would not be any prosecution against anyone due to insufficient evidence;

(iii) It was found that the CCTV footage mentioned by the complainant could not capture how the incident took place upon investigation by AFCD; and

(c) The complainant considered that it was superfluous for AFCD to refuse accepting the medical report issued by a public hospital (the public hospital) and yet request the hospital to reiterate that the complainant's wounds were caused by dog bite.

The Ombudsman's observations

Allegation (a)

7. AFCD issued a formal notice of investigation result to the complainant two months after the investigation had been completed. The Ombudsman considered that clearly a delay and, therefore, Allegation (a) was substantiated. As to whether AFCD's delay would have led to the complainant's failure to provide evidence, The Ombudsman was of the view that the complainant could provide AFCD with supplementary information anytime without the need to wait for AFCD's notification of its prosecution decision. Records also showed that she had provided supplementary information via email several times. Nevertheless, it was a serious mistake that relevant staff of the AMC had not forwarded the information concerned to the Prosecutions Unit for consideration.

Allegation (b)(i)

8. The Ombudsman considered that the content of a recorded telephone conversation revealed that the complainant was only informed of AFCD's decision not to institute prosecution on the telephone in February 2018 (rather than in November 2017). The Ombudsman, therefore, considered Allegation (b)(i) substantiated.

Allegation (b)(ii)

9. AFCD explained that its written reply was based on information provided by the complainant and the response of the officer of the Prosecutions Unit concerned. The Ombudsman considered AFCD's

explanation reasonable and Allegation (b)(ii) was, therefore, unsubstantiated. Nevertheless, it was inappropriate for the officer of the Prosecutions Unit to have failed to communicate with the case officers in the AMC regarding his telephone conversation with the complainant for the latter's proper handling.

Allegation (b)(iii)

10. AFCD already admitted that the expression "upon investigation" used in its reply was inaccurate. In fact, it had not asked for the relevant CCTV footage for conducting investigation. Allegation (b)(iii) was, therefore, substantiated.

11. Overall, The Ombudsman considered Allegation (b) partially substantiated.

Allegation (c)

12. AFCD already elaborated why it had requested further clarification from the hospital regarding the "first medical report" of the complainant. The Ombudsman considered that AFCD's request for clarification from the hospital of the clinical diagnosis of the Accident and Emergency Department doctor involved professional judgement by AFCD regarding collection and assessment of evidence. The Ombudsman would not comment in this regard.

13. In sum, The Ombudsman considered this complaint against AFCD partially substantiated and found the following inadequacies in AFCD's management in relation to the dog bite case -

(a) AFCD failed to properly supervise the AMC in the handling of email correspondence relating to the case, and could not detect at an earlier stage its staff's failure in printing out the correspondence with the complainant for filing, reflecting loopholes in relevant procedures. As such, the Prosecutions Unit could not take into consideration the relevant information at the material time. This was a serious mistake;

(b) AFCD failed to properly monitor the timely issuance of the "Notice of investigation result of a suspected animal attack case" in relation to the case by the AMC. Moreover, it was indeed improper for the officer concerned to have failed to file a copy of the Notice upon issuance;

(c) Both of the AMC staff concerned failed to file relevant correspondence with the complainant. This reflected that it was common for staff not to follow guidelines on recording all information of the communications concerning the case, and revealed that monitoring of the management was lax. Communication between the Prosecutions Unit and the section managing the case was also inadequate; and

(d) AFCD failed to properly monitor the handling of enquiries on the case by the AMC. The relevant staff inappropriately offered advice on when the complainant should file a civil claim for damages in the course of handling her enquiries, inappropriately mentioned how AFCD had handled other cases, and even indicated that he could let her inspect the materials of the Prosecutions Unit.

14. This incident reflected that relevant AMC staff had been very sloppy in handling the case, and repeatedly failed to follow relevant guidelines. AFCD should implement improvement measures in response to each of the above inadequacies.

15. The Ombudsman recommended that AFCD -

(a) take suitable disciplinary action (including giving advice) against the officers concerned for their inappropriate behaviour;

(b) review the case handling and filing procedures of the AMCs to ensure that all case-related information and evidence would be forwarded to the Prosecutions Unit for consideration;

(c) review the letter issuing and filing procedures of AMCs regarding cases and strengthen monitoring of compliance by staff;

(d) set up a mechanism for ensuring that records of all communications relating to a case are filed by staff; and

(e) step up monitoring of frontline staff to ensure that they respond properly to case-related enquiries. If necessary, AFCD can prepare standard written replies to general enquiries (such as those about case handling procedures and filing civil claims for damages) and provide them to enquirers.

Government's response

16. AFCD accepted The Ombudsman's recommendations and have taken the following follow-up actions –

(a) On 17 May 2019, AFCD reminded frontline staff of AMCs to comply with the Guidelines on Handling Dog Bite Cases, and written and verbal warnings were issued to the officers concerned in accordance with AFCD Departmental Standing Circular No. 3/2015 – The Verbal and Written Warnings System;

(b) AFCD has reviewed the documentation and filing procedures of AMCs and formulated measures to ensure that relevant information and evidence would be forwarded to the Prosecutions Unit in a timely manner for consideration of prosecution decision. Since 17 May 2019, upon receipt of supplementary information (such as medical reports) regarding dog bite cases, duty officers of AMCs are required to forward the information to the Field Officer (FO) I and Senior FO (SFO) concerned. The information will be forwarded to the investigators for filing and follow-up action after recording. AFCD has also reminded staff of AMCs to note and follow the record management guidelines and requirements which are re-circulated to them periodically. As for the electronic messages sent and received in the course of official business (including electronic messages in short message service or other instant messaging applications (such as WhatsApp)), they are all records and should be handled following the record management guidelines and requirements. Private conversations should be avoided;

(c) In addition, AFCD has reformulated the checklist for monitoring case progress, to facilitate supervisors' monitoring of the investigation progress of dog bite cases. The checklist has been put in use since 28 May 2019. Under the monitoring mechanism, the FOII responsible for investigating a case will report to his / her supervising FOI in the form of a monthly progress report, and the SFO of the respective AMCs will conduct random checks of reports from time to time;

(d) Since 17 May 2019, all correspondence to the victims is managed and monitored by FOIs, which include conducting a final check before issuing to ensure factual accuracy and proper filing afterwards. In addition, AFCD understands victims' wishes for earlier notification of prosecution decisions. Hence, under the new arrangements, if the Prosecutions Unit decides not to institute prosecution, AMCs should inform the victims in writing within 10 working days. In order to ensure that all communications relating to a case are properly recorded and filed by frontline staff, AFCD has requested FOIs of AMCs to review case-related records on a regular basis, and SFOs will conduct random checks on the communication records in the files; and

(e) As for stepping up monitoring of frontline staff to ensure they respond properly to case-related enquiries, AMCs have, with effect from 1 August 2019, provided the victims with information on how dog bite incidents are generally handled by AFCD and the contact details of the investigators, so that the relevant investigators can be contacted if necessary. In addition, AFCD has reminded AMC staff to advise the public to seek advice from legal professionals when they receive enquiries on civil claim procedures in the course of handling dog bite cases.

Agriculture, Fisheries and Conservation Department

Case No. 2019/2141 – (1) Delay in taking a statement from the complainant's son, who complained that he had been bitten by a dog; (2) Staff speaking in a manner partial to the dog owner concerned; (3) An officer giving the complainant a false expectation when answering her telephone enquiry, and delaying in handling the case; and (4) Failing to consider that the complainant's son, being a minor, was usually unable to receive telephone calls at school, without taking the initiative to contact his parents instead

Background

17. On 9 January 2019, the complainant's son was bitten on the right knee by a dog of an occupant of the upper floor unit. The complainant lodged a complaint against the Agriculture, Fisheries and Conservation Department (AFCD) with the Office of The Ombudsman on 20 May 2019. Her dissatisfaction with AFCD is summarised as follows –

(a) Her son was asked to take a statement by AFCD four months after the incident, but Officer A told her on 13 January during the visit to collect information at the scene that the police had already taken a statement, which was deemed to be most accurate (Allegation (a));

(b) Officer A spoke in a manner seemingly partial to the dog keeper on 13 January (Allegation (b));

(c) Officer B stated to the complainant on 14 February that it took time to prepare legal documents and conduct the relevant procedures. However, after taking a statement from the complainant's son on 16 May, Officer B said that AFCD would only determine whether to prosecute the dog keeper later. The complainant queried that Officer B gave her false expectations and delayed handling the case (Allegation (c)); and

(d) The officers failed to consider that the complainant's son, being a minor, was usually unable to receive telephone calls at school, and did not take the initiative to contact his parents. The case was handled in a bureaucratic manner (Allegation (d)).

The Ombudsman's observations

Allegation (a)

18. According to AFCD's investigation procedures on handling dog bite cases, if the victim was willing to testify in court in relation to the case, the officer concerned should invite him / her to provide a witness statement. The complainant's son had clearly stated on 13 January 2019 that he was willing to testify in court. However, AFCD only took a statement from the victim more than four months after the incident and followed up the case only by obtaining the medical report during the said period. This was indeed unsatisfactory in terms of efficiency. Furthermore, the complainant requested clearly that a statement be taken from her son as soon as possible. The Ombudsman considered that, in such circumstances, AFCD was negligent in delaying the taking of statement for four months.

19. AFCD admitted that there was room for improvement in Officer B's handling of the case. The Officer has been reminded to read the case records carefully and take statements as soon as possible. On the other hand, The Ombudsman considered that this case revealed the acute shortage of manpower in the Animal Management Centres (AMCs) under AFCD and the overwhelming workload of the two staff members in handling 800 dog bite cases a year, among other matters. The Ombudsman urged AFCD to review the relevant staff establishment to avoid backlog and delays in case handling in the future.

20. To sum up the above paragraphs, The Ombudsman considered Allegation (a) substantiated.

Allegation (b)

21. The Ombudsman considered that, by apologising to the complainant and her son on behalf of and as requested by the dog keeper, Officer A intended to ease the conflict and did not mean to show partiality. In fact, Officer A was not responsible for investigating and proposing prosecution action in this case. Therefore, The Ombudsman could not see any reason for him to show partiality to the dog keeper. In any case, AFCD had already prosecuted the dog keeper.

22. To sum up the above paragraph, The Ombudsman considered Allegation (b) unsubstantiated.

Allegation (c)

23. In the absence of corroborative evidence, The Ombudsman had no way to verify the actual conversation at the time, and thus had difficulties in commenting on the incident.

24. The incident revealed that AMC staff generally did not keep telephone conversation records when handling cases, which was undesirable. The Ombudsman considered that appropriate records, such as the date, time and persons involved as well as a gist of the conversation, should be kept even if the entire conservation could not be recorded.

25. To sum up the above paragraphs, The Ombudsman considered Allegation (c) inconclusive, but other inadequacies were found on the part of AFCD.

Allegation (d)

26. The Ombudsman considered that although Officer B had tried her best to contact the complainant's son, it would have been more desirable if she had attempted to contact his guardian after repeated failures to contact him. In addition, the victim was an adolescent, but he was a minor after all. AFCD should consider adding the option to contact guardians when dealing with cases involving minors and let their guardians decide who would be the contact persons of the cases.

27. To sum up the above paragraph, The Ombudsman considered Allegation (d) partially substantiated.

28. Overall, having regard to Allegation (a) being the crux of this complaint, The Ombudsman considered this complaint substantiated in its totality, and recommended that AFCD -

(a) implement measures for ensuring that statements will be taken in an expeditious manner (such as setting a target time frame), and establish a mechanism for monitoring the progress of cases;

(b) remind staff to read the case records carefully, pay due regard to the victims' and their guardians' concerns, and respond in a proper manner;

(c) review manpower establishment to ensure there are adequate manpower resources to cope with the workload;

(d) require staff to make proper records for reference when handling complaints or enquires from the public, to facilitate handling and following up possible disputes in the future; and

(e) add the option to contact the guardian(s) when dealing with cases involving minors.

Government's response

29. AFCD accepted The Ombudsman's recommendations. The follow-up actions are as follows –

(a) AFCD informed AMC staff in September 2019 that, in general, statements of the victim or witness should be taken within two months after a dog bite case. If complications in the case or other unforeseeable events prevent the officer from taking statements from the victim or witness within two months, the officer should notify supervisors for close monitoring of case progress. Besides, AFCD has also set up a monitoring mechanism, under which the Field Officer (FO) II responsible for investigating the case is required to report to his / her supervising FOI in the form of a monthly progress report, and the Senior FO of the respective AMCs will conduct random checks of the reports from time to time;

(b) AFCD introduced a mechanism in August 2019, under which each case will be investigated and followed up by a designated investigator, whose name, post and contact details will be given to the victim or witness at the first meeting, thereby reducing possible delays in the transmission of information;

(c) AFCD will review the staff establishment from time to time as and when necessary and consider the need for increasing manpower. Currently, the number of officers responsible for handling dog bite cases in New Territories North AMC has temporarily increased to three, each responsible for specific cases assigned to speed up the investigation process and enhance efficiency;

(d) In May 2019, AFCD instructed all officers responsible for investigations to make proper records when handling public complaints and enquires, and attach all communication records to the investigation documents, which would be inspected regularly by FOIs; and

(e) AFCD has updated the Guidelines on Handling Dog Bite Cases and notified all AMC staff in September 2019. For cases involving minors, officers should inform their supervisors, and guardians should be invited to accompany the minor for statement taking.

Buildings Department

Case No. 2018/4202 – Failing to take proper follow-up action and reply to the complainant about his report on unauthorised building works

Background

30. The complainant lodged a complaint with the Office of The Ombudsman against the Buildings Department (BD), alleging that it had not properly handled the four reports he had filed concerning unauthorised building works (UBWs) in an estate (the subject estate). The details are as follows –

(a) On 27 June 2018, the complainant reported to BD via 1823 that there were 21 UBWs on the roofs of Towers 1 to 6 of the subject estate. BD explained that removal orders would be issued to owners concerned in an orderly manner through a large scale operation (LSO). On 7 September 2018, the complainant then requested BD via 1823 to explain how it ascertained by visual inspection that the UBWs did not constitute imminent danger and the selection criteria of target buildings for LSOs, but only received BD's substantive response on 21 December 2018;

(b) On 18 September 2018, the complainant reported to BD via 1823 regarding UBWs at certain premises in the subject estate. BD replied on 20 December 2018 that no enforcement action would be taken. The complainant was not satisfied with the reply;

(c) On 4 October 2018, the complainant reported to BD via 1823 regarding UBWs under construction at certain premises but only received BD's substantive response on 21 December 2018; and

(d) The complainant queried why no further follow-up actions were taken by BD against UBWs at two premises in the subject estate for which the orders issued had been registered in the Land Registry (commonly known as "imposing an encumbrance") for many years.

The Ombudsman's observations

31. On the report at (a), it was understandable that BD had taken time to follow up as the complainant's reports involved more than 20 premises. However, BD took more than three months to reply to the complainant and the reply only covered BD's inspection results and enforcement actions. There was no specific response to the complainant's questions on the screening criteria of LSOs and challenges on visual inspections. The way BD handled the case was obviously unsatisfactory.

32. Regarding the complainant's reports at (b) and (c), BD had replied to the complainant after three and two months respectively by explaining follow-up actions that had been taken.

33. For the two premises mentioned at (d), BD had explained to the complainant the enforcement actions that had been and would be taken.

34. This case involves a large number of UBWs and premises. It was understandable that BD would need more time to carry out the inspections, prepare the information and take enforcement actions. Whether the UBWs in the reported premises or the UBWs concerned fell under the categories of actionable UBWs was subject to BD's professional judgement based on its inspections and analysis. The Ombudsman had no intention to interfere. For most UBWs of this case, BD would follow up in an orderly manner through LSOs in accordance with its current enforcement policy. For individual UBWs which were newly-erected or found to be under construction during previous inspections, BD had already issued removal orders to the relevant premises owners. Although some removal orders were not complied with for over ten years, BD had not taken further follow-up actions. It was undesirable, even having taken into account the upsurge in the number of reports on UBWs and dilapidated buildings received by BD.

35. In light of the above, The Ombudsman considered this complaint partially substantiated and recommended that BD –

(a) remind its staff to provide specific responses to matters raised by the complainant / informant; and

(b) step up follow-up actions on the removal orders issued but not yet complied with, including issuing warning letters to and instigating prosecution against the relevant owners. If the offender refused to comply with the removal order, BD should seriously consider engaging a contractor to remove the UBWs and then recover the cost from the owner concerned afterwards.

Government's response

36. BD accepted The Ombudsman's recommendations, and has reminded its staff to provide timely and specific responses to enquiries raised by the public.

37. BD has also stepped up follow-up actions on the six outstanding removal orders issued to owners in the subject estate. Of the two removal orders issued in 2019, the owner concerned in one of the orders has informed BD that removal works would be arranged. For the other order which had not been complied with, BD had issued a warning letter and would prosecute the relevant owner. Of the four removal orders which were issued earlier, one of the orders had been complied with. The owner concerned in another order has informed BD that removal works would be arranged. BD had prosecuted the owners concerned in respect of the two remaining orders. Those owners were eventually convicted and fined. BD would continue to closely follow up the outstanding removal orders.

Buildings Department

Case No. 2019/1598(I) – Unreasonably refusing the complainant's request for information (including investigation reports, qualifications of investigators, contracts with outsourced consultants, etc.)

Background

38. The complainant reported to the Buildings Department (BD) that the replaced common waste pipe of her building had not been properly connected to the branch pipes of her premises. She considered that BD had not carefully investigated the case before requesting her to repair the defective waste pipe.

39. Subsequently, the complainant requested from BD the following information under the Code on Access to Information (the Code) –

(a) investigation reports, test reports, record of assignment to the appointed consultant, authorisation documents, photographs and sketches related to her case (Information A);

(b) names, post titles, professional qualifications and experience of drainage system and water seepage of all investigators (including staff of BD and the consultant) involved in the relevant investigation (Information B); and

(c) BD's contract documents with the consultant, and operational guidelines (Information C).

40. However, BD refused her request for the information. The complainant considered the decision made by BD unreasonable. She also considered it unreasonable for the case officer instead of BD's Access to Information Officer to handle her request for information. Furthermore, the complainant also alleged that BD refused twice to respond to the same enquiries made by her regarding the location of the defective waste pipe, and provided her with an incorrect address of the Secretariat to the Appeal Tribunal (Buildings).

41. On 18 April 2019, the complainant lodged a complaint with the Office of The Ombudsman against BD.

The Ombudsman's observations

42. On the whole, Information A requested by the complainant from BD was related to an appeal lodged by the complainant to the Appeal Tribunal (Buildings). If the request had to be refused based on clause 2.6(b) of the Code (involving legal proceedings), BD should justify that the disclosure of information would harm or prejudice the conduct of any proceedings or impartial adjudication. However, BD had not provided any supporting justification. On the contrary, upon commencement of the appeal procedures, BD had provided all the information to the complainant. This showed BD had insufficient grounds for refusing to disclose Information A based on clause 2.6(b) of the Code.

43. Regarding Information B, the consultant was appointed by BD to carry out duties assigned by the latter. As civil servants should disclose their names and post titles upon request by the public when performing their duties, the same requirement should apply to the consultant, as they were appointed by BD to deliver public services. For this case, the staff of the consultant should disclose their identity to the management company and / or owner concerned when carrying out BD's duties before entering the premises. If in doubt, an owner also has the right to enquire about the identity of the investigators. In fact, similar requirements had been stipulated in BD's contract documents. Therefore, it was difficult to understand why BD refused the subsequent request by the complainant for information concerning the identity of the investigators on a specific inspection date. The Ombudsman considered it inappropriate for BD to refuse the disclosure of name and post title of the staff of the consultant based on clauses 2.14(a) and 2.15 of the Code (involving third party information and privacy of the individual). With regard to the release of information concerning the professional qualification of the staff of the consultant to the public, it was not unreasonable for BD to refuse disclosing such information, as there was no such requirement in the contract document between BD and the consultant, and the professional qualification of consultant staff had been vetted by BD.

44. Regarding Information C (BD's contract documents with the consultant, and operational guidelines), The Ombudsman could not see how the disclosure of the relevant information would harm the competitiveness or financial position of the consultant. If BD considered part of the information (e.g. salaries) as sensitive information, such information could be redacted when disclosing Information C to the complainant. Therefore, clause 2.16 of the Code (involving business affairs) is not applicable.

45. Regarding the allegation that it was unreasonable for a case officer instead of BD's Access to Information Officer to handle her requests for information, BD responded that in general, requests for information would be handled by the case officer who managed the relevant information. The role of BD's Access to Information Officer was mainly to provide relevant advice to officers and to conduct review of cases. The Ombudsman considered that BD's arrangement did not violate the spirit of the Code.

46. Regarding the complainant's allegation that BD refused twice to respond to the same enquiries made by her regarding the location of the defective waste pipe, BD replied to the complainant in the same month it received the complainant's letter, attaching a sketch of the waste pipe. The Ombudsman considered that BD had appropriately responded to the complainant.

47. Regarding the complaint that BD provided an incorrect address of the Secretariat to the Appeal Tribunal (Buildings), BD admitted that the new address of the Secretariat had been given in the remarks of the covering letter for the repair order but the address of the Secretariat in the repair order had not yet been updated. BD had subsequently apologised to the complainant. The Ombudsman considered that BD should learn a lesson from this to avoid re-occurrence.

48. In view of the above, The Ombudsman considered that the incident indicated BD's inadequate understanding of the Code when handling request for information from the public. Therefore, the complaint against BD was partially substantiated.

49. The Ombudsman recommended that BD enhance staff training to ensure its staff would strictly follow the requirements of the Code and its Guidelines on Interpretation and Application in handling requests for access to information by the public.

Government's response

50. BD accepted The Ombudsman's recommendation.

51. BD has briefed its staff on The Ombudsman's comments and recommendation with regard to this case through various internal meetings at different levels. Staff have also been reminded to strictly follow the requirements of the Code in handling application for access to information by the public.

Civil Engineering and Development Department

Case No. 2019/1123(I) – (1) Excessive masking of a report on traffic and transport impact assessment; and (2) Delay in providing the said report

Background

52. On 17 January 2019, the complainant sent an email to the enquiry email address of the Government Telephone Directory, requesting under the Code on Access to Information (the Code) a copy of the report on the Preliminary Traffic and Transport Impact Assessment under the Technical Study on Transport Infrastructure at Kennedy Town for Connecting to East Lantau Metropolis (ELM) (the Report). The complainant's email was subsequently referred to the Civil Engineering and Development Department (CEDD) on 21 January for handling. On 30 January, CEDD sent an acknowledgment email to the complainant, telling him that it would inform him of the latest progress on or before 10 February. On 8 and 22 February, CEDD emailed the complainant, explaining that, before it could release the Report to the public, it had to review the text and hide the commercial or sensitive information therein in accordance with the requirements of the Code. To this end, CEDD needed to consult the relevant technical departments and coordinate their inputs / comments. More time was therefore required for it to process his information request.

53. On 12 March, CEDD wrote to inform the complainant that a copy of the Report, with contents masked in accordance with the requirements of paragraphs 2.9 (management and operation of public service), 2.12 (improper gain or advantage), 2.13 (research, statistics and analysis) and 2.16 (business affairs) of the Code, was ready for his inspection. On 14 March, the complainant read the copy of the Report and found that CEDD had heavily masked the Report, including masking texts on the sections of "Traffic Forecast" and "Summary and Recommendation", and 24 figures that included forecast traffic flows, such that the masked Report was, in his view, virtually meaningless. On 15 March, the complainant wrote to CEDD raising his concern and requesting a review of its decision. Meanwhile, he also lodged a complaint with the Office of The Ombudsman (the Office) against CEDD, and his complaints are summarised as follows –

(a) excessive masking of the Report for his viewing which, contrary to what CEDD claimed, exceeded the requirements of the Code. He also doubted if the masked information was commercially sensitive (Allegation (a)); and

(b) delay in handling his information request. He took the view that CEDD had, instead of giving him a reply as soon as practicable, worked to the full extent of the target response times allowed in the Code when handling his information request (Allegation (b)).

The Ombudsman's observations

Allegation (a)

54. The Code requires Government departments to make available information to the public unless there are specific reasons under Part 2 of the Code for not doing so.

55. CEDD mainly relied on paragraph 2.13(a) of the Code to justify its masking of information in the Report that was obsolete, outdated, relating to incomplete analysis / research or no longer applicable. However, paragraph 2.13.2 of the Guidelines on Interpretation and Application of the Code states that departments may decide to release information relating to incomplete analysis, research or statistics if it is possible for the information to be accompanied by an explanatory note explaining the ways in which it is defective. CEDD did not adopt this approach when providing the complainant with the first masked Report, not until at the review stage when CEDD released most of the previously masked information on 3 May 2019, with explanatory notes added. The Office considered the Department's initial reliance on paragraph 2.13(a) for heavily masking the Report not justified.

56. Regarding CEDD's invoking paragraph 2.9 of the Code to deny, initially, the complainant's access to information about highway network and reclamation extent around Kau Yi Chau, the Office noted the preliminary concepts for ELM, including the construction of artificial islands around Kau Yi Chau which were to be served by a highway and railway system, were made known to the public as early as in January 2016 in the public consultation materials for the developments of Lantau Island. In July 2016, there were also media reports about the proposed extent of reclamation around Kau Yi Chau. Besides, a model showing the proposed developments of Lantau Island, including the reclamation extent of Kau Yi

Chau, was available for public viewing in CEDD's office. Since information about the reclamation works around Kau Yi Chau and the provision of highways at the artificial islands so created had already been available to the public at the time when the complainant made his information request, the Office did not see how the disclosure of such information might harm or prejudice the Government's negotiations with stakeholders and the award of discretionary grant or ex-gratia payments. The Office noted that CEDD did subsequently release such information to the complainant.

57. As for CEDD's reliance on paragraph 2.12 of the Code to account for its initial decision of non-disclosure of information about toll level assumptions and land use options, CEDD's concern about potential transport operators or land developers who possess the information would have improper gain or advantage could be addressed by releasing the information in question with explanatory notes. As such, the Office considered CEDD's initial masking of those pieces of information also not justified. The Office noted that CEDD did subsequently release those pieces of information to the complainant.

58. With regard to CEDD's citation of paragraphs 2.16 and / or 2.14(a) (third party information) of the Code in refusing disclosure of the air traffic / cargo data related to the Hong Kong International Airport, the Office accepted that the information was commercially sensitive. The Office also noted that the information was provided to CEDD by a third party, i.e. the Airport Authority Hong Kong, which refused to have it disclosed. In the context of this case, the Office saw no overriding public interest in disclosing such information that outweighs any harm or prejudice that may result to the carrier. As such, the Office considered it not unreasonable for CEDD to withhold this information.

59. The Office noted that, regarding the first masked Report, CEDD considered the extent of the content of the Report to be masked a collective decision of all the relevant bureaux / departments (B/Ds) concerned, including CEDD itself, and that it had reminded the B/Ds to minimise the extent of masking. Notwithstanding this, the final decision on whether or not information in the Report shall be masked as proposed by the B/Ds concerned rested with CEDD. Therefore, the Office considered Allegation (a) substantiated.

Allegation (b)

60. It was noted that CEDD met the target response times stipulated by the Code when handling the complainant's information request. Having examined the time sequence and the relevant records of CEDD's handling of the complainant's information request, the Office did not find CEDD to have delayed handling the request. Therefore, the Office considered Allegation (b) unsubstantiated.

61. In light of the above, The Ombudsman considered this complaint partially substantiated, and recommended that CEDD take reference from this case and enhance staff training for appropriate application of the Code.

Government's response

62. CEDD accepted The Ombudsman's recommendation, and has enhanced staff training for appropriate application of the Code. CEDD conducted experience sharing workshop, and provided real-time broadcast for their professional staff staying in outstation offices. The workshop aims at providing an overview on the Code and sharing the lessons learnt from the complaint case. The video recording of the workshop has also been uploaded onto the Intranet of CEDD for viewing by professional grade colleagues who were not able to attend the workshop and who are newcomers.

Correctional Services Department

Case No. 2019/0455 – An officer wrongly accusing the complainant of breaching discipline and insisting on taking disciplinary action against him

Background

63. According to the complainant, he had a "verbal misunderstanding" with a correctional officer (Officer A) of a correctional institution (CI) on 1 February 2019. On 7 February, Officer A asked the complainant to admit that two sheets of paper containing horse racing information belonged to him, but the complainant refused to do so. Later, the complainant was taken to the room of Day Orderly Officer (DOO) where Officer A tried to intimidate him into admitting that the sheets of paper belonged to him. The complainant immediately made a complaint to the DOO, but Officer A still insisted on taking disciplinary action against him. The complainant was of the view that he was targeted by Officer A because of the "verbal misunderstanding" between them on 1 February. The complainant lodged a complaint with the Office of The Ombudsman on 13 February 2019.

The Ombudsman's observations

64. The complainant alleged that the complaint stemmed from a "verbal misunderstanding" between the complainant and Officer A on 1 February. According to the statement given by Officer A, he did have a conversation with the complainant on the day of the incident, but he denied there was any "verbal misunderstanding" during the course of conversation. In the absence of any independent corroborative evidence, The Ombudsman had no knowledge of the actual course of the incident on that day and was thus unable to comment. However, there was no direct correlation between whether there was a "verbal misunderstanding" that day and the core issue of the case (i.e. whether Officer A intimidated the complainant on 7 February, the day of the incident, and whether the complainant was targeted by Officer A who improperly took disciplinary action against the complainant).

65. Having carefully watched the two closed circuit television (CCTV) footage (with picture but without sound) mentioned in the investigation report which captured Officer A and the complainant during the course of the incident, The Ombudsman found that what could be seen

from the CCTV footage was generally the same as the description in the investigation report. Specifically, the "misconduct" of the complainant, the things on the desk of the complainant, and what Officer A did after he walked over to the complainant at the time of the incident were not shown or clearly shown in the videos. In other words, from the CCTV footage, The Ombudsman could neither obtain a good knowledge of the course of the incident nor determine whether Officer A had committed any misconduct alleged by the complainant.

66. Regarding the facts that there were words written in green on the sheets of paper in question and that the complainant was not authorised to possess any green ball pens, The Ombudsman took the view that such facts could support the complainant's allegation that the sheets of paper in question did not belong to him. Nonetheless, The Ombudsman also agreed with the viewpoint of the Correctional Services Department (CSD) that this was not a key factor since there was no direct correlation between whether there were words written by anyone on the sheets of paper and whether the complainant was in possession of the sheets of paper at the time of the incident. Besides, neither the complainant's nor Officer A's statements about the incident could sway The Ombudsman to believing either of them. The Ombudsman, therefore, could not reach a conclusion on the complaint lodged by the complainant against Officer A.

67. The complainant complained about being intimidated and targeted by Officer A who improperly took disciplinary action against him. For this kind of "one-on-one" accusation, it would be difficult for The Ombudsman to find out the truth if the party under complaint denied the accusation and there was no independent corroborative evidence (such as evidence given by an independent third party or clear video footage, etc.). In this case, a CCTV system had been installed for recording at the venue in question. In particular, one of the cameras should have clearly recorded the people at the venue, but unfortunately it could not capture the area with the desk and chair where the complainant was seated due to limited coverage.

68. Besides, The Ombudsman did not agree with CSD's comment that it was reasonable for Officer A not to arrange video recording of the course of the incident that day. According to the guidelines of CSD, the purpose of using a Video Speaker Microphone (VSM) is to collect and obtain information about incidents in which the security of correctional facilities or the maintenance of custodial discipline is under threat. Examples of incidents during which video recording is allowed are given in the guidelines, which include any incidents that may result in

disciplinary or legal actions against any persons in custody (PICs). The Ombudsman took the view that the incident in question obviously fell within the definition of incidents during which video recording is allowed since the complainant was alleged to be in breach of discipline and might be subject to punishment. Although Officer A explained that he was unable to record the incident because it happened unexpectedly, the incident was not an emergency one that would result in Officer A's failure in recording the incident as seen from the video footage that day.

69. Regarding the points of view mentioned in the above two paragraphs, The Ombudsman recommended that CSD during the investigation (a) consider adjusting or expanding the coverage of the CCTV system installed at the correctional institution; and (b) remind its staff that the video-taking equipment must be used for the sake of collecting evidence while taking action that may result in disciplinary or legal proceedings against PICs unless the situation does not permit.

70. In response to recommendation (b) of The Ombudsman, CSD pointed out that the Department had laid down guidelines for the use of the video-taking function of VSMs by staff members. CSD considered that the existing arrangements had proven to be effective, and it was not necessary to make it mandatory for staff to use the video-taking function of VSMs to collect evidence during incidents which might result in disciplinary or legal actions against PICs. Moreover, CSD pointed out that recommendation (b) was not feasible for the following reasons –

(1) At present, for the VSMs issued to staff members, when the video-taking function is on, the battery power allows a continuous use of about 1 hour 20 minutes, while the memory capacity of each VSM is 32GB only which can save video footage of about 7.5 hours. In other words, with the existing specifications, the VSMs cannot support prolonged video-taking;

(2) Under the existing guidelines, staff members are required to give a verbal announcement to persons present at the scene as far as practicable before video recording with the use of VSMs. Past experience indicates that staff members may find at any time that PICs are suspected of possessing unauthorised articles during searches on them. They are required to report such indiscipline acts to the institutional management. If staff members are required to give a verbal announcement to PICs before each search, much longer time will be required for each search, thereby seriously affecting the daily institutional operations;

(3) Currently, not every staff member on duty at institutions is issued a VSM. If the institutional management can only deploy those staff members equipped with VSMs to conduct searches on PICs, there will be significant impact on institutional operations and manpower deployment;

(4) In case of emergencies (e.g. assaults on others by PICs), requiring staff members to collect evidence through video recording, this not only violates the principle of "save lives first", but may also result in staff's failure in timely stopping the assaults. They may focus their attention on collecting evidence through video recording, thereby aggravating the incident and causing more injuries;

(5) To comply with the security requirements as stipulated in the Personal Data (Privacy) Ordinance (Cap. 486), additional manpower would have to be deployed for the handling of the video footage of VSMs. This would result in additional administrative workload for institutions;

(6) VSMs can be used for video recording in a close distance. However, if it is mandatory for staff to record all acts of indiscipline (e.g. assaults or fights), scenes of victims' suffering and rescue procedures may be recorded in a close distance, and other PICs and members of the public (e.g. visitors in social visit rooms) will be captured as well. Such individuals may not wish to be recorded on video;

(7) Strip searches of PICs, including searching their rectums, nostrils, ears and any other external orifice or covered body parts, etc. are required to be conducted from time to time at institutions to ensure that PICs are not in possession of any unauthorised articles. If staff members are required to make a video recording of PICs' body parts for gathering evidence of acts of indiscipline, this may infringe on their privacy;

(8) Searches of PICs' cells are performed periodically, during which PICs are required to present all their belongings to staff for inspection to determine if the PICs are in possession of any unauthorised articles. If staff members are required to make a video recording during searches, contents of PICs' information

protected by legal privilege may be captured in a close distance, thus giving rise to associated legal disputes; and

(9) If it is mandatory for staff to gather evidence with the use of their video-taking equipment during incidents which may lead to disciplinary or legal actions against PICs, a substantial amount of video footage containing images of individual PICs and members of the public will be collected by the penal management. Images of penal security facilities may be recorded as well. As PICs or members of the public have the right to access video recordings that contain their personal images, the penal management will need to employ a substantial amount of resources to watch and process the video footage, such as erasing data of the third parties, when handling data access requests. The penal management therefore would have to shoulder additional administrative workload.

71. In relation to this case, The Ombudsman reiterated that Officer A was issued a VSM on the day of the incident. As can be seen from the video footage mentioned in the investigation report, there was neither any "save lives first" situation nor assault or fight that might lead to the suffering and rescue process of the persons involved being captured in a close distance. As such, The Ombudsman did not agree with CSD's point of view that it was reasonable for Officer A not to video record the incident that day.

72. In respect of CSD's reasons for opposing the initial recommendations by The Ombudsman as set out in the investigation report, The Ombudsman considered that those reasons mainly involved certain circumstances under which video recording was infeasible or inappropriate, and the likelihood of creating heavy administrative workload with the wider use of the video-taking equipment. Regarding CSD's explanation that video recording was "infeasible / inappropriate", The Ombudsman opined that there was no fundamental contradiction between this explanation and the initial recommendations made by The Ombudsman as The Ombudsman agreed that the video-taking function should not be used if the circumstances do not allow. As for CSD's concern over the additional administrative workload resulting from the wider use of the video-taking equipment, while The Ombudsman accepted such concern, it must be pointed out that under CSD's existing guidelines, video-taking is allowed for "any incidents that may lead to disciplinary or legal action against PICs". According to this guideline, the staff in this case was allowed to take videos, but he did not do so. If he had taken videos, useful

evidence would have been provided in resolving the disputes arising from the subsequent disciplinary proceedings. This indicated too much discretion was granted under the existing guidelines for staff members to decide whether to take video or not. The Ombudsman was of the view that CSD should formulate clearer guidelines to enable frontline staff to better understand the circumstances under which they should use VSMs.

73. The Ombudsman recommended that CSD –

(a) consider adjusting or expanding the coverage of the CCTV systems installed at institutions, so as to avoid as far as possible some of the venues for PICs' general activities falling outside the coverage of CCTV systems; and

(b) review and appropriately revise the existing guidelines to enable staff members to more clearly understand under what circumstances a VSM should be used, so that they can enhance their evidence gathering ability during incidents that may result in disciplinary or legal actions against PICs by making good use of the video-taking equipment.

Government's response

74. CSD accepted The Ombudsman's recommendations. As early as 2013, CSD planned to fully replace or enhance the existing CCTV systems at several correctional institutions, including the existing CCTV system at the CI concerned. In May 2017, the Legislative Council scrutinized and approved the appropriation for the relevant project.

75. Upon receipt of the recommendations from The Ombudsman, CSD immediately relayed them to the CI concerned and the relevant government departments for follow up on 28 November 2019. On 12 December 2019, the CI replied that additional CCTV cameras would be installed at various locations in the institution (including but not limited to dormitories, kitchens, workshops / vocational training workshops, dining halls, main corridors, etc.) to expand the coverage of the CCTV system without infringing upon personal privacy. System planning and design, as well as tender preparation of the relevant project were completed. The contract was awarded on 14 September 2020. Since the project involves the whole institution, the replacement and installation works will be conducted in phases and by areas to ensure normal operation of the institution.

76. CSD's Operations Division has also reviewed and revised the existing guidelines. Staff members equipped with a VSM while on duty are reminded to make good use of their equipment as far as practicable with a view to collecting evidence by video recording the incidents which pose threats to the security of correctional facilities and the maintenance of custodial discipline. The Operations Division also informed all Heads of Institutions / Sections via a memorandum on 14 February 2020 and uploaded the revised guidelines onto the intranet for staff reference. At the regular meeting of the Operations Division on 25 February 2020, Heads of Institutions / Sections were reminded to enhance their staff's awareness of the importance of making good use of relevant equipment.

Correctional Services Department

Case No. 2019/1156 – Staff unreasonably reading an inmate's letter addressed to a lawyer

Background

77. The complainant was earlier under the custody of the Correctional Services Department (CSD) in a reception centre (RC). He said that RC allowed persons in custody (PICs) to send letters to lawyers. Staff of designated ranks (Chief Officer rank in general) would be arranged to check whether there were any other articles attached to the letters, but they were not allowed to read the content of the letters.

78. In the morning of 21 February 2019, the complainant intended to send a 4-page letter to a lawyer. His letter was checked by a staff (Staff A) of the rank of Principal Officer which was lower than the rank of Chief Officer. Allegedly, the complainant claimed that Staff A had ignored his objection and warning, and read without authorisation the entire letter intended to be sent to the lawyer. Therefore, the complainant lodged a complaint with the Office of The Ombudsman (the Office) on 28 March 2019 against CSD.

The Ombudsman's observations

79. It can be seen from the investigation report that the arrangement of the RC to assign Staff A to check the letter to be sent by the complainant was in compliance with the relevant stipulations under the Prison Rules (Cap. 234A).

80. With respect to the question of whether the handling of the letter by the RC on 21 February was in compliance with the "rules on reading letters", the complainant and CSD gave different accounts of the incident. The complainant said that Staff A had read the letter (which was not marked with any signs) despite his warning, whereas Staff A said that he had not read the letter. He had a conversation with the complainant not because he needed to give a response to the complainant's warning of "Don't read the letter", but because the complainant had used the "Statement for Prisoners" as letter paper and marked signs on it.

81. The Office was not provided with the letter in question by the complainant and was thus unable to verify whether the letter was marked with any signs. In any case, Staff A totally denied he had read the concerned letter. Based on the closed circuit television (CCTV) footage as the single piece of objective evidence, The Ombudsman was unable to determine whether Staff A has told the truth.

82. Based on the above analysis, The Ombudsman could not reach a conclusion on the complainant's allegation that Staff A had read his letter to be sent to a lawyer without authorisation.

83. Although the Office could not determine whether Staff A had read the complainant's letter without sufficient justification in this case, The Ombudsman believed that letters of PICs (especially those between them and lawyers) often contained sensitive personal information. In fact, the Prison Rules also stipulate the requirement for protection of the correspondence between PICs and lawyers. Therefore, the RC should avoid arranging staff to check letters in the reception office where lots of PICs and staff are present. This can prevent other people present from hearing what is said when staff are enquiring about the content of letters. Besides, when Staff A, who was responsible for the checking, was holding the letter, other staff members were standing nearby. Staff A had even left the letter on the desk without covering it. The Ombudsman saw in the above procedures room for improvement, and recommended that CSD –

(a) arrange as far as practicable the checking of PICs' letters to be conducted at a place with fewer people; and

(b) remind staff members to stay vigilant when checking letters (especially those between PICs and lawyers) to prevent any unrelated persons from seeing the content of the letters.

Government's response

84. CSD accepted The Ombudsman's recommendations.

85. To follow up The Ombudsman's recommendations, CSD immediately reminded Heads of Institutions / Sections at the regular meeting of the Operations Division on 24 September 2019 to arrange the checking of PIC's letters to be conducted in places with fewer people. Staff members were also reminded to stay vigilant when checking the letters (especially those between PICs and lawyers) to prevent unrelated

persons from seeing the content of the letters. Subsequently, CSD issued a memorandum to Heads of Institutions / Sections on 26 September 2019, requesting all institutions / sections to review and update their Head of Institution Procedures based on the above two recommendations made by The Ombudsman for staff's compliance. All institutions had revised the relevant Head of Institution Procedures by 30 December 2019 accordingly and submitted them to the CSD Headquarters for record purpose.

Correctional Services Department

Case No. 2019/3369(I) – (1) Unreasonably withholding part of the information under request; and (2) Failing to make effort to keep time extensions for handling the information request and subsequent request for review to the minimum

Background

86. On 28 May 2019, the complainant requested the Correctional Services Department (CSD) under the Code on Access to Information (the Code) to disclose two memoranda, a circular and three record forms of certain specific dates.

87. In the request, the complainant made known to CSD that it might redact the personally identifiable information from documents in providing the requested information.

88. On 4 June 2019, CSD gave the complainant an interim reply, stating that according to paragraph 1.16 of the Code, CSD would inform the complainant of the progress of the case on or before 17 June. On 17 June, CSD further informed the complainant that legal advice was being sought on the complainant's information request and according to paragraph 1.18 of the Code, the complainant would be informed of the progress on or before 17 July.

89. On 16 July, CSD provided the complainant with the two memoranda and the circular requested, with redactions on CSD officers' names, signatures and contact information. However, CSD refused to disclose the three record forms requested, citing paragraph 2.15 of the Code as the reason for the decision. On the same day, the complainant requested CSD to review the decision on withholding the three record forms requested.

90. On 22 July, CSD wrote to inform the complainant that according to paragraph 1.25 of the Code, CSD would inform the complainant of the progress of the complainant's review case on or before 5 August. Upon the complainant's inquiry, CSD explained that the target response times for requests for review would run a new cycle and therefore CSD would, at the latest, provide a response in 21 calendar days upon receipt of the complainant's request for review. The complainant cast doubt on this interpretation of the target response times for review cases. The

complainant considered that counting of response times should start from the date of the initial information request, not the date of the request for review.

91. On 25 July 2019, the complainant complained to the Office of The Ombudsman against CSD for –

(a) unreasonably withholding the three record forms requested; and

(b) violating paragraph 1.19.1 of the Guidelines on Interpretation and Application of the Code (the Guidelines) by making no effort to keep time extensions for handling the complainant's information request and request for review to the minimum.

The Ombudsman's observations

Complaint (a)

92. Paragraph 2.15 of the Code serves to protect the privacy of an individual. As pointed out in paragraph 2.15.6 of the Guidelines, the restriction on disclosing information to third parties (i.e. paragraph 2.15 of the Code) does not apply to information concerning an individual from which it is not reasonably practicable to identify that individual.

93. The Ombudsman had examined the three record forms requested with appropriate redactions being made by CSD to protect the personal data of the individuals named in the documents. The Ombudsman took the view that the concern that any individuals named in the documents might have been identified should not exist should CSD have chosen to make appropriate redactions on the documents. With those redactions, the documents remained readable and meaningful and there was no need for CSD to further consider whether or not public interest in disclosure outweighed any harm or prejudice that would result from disclosure.

94. The Ombudsman's conclusion was that the citation of paragraph 2.15 of the Code by CSD as the reason for refusal to disclose the three record forms requested was inappropriate.

95. Upon receipt of the request for review, CSD re-examined the whole case and sought legal advice again. Realizing that disclosure of the three record forms requested would likely prejudice the internal investigation which is still ongoing and the impartial adjudication of

disciplinary proceedings which may take place in the future, CSD amended its position by citing paragraphs 2.6(b)[1] and 2.6(c)[2] of the Code as the reasons in support of its decision for refusal to disclose the information. The Ombudsman considered CSD to have corrected itself by properly applying the relevant restrictions for refusing to disclose the information.

96. The Ombudsman considered it proper for CSD to refuse disclosure of the three record forms requested in accordance with paragraphs 2.6(b) and 2.6(c) of the Code. Nonetheless, CSD's initial citation of paragraph 2.15 of the Code as reason for refusal was inappropriate.

Complaint (b)

97. This information request involved large volume and various types of information and seeking of legal advice by CSD, which undoubtedly was time consuming. Yet, CSD met the target response times stipulated by the Code when handling the complainant's information request and request for review. The Ombudsman accepted that the target response times for a request for review run a new cycle upon receipt of that request by the department concerned. Having examined the time sequence of CSD's handling of the complainant's information request and request for review, The Ombudsman considered the allegation that CSD made no efforts to keep time extensions to the minimum unfounded.

98. Overall, The Ombudsman considered this complaint unsubstantiated but other inadequacies were found. The Ombudsman recommended that CSD take reference from this case and implement training for staff for the proper application of the Code.

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[1] Paragraph 2.6(b) of the Code refers to information the disclosure of which would harm or prejudice the conduct or impartial adjudication of legal proceedings or any proceedings conducted or likely to be conducted by a tribunal or inquiry, whether or not such inquiry is public or the disclosure of the information has been or may be considered in any such proceedings.

[2] Paragraph 2.6(c) of the Code refers to information which relates to proceedings which have been completed, terminated or stayed, or which relates to investigations which resulted in or may have resulted in proceedings, whether any such proceedings are criminal or civil.

Government's response

99. CSD accepted The Ombudsman's recommendation.

100. To follow up The Ombudsman's recommendation, a half-day training workshop aimed at enhancing staff knowledge and competency in handling requests related to the Code, to be conducted by a guest speaker from Constitutional and Mainland Affairs Bureau at the CSD Staff Training Institute, was originally scheduled for 4 August 2020 for respective staff from different institutions and sections, including Chief Officers and Principal Officers / Officers. However, in light of the recent development of the COVID-19 pandemic, the talk is tentatively scheduled for February 2021.

Department of Health, Food and Environmental Hygiene Department and Immigration Department

Case No. 2018/3728A, B and C – Failing to prohibit the touting activities of undertakers at the Joint Office – Hong Kong Island Office jointly operated by the Immigration Department, Department of Health and Food and Environmental Hygiene Department

Background

101. On 26 September 2018, the Complainant visited the Joint Office – Hong Kong Island Office (the Joint Office), which is jointly operated by the Immigration Department (ImmD), the Department of Health (DH) and the Food and Environmental Hygiene Department (FEHD) for handling cases of death from natural causes. The complainant alleged that representatives of undertakers touted for business at the Joint Office, despite the signage and notices on prohibiting touting activities affixed thereat. One of the representatives of undertakers indicated to her that such touting activities had long existed at the Joint Office and they even had their own corner in the Joint Office with boxes storing their tools of trade. Therefore, she lodged a complaint with the Office of The Ombudsman (the Office) against the Joint Office for failing to prohibit touting activities of the undertakers at the premises concerned.

102. The Joint Office mainly comprised a public waiting area and three service counters which are operated by ImmD, DH and FEHD for registration of deaths, issuance of cremation permits and booking of cremations respectively. In the public area, two writing tables are provided to facilitate members of the public to fill in various application forms.

The Ombudsman's observations

103. In March 2019, staff of the Office conducted a visit to the Joint Office and observed the followings –

(a) Several representatives of undertakers were present at the public area. Some of them were rendering assistance to their clients. No touting activities were detected; and

(b) Representatives of undertakers placed stationery and personal belongings on and under the two writing tables which were supposed to be for public use. Representatives from different undertakers had occupied different parts of the tables. Some of them stationed and seated at the tables.

104. In May 2019, the staff of the Office further conducted two visits to the Joint Office at different time. Observations were the same as those of the first visit. Furthermore, representatives of undertakers were found charging up their mobile phones at the Joint Office's wall sockets and there were still considerable personal belongings such as stationery, stamps, vacuum flask and bags on the tables. No staff intervened in the situation during the visits.

105. On the alleged touting activities of the representatives of undertakers at the Joint Office, ImmD, DH and FEHD all replied to the Office in the negative. Staff of the Office also detected no touting activities during the three covert visits. The department concerned explained that the presence of undertakers at the Joint Office was not uncommon because undertakers might have been engaged by their clients to provide assistance at the Joint Office. In the circumstances, the Office could not find evidence of touting activities by the representatives of undertakers at the Joint Office.

106. Nevertheless, the Office considered that behaviours of the undertakers (e.g. putting their personal belongings on the tables) in the public area of the Joint Office still gave an impression that they were allowed or authorised to station at the Joint Office and that the public area was in lack of management.

107. While the three departments had tried to provide information and records as far as they could and to the best of their knowledge, they could not trace any record of agreement on the overall coordination and division of responsibilities on the operation and management of the Joint Office. It was apparent that throughout the years, overall coordination and division of responsibilities on the operation and management of the Joint Office were largely deficient.

108. Overall, The Ombudsman considered this complaint unsubstantiated, but there were other inadequacies found on the overall management of the Joint Office. As such, The Ombudsman urged ImmD, DH and FEHD to –

(a) reach consensus on the coordination and division of responsibilities on the operation and management of the Joint Office as soon as possible, with a view to formulating clear management policy of the Joint Office, especially the public area; and

(b) consider whether and how the presence and activities of the undertakers should be regulated and / or facilitated, taking into consideration the need of the public for assistance from undertakers for the booking of cremation session, and avoid giving an impression that they are there to conduct touting activities. If the departments consider it necessary for representatives of undertakers to station at the Joint Office to offer assistance to the public, the same opportunity should be offered to all undertakers in Hong Kong, and the public should be informed clearly of their roles.

Government's response

109. ImmD, DH and FEDH all accepted The Ombudsman's recommendations.

Recommendation (a)

110. At the inter-departmental meeting of 23 July 2019, ImmD, DH and FEDH reached a consensus to take turn as the overall venue management coordinator on a yearly basis. Moreover, the three departments had delineated the scope of duties for the coordinator and each department had designated contact officers at operation and management level for future communication.

Recommendation (b)

111. In order to avoid any false public perception that the representatives of undertakers are allowed or authorized to establish business or engage in touting activities at the Joint Office, ImmD, DH and FEHD agreed to take the following measures –

(a) to remove the telephone set placed on the writing table in the public area of the Joint Office;

(b) to affix notices on the writing tables specifying that the tables are used solely for form-filing purpose and any personal belongings left unattended will be removed after office hours; and

(c) to disable the wall power sockets at the public area of the Joint Office.

112. Regarding how the presence and activities of the undertakers should be regulated, DH and FEHD are of the view that since the Joint Office is open to all members of the public, any undertakers who are engaged by their clients for services should have the same opportunity to be present in the Joint Office as with other members of the public. DH further added that it is difficult to control the access by members of the public, including undertakers, unless their activities interfere with the operation of the Joint Office or cause nuisance to others.

113. The three departments will continue to work in a concerted manner in managing the Joint Office, review the effectiveness of the above measures regularly and take further actions as and when necessary.

Department of Health

Case No. 2018/4728 – (1) Selective enforcement against illegal smoking in different areas; (2) Misleading information on no smoking signs and gadgets; (3) Poor staff attitude; and (4) Transferring hotline service to 1823

Background

114. The complainant lodged a complaint against the Tobacco and Alcohol Control Office (TACO) of the Department of Health (DH) with the Office of The Ombudsman (the Office) on 26 November 2018.

115. According to the complainant, she made a complaint to TACO in October 2018 about illegal smoking outside an exit of a MTR Station, only to be told that the location concerned was not a statutory no smoking area (NSA), and thus TACO had no authority to take law enforcement action. In November 2018, the complainant made another complaint to TACO about illegal smoking within the precincts of a private housing estate and at the minibus station of a Public Pier via TACO's complaint hotline based on the information shown on the no smoking signs. In response, however, TACO told her that the public transport interchange was under its purview but the private housing estate concerned was not. She was thus advised to report the problem to the relevant property management company. The complainant maintained that the two complaints were lodged according to the information provided on the no smoking signs at the above two locations, which was identical (including the logo of TACO, the complaint hotline number and the amount of the fixed penalty). In this regard, the complainant expressed her dissatisfactions as follows –

(a) TACO was alleged to have shirked its responsibility and of selective enforcement when it told the complainant that it had no authority to take enforcement action in the private housing estate concerned (Allegation (a));

(b) TACO was alleged to have permitted the venue manager of a location which was not a statutory NSA (non-NSA) to display no smoking signs and gadgets produced and provided by TACO, which might mislead the public into believing that TACO was authorised to take enforcement action in the venues concerned (Allegation (b));

(c) The attitude of the two TACO officers (Officers A and B) handling her complaints was poor. They told the complainant that Tobacco and Alcohol Control Inspectors (TACIs) could take enforcement actions in venues displaying yellow no smoking banners but might not be empowered to do so in venues with no smoking signs made of silver aluminium plate. She found their remarks irresponsible. The TACIs also failed to explain to her why enforcement actions might not be taken at venues displaying no smoking signs made of silver aluminium plate (Allegation (c)); and

(d) The operator(s) at the 1823 hotline, to which the calls of the TACO hotline were transferred, could not answer the questions of the complainant regarding the work of TACO in a thorough and professional manner (Allegation (d)).

The Ombudsman's observations

Allegation (a)

116. DH already explained to the complainant that some of the locations involved in the complaints lodged were not statutory NSAs under the Smoking (Public Health) Ordinance (Cap. 371) (the Ordinance). TACIs were acting in accordance with the law when they told the complainant that they were not authorised to take enforcement actions at those locations, which did not constitute selective law enforcement.

117. As to those locations designated as statutory NSAs, TACO conducted two inspections upon receipt of the complaints from the complainant. The Ombudsman considered that TACO had proactively followed up the complaints, and therefore considered Allegation (a) unsubstantiated.

Allegation (b)

118. The Ombudsman understood the frustration and confusion experienced by members of the public who lodged complaints via the hotline according to the information provided on TACO's no smoking signs, only to be told that the locations concerned were not statutory NSAs. In fact, those no smoking signs were supposed to be displayed in statutory NSAs only. However, since a lot of statutory NSAs were private premises, it was difficult for TACO to preclude the improper use of no smoking signs

in non-NSAs. The complainant believed that TACO should proactively arrange for its staff to inspect all non-NSAs in Hong Kong. As far as resources are concerned, The Ombudsman considered such practice impracticable since most of the indoor and outdoor areas in the territory are basically non-NSAs. Moreover, the resources of TACO should be deployed mainly for smoking control (including site inspections upon receipt of complaints). The Ombudsman did not find it reasonable or practicable for TACO to allocate substantial resources to identify no smoking signs in non-NSAs. As such, The Ombudsman agreed to the prevailing practice of TACO to request venue managers to remove no smoking signs inappropriately displayed in non-NSAs during its routine inspections or upon receipt of complaints.

119. As far as the posting of no smoking signs is concerned, The Ombudsman considered that persons who applied to obtain no smoking sign produced by TACO should ascertain whether the proposed locations for displaying such signs were statutory NSAs beforehand. DH has reminded applicants to refer to the Ordinance or relevant leaflets for the coverage of statutory NSAs. Nonetheless, The Ombudsman understood that the general public or venue managers might have genuine difficulties in identifying whether a location is a statutory NSA. Under such circumstances, TACO was advised to consider preparing reader-friendly pamphlets or leaflets attached to the application form to educate venue managers how to define statutory NSAs.

120. Upon verification, The Ombudsman learnt that the application form had already advised that no smoking signs could only be put up in statutory NSAs. The Ombudsman further learnt that the words specifying the requirement in the application form were too inconspicuous to be noted. TACO was advised to revise the existing application form so that the requirements were clear and prominent. Therefore, The Ombudsman considered Allegation (b) unsubstantiated but there was room for improvement.

Allegation (c)

121. Different accounts of the conversation between the complainant and the two TACO officers were given by the two parties. In the absence of independent corroboration, The Ombudsman found it difficult to establish the facts, and thus was unable to comment on whether the attitude of the officers was poor.

122. As to the complainant's dissatisfaction with the response given by the two TACO officers, The Ombudsman considered that they were just stating the fact. Venue managers were at liberty to put up silver no smoking signs upon application. Only after paying a visit to a particular location could TACIs confirm whether they had the authority to take enforcement actions there. Hence, it was not unreasonable for the officers concerned to tell the complainant that TACIs might not be able to take enforcement actions at locations displaying no smoking signs made of silver aluminium plate. As clarified by DH, the issue at hand was that the types of no smoking signs had nothing to do with the enforcement power of TACIs.

123. In any case, TACO had reminded the officers concerned to maintain good communication with complainants and answer public enquiries with patience. Therefore, The Ombudsman considered Allegation (c) unsubstantiated.

Allegation (d)

124. The Ombudsman understood that the complainant was dissatisfied with the operator of the 1823 hotline as no direct answer was given in response to her enquiries. The hotline provides round-the-clock one-stop services, including answering simple enquiries from the public, receiving and passing on complaints against departments, putting on record the particulars of each complaint case, and keeping track of progress of relevant follow-up work. Upon receipt of cross-departmental complaints, the 1823 operators work to ensure that the complaint cases are properly handled, and replies relayed to the complainants at the request of the departments concerned. The Ombudsman considered that the service value of the hotline should not be undermined by its failure to answer complicated questions posed by the complainant. What really matters was whether the operator concerned had duly passed on the complaint case for proper follow-up. Therefore, The Ombudsman considered Allegation (d) unsubstantiated.

125. Overall, The Ombudsman considered the complaint against DH unsubstantiated but there was room for improvement on the part of DH. Therefore, The Ombudsman recommended that DH –

(a) keep a closer eye on whether no smoking signs from TACO are put up in non-NSAs and, if so, request venue managers to remove them if such cases are found;

(b) produce reader-friendly pamphlets or leaflets to be attached to the relevant application form to educate venue managers on how to define a statutory NSA and prevent improper posting of no smoking signs; and

(c) revise the current application form for posting no smoking signs so that the application requirements are clear and prominent.

Government's response

126. TACO accepted The Ombudsman's recommendations, and has reminded all its enforcement staff at two internal meetings held on 13 and 20 June 2019 to keep a closer eye on whether no smoking signs of TACO are put up in non-NSAs and, if so, request venue managers to remove them. TACO has also attached a pamphlet to the application form for no smoking signs and made enhancement to the application form.

Department of Health

Case No. 2018/4756A and 2019/0063A– Omitting to include persons with disabilities in receipt of Comprehensive Social Security Assistance as an eligible group under the Vaccination Schemes

Background

127. Two members of the public (the complainants) lodged a complaint with The Ombudsman separately against the Department of Health (DH) and the Social Welfare Department (SWD). They alleged that DH had unreasonably refused to provide free or subsidised vaccination service, contrary to the principles of the Vaccination Schemes. They were also dissatisfied with SWD for failing to coordinate with DH and issue the relevant documentary proof to them.

128. Under the Vaccination Schemes operated by the Vaccination Office of the Centre for Health Protection (CHP) under DH, persons receiving the Disability Allowance (DA) are eligible for free or subsidised vaccination. They only need to present the notification of successful application for DA issued by SWD to receive the vaccination.

129. The complainants are both persons with permanent disabilities and recipients of the Comprehensive Social Security Assistance (CSSA). The CSSA notification issued by SWD to the complainants did not contain the words "disability allowance". Upon enquiries, SWD told the complainants that the DA was already included in their allowances, and the notification would only show the "standard rate".

130. In November and December 2018, the complainants requested to receive free vaccination at a private clinic enrolled in the Vaccination Schemes and a DH clinic respectively. Nevertheless, both clinics replied that the complainants must present a letter issued by SWD with the words "disability allowance" printed on it to be eligible for free vaccination. Since the words "disability allowance" were not on the CSSA notification issued by SWD to the complainants, the two clinics refused to provide them with vaccination service.

131. The complainants considered DH unreasonable in refusing to provide them with free vaccination merely because the words "disability allowance" were not printed on the letters issued by SWD. They also criticised SWD for failing to coordinate with DH and issue documentary

proof to CSSA recipients like them for verifying that they were persons with disabilities in receipt of the DA.

The Ombudsman's observations

132. Taking into account the risks of complications caused by seasonal influenza infection and the relatively low self-care ability of persons with disabilities (which makes them a high-risk group for influenza), the Government has included DA recipients as an eligible group under the Vaccination Schemes. The Ombudsman considered that the Government should subsidise persons with disabilities given that they belong to a high-risk group for influenza. Whether they are receiving the DA or not should not have any implication on their eligibility for free or subsidised vaccination.

133. The Ombudsman believed that DH had presumed that most persons with disabilities would have applied for DA, and hence at that time adopted a relatively simple and direct way of accepting DA recipients to present the notification of successful application for DA issued by SWD for frontline healthcare personnel to confirm their identity. However, this practice fails to cater for the situation of CSSA recipients who are 100% disabled, because under the existing public welfare mechanism they are not entitled to DA at the same time and are unable to present such notification.

134. Regarding the omission above, DH explained that when it enquired with SWD in June 2016, it was never informed by SWD that some CSSA recipients were actually also assessed as being 100% disabled, same as DA recipients. As a result, DH could not cover this group of persons under the Vaccination Schemes.

135. Nevertheless, SWD disagreed with DH's claim. SWD stated that it had provided DH with the relevant information in its reply dated 5 October 2016. From the aforesaid email reply provided by SWD, CHP should have become aware that some CSSA recipients were also assessed as being 100% disabled, but CHP did not make any further enquiry with SWD. The Ombudsman, therefore, considered that DH could hardly shift the blame for the omission.

136. The Ombudsman also considered that SWD played the role of a consulted party in this incident, and it had already provided CHP with information upon its request.

137. Based on the above analysis, The Ombudsman considered the complaint against DH substantiated, and the complaint against SWD unsubstantiated.

138. The Ombudsman recommended that DH, jointly with SWD, implement as soon as possible a solution for issuing a documentary proof for CSSA recipients who are 100% disabled.

Government's response

139. DH accepted The Ombudsman's recommendation. In view of the provisions in the Personal Data (Privacy) Ordinance (Cap. 486), SWD cannot issue a documentary proof to all 100% disabled CSSA recipients for receiving free or subsidised seasonal influenza vaccination (SIV) as their personal information collected by the SWD is not for such purpose. The Government has also considered requesting CSSA recipients who are 100% disabled to obtain documentary proof from SWD prior to vaccination if they want to receive free or subsidised SIV. However, DH opined that such an arrangement was inconvenient for the 100% disabled CSSA recipients, and thus not a satisfactory solution. Based on the recommendation of The Ombudsman, DH would adopt a self-declaration mechanism for the 100% disabled CSSA recipients in order to facilitate them to receive free or subsidised SIV at clinics / hospitals of DH or the Hospital Authority or private clinics participating in the Vaccination Subsidy Scheme (VSS). The details of the relevant mechanism are in the ensuing paragraphs.

140. Since the 100% disabled CSSA recipients may not be able to provide a documentary proof of the category of CSSA recipients to which they belong, they can prior to vaccination fill in a self-declaration form to establish their claims of eligibility for free[3] or subsidised SIV under the Government Vaccination Programme (GVP) and the VSS. If the 100% disabled CSSA recipient is a minor or does not have the capacity to make declaration, his / her parent / guardian / appointee has to sign the declaration form on his / her behalf. The signed forms will be kept by the public clinics / hospitals or the private doctors concerned and will be subject to random check by DH to verify their CSSA status with SWD.

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[3] For existing patients in receipt of CSSA, doctors in DH or the Hospital Authority, after clinically assessed them as 100% disabled, may waive the requirement of signing the declaration form by the 100% disabled CSSA recipients, and provide free SIV to them under the Government Vaccination Programme.

141. Moreover, since CSSA recipients who are categorised as "requiring constant attendance" are more serious in disability than the 100% disabled CSSA recipients, as reflected in their higher rate of CSSA, DH will also include this category of CSSA recipients requiring constant attendance under the two aforesaid schemes with the same mechanism.

142. DH has implemented the proposed arrangements in the 2020/21 GVP and VSS.

Fire Services Department

Case No. 2018/4329 – (1) Approving requests for extension of time for abating fire hazards in mini-storage premises too easily; and (2) Failing to publicise information about ministorage premises which had yet to abate fire hazards

Background

143. Subsequent to a blaze that took place at mini-storage premises (MSP) in June 2016, the Fire Services Department (FSD) conducted inspections to MSPs and identified some common fire hazards. FSD would issue Fire Hazard Abatement Notices (FHANs) to operators of those MSPs which were found to have any of the said fire hazards. Those who failed to abate the fire hazards specified might be prosecuted.

144. Allegedly, a large number of operators of existing MSPs were reluctant to comply with FHANs because compliance would substantially reduce the rentable storage space and the income of the business. The complainant was dissatisfied that, notwithstanding a specific period stated in the FHANs for compliance, FSD granted extension of time (EoT) for compliance with FHANs readily, especially for those cases where the abatement measures involved a change in an MSP's layout and provision of sufficient number of windows.

145. Given the readiness of FSD to grant EoT, many MSPs only needed to make pretence of willingness for compliance by undergoing piecemeal rectifications. As at April 2018, less than 2% of MSPs with fire hazards identified had fully complied with FHANs.

146. In April 2018, the complainant urged FSD to tighten the time allowed for MSPs' compliance with FHANs. In May and June 2018, the complainant wrote further to FSD, reporting three MSPs operated by two operators (hereinafter referred to as "Operator A" and "Operator B") with fire hazards[4]. FSD did not address the complainant's concerns, but only replied that EoT was granted on a case-by case basis and that appropriate enforcement action would be taken against MSP operators who failed to comply with FHANs without reasonable excuse.

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[4] The complainant reported on two cases but one turned out to involve two MSPs run by the same operator.

147. The complainant was also dissatisfied that FSD had not made available to the general public a list of MSPs with outstanding FHANs. The complainant considered that with such a list, the public could make informed choices between compliant MSPs and non-compliant MSPs.

148. The complainant lodged a complaint with the Office of The Ombudsman on 3 October 2018. In sum, the complainant was dissatisfied with FSD for –

(a) blindly granting EoT to MSP operators for compliance with FHANs; and

(b) failing to inform the public of those MSPs that have outstanding FHANs.

The Ombudsman's observations

149. FSD should have fire safety as its utmost concern. While trying to take care of the difficulties faced by the mini-storage industry, the Department must not compromise fire safety.

150. On the two complaint points that the complainant made against FSD, The Ombudsman had the following comments.

Complaint (a)

151. The tragic fire of June 2016 and the subsequent territory-wide inspection of MSPs conducted by FSD showed that the fire hazards presented by most MSPs were serious and imminent. Hence, besides issuing FHANs swiftly, FSD needed also to ensure MSP operators comply with FHANs as soon as practicable.

152. FSD had explained the rationale behind setting the deadline for compliance with FHANs at 60 days and the EoT mechanism. The Ombudsman accepted that FSD had to strike a balance between the conflicting needs for timely enforcement of FHANs and for giving reasonable time for MSP operators to complete modifications to their premises required for compliance with FHANs. The Ombudsman considered the balance struck by FSD not unreasonable. The Ombudsman also accepted in principle why more time was usually needed to comply with the FHANs related to undesirable layout and insufficient number of windows.

153. Having examined the way FSD had handled the MSPs on which the complainant had reported, The Ombudsman considered the Department's decision to grant Operator A and Operator B EoTs not unreasonable, as both Operators had indeed complied with some of the FHANs issued to them, and been assessed to have taken steps to comply with the FHANs related to undesirable layout and insufficient number of windows.

154. There was no evidence showing that FSD had been granting EoT to MSP operators too loosely, at least not in the cases of Operators A and B. The Ombudsman therefore considered Complaint (a) unsubstantiated.

Complaint (b)

155. The Ombudsman had reservations about FSD's explanations for keeping confidential the identities of those MSPs with outstanding FHANs. The fire in 2016 was unquestionably tragic and The Ombudsman considered it important for FSD to inform the public of MSPs with significant fire risks, such as those that had already been prosecuted in court.

156. That said, The Ombudsman accepted that it was not appropriate to disclose information about MSPs with outstanding FHANs while court proceedings were still in progress.

157. Besides, The Ombudsman had to acknowledge that FSD had indeed made efforts in enhancing public's understanding of the fire hazards in MSPs. The Ombudsman therefore considered Complaint (b) unsubstantiated.

158. Despite that the complaints against FSD were unsubstantiated, The Ombudsman urged FSD to –

(a) remind officers to adhere to the "Law Enforcement Guidelines for MSP" (the Guidelines) in handing EoT requests; and

(b) subject to the outcome of the said judicial review proceedings and taking into consideration the interest of all stakeholders, consider making known to the public more information about MSPs that have significant fire hazards.

Government's response

159. FSD accepted The Ombudsman's recommendations and has taken the following actions –

(a) all officers tasked to deal with mini-storage cases had been reminded again to adhere to the Guidelines. Supervisors will monitor their Officers to ensure the guidelines are strictly adhered to; and

(b) although the final judgment of the judicial review cases has yet to be handed down, FSD has been in the interim seeking the Department of Justice's advice in relation to the legality of promulgating more information to the public about MSPs that had complied with all the fire safety requirements set by FSD. FSD would examine the legal advice and review the situation from time to time subject to the final judgment of the judicial review cases.

Food and Environmental Hygiene Department and Lands Department

Case No. 2019/0404A and 2019/0404B – Delay in handling a complaint about prolonged occupation of a bicycle parking space by a suitcase

Background

160. On 5 February 2019, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Food and Environmental Hygiene Department (FEHD). According to the complainant, a bicycle parking space was occupied persistently by a suitcase (the issue). In December 2018, the complainant lodged a complaint with 1823 about the issue. On 13 February 2019, FEHD replied to the complainant via 1823 that the department was responsible for handling waste disposed of in public areas, hence the issue was not within its purview. As the suitcase was locked together with a bicycle, FEHD had referred the case to the relevant District Office of the Home Affairs Department (the District Office) for coordinating joint operations with relevant departments.

161. After a preliminary inquiry with FEHD, the Office opined that the occupation problem also involved the Lands Department (LandsD). On 30 May 2019, the Office launched a full investigation against LandsD and FEHD.

The Ombudsman's observations

Comments on FEHD

162. FEHD explained that it was not within its purview to tackle the occupation of public bicycle parking spaces. Moreover, the suitcase in question could not be treated as a piece of rubbish or waste as it was locked with the bicycle and did not cause any hygiene problems. The Office considered FEHD's explanation reasonable.

163. However, FEHD was not prompt in dealing with the case as it failed to convey the investigation results to the complainant in a timely manner and did not seek early assistance of the District Office to list the

occupation problem as a target for joint operations. Therefore, the Office considered the complaint against FEHD partially substantiated.

Comments on LandsD

164. LandsD explained that the District Lands Office (DLO) concerned would work together with the District Office in the joint operations for clearance of bicycles illegally parked in public areas. At the request of the District Office, DLO took part in the joint operation on 8 March 2019. It was found during the joint operation that the statutory notice[5] affixed on the bicycle had disappeared. DLO hence did not arrange removal of the bicycle in accordance with the existing practice because it was uncertain whether the statutory notice had been affixed on the bicycle. The Ombudsman opined that DLO had followed the established procedures in taking action.

165. Nevertheless, according to the prevailing policy of LandsD, if the statutory notice affixed on a bicycle has been removed before a joint operation, the bicycle is deemed not to have been affixed with such and thus is not subject to removal on the day of joint operation. In other words, offenders (persons illegally parking their bicycles) can circumvent LandsD's clearance by simply removing the statutory notices. This is an enforcement loophole. LandsD should review its practice.

166. Having scrutinised the legal advice (previously sought by LandsD), The Ombudsman believes that the legal advice does not preclude the practicability of DLO arranging the removal of a bicycle if there is sufficient evidence to establish that a statutory notice has been affixed on the bicycle concerned.

167. In view of the above, The Ombudsman considered the complaint against LandsD unsubstantiated but other inadequacies were found.

168. The Ombudsman was of the view that the prolonged occupation of a bicycle parking space is unfair to those who need to use it. The Ombudsman recommended that –

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[5] LandsD is empowered by the Land (Miscellaneous Provisions) Ordinance (Cap. 28) to post a notice requiring the occupation of unleased land to cease before a date specified in the notice (the statutory notice). In the case of non-compliance, an authorised officer may remove the occupier from the land and take possession of any property or structure thereon and instigate prosecution against the occupier who failed to comply with the statutory notice without any reasonable excuse.

(a) FEHD should review its procedures for handling complaints about occupation of bicycle parking spaces by miscellaneous articles or bicycles so as to avoid similar cases of late referrals; and

(b) LandsD should consider seeking legal advice again on whether further law enforcement action can be taken where the same object can be clearly identified by its staff notwithstanding the removal of any previously affixed statutory notices. If the legal advice is affirmative, internal instructions should be provided so that its staff can identify all objects previously affixed with statutory notices, enabling any law enforcement actions against objects placed without authorisation in public areas even when the statutory notices affixed to them are removed.

Government's response

169. FEHD and LandsD both accepted The Ombudsman's recommendations.

FEHD

170. FEHD has reviewed its existing procedures and guidelines for handling complaints about street obstruction by miscellaneous articles and considers that the delay could have been avoided if the staff handling the case followed the guidelines and made a referral to LandsD in a timely manner. FEHD has instructed the relevant staff of the district concerned to adhere to the departmental guidelines, inform complainants about the progress of their cases and refer complaints outside FEHD's purview to the relevant departments for follow-up actions as soon as possible.

171. FEHD will continue to closely monitor the occupation problem of the site and conduct joint operations with relevant departments to clear illegally parked bicycles and miscellaneous articles.

LandsD

172. LandsD has consulted the Department of Justice (DoJ) again. According to DoJ's legal advice, if DLO's staff have evidence to confirm that it is the same bicycle parking at the same spot upon expiry of the statutory notice affixed on it under the relevant Ordinance, the bicycle concerned can be removed in accordance with the Ordinance

notwithstanding the notice having been removed. Based on the legal advice, LandsD issued new internal guidelines on 30 July 2020 to all DLOs on the removal of bicycles and required them to properly maintain records of illegally parked bicycles (including photos of those bicycles) in the process of land control action, so that its staff can identify bicycles previously affixed with statutory notices and those who have contravened the Ordinance cannot circumvent their legal responsibility simply by removing the statutory notices already affixed.

Food and Environmental Hygiene Department

Case No. 2019/0433 – Failing to take effective enforcement action against street obstruction caused by automobile tyres placed on a walkway

Background

173. The complainant claimed that an automobile tyre shop (the shop) in a certain district often placed tyres on the pavement outside the shop (the location), causing obstruction (the street obstruction). In November 2018, the complainant lodged a complaint with the Food and Environmental Hygiene Department (FEHD), but the situation has not improved. The complainant then filed a complaint against FEHD with the Office of The Ombudsman (the Office) in February 2019.

The Ombudsman's observations

174. Under section 22 of the Public Health and Municipal Services Ordinance (Cap. 132) (the "provisions on obstructions to scavenging operations"), if any article or thing is found to be so placed as to cause obstruction to any scavenging operation, FEHD may serve a Notice to Remove Obstruction (Notice) upon the owner of such article, or, where the owner cannot be found or ascertained, attach to such article, the Notice requiring the owner to remove the same within a period of four hours after the Notice is so served or attached, and to prevent the recurrence of such obstruction by the article during such period, as may be specified in the Notice. In case of non-compliance, FEHD will seize and detain the article concerned.

175. If the obstruction persists, or the obstructing article occupies a large area or is of a large quantity, and the owner of the article is present at the scene, FEHD may, without prior warning or notice, prosecute the owner immediately under the "provisions on obstructions to scavenging operations".

176. With effect from 24 September 2016, the Government has implemented the Fixed Penalty (Public Cleanliness and Obstruction) Ordinance (Cap. 570) as an additional legal tool to tackle the problem of shop front extensions (SFEs). Under the new fixed penalty system, in addition to prosecuting offenders under the summons system (i.e. the

"street obstruction provisions" under section 4A of the Summary Offences Ordinance (Cap. 228)), FEHD's staff are also empowered to issue fixed penalty notices (FPNs) in respect of SFEs.

177. Under the existing policy, for certain SFEs not involving illegal hawking, FEHD will mount joint operations with other departments, including the Hong Kong Police Force, as appropriate. During the joint operations, FEHD's enforcement officers may issue an FPN to any person if it is confirmed that he or she, without lawful authority or excuse, sets out or leaves any matter or thing which causes obstructions, inconveniences or dangers in a public place.

178. On 6 November 2018, the local District Environmental Hygiene Office (DEHO) of FEHD received a complaint about the street obstruction, which was followed up by its Cleansing Section.

179. Between 11 November and 4 December 2018, and between 5 January and 17 March 2019, the Cleansing Section deployed staff to carry out a number of inspections in the vicinity of the location. Whenever tyres were found placed on the location causing obstruction, staff of the Cleansing Section did immediately ask the person(s) present (including staff member(s) of the shop) to whom the tyres belonged.

180. Only on one occasion among the above numerous inspections did someone (i.e. staff member(s) of the shop) admit possession of a small quantity of tyres placed on the location. Upon receipt of a verbal warning from staff of the Cleansing Section, the shop operator removed the tyres immediately.

181. For other inspections where no one admitted possession of the tyres found placed in the location to staff of the Cleansing Section, FEHD was not able to identify the owner of the tyres or initiate prosecution. In such case, staff of the Cleansing Section could only post a Notice at the scene under the "provisions on obstructions to scavenging operations" and seized the tyres not yet removed upon expiry of the deadline set in the Notice.

182. During the inspections between 28 November 2018 and 17 March 2019, the Cleansing Section found in total 79 tyres on the pavement off the shop and seized nine of them under the "provisions on obstructions to scavenging operations". The remaining 70 tyres had been removed before follow-up actions took place.

183. As evident from the information provided by FEHD, its Cleansing Section did follow up on the street obstruction. Staff were deployed to carry out inspections, ask the person(s) present (including staff member(s) of the shop) to whom the tyres belonged, and issue a verbal warning to the person(s) who admitted possession of the tyres for their removal. As for those tyres unclaimed, the Cleansing Section attached a Notice to them under the "provisions on obstructions to scavenging operations" and upon expiry of the deadline therein followed up and seized the tyres left unremoved. So far there had not been any obstructions to scavenging or pedestrians at the location caused by tyres being placed for a long time.

184. However, the inspection records (including photos) provided by FEHD to the Office and the photos from the complainant showed that tyres were piled up on both sides of the pavement off the shop on different days. It revealed the fact that the situation was by no means occasional and the existing enforcement actions of FEHD failed to root out the problem. Therefore, FEHD should continue to closely monitor the location and consider taking more effective enforcement measures if the problem deteriorates.

185. In conclusion, the Office believed that FEHD had taken necessary enforcement actions against the street obstruction and therefore considered this complaint unsubstantiated. However, FEHD should closely monitor the situation and step up enforcement actions where necessary.

186. The Ombudsman recommended that FEHD –

(a) continue to closely monitor the street obstruction. Meanwhile, publicity and education should be considered as a means to appeal to the tyres shops in the vicinity of the location to be considerate and not to place tyres in public places; and

(b) step up enforcement actions if the street obstruction deteriorates, such as making further efforts to identify for prosecution purpose the offender(s) who has / have placed the tyres.

Government's response

187. FEHD accepted The Ombudsman's recommendations.

188. FEHD has carried out publicity and education work among the shops in the vicinity of the location as per recommendation (a), appealing to them not to place articles in public places and to keep the environment clean. It will also follow recommendation (b) to continue to monitor the location, and take enforcement and follow-up actions as appropriate if any street obstruction is found.

Food and Environmental Hygiene Department

Case No. 2019/2885 – Impropriety in handling the hygiene problem caused by roadside car washing activities of car washing shops

Background

189. On 26 April and 7 May 2019, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Environmental Protection Department (EPD) and the Food and Environmental Hygiene Department (FEHD) respectively. According to the complainant, complaints had been lodged against EPD repeatedly since late 2018 that two shops providing car services (the shops) on a certain street often washed and waxed cars at the roadside, causing environmental pollution, and the problem persisted. The complainant subsequently learnt from a local District Council paper that the primary responsibility for enforcement in respect of the problem rested with FEHD. The complainant was dissatisfied that his complaint was not followed up properly by EPD or FEHD.

The Ombudsman's observations

190. From the closed circuit television (CCTV) footage provided by the complainant on 10 June 2019, the Office noted that the shops often washed cars at the roadside, and there were even suspected plainclothes officers who visited the location many times for inspection and took photos for record. But before taking photos, obstructions on the street were all removed or photos were taken deliberately at locations where car washing activities could not be seen, which was suspicious as wilful concealment of the actual street cleanliness condition.

191. Staff of the Office conducted on-site inspections at the shops on 16 July, 19 August and 29 August 2019 respectively. The inspection results were as follows –

From 3:00 to 4:00 p.m. on 16 July

(1) The shops washed three cars and discharged a large amount of waste water o1to t1e roadside; 1

(2) Illegal parking was very serious at the location. At its worst, there were two to three cars, believed to be those of the patrons of the shops, double-parked at the roadside. The street was so obstructed that staff of the shops had to drive the cars aside or into the shops to make room for ot1er cars to drive t1roug1;1

From 10:45 a.m. to 12:00 noon on 19 August

(3) Two cars drove into one of the shops for washing and waste water was discharged from the garage. When the third car arrived subsequently, staff washed the car and its rims right at the roadside;1

From 11:00 a.m. to 12:30 p.m. on 29 August

(4) Although all cars had been driven into the shops for washing, some were not completely parked into the garages and waste water was disc1arged o1to t1e paveme1t;1

(5) Some of the shop staff was1ed fruits rig1t at t1e roadside; a1d1

(6) There were always cars, believed to be those of patrons, parked outside the shops, some of which were even parked in the middle of the road.

192. The Office considered that the contractor requiring its staff to take photos at the street concerned for internal monitoring, though not in response to the request of FEHD, should be relevant to its performance of the service contract. The practice of its staff (e.g. moving away objects of the shops that caused obstruction, taking photos with their back facing those washing the cars, etc.), as captured on CCTV, might give the contractor a wrong impression of the cleanliness of the street concerned, and eventually affect the cleansing service it provided. It was indeed undesirable that FEHD had not probed into the situation. For better monitoring of the contractor's performance, it is necessary for FEHD to further explore such issues as the purpose of the contractor requiring its staff to take photos of the street, whether the purpose could be achieved by their way of photo-taking, and whether the contractor had been misled about the cleanliness of the street.

193. As pointed out by FEHD, the fact that only in one of many inspections did it manage to collect sufficient evidence for issue of a fixed penalty notice (FPN) to an offender reflected the difficulty of proof. Under certain circumstances, law enforcement officers were required to undergo prolonged observation before they could ascertain the criminal intent of the offenders. That being said, the Office considered it time-consuming to collect evidence rather than difficult to establish proof in this case. During the above three site visits conducted by the Office, the shops were spotted washing cars or tools / fruits at the roadside. Waste water was found discharged directly onto the pavement even when cars were washed inside the garages. The average duration of the three visits was just over an hour. During the one conducted in fine weather in July, quite a number of cars were found being washed at the scene as soon as staff of the Office arrived. In addition, the Office noted that FEHD's officers were in uniform during surprise inspections, which inevitably raised the alertness of the offenders.

194. The Office found in visits that there were in fact hidden locations available for observation of car washing activities in the vicinity of the shops. If FEHD's officers stayed a bit longer on fine weather days, it should not be hard for them to collect sufficient evidence for actions against the shops.

195. In light of the above, The Ombudsman considered this complaint substantiated, and recommended that FEHD –

(a) monitor closely the performance of the contractor involved, including conducting more surprise inspections of the location concerned; and

(b) step up enforcement and review the current inspection method (such as staying at the scene longer and conducting plainclothes inspections) for better chance of successful collection of evidence.

Government's response

196. FEHD accepted The Ombudsman's recommendations.

Recommendation (a)

197. FEHD has been closely monitoring and supervising the performance of various cleansing services provided by the contractor. On photo-taking of street condition by its staff, this was followed up again

with the contractor who was required to comprehensively review the situation and improve the monitoring of its staff. Meanwhile, FEHD has further stepped up monitoring of the contractor by conducting surprise inspections at the location from time to time to ensure the performance of the contractor. Once any contract terms are found violated, FEHD will request the contractor to make improvement, and will issue to it a default notice with deduction of monthly payment of service charge as appropriate. From November 2019 to March 2020, FEHD issued a total of 57 default notices (26 of which involved the location and its vicinity) to the contractor for unsatisfactory performance and deducted monthly payment of service charge under the contract. FEHD will keep watch of the location and urge the contractor to provide satisfactory service.

Recommendation (b)

198. FEHD has reviewed the mode of inspection at the location, deployed additional plainclothes staff for law enforcement and prolonged the stay of enforcement officers at the location for observation of any acts of suspected offenders. From November 2019 to March 2020, FEHD's officers carried out a total of 13 enforcement operations against relevant cleansing offences and issued FPNs to 15 offenders, six of whom for roadside car washing. FEHD will keep in view the performance of the contractor at the location. Subject to availability of resources, it will continue to strengthen relevant enforcement actions and mount inter-departmental joint enforcement operations with departments concerned.

Food and Environmental Hygiene Department

Case No. 2019/3449 – Unreasonably rejecting an application for succession to the tenancy agreement of a market stall

Background

199. The complainant claimed that his mother was the tenant of a Food and Environmental Hygiene Department (FEHD) market stall (the stall). It was stipulated in Clause 7 of The Third Schedule (the clause) of the Tenancy Agreements (original tenancy agreement) that application for succession to the tenancy agreement in respect of the stall shall be made to the landlord within three calendar months upon the death of the tenant. The complainant's mother passed away in November 2011. In 2012, FEHD granted approval for the complainant's father to succeed the tenancy agreement in respect of the stall. On 31 July 2012, the complainant's father entered into a tenancy agreement (the 2012 tenancy agreement) with FEHD in which the clause was included. At the time when the tenancy agreement was signed, the complainant asked FEHD staff if he was eligible for succession to the 2012 tenancy agreement in the future. FEHD staff replied that the content of the 2012 tenancy agreement was the same as that of the tenancy agreement signed by the complainant's mother and the complainant had the right of succession. Subsequently, the tenancy agreement signed by the complainant's father was renewed for a number of times and the expiry date of the final tenancy agreement fell on 30 June 2020.

200. In mid-2018, the complainant's father passed away. In August 2018, the complainant applied to FEHD for succession to the tenancy agreement in respect of the stall (the application). FEHD rejected the application because according to the policy, no arrangement for application for tenancy agreement succession was available to new tenancy agreements commenced after July 2010. The complainant negotiated with FEHD on this matter for many times but in vain.

201. In addition, when meeting with the staff of the local District Environmental Hygiene Office (DEHO) in end-2018, the complainant requested the staff to provide him with the document which informed market stall tenants that no succession was allowed for new tenancy agreements commenced after July 2010 (notification document). The complainant also called the relevant staff twice at end-2018 to obtain the notification document but DEHO had not yet replied to him.

202. On 28 July 2019, the complainant lodged a complaint with the Office of The Ombudsman (the Office), and alleged that FEHD had –

(a) unreasonably refused to approve the application which was made in accordance with the spirit of the clause;

(b) failed to state in the document titled "Documents required for application for succession to market stall (upon death of stall tenant)" which was issued to him or in the tenancy agreement signed by the complainant's father that no succession was allowed for new tenancy agreements commenced after July 2010; and

(c) failed to provide him with the notification document after a long time.

The Ombudsman's observations

Allegation (a)

203. FEHD explained that in view of numerous unfounded rumours about the renewal of market tenancy agreements in 2010, a letter (the 2012 letter) was issued to all public market stall tenants (including the complainant's mother) on 2 June 2010, stating that the tenancies signed by the then tenants might be succeeded by their parent, spouse or off-spring. However, no succession arrangement would be available to those who obtained the tenancy agreement otherwise than by way of the "one-off transfer scheme" (e.g. open auction, transfer or succession) after July 2010. In other words, the succession right in respect of tenancy agreements signed before July 2010 would not be affected (principle of succession right).

204. According to records, the first tenancy agreement signed between the former Regional Council and the complainant's mother commencing on 1 June 1985 had been continually renewed until 31 December 2012.

205. On 23 May 2012, the complainant's father applied to FEHD for succession to the tenancy agreement of the stall. Since the complainant's mother obtained the tenancy agreement before July 2010, FEHD approved the application in accordance with the principle of succession right. The first tenancy agreement of the complainant's father commencing on 1 September 2012 had been continually renewed until 30 June 2020.

206. On 12 August 2018, the complainant applied to FEHD for succession to the tenancy agreement of the stall. FEHD staff explained to the complainant on 5 October 2018 that the first tenancy agreement of the complainant's father (i.e. the 2012 tenancy agreement) was obtained otherwise than by way of the one-off transfer scheme after July 2010. Under the existing policy, no succession right was allowed in respect of that tenancy agreement.

207. Furthermore, in any event, the landlord shall have absolute discretion for the disposal of the stall according to the clause.

208. FEHD has clarified that apart from tenancy agreements obtained by way of the one-off transfer scheme, only those obtained by tenants before July 2010 (i.e. the existing tenants as specified in the 2010 letter) might be succeeded by the parent, spouse or off-spring of the tenant.

209. As the first tenancy agreement granted to the complainant's father by FEHD commenced on 1 September 2012, it was not unreasonable for FEHD to consider that there was no succession right in respect of the tenancy agreement.

210. Moreover, the clause only stipulated that any application for succession to the tenancy agreement in respect of the stall shall be made within three months upon the death of the tenant. The clause did not prescribe that the landlord had to agree to such application.

211. In view of the above, the Office considered Allegation (a) unsubstantiated.

Allegation (b)

212. The succession or transfer arrangement was only available to tenants who obtained their tenancy agreements either before July 2010 or by way of the one-off transfer scheme after July 2010. For this type of tenancy agreement succession applications, FEHD revised the content of the declaration by applicant in the Application for Succession of Market Tenancy Agreements in mid-2014 and included a clause stating that applicants clearly understood that no succession and transfer would be allowed in respect of their new tenancy agreements. The above arrangement should suffice to let the successful tenancy agreement succession applicants know that no succession and transfer arrangement would be available in respect of their tenancy agreements. Besides, the

relevant auction rules for open auctions of public market stalls clearly stipulate that succession to or transfer of tenancy agreements signed by successful bidders is not permitted.

213. Since the issue of the 2010 letter by FEHD, stall tenants have generally acknowledged that tenants who obtained their tenancy agreements after July 2010 are not entitled to succession rights. Therefore, FEHD has no longer issued the relevant notice to stall tenancy agreement succession applicants, nor has it accounted for the policy in the Application for Succession of Market Tenancy Agreements or other relevant application documents (such as the Documents required for application for succession to market stall (upon death of stall tenant)).

214. In addition, a market stall tenancy agreement is a contract entered into between FEHD and the tenant which sets out the obligations of both parties, particularly the terms and conditions to be observed by the stall tenant during operation of stall business. The commencement and end dates of the tenancy agreement are specified in the tenancy agreement. Contractually speaking, a tenancy agreement will lapse upon the death of a tenant. Whether or not succession to market stall tenancy agreements will be allowed is solely a policy of FEHD. It is not obligatory to incorporate the restrictions on succession right into the tenancy agreement terms.

215. The Office considered that the above explanation by FEHD was not unreasonable.

216. Moreover, although FEHD did not account for the policy in the Application for Succession of Market Tenancy Agreements or other relevant application documents, it had already done so in the 2010 letter which was issued to all public market stall tenants (including the complainant's mother). If the applicant had doubts on whether there was a succession right in respect of the market stall tenancy agreement concerned, he could make an enquiry to FEHD.

217. In view of the above, the Office considered Allegation (b) unsubstantiated.

Allegation (c)

218. During the interview with the complainant on 5 October 2018, DEHO's staff member (Staff A) explained that there was no succession right in respect of the tenancy agreement of the complainant's father under

the prevailing policy. Staff A had not kept any written record of the said interview. He could not recall the details of the interview and whether or not the complainant had made enquiries on the phone or requested the notification document (i.e. the 2010 letter) from DEHO at the end of 2018.

219. A copy of the 2010 letter was attached to FEHD's written reply to the complainant dated 6 September 2019 for his reference.

220. There were discrepancies between the statements of Staff A of FEHD and the complainant as to whether the complainant had requested Staff A to provide him with the notification document in end-2018. In the absence of independent corroborative evidence, the Office was unable to establish the truth.

221. In view of the above, the Office considered Allegation (c) inconclusive.

222. However, the Office noticed that Staff A had failed to keep written record of his interview with the complainant on 5 October 2018 and as a result, he was unable to specifically respond to whether the complainant had requested the notification document from DEHO during the interview.

223. In light of the above, The Ombudsman considered this complaint unsubstantiated, but recommended that FEHD should remind its staff to prepare proper written records as soon as possible after interviews with the public for future checking.

Government's response

224. FEHD accepted The Ombudsman's recommendation and has reminded its staff to keep proper written records upon interviews with and receipt of enquiries / complaints from the public.

Government Secretariat – Civil Service Bureau

Case No. 2019/0029(I) – Unreasonably refusing the complainant's information request for the appraisal forms for AO grade staff and the supplementary notes on completion of the appraisal forms

Background

225. In January 2019, the complainant requested the Civil Service Bureau (CSB) to provide him with copies of the Administrative Officer (AO) / Senior Administrative Officer (SAO) Performance Appraisal Form, Hong Kong Government Administrative Service Performance Appraisal Form and Supplementary Notes on the Completion of Appraisals Forms for AOSGBs, AOSGB1s and AOSGAs. CSB only provided the complainant with a summary of the said documents but refused his request for the copies by quoting paragraph 2.11[6] of the Code on Access to Information (the Code) as the reason. The complainant considered it unreasonable for CSB to decline his request.

The Ombudsman's observations

226. The complainant was not asking for any individual officer's appraisal form but only the blank forms and the supplementary notes. Those documents do not contain any personal data or opinions / assessments about an officer as mentioned in the Guidelines on Interpretation and Application of the Code (the Guidelines) concerning paragraph 2.11 of the Code. If CSB considered disclosure of the blank forms would harm or prejudice the management of the public service, it should have clearly explained to the complainant what harm it would bring and why.

227. In CSB's replies of 14 December 2018 and 3 January 2019, CSB merely quoted paragraph 2.11 of the Code as the reason for refusal without further stating its justification. It was only until 24 January 2019 did CSB provide a more detailed explanation on its refusal to the complainant. Even then, the justifications provided could not stand up to challenge as CSB later accepted that assessment or commentary on public officers by the public was unobjectionable.

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[6] Paragraph 2.11 of the Code refers to information the disclosure of which would harm or prejudice the management of the public services.

228. Later in February 2019, in deciding to disclose the full text of the forms, CSB contended that the Appraisal Forms and the Supplementary Notes were for the exclusive use of the appraisees, their appraising and countersigning officers and the Grade Management. They were not for appraisal of AOs by the public and therefore should not be made available to the public. However, paragraphs 1.9.2 and 1.10.2 of the Guidelines clearly state that in general, other than requests for personal information or commercially sensitive information, the identity of the requestor would normally have no bearing on whether or not the information sought should be released. Similarly, the purpose of the request should not be a reason for withholding the information requested in part or in full. In other words, under the Code, the fact that the purpose of the request does not match with the original purpose of the Appraisal Forms and the Supplementary Notes is not a valid reason for non-disclosure.

229. Eventually, in response to The Ombudsman's draft report in May 2019, CSB added that use of the performance appraisal forms by non-authorised persons would mislead the readers as the forms carry authenticity. The unauthorised use of the blank authentic form would harm the management of the public service, and that was why CSB agreed to provide the full text of the forms but not the authentic version. The Ombudsman accepted that the concern was a valid justification for invoking paragraph 2.11 of the Code.

230. In view of the above, The Ombudsman considered that CSB was not unreasonable to have declined the complainant's request but failed to explain the justification for refusal to the complainant in accordance with the Code. The complaint against CSB was therefore considered partially substantiated.

231. The Ombudsman recommended that CSB –

(a) strengthen staff training on the Code and remind its staff regularly of the need to comply with the Code; and

(b) explore various alternatives at an earlier stage to meet the request for information (e.g. partial disclosure, disclosure in other formats, an opportunity to the requestor to view the information) if the request cannot be fully acceded to.

Government's response

232. CSB accepted The Ombudsman's recommendations.

233. CSB organises training programmes on the Code on a regular basis. Relevant materials are made available at CSB's Departmental Portal for the reference of colleagues. CSB would continue to re-circulate the relevant service-wide General Circular and CSB's Internal Circular about the Code on a regular basis.

234. CSB has drawn up a note with salient points on proper handling of similar cases, taking reference from this case. The note has highlighted the merits of exploring alternative means in complying with the Code at earlier stages if the request could not be directly and fully acceded to. It has been shared among all CSB colleagues responsible for handling requests under the Code.

Government Secretariat – Development Bureau

Case No. 2019/3031(I) – Unreasonably refusing to provide the complainant with the tenancy agreements for two revitalisation projects of historic buildings

Background

235. On 10 April 2019, the complainant made a request to the Development Bureau (DEVB) through his assistant for the tenancy agreements that the Government had entered into regarding two revitalisation projects of historic buildings under the Code on Access to Information (the Code).

236. DEVB replied to the complainant on 18 April 2019, refusing to provide information on the above two tenancy agreements by quoting the reasons stated in the following paragraphs[7] under Part 2 of the Code:

(a) For one of the tenancy agreements – paragraphs 2.9(a), 2.9(c) and 2.18(b); and

(b) For the other tenancy agreement – paragraphs 2.9(a), 2.9(c), 2.16 and 2.18(b).

237. The complainant was dissatisfied with the decision of DEVB and considered that even if parts of the sensitive information in the tenancy agreements could not be disclosed, the remaining parts could still be released to him. On 5 July 2019, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against DEVB. He alleged DEVB of not complying with the provisions of the Code to provide him with the disclosable parts or summaries of the tenancy agreements concerned.

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[7] Paragraph 2.9(a) of the Code refers to information the disclosure of which would harm or prejudice negotiations, commercial or contractual activities, or the awarding of discretionary grants and ex-gratia payments by a departme1t; Paragrap1 2.9(c) refers to i1formatio1 t1e disclosure of w1ic1 1 would 1arm or prejudice t1e proper a1d efficie1t co1duct of t1e operatio1s of a departme1t; Paragrap1 1 2.16 refers to information including commercial, financial, scientific or technical confidences, trade secrets or intellectual property the disclosure of which would harm the competitive or financial positio1 of a1y perso1; Paragrap1 2.18(b) refers to i1formatio1 t1e disclosure of w1ic1 would 1 constitute a breach of any obligation arising under common law or under any international agreement which applies to Hong Kong.

The Ombudsman's observations

Paragraphs 2.9(a), 2.9(c) and / or 2.16 of the Code

238. DEVB listed a number of clauses in the two tenancy agreements and pointed out that they were sensitive contractual terms and / or contained confidential commercial information, the disclosure of which might cause harm or prejudice as stated in paragraphs 2.9(a), 2.9(c) and / or 2.16 of the Code. However, the Office noticed that much of the content of these clauses had in fact been disclosed previously. Even if DEVB disclosed to the complainant the content of the tenancy agreements which had already been made available to the public, it would not necessarily cause any harm or prejudice, nor would it weaken the Government's negotiation position, affect the implementation of the revitalisation projects or harm the projects' financial position. As such, DEVB's refusal to disclose all the content of the above clauses based on paragraphs 2.9(a), 2.9(c) and / or 2.16 of the Code was not appropriate.

239. The Office, however, agreed that some information in the concerned clauses had not been made available to the public. If such information was disclosed, it might indeed affect the Government's negotiation position or the financial position and operations of the revitalisation projects. The Office thus considered DEVB's refusal to disclose such information not unreasonable.

Paragraph 2.18(b) of the Code

240. The Office noted that it was stipulated in both tenancy agreements that the Government had the right to disclose information with regard to the agreements to other parties concerned, under the conditions including but not limited to answering questions from the Legislative Council (LegCo). With this clause in the tenancy agreements, the organisations in charge of the two revitalisation projects should have reasonably expected that there might be occasions on which the Government would disclose the information and content of the tenancy agreements to the public. As such, the Office did not agree that the Government had an absolute duty of confidentiality with regard to the two tenancy agreements concerned.

Overall comments

241. As the two tenancy agreements concerned were commercial contracts in nature, this might lead people to perceive that the information contained therein was confidential commercial information that was non-

disclosable. Actually, the content of tenancy agreements is not necessarily non-disclosable.

242. Firstly, the tenancy agreements concerned involved two major revitalisation projects. The Government had already made available to LegCo and the public some of the major clauses and they were no longer confidential. Secondly, the tenancy agreements concerned contained a number of general terms of obligations commonly seen in tenancy matters, e.g. tenants should pay rent on time, maintain the properties in good condition, etc. As these clauses were not unique or sensitive commercial information, their disclosure was unlikely to cause any harm or prejudice.

243. Besides, the two revitalisation projects have attracted much public attention. Disclosure of the content of the tenancy agreements concerned was apparently in the public interest as it would enable the public to know more about and monitor the Government's implementation of the projects.

244. Overall speaking, the Office considered that the two tenancy agreements were not totally non-disclosable. As such, DEVB's refusal to disclose to the complainant (through his assistant) all the content of the two tenancy agreements concerned was not appropriate.

245. In light of the above, The Ombudsman considered this complaint substantiated, and recommended that DEVB re-consider carefully which parts of the two tenancy agreements should not be disclosed under the Code and provide the complainant with a copy of the remaining parts of the tenancy agreements.

Government's response

246. DEVB accepted The Ombudsman's recommendation and has re-examined which parts of the two tenancy agreements should not be disclosed under the Code. After seeking legal advice and the views of the organisations in charge of the two revitalisation projects, DEVB provided the complainant with a copy of the remaining parts of the two agreements on 28 October 2020.

Government Secretariat - Education Bureau

Case No. 2018/4581 – Failing to offer proper assistance in handling the complainant's dispute with a school on the provision of some records of a student with special educational needs

Background

247. On 16 November 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Education Bureau (EDB).

248. The complainant's son was an 8-year-old student of an aided ordinary primary school (the School) at the material time. He had attention deficit / hyperactivity disorder (AD/HD) symptoms and needed to attend medical check-ups at a hospital of the Hospital Authority (HA) from time to time. To facilitate the medical check-ups, the hospital required the School to complete a checklist of Strengths and Weaknesses of AD/HD Symptoms and Normal Behaviour (SWAN Checklist) for him, indicating the scores of his behaviour, and send it to the hospital via the parents / guardians. However, the school returned the SWAN Checklist direct to the hospital.

249. In order to better understand the needs of her son before the medical check-up in January 2019 and to facilitate enrolment of relevant services provided by other organisations, the complainant asked the School in May 2018 for a copy of the SWAN Checklist completed by the teacher in the same month for reference but to no avail. The complainant then approached different sections of EDB for assistance but the issue remained unresolved.

250. Against this background, the complainant complained against EDB for failing to offer proper assistance, in particular, failing to provide records of her son's behaviour inputted by the School in EDB's Special Education Management Information System (SEMIS) and failing to arrange mediation meeting between the complainant and the School to resolve the dispute.

The Ombudsman's observations

251. EDB has provided guidelines on handling records of students with Special Educational Needs (SEN) in the "Operation Guide on the Whole School Approach to Integrated Education". While the student concerned / parent / guardian has the right to request access to personal data in relation to the student or to obtain a copy of the student's assessment report, the personal data should be protected in accordance with the Data Protection Principles as given in the Personal Data (Privacy) Ordinance (Cap. 486) (PDPO). EDB's School Administration Guide requires the schools to set up school-based policy for handling student records and access to those records. Under the school-based policy, EDB did not intervene into the school's policy regarding the types of personal data to be released to parents / guardians, as long as the policy complied with PDPO.

252. The requested personal data involved the SWAN Checklist, which was one of the screening instruments for students with SEN. According to HA, the SWAN Checklists were intended to obtain the teachers' assessments on the patient's behaviour and abilities at school.

253. Since receipt of the complaint in June 2018, EDB had been rendering various assistance to the complainant, including explaining EDB's guidelines on handling students' data and practices of administration of the SWAN Checklist, replying to her enquiries, urging the School to follow up on her enquiries aptly for better home-school communication, and arranging mediation meeting between the complainant and the School.

254. Having considered all the information available, the Office considered EDB to have, in general, offered necessary assistance to the complainant in liaising between her and the School with a view to resolving the dispute between them. Also, the Office saw no reason to doubt that the School did not have the requested information, nor did it keep a copy of the SWAN Checklist, as under the current policy, the School was not required to enter such information into SEMIS.

255. However, the Office considered EDB's grounds[8] for defending the School's arrangement on the transfer of the SWAN Checklist not justified. As mentioned, the student concerned / parent / guardian had the right to request access to personal data in relation to the student or to obtain a copy of the student's assessment report. As the information under request (the SWAN Checklist) contained personal data of the complainant's son, she had the right to obtain such information. The Office noted the School's current arrangement with the hospital for the SWAN Checklist to be sent to the hospital direct instead of via the parent concerned. However, the Office also noted that there was a label on the SWAN Checklist stipulating the following –

> "請填寫夾附的問卷，以作病人治療之用。
> *如對問卷有疑問，請致電 xxxx xxxx
> (xxxxxxxxx 醫院精神科門診部)
> *填完後，請託家長於下次覆診時交回門診部
> 多謝合作
>
> 門診部醫生示"

256. In response to EDB's concern[9] on releasing such data to the parents, the Office had further inquired HA, the copyright owner of the SWAN Checklist. HA did not object to the School making a copy if the parents / caregivers made such a request, as it was the assessment of a students' behaviour and abilities at school, and HA expected the School would keep records of these information for monitoring the student's learning and development progress. It was not a mandatory requirement to have the SWAN Checklist sealed before they were passed to the parents for returning to the hospital. Given that parents / caregivers' understanding and participation was important for effective clinical care and outcome, they would be explained of the information related to the assessment and clinical management of the patient. In the discussion with the parents / caregivers, doctors would often explain the findings from these

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[8] The EDB considered that the School completed the checklist as requested by the hospital. It should be for the hospital to decide how the checklist should be returned and whether it would benefit the parent if the checklist was returned via the parent. In this case, the School concerned had already agreed with the hospital concerned that the School could return the checklist to the hospital direct. EDB therefore was not in a position to query the agreed arrangement between the hospital and the School.

[9] SWAN Checklist is a screening instrument for children with AD/HD and is used by eligible professionals in research and clinical work. Hence, it is the legitimate responsibility of the professionals concerned to interpret the data obtained from this instrument with due consideration of clinical observation and other essential information about the children concerned. It is also understandable that the School concerned had not made any copy of the SWAN Checklist completed by the teachers as it contains personal data and it is stated clearly in the checklist that no reproduction is allowed without permission. Notwithstanding that, parents can directly request a copy of the assessment findings from the professionals concerned.

questionnaires or even show the filled questionnaires to help in the explanation on the patient's condition and management plan. If HA was asked to provide such information, it would process such requests in accordance with the prevailing application procedures. The above responses showed clearly that HA did not share EDB's concerns on the release of such data to the parents / guardians.

257. Although EDB considered it not necessary to drill down to the practice of individual institutions, the Office considered EDB's stance in supporting the School's arrangement (i.e. not to disclose the content of the SWAN Checklist to the parents) without seeking the views of HA problematic. The professional views the Office had obtained from HA above suggested that the School's current arrangement might deprive the complainant of her opportunity to understand her son's behaviour earlier and prepared for a more fruitful discussion with the HA doctors on how her son should be treated and managed. It might also prejudice her son's interest to receive appropriate services from other organisations.

258. The Office did not dispute that the SWAN Checklist should be interpreted by professionals. The point at issue was whether letting a parent had sight or a copy of the SWAN Checklist was in the child's interests. In this connection, HA had confirmed that it was.

259. The interests of students should be a paramount consideration. When a parent sought help from EDB after failing to obtain from school a copy of a checklist concerning his / her child, it was incumbent on EDB to find out from HA whether giving the parent a copy was in the interests of the student and then advised the school concerned accordingly. The Office did not think that the principle of school-based management should stop EDB from giving that advice.

260. In this connection, EDB should have tried to find out what was in the best interests of the complainant's son. Instead, EDB trumped up a reason for not letting the complainant have a copy of the SWAN Checklist and refused to advise the School even after the Office informed them of HA's opinion. This was EDB failing its duty. It was unacceptable.

261. In view of the above, the Office considered the complaint partially substantiated.

262. The Ombudsman recommended that EDB should take account of HA's view, and advise all schools not to deviate from the recommended procedures and return the SWAN Checklists to hospitals via parents / guardians, so that parents / guardians would have access to the data on the SWAN Checklists.

Government's response

263. EDB accepted The Ombudsman's recommendation.

264. In response to The Ombudsman's recommendation, EDB has liaised with HA on the revised procedures and noted that HA has confirmed with the Office that hospitals would give a notice to inform schools to return the SWAN Checklist to clinics either through the parents in a sealed envelope or by the schools directly. The Office considered that EDB has implemented the recommendation on the basis that the revised procedures were recommended by HA. HA confirmed that it had no objection to parents / guardians accessing the data on the SWAN Checklist and schools' copying of it for parents / guardians upon their request. In following up the revised procedures, EDB has approached HA to revise or delete the wording "版權所有 不得翻印" on the SWAN Checklist; otherwise schools will still seek agreement of HA case by case to avoid the violation of PDPO. While this matter is being followed up, EDB has updated the internal guidelines to advise schools on parents'/guardians' right to access the information when they handle the SWAN Checklist.

Government Secretariat - Education Bureau

Case No. 2018/4972 – Delay in providing hearing aid fitting services for the complainant's son with hearing impairment

Background

265. On 10 December 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Education Bureau (EDB) for its alleged delay in providing her son with hearing aid fitting services.

266. In early September 2018, the complainant's son (being 17 months old at the time) was assessed as having moderate hearing impairment (HI) by one of the Child Assessment Centres (CAC) under the Department of Health (DH). DH referred him to EDB for the hearing aid fitting and related services (fitting services), so that a hearing aid would be fitted for him.

267. The complainant learned from the CAC and EDB that the latter usually took one month to fit a hearing aid for a child. Nevertheless, when she took her son to EDB for the fitting services in early October 2018, a staff told her that EDB was in the process of changing the service supplier and the relevant services were temporarily suspended. In December 2018, the complainant made an enquiry with EDB again, but was told that EDB had yet to reach an agreement with the supplier, and the fitting services could not be provided for the time being.

268. In January 2019, EDB already resumed the fitting services. It started purchasing ear mould modelling and hearing aid fitting services from a related non-governmental organisation (NGO) in early January, and started leasing in mid-January the audiology centre of Queen Elizabeth Hospital under the Hospital Authority (HA), where the fitting services were provided for children by EDB's audiologists.

269. During the four months of suspension of the fitting services between 1 September and 31 December 2018, EDB received 47 new cases and 18 old cases requiring replacement hearing aids. Among these cases, 10 new cases received in September 2018 were handled by EDB's supplier under the previous fitting services contract with the residual contract value. After resumption of the fitting services in January 2019, EDB further referred seven new cases with urgent needs (including the complainant's

son) to the NGO in early January, and arranged for 30 new cases and 18 old cases to receive the fitting services at Queen Elizabeth Hospital's audiology centre in mid-January.

270. The complainant's son was offered ear mould modelling services by the NGO on 15 January 2019, and had a hearing aid fitted on 19 February.

271. Concurrently, EDB found that there were few suppliers engaging in hearing aid fitting services at the material time, and outsourcing could not ensure a steady supply of fitting services. Therefore, EDB decided to discontinue outsourcing the fitting services. In early April 2019, EDB reopened its audiometric assessment room and reverted to direct provision of the fitting services. EDB also ceased purchasing ear mould modelling and hearing aid fitting services from the NGO, and its lease of Queen Elizabeth Hospital's audiology centre terminated after late June 2019.

The Ombudsman's observations

272. Hearing impairment would affect children's learning and development. Early fitting of hearing aids for them can minimise the impact. Hence, the fitting services are essential and should not be delayed.

273. EDB was well aware that the previous contract for the fitting services was due to expire at the end of August 2018. When vetting of the tender documents had not been completed by mid-2018, EDB should have realised that the services might be disrupted. In fact, the tender opened by EDB in early August would not be closed until mid-September. Given the lead time between the close of tender and award of a new contract, the services would be suspended for at least a month. However, EDB did not start adopting and studying contingency measures until late August. Since it took time to study and implement such measures, apart from a small number of cases being handled by the supplier under the previous contract with the residual contract value, the overall services were only resumed in January 2019, after suspension for four months from 1 September to 31 December 2018.

274. In the Office's view, EDB failed to formulate contingency measures soon enough when it had foreseen the inevitable disruption to the fitting services. Consequently, the fitting of hearing aids for 55 children (i.e. 37 new cases, including the complainant's son, and 18 old cases) had

to be deferred, resulting in their learning and development being unnecessarily affected. EDB could hardly escape the blame.

275. Moreover, EDB had extended the tender period but still received only one submission that did not meet the tender requirements, leading to cancellation of the tender. When EDB switched to inviting quotations, it had to make adjustments due to lack of response, but the only quotation received thereafter far exceeded its cap on procurement value. Such incidents reflected EDB's lack of market knowledge and insufficient preparation before the tender exercise. It was not until the services were suspended that EDB realised the number of suppliers engaging in hearing aid fitting services was too small to ensure steady services. Eventually, EDB reverted to direct provision of the services. This showed that EDB had not been fully aware of the necessary preparatory work required for the tender exercise.

276. In light of the above, The Ombudsman considered the complaint substantiated, and urged EDB to –

(a) closely monitor the operation of the new arrangements and, in case any flaws are identified, adopt remedial measures promptly, so as to avoid any further undesirable effect on the children in need; and

(b) provide staff responsible for tender exercises with proper training to prevent recurrence of similar incidents.

Government's response

277. EDB accepted The Ombudsman's recommendations.

Recommendation (a)

278. Starting from 14 January 2019, EDB has rented the hearing centre of the Queen Elizabeth Hospital and arranged the audiologists of EDB to provide the fitting services to children in need at that centre. This was accompanied by the full resumption of the fitting services provided by EDB. At the same time, EDB has equipment installed for the audiological examination chambers of the EDB Kowloon Tong Education Services Centre. Since early April 2019, EDB's audiologists have been directly providing the fitting services for children at the audiological examination chambers.

279. Under the above arrangement, EDB would contact the parents within five working days upon receipt of new referrals, and the audiologists would in general meet the parents within two weeks. For new cases requiring hearing aids, the audiologists would make an earmould impression for the child during the first intake interview, and arrange for hearing aid fitting when the child's earmould is ready. For children who use open-fit hearing aids and do not require earmoulds, the audiologists would immediately fit them with hearing aids during the first intake interview. In other words, the new service arrangements save parents the time to make appointments with the service provider themselves, enabling children to receive the fitting services earlier. Basically, if parents attend the appointments as scheduled, EDB can complete hearing aid fitting for their children in about four to six weeks.

280. In addition, the Speech and Hearing Services (SHS) Section and the Supplies Section of EDB will maintain close contact to ensure timely procurement arrangements for the fitting services (such as procurement of hearing aids and outsourcing of earmould production).

281. EDB has been closely monitoring the operation of the new arrangements since the resumption of the fitting services. Also, parents have been invited to complete questionnaires so that EDB can understand their level of satisfaction with the current services. In addition, to ensure its quality of the fitting services as well as their compliance with international standards, EDB has invited local and overseas experts to serve as consultants and provide professional advice on the fitting services for continuous service enhancement.

Recommendation (b)

282. EDB has arranged its staff to participate in training courses on tendering and procurement. EDB will continue to pay attention to the operational needs of staff and arrange appropriate training. In addition, staff of the SHS Section and the Supplies Section will maintain close contact in respect of procurement matters to ensure that procurement and outsourcing for the fitting services will be conducted in an appropriate and timely manner.

283. Apart from the above, EDB, the Food and Health Bureau and HA have reached consensus to jointly improve the hearing aid fitting services for children with HI.

284. Starting from the 2019/20 school year, HA has provided one-stop follow-up service for children in need of hearing aids in addition to cochlear implants / implantable hearing aids, while EDB provides the fitting services for children in need of hearing aids only. Children are no longer required to approach HA and EDB separately for service.

285. Furthermore, HA has streamlined the referral procedures so that children who are assessed to be in need of hearing aids can be referred to EDB for the fitting services in a timely manner. With the cooperation of all parties concerned, the efficiency in providing the fitting services for children with HI will be gradually enhanced.

Government Secretariat - Education Bureau

Case No. 2019/3627(I) – Unreasonably refusing to provide the membership list of the Working Group on Review of School Nets, and minutes of meetings of the Working Group and the Secondary School Places Allocation Committee with discussion on relevant issues

Background

286. The complainant made a request to the Education Bureau (EDB) for the membership list of the Working Group on Review of School Nets (Working Group), and the minutes of meetings of the Working Group and the Secondary School Places Allocation Committee (the Committee) that covered discussions on relevant issues. But EDB refused to provide such information on the grounds of paragraph 2.10(b)(ii) (i.e. inhibiting the frankness and candour of discussion within the Government) of Part 2 of the Code on Access to Information (the Code). The complainant considered EDB's justification for refusal unreasonable and lodged a complaint with the Office of The Ombudsman (the Office) on 12 July 2019.

The Ombudsman's observations

287. The Office stated that according to the Code, government departments should, in response to a request, disclose information in their possession where possible unless there are specific reasons for not doing so, and these specific reasons are set out in Part 2 of the Code. If a request is refused, government departments should as far as possible give reasons for refusal in accordance with the provisions in Part 2 of the Code.

288. Regarding the request for the minutes of meetings of the Committee and the Working Group, EDB invoked paragraph 2.10(b)(ii) of the Code as the reason for refusal. As stated in that paragraph, government departments may refuse a request if disclosure of the requested information would inhibit the frankness and candour of discussion within the Government, and advice given to the Government. According to paragraph 2.10.3 of the Guidelines on Interpretation and Application (Guidelines) of the Code, civil servants involved in the decision-making process should be able to express views and tender advice without being concerned that these views and advice will be subject to public debate and criticism. The same considerations apply to discussion, opinions, advice, etc., tendered by members of the Government's advisory bodies. After

examining the relevant minutes of meetings, the Office agreed that disclosure of the information in question may indeed inhibit the frankness and candour of discussion within the Committee and the Working Group.

289. Moreover, paragraph 2.10.4 of the Guidelines specifies that "this provision does not authorise the withholding of all such information – only to the extent that disclosure might inhibit frankness and candour. Thus, for example, information on the views or advice of an advisory body, consultant or other individual or group may be divulged if there is no such risk. In this connection, it would be prudent and courteous to seek the views of individual advisory bodies, etc. on the extent to which they would wish their advice, etc., to be regarded as confidential".

290. As regards the reason for refusal, EDB indicated that discussion of the relevant issues would inevitably involve sensitive information and touch on the varying concerns and demands of the sector and other stakeholders. It further pointed out that all along, issues and relevant information deliberated at the Committee meetings had been handled in accordance with the principle of confidentiality, while the minutes of meetings had been provided for members' perusal as "Restricted" documents without being released to the public. According to the internal "Procedural Guide" of the Committee, members may divulge the decisions agreed in the meetings of the Committee to the principal associations / school councils / associations / participating schools in individual school nets they represent; while the Chairperson, the Vice-chairperson and the Secretary are the official spokespersons of the Committee to release the decisions made in the meetings of the Committee to outside bodies. In other words, members could only inform the associations / bodies they represent of the decisions made in the designated manner. For unresolved issues or the course and details of deliberations, it was an established practice of the Committee not to disclose such information so as to ensure that members could express their views candidly. For the Working Group, it also had its own "Rules of Meeting", which clearly stated, among others, members should comply with the principle of confidentiality and refrain from disclosing any views expressed at the meetings. As far as this case is concerned, the Office was of the view that the Committee had prior consensus with the Government that the discussion of the meetings should be kept in strict confidence.

291. Based on the observations above, the Office did not consider EDB's refusal to provide the requested minutes of meetings to the complainant unreasonable.

292. As to whether the membership list of the Working Group could be disclosed, EDB explained that as the Working Group was disbanded in 2012 and its members had retired or left their affiliated associations one after another, EDB has not been able to ask the members about their willingness to have their membership disclosed to the public. The Office found it hard to agree with this position. The Office understood that the membership list of the Working Group involved personal data of individuals. However, according to paragraph 2.15(b) of the Code, if the subject of the information has given consent to its disclosure, departments are not supposed to refuse disclosure of the information by invoking the same paragraph. The Office opined that members of the Working Group, upon accepting EDB's appointment as a holder of public office, should be reasonably expected to embrace openness to support the disclosure of such a capacity to the public. If EDB had not obtained prior explicit or implicit consent from members of the Working Group to the disclosure of their names, in the Office's opinion, EDB should ask the members individually about their willingness before making a decision as to whether such information should be disclosed. Though some members might be out of reach due to retirement or departure from the original affiliated associations, they might still be serving on other advisory groups in the education sector, and therefore it should not be difficult for EDB to get in touch with them. It was unreasonable that EDB had not tried to contact the members of the Working Group to ask about their wish.

293. The Office referred to paragraph 1.16 of the Code, which specifies that where possible, information will be made available by government departments within ten days (calendar days) of receipt of a written request. If that is not possible, the applicant will be so advised by an interim reply within ten days of receipt of the request. The target response time will then be twenty-one days from receipt of the request. Paragraph 1.18 of the Code also specifies that response may be deferred beyond twenty-one days only in exceptional circumstances, which should be explained to the applicant.

294. The Office highlighted that the complainant made a request for the information on 25 February 2019, and EDB did not give him a reply until 22 May 2019. There was a lapse of nearly three months, which exceeded the response time limit stipulated in the Code. While EDB explained that the complainant had kept sending it letters to make numerous enquiries (including the request for the information in question) since January 2019 and it was EDB's plan to furnish a consolidated reply, it was, after all, clear that the actual lapse of time exceeded the response time limit stipulated in the Code. In addition, EDB failed to include in its

reply information about the avenue of internal review and the option of lodging a complaint, as required by the Code. In short, EDB did not handle this case in full compliance with the Code, and there were procedural inadequacies that needed to be addressed.

295. Based on the above analysis, the Office considered the complaint against EDB about its refusal to disclose the membership list of the Working Group partially substantiated.

296. The Office reiterated that under normal circumstances, members of the Working Group, upon accepting EDB's appointment as a holder of public office, should be reasonably expected to embrace openness to support the disclosure of such a capacity to the public. Should individuals take up an official appointment but insist on keeping such a capacity confidential, this would undoubtedly undermine the credibility of the advisory groups they serve on and the Government's decision in the related policy area. Therefore, The Ombudsman considered that it should be a norm to have a membership list disclosed.

297. The Ombudsman recommended that EDB –

(a) try to get in touch with members of the Working Group and ask about their willingness to disclose their names to the complainant, and make such a disclosure if consent is obtained;

(b) give prior notification to prospective members that their names would be made public when setting up working groups in future; and

(c) strengthen staff training to ensure their strict compliance with the Code and the Guidelines.

Government's response

298. EDB accepted The Ombudsman's recommendations.

Recommendation (a)

299. EDB subsequently contacted members of the Working Group. Of those in touch, only one gave consent to the disclosure of his / her name. After taking into account the views of the majority, EDB considered that

it was not appropriate to disclose the membership list of the Working Group to the complainant.

Recommendation (b)

300. EDB has agreed that under normal circumstances, it is fine to inform prospective members that their names will be made public when setting up working groups. However, if sensitive issues are to be discussed by individual working groups, disclosure of members' identity may possibly lead to excessive publicity and hence expose members to nuisances. Such an arrangement may discourage interested individuals from joining the working groups, and in turn affect the prevailing operation of the Government. Nevertheless, EDB has circulated the relevant recommendation for the reference of various divisions / sections, with a view to taking it forward when circumstances allow.

Recommendation (c)

301. As always, EDB is committed to raising the awareness of the Code among its staff. Internal circulars on the Code and the Guidelines are circulated regularly to ensure staff's full understanding of and strict compliance with the Code.

302. On the related recommendation of the Office, EDB has immediately circulated the relevant information among the staff working in the sections concerned to ensure that the responsible officers have a good understanding of the application and the spirit of the Code. Moreover, EDB will organise workshops on the Code so that its staff can learn more about the details and provisions of the Code through case sharing and question-and-answer sessions.

Government Secretariat - Innovation and Technology Bureau (the Efficiency Office) and Lands Department

Case No. 2018/4419 and 2018/4793A – Shirking responsibility when following up a request for modification of a pavement railing close to the boundary of a village resite

Background

303. On 6 November 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against 1823, the Lands Department (LandsD) and the Architectural Services Department (ArchSD). According to the complainant, he sent an email to the Highways Department (HyD) via 1823 on 24 July 2017, enquiring whether a barrier-free space could be provided in the middle of the pavement railing close to the boundary of a village resite to facilitate access by wheelchair users as well as persons loading and unloading goods. After that, 1823 referred his case to LandsD and ArchSD for follow-up actions. The complainant was dissatisfied with 1823 for the absence of a definite reply as to which government department was responsible for taking care of the railing even by the time he lodged the complaint with the Office. In addition, his case was left unhandled after 1823's reply of 13 February 2018, informing the complainant that the case had been referred to ArchSD. The complainant considered that the government departments concerned were shirking responsibilities.

The Ombudsman's observations

Comment on 1823

304. When the Transport Department (TD) and LandsD refused to take up the case, 1823 did request the responsible officers of the two departments to review the case on 26 October 2017 according to the established mechanism. Thereafter, the Water Supplies Department also refused to take up the case in early November 2017. Both TD and LandsD did not respond to the request for review within the time frame. The demarcation of duties was still unclear after the complainant had brought up the case for more than three months, and 1823 should have escalated the case to the liaison officers of the relevant departments to identify the responsible department as soon as possible. However, 1823 only escalated the case in mid-January 2018 when LandsD again refused to take up the

case. Subsequently, the departments involved reiterated their responses that the case was not within their purview. 1823 did not escalate the case further to the complaint officers of the departments in accordance with the mechanism, but only consulted the Home Affairs Department.

305. After ArchSD first received 1823's referral with respect to this case on 13 February 2018, it informed 1823 on 21 February that the department would liaise with LandsD to ascertain the location of the railing (because ArchSD was responsible for the maintenance works of railings within the area of village resite). ArchSD then informed the complainant of its follow-up actions, and requested 1823 to refer the case to LandsD for coordination and necessary follow-up. However, 1823 neither referred nor followed up the case (before the Office's intervention). Despite the Efficiency Office's (EffO's) explanation that 1823 honestly believed the relevant department had confirmed that it would follow up the case and had replied to the complainant, the Office considered the case obviously not completed at that juncture. The complainant was only partially informed of the follow-up actions taken by the department and no substantive reply was provided (whether the department agreed to make an opening in between the railing). It was inappropriate for 1823 to cease following up the case. 1823 only escalated the case to the complaint officers of the departments concerned after the complaint was referred by the Office. By that time, the complainant's case had been dragged on for nearly 17 months. Therefore, The Ombudsman considered the complaint against 1823 substantiated.

Comment on LandsD and ArchSD

306. After the case referral from 1823, it took LandsD for more than a month in advising 1823 that the case fell outside its purview. The delay was rather unsatisfactory.

307. On the other hand, the Water Services Department (WSD), which held a simplified Temporary Land Allocation (STLA) for an engineering contract in the area, pointed out that the railing in question had nothing to do with its engineering contract. LandsD's repeated claims that the case should be followed up by WSD was questionable. According to a relevant technical circular, LandsD is responsible for delineating the boundary of a village resite and coordinating maintenance responsibilities within the village resite. In this case, LandsD should consider whether the requested works should be referred to ArchSD (which is responsible for maintenance works of railings within village resites), depending on whether the railing falls within the village resite. In addition, after a site inspection, ArchSD

also advised the relevant District Lands Office (DLO) in accordance with the technical circular concerned to follow up and reply to 1823. DLO should have taken early actions to identify the responsible department for the railing concerned, instead of allowing the case to remain unattended. In view of the above, The Ombudsman considered the complaint against LandsD substantiated, whilst the complaint against ArchSD unsubstantiated.

308. The Ombudsman recommended that –

(a) 1823 should closely monitor the progress of cases, invoke the escalation mechanism and to further escalate in a timely manner. It should not cease following up a case until it is certain that an appropriate department has taken up the case and a reply has been given to the caller;

(b) LandsD should provide prompt replies to the cases referred by 1823 to avoid delays in following up public requests / complaints;

(c) When handling similar cases, LandsD should take immediate actions to clarify the boundary of a village resite and the department(s) responsible for the works concerned. LandsD should also ascertain the department(s) responsible for the works concerned to avoid delays in case handling as a consequence of confused responsibilities or mistaken referral; and

(d) LandsD should ascertain without delay the department responsible for the future repair / maintenance of the railing in question.

Government's response

309. EffO and LandsD both accepted The Ombudsman's recommendations.

EffO

310. EffO formulated some improvement measures, which have been fully implemented. Details are as follows –

(a) 1823 has reminded its staff to monitor each case closely and invoke the escalation mechanism, as well as to further escalate as necessary in a timely manner. 1823 has assigned supervisors of its Complaint Handling Team to monitor the handling of cases to ensure compliance by frontline staff; and

(b) 1823 has reminded its staff that they should not cease following up a case until it is certain that an appropriate department has taken up the case and a reply has been given to the caller.

311. EffO has also included the above two key points in the training of new staff and given regular reminders to staff to prevent the recurrence of similar incidents.

LandsD

312. LandsD has taken the following follow-up actions –

(a) LandsD has reminded its staff in DLOs that complaints referred by 1823 should be handled in a timely manner, in order to avoid delays in following up public requests / complaints;

(b) LandsD has reminded DLOs to note the responsibilities of LandsD and other relevant departments under the relevant technical circular on maintenance responsibilities for village resite / expansion areas, and requested DLOs to prepare a complete list of villages in their village resite / expansion areas, together with a master plan showing their village boundaries and locations. It would facilitate early determination of whether a complaint involves a village resite / expansion area and which department is responsible for the works concerned, so as to avoid delays in case handling as a result of confused responsibilities or mistaken referral; and

(c) LandsD has confirmed with HyD that the subject railing was located along a public footpath off the village resite area concerned. Hence, the repair / maintenance of the railing should fall within HyD's purview.

Government Secretariat – Security Bureau

Case No. 2019/1472(I) – Refusing to disclose the written submissions received by the Government on the proposed amendments to the Mutual Legal Assistance in Criminal Matters Ordinance and the Fugitive Offenders Ordinance

Background

313. On 14 March 2019, the complainant requested the Security Bureau (SB) under the Code on Access to Information (the Code) to disclose about 4 500 written submissions (the Requested Information) received on the proposed amendments to the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) and the Fugitive Offenders Ordinance (Cap. 503) (the Proposed Legislative Amendments). On 3 April, SB refused the complainant's request pursuant to paragraph 2.14(a) of the Code (third party information). The complainant was dissatisfied that SB had refused to disclose the Requested Information. On 10 April, he complained to the Office of The Ombudsman (the Office) against SB.

The Ombudsman's observations

314. The Office considered that the Government should conduct public consultation in an open and transparent manner as far as possible, especially when the subject of consultation is an issue of wide public concern and controversy. Disclosing the views collected can help the public genuinely and comprehensively understand the reasons for and against the issue submitted by the respondents. It can also demonstrate that the Bureau's subsequent analysis and summarisation are fair and have solid grounds. This is a measure of good public administration, and a common practice. Since the Bureau understood that the surrender of fugitive offenders was an issue of significant public concern and was also aware of the tight timeframe, it was even more crucial to state at the time of conducting the public consultation on the Proposed Legislative Amendments that all submissions received would be disclosed in their entirety. It would have helped the public better understand the views of various community sectors on the Proposed Legislative Amendments, and saved the time and effort of subsequently seeking consent from individual respondents.

315. SB explained that it did not state at the time of conducting the public consultation on the Proposed Legislative Amendments that it might disclose the submissions received, it will have to allocate extra resources to seek the consent of individual respondents if the Requested Information is to be partially disclosed now. That would arguably involve unreasonable allocation of resources. In any event, the Government already issued a press release on 4 September 2019, announcing that it would formally withdraw the Fugitive Offenders Bill. The work in relation to the Proposed Legislative Amendments was fully halted. In such circumstances, it is pointless to insist that SB should contact all the respondents who are traceable, or disclose the Requested Information after obliterating all personal data or certain sentences / words from each of the 4 500 submissions. Besides, SB has reviewed the matter to prevent recurrence of the mistake.

316. In light of the above, The Ombudsman considered this complaint substantiated and recommended that SB –

(a) take reference from this case and strictly comply with the Code in handling the public's request for information in future; and

(b) ensure that when conducting public consultation in future, it will be stated in the consultation paper that the submissions and identities of all respondents might be disclosed unless the respondents clearly express objection.

Government's response

317. SB accepted The Ombudsman's recommendations. SB has taken reference from this case and put in place measures to ensure that when conducting public consultation in future, it will be stated in the consultation paper that the submissions and identities of all respondents might be disclosed unless the respondents clearly express objection.

Government Secretariat – Transport and Housing Bureau and Transport Department

Case No. 2019/0180A and 2019/0180B – Failing to take effective measures against illegal carriage of passengers for reward by motor vehicles

Background

318. The complainant alleged that the Government's effort in combating the illegal carriage of passengers for hire or reward by motor vehicles (commonly known as "pak pai vehicles") was insufficient. As "pak pai vehicles" are illegally operated, their third party risks insurance will be invalid which will not be able to provide protection for their passengers and other road users. Furthermore, "pak pai vehicles" would induce unfair competition against the law-abiding land passenger transport service operators. Because of the above, the complainant was dissatisfied with Transport and Housing Bureau (THB) and Transport Department (TD) in not taking effective deterrent measures to combat the activities in relation to illegal carriage of passengers for hire or reward as well as not responding positively to the suggestions made by the transport trades on eradicating "pak pai vehicles", such as increasing penalties through legislative amendments and reviewing the related policy. On 17 January 2019, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against THB and TD.

The Ombudsman's observations

319. Under the existing legislation, the carriage of passengers for hire or reward by use of light goods vehicles and private cars without a hire car permit is illegal and may invalidate the third party risks insurance taken out for such vehicles. Not only does it deprive the drivers and passengers of protection, it also undermines the rights and protection of other road users.

320. The Police are responsible for law enforcement on "pak pai vehicles", and TD has been passing the information obtained from the reports from the public to the Police for follow-up. The number of enforcement actions taken by the Police in the first quarter of 2019 against illegal carriage of passengers by private cars and light goods vehicles increased significantly when compared to the annual figures of the past

few years. Apart from liaising with the Police on law enforcement, THB and TD have put in place a number of measures against illegal carriage of passengers for hire or reward, such as stepping up education and publicity measures, proposing legislative amendment to increase the penalties, improving the existing mechanism to facilitate new operators to join the market, enhancing the service quality of taxi, etc. In conclusion, the Office considered the complaint unsubstantiated as THB and TD have proactively followed up on the issue under the existing legislation and regime.

321. However, as reflected from the popularity of online car hailing service, there is a demand for high-end personalised transport service. The online car hailing service mode allows citizens to book the car service in a more convenient manner, and more importantly, they can evaluate the service quality more easily and directly, which is beneficial to the monitoring of the service quality. It transpires that the traditional operational mode of taxi could no longer address the needs of all passengers and many of them are willing to pay more in exchange for a higher service quality. Therefore, to tackle the problem of "pak pai vehicles" in the long run, the Office considered that the Government should adjust the current policy by introducing a new transport service operating mode and a corresponding regulatory regime in order to meet the new trend.

322. In addition, the number of hire car permits for private hire car service issued by TD (ranging from 631 to 868 in the past four years) only accounts for 42%-58% of the statutory limit (1 500). Therefore, TD still has room to appropriately increase the number of hire car permits under the current legislation to meet the market demand for such services.

323. The Ombudsman recommended that THB and TD –

(a) continue to closely collaborate with the Police in assisting their law enforcement work on combating "pak pai vehicles";

(b) expedite the work of amending the Road Traffic Ordinance (Cap. 374) (the Ordinance) for increasing the penalties for illegal carriage of passengers for hire or reward;

(c) review existing policy and consider the feasibility of regulating online hailing hire car services; and

(d) consider issuing more hire car permits for private hire car service to meet the market demand for such services.

Government's response

324. THB and TD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

Recommendation (a)

325. To combat illegal carriage of passengers for hire or reward by motor vehicles, TD has been working closely with the Police by proactively referring suspected cases breaching section 52(3) of the Ordinance (concerning the use and hire of vehicles) to the Police and, on the Police's request, providing relevant vehicle information to the Police for investigation. TD will continue to work closely with the Police in combating the illegal carriage of passengers for hire or reward by motor vehicles.

Recommendation (b)

326. With the general support of the Legislative Council (LegCo) Panel on Transport, the Transport Advisory Committee and the relevant transport sector, the Government has commenced the legislative amendment exercise to increase the penalties for illegal carriage of passengers for hire or reward by motor vehicles under the Ordinance. The maximum fine is proposed to be increased from the current $5,000 for first conviction and $10,000 for subsequent conviction(s) to $10,000 and $25,000 respectively, while the period for the temporary suspension of vehicle licence and impoundment of vehicles is proposed to be lengthened from the current 3 months for first conviction and 6 months for subsequent conviction(s) to 6 months and 12 months respectively. The Government has been pressing ahead with the legislative amendment work and plans to introduce the Bill into LegCo for scrutiny in due course.

Recommendation (c)

327. The Government encourages the application of different types of technology, including the use of the internet or mobile applications for hailing hire cars, provided that the existing laws and regulations are abided by in order to protect the interests and safety of passengers, and to ensure the effective use of roads as well as the efficient, reliable and long-term healthy development of the public transport system which is being used by over 90% of the commuters.

328. Under the "Public Transport Strategy Study" which was completed in June 2017, the Government conducted a comprehensive review on personalised and point-to-point transport services and recommended a two-pronged approach to enhance the services. On the one hand, the Government will continue to enhance the service quality and operating environment of existing taxis. On the other hand, the Government proposes to introduce franchised taxis to meet the new demand in the community for personalised and point-to-point public transport services of higher quality and with online hailing features.

329. As compared with the existing illegal online hailing hire car services, the franchised taxis proposed by the Government will be one form of public transport service. The number, service, fares as well as drivers' quality of franchised taxis will be regulated by the Government. This will provide better protection, more assured service quality and more transparency on the fares to the passengers. The impact on road traffic is also easier to anticipate. From transport policy perspective, franchised taxis can provide an additional choice for passengers, and facilitate the planning and development of the public transport system in an orderly manner. In light of the above, the Government considers that introducing franchised taxis is a more practical option that can meet the new demand in the community for personalised and point-to-point public transport services while taking into account the delicate balance of the public transport trades.

330. In the light of the results of consultation with the LegCo Panel on Transport and the generally supportive views from the community at large, the Government proposed to introduce the franchised taxis under a trial scheme and introduced the Franchised Taxi Services Bill into LegCo in May 2019. The scrutiny of the Franchised Taxi Services Bill was however discontinued by the Bills Committee in June 2020. Having considered the latest economic situation and the views received at the Bills Committee earlier, the Government considered that it was not an opportune time to introduce franchised taxis and decided to withdraw the Franchised Taxi Services Bill in November 2020. The Government will review the franchised taxi proposal and the way forward in the light of public views and relevant circumstances. Meanwhile, the Government will continue to maintain close communication and collaboration with the taxi trade to work together to enhance taxi service quality.

Recommendation (d)

331. As stipulated in Regulation 14(3)(b) of the Road Traffic (Public Services Vehicles) Regulations (Cap. 374D) (the Regulations), the Commissioner for Transport may issue to the applicant a hire car permit if he / she is of the opinion that the type of hire car service specified in the application is reasonably required.

332. In this connection, applications for hire car permits would only be approved if the applicants submitted sufficient proof to justify the long-term service needs and reasonable usage of hire cars. In fact, personalised and point-to-point transport services should be provided by taxis while hire cars are positioned as a supplementary service for meeting special travel needs that could not be served by the existing public transport modes (including taxis), for instance, high quality cross-boundary service for individuals, pick-up services for hotel clients or incoming visitors and wedding car services.

333. Owing to the increasing demand for hire car services in recent years, as well as TD's introduction of a series of enhancement measures on the issue of hire car permits in February 2017 to improve and streamline the assessment system and regulatory regime for hire car service, the number of hire car permits for private hire car service issued by TD during the period from 2017 to 2018 increased by 190, such increase (around 30%) was much higher than that recorded in the previous year (i.e. 34). In order to address the demand, the Government will closely keep in view the community's demand for hire car service (including private hire car services), and review the assessment criteria and the limit on the number of hire car permits that can be issued in a timely manner.

Government Secretariat – Transport and Housing Bureau (Independent Checking Unit)

Case No. 2019/0759(I) – Withholding of information by Independent Checking Unit staff

Background

334. On 4 March 2019, Complainant A and Complainant B (the two Complainants) lodged a complaint with the Office of The Ombudsman (the Office) against the Independent Checking Unit (ICU) under the Transport and Housing Bureau (THB), alleging that its staff had failed to handle the case properly and withheld information from them.

335. The two Complainants lived in a Home Ownership Scheme (HOS) court. Complainant A completed the window inspection works of her flat on 2 April 2016. On 6 April 2016, Complainant A discovered an empty plastic bag posted outside her flat and learnt from the caretaker that government officer had visited her flat for window inspection. During the period from 7 to 13 April 2016, Complainant A contacted Staff X of ICU a number of times to tell him that she did not receive the document ICU posted outside the flat and the window inspection works of her flat were completed on 2 April 2016. On 13 April 2016, Staff X informed Complainant A that he had received the document certifying the completion of window inspection and that there were no other issues for Complainant A to follow up. On 25 July 2017, Complainant A received a letter from ICU acknowledging receipt of the document certifying the completion of window inspection.

336. On 5 December 2018, Complainant A received a summons to appear before court for outstanding payment of fines[10]. Complainant A contacted Staff Y of ICU (who had taken up the position of Staff X) and noted that ICU had sent the penalty notices by both registered and surface mails. However, Complainant A had never received any of them and ICU had already received the returned registered mail. Staff Y told Complainant A that she might explain the situation to the court and then the case would be remitted to ICU. However, during the court hearing,

[10] The complainant only completed the window inspection works on 2 April 2016, more than a year after the statutory deadline (i.e. 14 February 2015) as stipulated in the relevant statutory notice had lapsed. ICU had not received the documents certifying the completion of window inspection in respect of the complainant's premises when it issued the penalty notices on 6 April 2016. Hence, the Office considered that ICU had lawfully issued the notices and there was no impropriety found in carrying out its duty.

Staff Y of ICU (whom Complainant A believed was the staff she had been contacting with) claimed that the penalty notices had been posted outside the flat and it was supported by photos.

337. Complainant A had several discussions with Staff Y of ICU, during which she requested copies of ICU documents relating to the delivery of penalty notices and enquired whether the staff who attended the court was the one she had been contacting with on the phone. Complainant A did not understand why she had received two penalty notices for the same flat. As Staff Y had neither given any direct response or confirmation nor provided the information requested by Complainant A, Complainant A called Staff Z, the supervisor of Staff Y, on 31 January 2019. However, Staff Z did not give any direct response either. Although Complainant A had asked Staff Z many times for the name and contact means of his supervisor, Staff Z refused to provide such information and even hung up the phone to end the conversation.

338. Complainant A lodged a complaint against ICU through a District Councillor on 9 February 2019 and told the Housing Department (HD) about this by phone on 18 February 2019. However, apart from the interim reply from ICU received on 19 February 2019, no further reply was received by her as at the time of lodging her complaint with the Office.

339. In sum, the two Complainants were dissatisfied with ICU about the following –

(a) Staff Y withheld the relevant documents on penalty notices and refused to confirm whether he was the staff who attended the court; and

(b) Staff Z withheld the name and contact means of his supervisor from Complainant A.

The Ombudsman's observations

340. Staff Y did not know that Complainant A had requested the relevant documents on penalty notices until 11 February 2019 when she received such request from the District Councillor on behalf of Complainant A. As legal proceedings were in progress and the District Councillor was not duly authorised by Complainant A, ICU did not provide the documents requested to the District Councillor. The Ombudsman considered it a right decision. Records showed that ICU replied the

District Councillor in writing on 19 February 2019 that the request was being processed with no information withheld and reply would be given as soon as practicable. As a matter of fact, Staff Y handed over the documents requested to Complainant A in court on 20 March (i.e. 37 days from date of receipt of the request). This complied with the provision of the Code on Access to Information (the Code) which stated that information should normally be provided within 51 days under exceptional circumstances.

341. As for the allegation against Staff Z for withholding the name and contact means of his supervisor, Staff Z explained that he did not withhold such information from Complainant A and that the information was not provided simply because Complainant A had not repeated the request in their second phone conversation. Having taken into account the content of the conversation described by Staff Z, The Ombudsman considered that it was understandable but inappropriate for Staff Z to neglect the information request. Besides, HD should not withhold the information requested previously simply because the Complainants did not reiterate their requests.

342. In light of the above, The Ombudsman considered this complaint partially substantiated, and recommended that THB ask ICU to remind all its staff to treat information requests from members of the public seriously and to handle and respond to them expeditiously. Such requests should not be neglected on the grounds that they were not brought up again or the need for such information was not confirmed in subsequent communications.

Government's response

343. THB accepted The Ombudsman's recommendation.

344. ICU issued an email to its staff on 1 August 2019, reminding them to treat information requests (in oral or written form) from members of the public seriously by dealing with the requests and giving replies expeditiously in strict compliance with the Code.

Home Affairs Department, Lands Department and Transport Department

Case No. 2018/4802A, B and C – Failing to install railings or stone pillars at the entrance of the footpath near a village

Background

345. In September 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against Highways Department (HyD), Transport Department (TD), Lands Department (LandsD) and Home Affairs Department (HAD). Allegedly, illegal parking of vehicles was found at a piece of government land (the subject government land) in a village (the village) but no enforcement action had been taken by the Police over the previous six months. The complainant requested the departments concerned to install railings or stone pillars at the entrance of the footpath near the village (the subject opening) to protect the safety of pedestrians and prevent vehicles from trespassing and parking illegally at the location. However, no railings or stone pillars have been installed so far.

The Ombudsman's observations

346. On receipt of the requests from the Resident Representative of the village and the complainant in September 2017 and March 2018 respectively to install bollards and concrete columns to deter illegal parking in the village, the relevant District Lands Office of LandsD (DLO), the relevant District Office of HAD (the District Office) and TD had followed up the matter according to their respective roles and duties. They had convened inter-departmental meetings to discuss alternative solutions, conducted local consultations to collect residents' views and provided advice (on right of access, traffic management and road safety) to address residents' concerns.

347. As there were divergent views from the residents on the departments' proposals, LandsD, HAD and TD needed more time to work out the final solution to address all of their concerns. Having examined the process of handling this case and the relevant work records, The Ombudsman considered that LandsD, HAD and TD have by and large handled this case in a proper manner.

348. With the benefit of hindsight, it would have been better should the departments have sought the assistance from the Village Representative (VR) at an earlier stage so as to work out a pragmatic solution sooner which could address most residents' concerns.

349. On the other hand, the subject matter of this case is illegal parking at the subject government land. While the three departments have come up with a pragmatic solution of allowing vehicles to use the subject access and requiring the VRs to undertake in writing to manage the use of the subject access via active liaison with villagers and relevant departments to prevent illegal parking at the subject government land (a solution agreed by both the VRs and the complainant), TD's enhancement works to provide a proper run-in / out would reinforce the villagers' claim to a guaranteed right of vehicular access at the subject opening.

350. In view of the above, The Ombudsman considered this complaint unsubstantiated, but recommended that –

(a) TD should inform the VRs and all villagers that TD's enhancement works will have no implications on the villagers' guaranteed right of vehicular access to the subject government land and should not be construed as such, and that TD may install railings / bollards at the subject opening to deter illegal parking if the situation warrants; and

(b) the three departments should closely monitor complaints about illegal parking at the subject government land and consider further actions if necessary.

Government's response

351. TD, LandsD and HAD accepted The Ombudsman's recommendations and has taken the following follow-up actions.

Recommendation (a)

352. At the inter-departmental meeting chaired by the District Office (with the presence of relevant government departments and the VRs) on 15 August 2019, TD reiterated that the enhancement works would have no implications on the villagers' guaranteed right of vehicular access to the subject government land and should not be construed as such, and that TD

might install railings / bollards at the subject opening to deter illegal parking if the situation warranted.

Recommendation (b)

353. TD, DLO, the District Office, among other departments, have been conducting checks on illegal parking at the subject government land from time to time, but the problem of illegal parking of vehicles was still observed during the visits. Specifically, DLO found some ground markings for vehicle parking at the subject government land, and had thus initiated land control actions by posting notice under section 6(1) of the Land (Miscellaneous Provisions) Ordinance (Cap. 28) on 24 February 2020, requiring the occupation (i.e. ground markings) to cease before 2 March. On 2 March, DLO carried out a site inspection, and found that the ground markings had been removed.

354. In view of the persistent illegal parking problem, the District Office chaired inter-departmental meetings in January and May 2020 to consider the case. It was agreed that a bollard should be installed at the subject opening to deter illegal parking. On 16 July 2020, the District Office posted notices at the site advising the public and villagers that the government would carry out modification works to improve the pedestrian entrance and to prevent illegal parking, and all vehicles should be driven away before 30 July 2020. Such notices were also served to the relevant Rural Committee and the VRs for their information. The installation of the bollard was originally scheduled for 30 July 2020, but the works were withheld due to obstructions found on site. VRs and villagers reiterated on the same day their objection to the proposed works as well as their willingness to continue managing the use of the subject opening to avoid complaints against illegal parking at the subject government land.

355. In view of the latest development, the District Office has liaised and agreed with both the Chairman of the relevant Rural Committee and the VRs that a further three-month period (up to end-October 2020) would be allowed for the VRs to manage the use of the subject access. Provided that there are no signs of deterioration of illegal parking at the subject government land, the installation of the bollard(s) at the subject opening would not be pursued at this stage. The proposed course of action above has been agreed among all relevant departments.

356. In the site visits conducted by relevant department during August and October 2020, it was observed that the problem of illegal parking at the subject government land had improved against the situation in September 2018. Relevant departments will continue to monitor the illegal parking situation at the subject government land through village visits and site patrols, and in collaboration take necessary actions as required.

Hong Kong Police Force

Case No. 2018/3889(I) – Unreasonably refusing to provide the complainant with an investigation report of the Complaints Against Police Office

Background

357. In March 2007, the complainant filed a claim with the Small Claims Tribunal against a beauty parlour for compensation. The complainant alleged that she found her signature was forged on the receipt(s) produced by the beauty parlour in court during the trial. She therefore reported the case to the police, and the case was handled by a Police District of the Hong Kong Police Force (HKPF).

358. In October 2007, HKPF wrote to inform the complainant that no criminal offence was found involved in the case concerned and therefore no further action would be taken. The complainant was dissatisfied with the investigation result and lodged a complaint against the police officers responsible for the investigation of the case concerned to HKPF in November of the same year.

359. In September 2009, the complainant complained to HKPF again. Upon completion of the investigation by HKPF, the Independent Police Complaints Council endorsed HKPF's investigation result in June 2012. On the 13th day in the same month, HKPF wrote to inform the complainant of the investigation result.

360. On 1 November 2016, the complainant wrote to HKPF to obtain the investigation report on the complaint concerned. The request was subsequently refused. The complainant accused HKPF of improperly invoking the Code on Access to Information (the Code) and unreasonably refusing her request for the investigation report.

361. On 8 October 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office).

The Ombudsman's observations

362. In its reply to the complainant on 9 December 2016, HKPF invoked paragraphs 2.9(c), 2.14(a) and 2.15 in Part 2 of the Code, refusing to provide the complainant with the investigation report concerned. It also pointed out the following to the complainant –

(a) Management and operation of the public service

Paragraph 2.9(c): Information the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of a department.

(b) Third party information

Paragraph 2.14(a): Information held for, or provided by, a third party under an explicit or implicit understanding that it would not be further disclosed.

(c) Privacy of the individual

Paragraph 2.15: HKPF has the responsibility to protect the privacy of the person who provided the information and keep his / her information confidential during investigation.

363. The Office accepted HKPF's explanation that the investigation report contained details of police investigation as well as information provided to HKPF by other witnesses. Disclosing the information would harm the effectiveness of criminal investigation and complaint handling by the HKPF in the future. The Office therefore opined that HKPF could invoke paragraph 2.9(c) of the Code to refuse to provide the report concerned.

364. However, in respect of invoking paragraphs 2.14(a) and 2.15 of the Code, "a third party" did not include the staff of the department concerned. In this sense, paragraph 2.14(a) of the Code was not applicable to the information provided by the police officers complained against, but that provided to HKPF by other members of the public. In addition, if the report contained the personal data of the police officers complained against, HKPF could redact the personal data before disclosing the report. Therefore, the justification for citing paragraph 2.15 of the Code by HKPF was not sufficient.

365. In respect of the handling procedures, the Office noticed that HKPF issued a reply only 38 days upon receipt of the complainant's information request, exceeding the general time frame of 21 days set out in the Code without reason for the delay provided. Its reply letter did not elaborate on the justification for the application of paragraphs 2.9(c), 2.14(a) and 2.15 of the Code to this case, nor did it notify the complainant of the review and complaint channels.

366. In view of the above, The Ombudsman considered this complaint partially substantiated, and recommended that HKPF enhance training to ensure its staff understand the provisions of the Code and handle information requests from members of the public properly in accordance with the Code in future.

Government's response

367. HKPF accepted The Ombudsman's recommendation. HKPF invited a representative of the Office to hold a seminar in May 2019 with common mistake analysis and case sharing, so as to enhance officers' knowledge and understanding of the Code.

368. HKPF will continue to organise regular seminars on the Code to ensure that officers understand and comply with the provisions of the Code and its Guidelines on Interpretation and Application, with a view to applying relevant knowledge to handle information requests in a professional manner.

Hong Kong Police Force

Case No. 2018/4535(I) – Failing to comply with the Code on Access to Information in handling the complainant's request for an investigation report

Background

369. On 4 September 2016, the Hong Kong Police Force (HKPF) received a report of "Assault Occasioning Actual Bodily Harm" made by the complainant. The case investigation was taken over by a Police District (the concerned Police District). In connection with the case, a male (the defendant) was charged and convicted after trial in 2017. The defendant lodged an appeal against the conviction, which was subsequently quashed in February 2018.

370. On 24 July 2018, the complainant submitted an information request to HKPF for the investigation report of the concerned case (the first request). On 2 August 2018, the concerned Police District replied to her that the concerned case had been concluded in High Court and the defendant had been found not guilty.

371. Since HKPF had not provided the requested investigation report, the complainant made another request to HKPF on 11 October 2018 (the second request). On 22 October 2018, HKPF sent an interim reply to her, indicating that her request would be handled by the concerned Police District.

372. On 13 November 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against HKPF for failing to comply with the Code on Access to Information (the Code).

The Ombudsman's observations

373. On 31 December 2018, HKPF informed the complainant of the reason for the refusal by invoking paragraph 2.6(e) of the Code, i.e. disclosure of such information would harm or prejudice the prevention, investigation and detection of crime and offences, and the apprehension or prosecution of offenders. The Office accepted the explanation of HKPF that the investigation report contained details of police actions and investigations and that if the information was disclosed, the work of

prevention, investigation and detection of crime and offences, and the apprehension or prosecution of offenders would be harmed or prejudiced.

374. However, the Office considered that HKPF has failed to observe the time frame set out in paragraphs 1.16 and 1.18 of the Code.

375. In response to the complainant's first request, HKPF only informed her of the court result of the concerned case in its reply on 2 August 2018. However, HKPF's decision on whether or not to accede to the information request was not made known to the complainant.

376. As for the second request, HKPF issued an interim reply to the complainant. After the Office had commenced an investigation, HKPF informed the complainant on 31 December 2018 of the reason for refusal.

377. The Ombudsman considered this complaint substantiated, and recommended that HKPF remind its staff to strictly comply with the Code.

Government's response

378. HKPF accepted The Ombudsman's recommendation.

379. Supervisory officers of the responsible units have been reminded to observe the provisions of the Code and in particular the time frame stipulated in paragraphs 1.16 to 1.19.

380. HKPF invited a representative of the Office to hold a seminar in May 2019 with common mistake analysis and case sharing, so as to enhance officers' knowledge and understanding of the Code. HKPF will continue to enhance officers' understanding on the interpretation of the Code and its compliance through different platforms (e.g. organising regular seminar).

381. A 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.

Hong Kong Police Force

Case No. 2018/4536(I) – Failing to comply with the Code on Access to Information in handling the complainant's request for an investigation report

Background

382. On 4 September 2016, the Hong Kong Police Force (HKPF) received a report of "Assault Occasioning Actual Bodily Harm". The case investigation was taken over by a Police District (the concerned Police District). In connection with the case, the complainant was charged and convicted after trial in 2017. The complainant lodged an appeal against the conviction, which was subsequently quashed in February 2018.

383. On 24 July 2018 and on 10 October 2018, the complainant submitted two separate information requests to HKPF for the investigation report of the concerned case (the first request and the second request). On 22 October 2018, HKPF sent an interim reply to the complainant in respect of the second request, indicating that the request would be handled by the concerned Police District.

384. On 12 and 13 November 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against HKPF for failing to comply with the Code on Access to Information (the Code).

The Ombudsman's observations

385. The Office accepted HKPF's explanation that the investigation report contains details of police operation and investigation and therefore HKPF's refusal to disclose the investigation report by reasons of paragraph 2.6(e) of the Code is not unreasonable. However, the Office considered that HKPF had failed to observe the time frame set out in paragraphs 1.16 and 1.18 of the Code.

386. HKPF received the complainant's two requests on 24 July 2018 and 10 October 2018 but only an interim reply had been issued to the complainant on 22 October 2018 in respect of the second request. HKPF eventually replied to the complainant substantively on 31 December 2018.

387. The Ombudsman considered this complaint substantiated, and recommended that HKPF remind its staff to strictly comply with the Code.

Government's response

388. HKPF accepted The Ombudsman's recommendation.

389. Supervisory officers of the responsible units have been reminded to observe the provisions of the Code and in particular the time frame stipulated in paragraphs 1.16 to 1.19.

390. HKPF invited a representative of the Office to hold a seminar in May 2019 with common mistake analysis and case sharing, so as to enhance officers' knowledge and understanding of the Code. HKPF will continue to enhance officers' understanding on the interpretation of the Code and its compliance through different platforms (e.g. organising regular seminar).

391. A 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.

Hong Kong Police Force

Case No. 2018/5187(I) – Failing to respond to the complainant's information requests for the investigation report and handwriting examination report of a case, and the names and ranks of the responsible police officers

Background

392. In March 2007, the complainant filed a claim with the Small Claims Tribunal against a beauty parlour for compensation. The complainant alleged that she found her signature was forged on the receipt(s) produced by the beauty parlour in court during the trial. She therefore reported the case to the police, and the case was handled by a Police District (the Police District) of the Hong Kong Police Force (HKPF).

393. In October 2007, HKPF wrote to inform the complainant that no criminal offence was found involved in the case concerned, therefore no further action would be taken. The complainant was dissatisfied with the investigation result and lodged a complaint against the police officers responsible for the investigation of the case concerned to HKPF in November of the same year.

394. In September 2009, the complainant complained to HKPF again, accusing the police officers concerned of failing to conduct handwriting comparison on the signature(s) on the receipt(s) in question in the course of investigation. In October in the following year, the Police District submitted the information of the case concerned to the Government Laboratory for handwriting examination. On 3 November 2014, the Police District issued a letter to the complainant informing her that HKPF had completed the investigation of the case concerned. Since there was insufficient evidence to institute a charge against any person, HKPF would not take any prosecution action.

395. On 1 November 2016, the complainant requested the Police District to provide the handwriting examination report of the case concerned (information (1)); the names and ranks of the police officers handling the case concerned (information (2)); and the investigation report of the case concerned (information (3)) in writing. On 21 November 2016, the Police District wrote to the complainant informing her that they would follow up her request. One day in December of the same year (exact date unknown), an officer of the Police District made a telephone call to the

complainant to explain the reasons for refusing disclosure of the information requested in accordance with the Code on Access to Information (the Code).

396. On 8 October 2018, the complainant lodged a complaint with the Office of The Ombudsman (the Office), accusing the Police District of failing to comply with the Code in the handling of the aforementioned information request.

The Ombudsman's observations

Regarding the procedures of handling the requests for information

397. HKPF's interim reply to the complainant had exceeded the time frame of ten days set out in the Code. The Office considered that as the complainant's request had been made in writing, and HKPF had also once given an interim reply in writing, having further considered the reasons for non-disclosure of information to the complainant (see below), HKPF should have given a concrete reply in writing to the complainant. Besides, this does not comply with the requirement stipulated in the Guidelines on Interpretation and Application (the Guidelines) of the Code that each department should maintain a record of the actions taken in response to the requests.

Regarding the decision on whether to disclose the information

398. In response to this complaint, HKPF reviewed the information request made by the complainant, and subsequently upheld its decision to refuse to disclose information (1), as information (1) was regarded as the information mentioned in paragraphs 2.6(e), 2.9(c) and 2.14(a) of the Code. HKPF refused to disclose information (2) in accordance with the Personal Data (Privacy) Ordinance (Cap. 486) and paragraph 2.15 of the Code. As for information (3), it had been destroyed according to the general procedures of the department, so HKPF was unable to provide the information.

399. The Office agreed that the disclosure of the content of the handwriting examination report would create an avenue for the public to "learn" how to better forge a signature, thus prejudicing the prevention, investigation and detection of crime and offences by the police. The Office therefore accepted that HKPF's refusal of disclosure of information (1) by citing paragraphs 2.6(e) and 2.9(c) of the Code. However, the Office

considered that information (1) was provided by the Government Laboratory in response to the request of HKPF and the Government is not regarded as "third party" referred to in the Code. Therefore, it was inappropriate to cite paragraph 2.14(a) of the Code as a reason for refusing the disclosure.

400. As for information (2), in accordance with paragraph 2.15(a) of the Code, a department can disclose personal data if such disclosure is consistent with the purposes for which the information was collected. In addition, paragraphs 1.9.2 and 1.10.2 of the Guidelines clearly state that the purpose of the request, or the applicant's refusal to reveal the purpose of the request, should not be a reason for refusing the disclosure of information. Therefore, the Office opined that HKPF should not refuse to disclose information (2) to the complainant.

401. Since information (3) had been destroyed and HKPF did not keep a record of the reason for refusing to provide information (3) to the complainant, the Office was unable to comment on whether relevant requirements of the Code had been met.

402. In sum, The Ombudsman considered this complaint substantiated, and recommended that HKPF –

(a) reconsider the complainant's request for information (2) in accordance with the Code. Unless there are reasonable grounds for refusing to provide the information in accordance with Part 2 of the Code, it should be disclosed to the complainant; and

(b) enhance its training to ensure its staff understand and comply with the provisions of the Code and its Guidelines, particularly the requirements on response time frame, style and maintenance of record.

Government's response

403. HKPF accepted The Ombudsman's recommendations.

Recommendation (a)

404. HKPF had reconsidered the complainant's request for information (2) in accordance with the Code and provided the complainant with the information concerned on 19 June 2019 in writing.

Recommendation (b)

405. HKPF invited a representative of the Office to hold a seminar in May 2019 with common mistake analysis and case sharing, so as to enhance officers' knowledge and understanding of the Code. HKPF will continue to organise regular seminars on the Code to ensure that officers understand and comply with the provisions of the Code and the Guidelines, with a view to applying relevant knowledge to handle requests for access to information in a professional manner.

Hong Kong Police Force

Case No. 2019/1240(I) – Delaying and refusing to provide information related to a case in which the complainant was arrested

Background

406. On 22 March 2019, the complainant requested a Police District (the Police District) of the Hong Kong Police Force (HKPF) to provide the following information regarding a case of "Assault Occasioning Actual Bodily Harm" involving herself –

(1) Details of the report, including (a) the informant, (b) the time the police received the report and (c) the reporting method;

(2) Record of the entire process for the arrest of the complainant;

(3) Any record showing the two handling police officers have viewed the CCTV footage provided by the complainant at the offence location;

(4) All the records containing the reasons for the arrest of the complainant;

(5) All the records and contents of the telephone contact between the police and the complainant; and

(6) All the CCTV records capturing the complainant during her detention in the police station.

407. On 28 March 2019, the Police District issued a letter to the complainant, asking the complainant to provide the purpose of her information request, as the information requested by the complainant involved the privacy of a third party. In accordance with paragraph 2.15(a) of the Code on Access to Information (the Code), information about any person (including a deceased person) should not be disclosed, other than to the subject of the information or other appropriate person. Unless such disclosure is consistent with the purposes for which the information was collected, HKPF could refuse to disclose such information.

408. On 1 April 2019, the complainant lodged a complaint against HKPF with the Office of The Ombudsman (the Office). The complainant considered that, except for information (1)(a) which involved the privacy of the informant, all other information was related to her only. Furthermore, the Code does not require the applicant to state the reason or purpose for requesting information. The complainant accused the Police District of improperly requesting her to provide the purpose of the information request, which violated the provisions of the Code.

The Ombudsman's observations

409. On 12 April 2019, the Police District sent an email to the complainant to confirm they had contacted the complainant on 4 April 2019, and learnt that the complainant's purpose for requesting the information was to take legal action. After considering the complainant's purpose of the information request, the Police District issued reply letters to the complainant on 17 April and 8 May, providing information (1)(b), (1)(c), (2), (3) and (4) as well as refusing to disclose information (1)(a), (5) and (6) by citing the following reasons –

Information (1)(a)

Paragraph 2.15: It involved the privacy of a third party.

Informaton (5)

HKPF did not keep any record or information of the telephone contact between the complainant and the police officer(s).

Information (6)

Paragraph 2.15: It involved the privacy of a third party. When HKPF later responded to the inquiry from the Office, it invoked paragraph 2.6(e) of the Code as well, i.e. Information the disclosure of which would harm or prejudice the security of any detention facility or prison.

Regarding requiring the complainant to state the purpose of the request for information

410. The Office agreed that apart from information (1)(a), information (6) also involved the privacy of other persons. The Office considered that HKPF did not violate the provisions of the Code when it

required the complainant to state the purpose for requesting the information before considering whether to release such information and regarded it as one of the factors for the consideration of disclosure. However, if HKPF could clearly explain to the complainant what kinds of personal privacy were involved in her request and the reason(s) for confirming her purpose, it could help clear the doubts of the complainant. Besides, it would be more desirable for HKPF to cite paragraph 2.6(e) of the Code to explain to the complainant the reason for not being able to disclose to her the CCTV records concerned in its replies.

Regarding HKPF's consideration and response to requests

411. The Office accepted that HKPF had provided the complainant with the requested information (1)(b), (1)(c), (2) and (4) in the reply letters.

412. As for information (3), the Office considered that the relevant records listed in the "Case Details Report" provided by HKPF to the complainant did not fully meet the complainant's request for information (3). The Office opined that HKPF should consider providing relevant parts of the investigation report to the complainant in response to her request for information (3). As provided in the Code, if the investigation report contained information that should not be disclosed (e.g. personal data of a third party), HKPF could obliterate the parts that should not be disclosed and quote relevant paragraphs in Part 2 of the Code to explain to the complainant. If this approach was still not feasible, HKPF could consider rejecting the complainant's request for information (3) by citing the reasons stated in Part 2 of the Code.

413. The Office considered that HKPF had provided the complainant with reasonable grounds for its refusal to disclose information (1)(a), (5) and (6) and did not violate the provisions of the Code.

Regarding other provisions of the Code

414. It was not until 17 April 2019 that HKPF issued a reply in response to the complainant's request for information on 22 March 2019. The lapse of 26 days slightly exceeded the time frame of 21 days set out in the Code.

415. In addition, the Office noticed that HKPF did not inform the complainant of the channels for review and complaint when refusing to disclose part of the information to her.

416. In light of the above, The Ombudsman considered this complaint unsubstantiated but other inadequacies were found, and recommended that HKPF –

(a) enhance staff training to ensure members understand and comply with the provisions of the Code and its Guidelines on Interpretation and Application, and remind them to strictly comply with those provisions when handling public request for information; and

(b) reconsider the complainant's request for information (3) and handle the request in accordance with the Code.

Government's response

417. HKPF accepted The Ombudsman's recommendations.

Recommendation (a)

418. The Access to Information Officer of the Police District had reminded the officers concerned of the points to note when handling information request under the Code. HKPF also organised a training seminar for its officers in November 2019.

Recommendation (b)

419. After review, HKPF had provided the complainant with supplementary materials for information (3) on 20 November 2019.

Hong Kong Police Force

Case No. 2019/3326(I) – Delay and impropriety in handling the complainant's request under the Code on Access to Information for guidelines on the operation of police stations

Background

420. On 22 July 2019, the complainant sent an email to the Hong Kong Police Force (HKPF) requesting the guidelines governing the operation of district police stations (Email I). On 23 July 2019, the handling unit of HKPF replied to the complainant providing the latter with a hyperlink to apply for data information at the Police Public Page.

421. On 1 August 2019, the complainant emailed to HKPF and other parties urging for the information he requested in Email I. On same day, the complainant emailed to HKPF and the Office of The Ombudsman (the Office) complaining against HKPF for mishandling his information request and rasied other queries and requests. In the same email, the complainant also requested HKPF to provide a sequence of events, and names and ranks / posts of all officers involved in handling his request in Email I (Email II). However, HKPF claimed that they did not receive Email II.

422. In repsonse to the complainant's Email I, HKPF further replied the complainant on 10 September 2019 that the Complaints Against Police Office (CAPO) had been dealing with complaints of the same nature, and HKPF would not comment on individual case at the present stage.

The Ombudsman's observations

Regarding the handling of the request for information

423. Paragraph 1.15 of the Code on Access to Information (the Code) requires that if a department receives a written request for information which is held by another department, it will transfer the request to that department and so advise the applicant. The Office considered that the handling unit of HKPF should refer the complainant's information request internally to the relevant branch / section for action instead of asking the complainant to submit his / her request again.

424. Though HKPF's handling of the request in Email I did not exceed 51 days, the Department had not explained to the complainant the reason(s) why it could not respond to his / her information request within 21 days.

Reasons for not being able to provide the requested information

425. Given that the guidelines on the operation of a police station was publicly accessible at HKPF's website, the Office accepted that, under the Code, it was not necessary for HKPF to provide a copy of the information to the complainant. Nevertheless, HKPF failed to inform the complainant of how he could access the information, and the channels for review and complaint.

Other issues

426. HKPF claimed that it had not received Email II, nor had it received any relevant referral from other parties. The Office could not ascertain the reason why HKPF could not receive Email II.

427. Apart from the Code request, the complainant had also made a number of queries on HKPF's actions and decisions on various matters. According to The Ombudsman Ordinance (Cap.397), HKPF is outside The Ombudsman's jurisdiction except for complaints relating to alleged breaches of the Code. As for the complainant's other dissatisfaction with HKPF, including whether HKPF had properly responded to the complainant's enquiries or comments, the Office is precluded by law from investigating into those matters.

428. In light of the analysis above, The Ombudsman considered this complaint substantiated, and recommended that HKPF –

(a) review and revise its mechanism for internal referral of information requests to ensure that the mechanism is in line with the requirements and spirit of the Code;

(b) remind its staff to strictly observe the procedural requirements of the Code when handling information requests in future; and

(c) clarify with the complainant whether he / she still needs the information requested in Email II and, in case of an affirmative response, handle the information request in accordance with the provisions of the Code.

Government's response

429. HKPF accepted The Ombudsman's recommendations.

Recommendation (a)

430. HKPF has reviewed the mechanism for internal referral of information requests and briefed the staff of handling unit for proper referral of information requests. If the information is not held by the receiving formation, the request will be forwarded to appropriate formation within the HKPF for handling.

Recommendation (b)

431. The staff of the handling unit have been reminded to strictly comply with the requirements of the Code. HKPF also organised a sharing session in May 2020 to enhance officers' knowledge and understanding of the Code, and to enhance the officers' professionalism and competence in handling requests for access to information. HKPF will continue to organise regular seminars on the Code to ensure its members understand and comply with the provisions of the Code and the Guidelines.

Recommendation (c)

432. HKPF contacted the complainant via email on 20 March 2020 to clarify whether he still needed the information requested in Email II. Yet, the complainant has not responded to date.

Hong Kong Police Force

Case No. 2019/3780(I) – Failing to comply with the Code on Access to Information in handling a request for information about the arrests made by the Police related to the drug trafficking activities in a district

Background

433. On 6 July 2019, the complainant made a complaint via 1823 mobile application about a group of suspected drug addicts occupying a place in Hong Kong for drug trafficking activities. The case was then referred by 1823 to a Police District (the responsible Police District) of the Hong Kong Police Force (HKPF), where the aforementioned place was situated for follow-up. The complainant did not give consent for 1823 to disclose his / her identity and contact information to HKPF.

434. On 16 July 2019, HKPF replied to complainant via 1823 that arrests had been made at the place concerned and provided the complainant with the names and posts of the officers of the responsible Police District. On the same day, the complainant sent an email to 1823, requesting HKPF to provide information on the arrests by citing the Code on Access to Information (the Code).

435. On 17 July 2019, 1823 referred the complainant's request for information to another unit (the handling unit) at Police Headquarters for follow-up. On 23 July, the handling unit replied to the complainant via 1823 that it was responsible for dealing with general enquiry emails and was unable to provide relevant information. It also indicated that the public could refer to HKPF's website for application for access to information with the electronic form thereon and provided the link to the website.

436. In July 2019, the complainant contacted 1823 by phone and email for numerous times, indicating that HKPF should forward his / her request for information to the responsible Police District for follow-up and requesting HKPF to review the case as well as provide the identities of the officers making the original decision and handling the review. The requests were referred to the handling unit by 1823 for follow-up. In response to the above requests, HKPF replied to the complainant and reiterated the content of its reply on 23 July without any other supplementary information.

437. On 6 August 2019, the complainant requested HKPF via 1823 to provide the names and posts of the officers handling his / her request. The request was then referred to the handling unit by 1823 on the same day. However, HKPF said it had never received the referral.

438. The complainant was dissatisfied with HKPF's failure to handle his / her requests in accordance with the Code and disclose the names and posts of the officers responsible for handling his / her requests. As such, the complainant lodged a complaint with the Office of The Ombudsman (the Office) on 15 August. HKPF eventually passed the information requested by the complainant to 1823 on 1 November, and 1823 forwarded the information to the complainant the next day.

The Ombudsman's observations

439. HKPF finally provided the complainant with the case information he requested. Yet as provided for in paragraph 1.15 of the Code, if a department receives a written request for information which is held by another department, it will transfer the request to that department and so advise the applicant. Both the handling unit and the responsible Police District were under HKPF. The Office opined that the handling unit should refer the requests to an appropriate unit within the department for processing after receiving the case, rather than requiring the complainant to re-apply with the form on HKPF's website. In addition, both the Code and its Guidelines on Interpretation and Application (the Guidelines) have explained that it is not necessary to request information with a designated form.

440. HKPF stated that it had never received the referral of the complainant requesting the identities of the officers handling his / her requests for information. The reason was uncertain.

441. In light of the above, The Ombudsman considered this complaint substantiated.

442. The Ombudsman recommended that HKPF remind staff to handle public requests for information in accordance with the provisions and spirit of the Code, which includes (i) taking substantial follow-up actions and issuing replies regardless of whether the request for information is made with a designated form so as to comply with the provisions of the Code, and (ii) contacting the relevant unit as soon as possible for further

processing of the request concerned if the information concerned is held by other units within the department.

Government's response

443. HKPF accepted The Ombudsman's recommendation.

444. HKPF has reminded the officers concerned to handle public requests for information in accordance with the Code. The supervisory officers would pay attention to the implementation and issue regular reminders to the officers concerned.

445. HKPF also organised a sharing session on the Code in May 2020 to enhance officers' knowledge and understanding of the Code, and to enhance the officers' professionalism and competence in handling requests for access to information. HKPF will continue to organise regular seminars on the Code to ensure its members understand and comply with the provisions of the Code and the Guidelines.

Hospital Authority

Case No. 2019/1616 – St. John Hospital failing to dispense all the drugs as prescribed to the patient outside its pharmacy's service hours, and requesting her to obtain the remaining quantity from the hospital within the pharmacy's service hours or from other urban hospitals, which was inconsiderate to the patient

Background

446. The complainant attended St. John Hospital (the Hospital)'s Accident & Emergency Department (AED) in Cheung Chau on 10 March 2019 (Sunday) and was prescribed with antibiotics for seven days. When she was awaiting her prescription, the hospital nurse stated that only one dosage of antibiotics could be dispensed on that day and the complainant had to collect the remaining dosages on the following day. The complainant indicated that she had a business trip the next day and would not be able to collect the drugs at the Hospital. The nurse's senior explained that the Hospital was not a major hospital and could not dispense all the drugs as prescribed to her outside its pharmacy's service hours. The complainant was advised to obtain the remaining quantity on the following day from the Hospital within its pharmacy's service hours or from other urban hospitals with 24-hour pharmacy service. Upon further request by the complainant, the Hospital eventually dispensed two days of antibiotics to her. Since there was no registered pharmacy in Cheung Chau, the complainant had to ask her friend to buy the prescribed antibiotics in the urban area for her.

447. The complainant questioned why the Hospital did not keep enough stock of antibiotics during the influenza season, such that she was requested to obtain the remaining quantity on the following day from the Hospital within the pharmacy's service hours or from other urban hospitals, which was inconsiderate to patients. The complainant thus lodged a complaint with the Office of The Ombudsman (the Office) against the Hospital Authority (HA) on 17 April 2019.

The Ombudsman's observations

448. HA clarified that there had never been a shortage of drugs in the Hospital. The concerned AED nurse had handled the complainant's case in accordance with the established guideline of the Hospital's nursery department and exercised her discretion to dispense one more day of drugs in the light of the complainant's situation.

449. However, the Office considered the drug dispensing arrangement of the Hospital outside its pharmacy's service hours unsatisfactory to patients and difficult to understand. Firstly, if reviewing doctor's prescription and checking of drugs were prerequisite procedures for dispensing drugs to patients, and these procedures should be carried out by the pharmacy staff, then the current practice of dispensing drugs by nurses was inappropriate. If these procedures could be carried out by nurses, The Ombudsman did not see any reason why the Hospital only allowed nurses to dispense the quantity of drugs sufficient for patients' consumption until resumption of service of its pharmacy, instead of dispensing all the prescribed quantity.

450. The Office noted that the three hospitals under HA without 24-hour pharmacies (namely St. John Hospital, North Lantau Hospital and Tin Shui Wai Hospital) had similar dispensing arrangements outside the pharmacy's service hours. However, HA had already planned to provide 24-hour pharmacy services in North Lantau Hospital and Tin Shui Wai Hospital.

451. The Office understood that St. John Hospital was a small regional hospital with limited resources, and hence the Hospital had to carefully consider how to balance between hospital operation and patient needs. Nevertheless, as patients sought medical consultation were feeling unwell, the practice of asking patients to obtain the remaining quantity of drugs on another day or pay a visit from Cheung Chau to other urban hospitals during their illness would give patients an impression that the Hospital was inconsiderate to them.

452. In light of the above, The Ombudsman considered this complaint substantiated, and recommended that HA review the current practice of drug dispensing outside the pharmacy's service hours and actively explore the possibility of operating 24-hour pharmacy service at St. John Hospital so that patients could be dispensed with all the prescribed quantity of drugs after consultation.

Government's response

453. HA accepted The Ombudsman's recommendation and had conducted a review on St. John Hospital's drug dispensing arrangement.

454. Upon review, HA considered that as St. John Hospital was a small regional hospital, operating 24-hour pharmacy service would put further pressure on the Hospital's medical manpower. With a view to ensuring a cost-effective use of public resources, HA has no plan to provide 24-hour pharmacy service in the Hospital at this stage. To further improve the pharmacy service, St. John Hospital and its affiliated Hong Kong East Cluster are actively planning to expand their drug dispensing services, so as to provide patients with a more convenient way to collect drugs outside the pharmacy service hours.

455. St. John Hospital has implemented an improvement plan since 7 September 2020. The plan makes use of information technology and automated dispensing cabinets to enable the prescriptions issued outside the Hospital pharmacy's service hours by AED doctors to be sent to other 24-hour pharmacies in Hong Kong East Cluster through the information system, so that the on-site pharmacists can review and check the prescriptions. Once the prescription is checked, the on-duty AED nurse in the Hospital can obtain all the prescribed drugs from the automated dispensing cabinet for patients. Instructions on drug taking will also be clearly printed on the package. Patients can contact the AED staff for assistance if they have any questions.

Housing Department

Case No. 2018/3787 – Failing to clearly explain the arrangement of ballot for allocation of venues in a public housing estate; (2) Failing to monitor the utilisation of venues by successful applicants; and (3) Failing to face up to the problem of prolonged occupation of venues by certain applicants

Background

456. On 2 October 2018, an applicant (the Organisation) lodged a complaint with the Office of The Ombudsman (the Office) against the Housing Department (HD). The Organisation claimed that it had regularly made applications to the estate office of a certain public housing estate (the Estate Office) since August 2017 for using a public open space outside a sightseeing elevator of a shopping centre at the estate (the Venue) for organising events on Saturdays, Sundays and public holidays. Initially, approval was granted to most of the applications from the Organisation for using the Venue, but the number of approved applications registered a significant drop after a few months. Worse still, none of the applications made by the Organisation for using the Venue in August and October 2018 was approved. The Estate Office was managed by a property services agent appointed by HD.

457. The Organisation enquired with the Estate Office about the reasons for the above situation. The Estate Office indicated that as there were other organisations applying for the use of the Venue on the same dates, the Estate Office had to determine the priority by ballot and thus the chance of obtaining approval for the applications made by the Organisation was affected. The Organisation had sent its representatives to witness the balloting process at the Estate Office, and found that staff members of the Estate Office did not explain to the applicants the balloting criteria, the dates for which balloting was required and the allocation of time slots among the successful applicants prior to conducting the ballot. The Organisation also observed that two organisations, i.e. Applicant A and Applicant B, who were successful only once in the balloting, could use the Venue for many consecutive days in a particular month. The Organisation was dissatisfied with HD and the Estate Office for their failure to specifically explain the balloting method and alleged there was a lack of transparency in their handling of the matter (Allegation (a)).

458. The Organisation had checked with the Estate Office the booking records for the Venue and found that the dates that Applicant A and Applicant B applied for using the Venue always coincided with those of the Organisation, with Applicant A having the highest number of applications approved for use of the Venue. However, between August and October 2018, the two organisations had not been using the Venue for most of the approved time slots. The Organisation cited an example that Applicant A was granted approval to use the Venue on a day in September 2018, but the Organisation found that no event was held at the Venue when they took photographs on the spot in the morning and afternoon that day. The Organisation pointed out that the two organisations did not cancel the booking of the Venue three days prior to the event in accordance with HA's requirements, but the Estate Office continued to grant approval for them to use the Venue. The Organisation was dissatisfied with HD and the Estate Office for their failure to properly monitor whether successful applicants had actually used the Venue as approved (Allegation (b)).

459. Furthermore, the Organisation discovered that the addresses of five applicants (including the address of Applicant A) were totally identical and that one of those applicants (Applicant C) had a close affiliation with Applicant B. The Organisation cited an example that Applicant C was granted approval to use the Venue on a day in October 2018, but when the Organisation was taking photographs on the spot around 7:00 o'clock (without indicating whether it was in the morning or afternoon) that day, it was found that Applicant B was holding an event there while Applicant C was not using the Venue. The Organisation suspected that someone was applying for the use of the Venue in the names of different organisations merely to "hold up the time slots", so that other organisations would have fewer chances of using the Venue. The Organisation was dissatisfied with HD for its failure to tackle the aforesaid problem (Allegation (c)).

The Ombudsman's observations

Allegation (a)

460. Regarding whether staff members of the Estate Office had verbally explained the details (such as the balloting criteria and the dates for which balloting was required) to the Organisation's representatives on the spot before the ballot, there was inconsistency between the accounts of HD and the complainant. In this connection, the Office had further verified the situation with a representative of another organisation who had participated in and witnessed the balloting process. The representative

stated that the Estate Office would explain the balloting arrangements every time before the ballot was conducted, such as the time slots requiring balloting and the applicants participating in the balloting. The representative's description of the balloting process to the Office tallied with the account of HD. Therefore, the Office accepted HD's account as truthful.

461. The Office was of the view that if the representative of the complainant did not understand the balloting criteria and detailed arrangements, he / she could immediately raise questions with the staff members of the Estate Office on the spot. However, the representative did not express to the Estate Office that he / she was not clear about the balloting criteria and detailed arrangements until the fourth balloting session. Subsequently, the Estate Office had made corresponding improvement measures (by posting up Notice presenting the balloting criteria). The Office considered that the Estate Office had appropriately followed up the Organisation's request.

462. The Office agreed that unnecessary misunderstandings and arguments could be avoided by setting out the balloting method in writing. However, the Office noted that there was a discrepancy between the method indicated in the Notice, i.e. "drawing of lots will be conducted by ballot", and the actual balloting method (the successful applicant was determined by a staff member of the Estate Office drawing out a table tennis ball). There was room for improvement in the use of wordings. Besides, HD and the Estate Office could consider sending the timetable to the applicants concerned in advance, so that they could negotiate among themselves before the ballot.

463. HD stated that it would take into account the views of the Office and consider further improving the content of the Notice and providing the balloting arrangements and the timetable in writing to the applicants earlier.

464. Regarding the Organisation's suspicion that the two applicants were allowed to use the Venue for many days despite being successful in the ballot only once, HD clarified that each ballot would only determine the allocation of a venue for a time slot, and pointed out that the two applicants would apply for using the Venue on Monday to Friday (time slots in which only one application was received and thus balloting was not required). It could not be ruled out that the two applicants had, sometimes, applied for using the Venue on weekday (time slots where balloting was not required) as well as on Saturday or Sunday (time slots in which more than one application was received and thus balloting was

required), and hence causing understanding by the Organisation. The Office was of the view that HD's account might be reflecting the truth.

465. Therefore, the Office considered Allegation (a) unsubstantiated.

Allegation (b)

466. The Estate Office stated that the security guards of the estate would monitor the utilisation of the booked venue during daily patrol and record the findings on the "Inspection Checklist", which was not the "Standard Form" compiled by HD. The Office discovered the following major differences between them –

(a) The inspection officer is only required to indicate on the "Inspection Checklist" whether the successful applicant has held the event; and

(b) The inspection officer is required to put down his / her name, rank and date of inspection on the "Standard Form" and signs on it as confirmation. The inspection officer also needs to give a detailed description in case he / she identifies any irregularities on the part of the successful applicants.

467. It can be seen that the requirement of the "Standard Form" is clearly more stringent than that of the "Inspection Checklist". The Office considered that the inspection records of the Estate Office were rough and failed to provide any concrete information (such as the name of the inspection officer and information about the activity). It was totally impossible to further verify the situation described by the complainant by referring to the inspection records of the material time kept by the Estate Office. The Office also discovered that there were no requirements on the "Standard Form" requiring the inspection officer to record the inspection time or the successful applicants to take photographs of the event for filing.

468. Estate venues are public resources and there is keen demand for applications to use such venues. There is a need for HD to adopt measures to regulate and inspect the actual number of hours of utilisation, improve the content of the inspection records and urge the Estate Office to maintain proper records.

469. In HD's current guidelines and notes on the application for the use of venues, there were no regulations at all on the actual number of hours of venue utilisation. There has been keen competition for use of the Venue. If HD does not regulate the actual number of hours of venue utilisation, this is tantamount to allowing successful applicants to book the Venue for the whole day but actually leaving it idle for most of the time, which would be unfair to the unsuccessful applicants.

470. The Office considered that HD had the responsibility to vet and approve applications for the use of venues and monitor their utilisation. At the same time, the Office understood that HD's frontline estate management staff had a heavy workload. In considering the need to balance the use of resources, the Office was of the view that HD should adopt measures to curb the current situation of unlimited hours for the booking of venues by the applicants. One possible measure HD could consider is to require the successful applicants to take photographs of the events for record purpose, and explain clearly to such applicants that HD would only require them to provide photographs of the events as proofs where necessary (for example, when HD received complaints that certain successful applicants had not used the approved venues). Such a practice would not involve routine administrative work and therefore would not require additional resources and manpower. This could also enable the monitoring of the use of venues by the successful applicants. HD should, depending on the circumstances of individual estates, formulate appropriate measures to curb the loophole of allowing the booking of unlimited hours by the applicants.

471. Therefore, the Office considered Allegation (b) substantiated.

Allegation (c)

472. Regarding the Organisation's claim that Applicant B used the Venue allocated to Applicant C on a day in October 2018, HD pointed out that Applicant B had uploaded photographs of its work reports on the website around 11:00 a.m. that day and thus HD believed that the photographs provided by the Organisation should have been taken at around 7:00 a.m. (rather than 7:00 p.m.) on the same day. Given that Applicant B used the Venue without submitting an application, HD had already issued a letter advising Applicant B that it had violated the rules on the use of venues, and seriously reminded Applicant B that application should be made for the use of venue in future. On the other hand, Applicant C was granted approval to use the Venue from 11:00 a.m. to 8:00 p.m. that day. Applicant C had provided HD with photographs of the

event on the same day to prove that it had actually conducted an event there on that day. In this connection, HD considered that there was no transfer of the right to use the Venue as claimed by the Organisation. The Office considered HD's explanation reasonable.

473. However, the Office noted that HD accepted the Certificate of Registration of a Society as a documentary proof for application for the use of venues (which was not one of the three documentary proofs specified in HD's guidelines[11]). The Office was of the view that there were inadequacies as the Estate Office had not followed the guidelines. If HD considered the Certificate of Registration of a Society an acceptable documentary proof for application for the use of venues, it should update its guidelines and the content of the notes to application for the use of venues. If not, it should require the Estate Office to strictly follow the requirement under the established guidelines in handling matters about the application for the use of venues.

474. Therefore, the Office considered Allegation (c) unsubstantiated but other inadequacies were found on the part of HD.

475. In light of the above, The Ombudsman considered this complaint partially substantiated, and recommended that HD –

(a) take measures to monitor the actual number of hours for use of the venue by the successful applicants and improve the content of the "Standard Form"; and

(b) strictly implement the guidelines on handling applications for the use of venues and if necessary, update its content for accepting the Certificate of Registration of a Society as a documentary proof.

[11] The documentary proofs refer to: (1) Certificate of Incorporation issued by the Registrar of Compalies, Holg Kolg, ildicatilg tle registratiol of tle orgalisatiol colcerled as a claritable ole; l (2) Letter from the Commissioner of Inland Revenue, confirming the status as charitable organisation ulder lSectiol l88 lof ltle llllald lRevelue lOrdilalce l(Cap. l 2); lor l(3) lOtler lwrittel lrecords, l publications or photographs showing the organisation's past experience in holding charitable activities.

Government's response

476. HD accepted The Ombudsman's recommendations.

Recommendation (a)

477. HD has revised the content of the "Standard Form" and required inspection officers to record their inspection time as a means to monitor the actual number of hours for use of venues by the successful applicants. Furthermore, HD has required the applicants to take photographs of the events for record purpose. Where necessary (e.g. upon receipt of complaints against an applicant for not using the approved venue), HD would request the applicant concerned to submit the photographs of the event as proofs.

Recommendation (b)

478. HD has also updated the content of relevant guidelines and the notes to applications for the use of venues to accept the Certification of Registration of a Society issued by the Commissioner of Police as one of the documentary proofs for verifying the eligibility of the applicants.

Housing Department

Case No. 2019/0880 – Failing to follow up a report of unauthorised alterations in a public housing unit

Background

479. The complainant noted that a public housing unit (the Unit) was suspected of unauthorised alterations (UAs) involving changes to the layout. On 3 March 2018, he reported the case to the Housing Department (HD) via the latter's website and left his telephone number for reply. Subsequently, HD's Estate Office replied that it noted the case and would take follow-up actions. However, in 2019, the complainant found that the Unit had not been re-instated and the tenant had not moved out. He suspected that HD was harbouring the tenant. Later, he quoted and provided photos for a few UAs which had not yet been rectified, and queried that HD had not followed up the case in accordance with its guidelines and the law. He also stated that he could not find any general guidelines regarding alterations of landlord's fixtures by tenants on the notice board of the estate management office and questioned if HD had displayed the guidelines concerned.

480. The complainant lodged a complaint with the Office of The Ombudsman (the Office) against HD on 12 March 2019 for its failure to follow up his report of suspected UAs in a public housing unit.

The Ombudsman's observations

481. The Office has examined the complaint and the supplementary information, HD's reply, the relevant guidelines, application records, inspection records, photographs and correspondences, etc. According to the Office's investigation, before receiving the complainant's report, HD had already been taking follow-up actions against the suspected non-compliant alterations in the Unit. After receiving the complainant's report, HD had also been following up and giving replies to the complainant, although it could not advise him the details which concerned the privacy of the tenant of the Unit (the Tenant). After examining the records, the Office confirmed that HD had acted according to the relevant guidelines in following up the complainant's report and there was no evidence of any improper handling or harbouring. HD had also explained the circumstances under which the Housing Authority (HA) would terminate

the tenancy agreement on the ground of UAs. Although the Tenant was still residing in the Unit, it did not represent that HD had not followed up the report.

482. In accordance with the "Guidelines on Tenants' Alteration Works" (the Guidelines), landlord's fixtures are classified into Categories A, B and C. No alterations are permitted to Category A fixtures and tenant's applications for those alterations shall be rejected. As for Category B fixtures, a tenant shall submit the duly completed application form to seek HA's prior approval before altering the relevant fixture. All alteration should be made in compliance with the conditions of approval as stated in the application form. As regards Category C fixtures, HA's approval is not required for alterations.

483. According to the Estate Management Division Instruction (EMDI), estate management staff shall check whether an application form is duly completed by the tenant concerned. If there are records of UAs / irregularities related to the concerned flat, such as those "unacceptable" UAs as listed in the Guidelines, and the UAs / irregularities are not yet rectified, the application shall be rejected. No retrospective approval will be granted for UAs.

484. However, the Office found that HD's Guidelines for processing the application made by the Tenant were unclear. HD pointed out that according to the usual practice and understanding between HD and the residents, the relevant statements of the Guidelines were construed to mean that before submitting an application for alterations, tenants had to ensure that there was no UA in their flats that might have adverse impact that was not yet rectified. In this connection, HD indicated that it would consider revising the Guidelines so as to reflect the original intent more clearly.

485. The Office considered that HD should also keep tenants informed of the Guidelines so that they would know that before submitting an application for alterations, they had to ensure that there was no UA in their flats that might have adverse impact that was not yet rectified.

486. The Office was also aware that during the time when the Tenant's application was being processed, HD revised the Guidelines. Two versions of the Guidelines, namely the 2016 version and 2018 version, were involved in this case. Under the 2016 Guidelines, Estate Offices were required to conduct a site inspection normally within 90 days upon receipt of an application for alterations to Category B fixtures to check if there are any UAs, especially those relating to Category A fixtures. If the relevant

works were still in progress at the time of inspection, the Guidelines did not require the Estate Offices to conduct another inspection. Under the 2018 Guidelines, Estate Offices were required to complete site inspection in respect of applications for casual vacancy and mass intake normally within 90 days and 180 days respectively. The Guidelines did not mention that the site inspection should cover alterations to flats occupied by existing tenants. If the alteration works were not completed within the above timeframe, the case officers had to report to the senior manager for advice. Upon receipt of the application from the Tenant in November 2017, the Estate Office deployed staff to conduct inspection in the same month according to the then prevailing Guidelines. As for the application from the Tenant in May 2019, the Estate Office did not deploy any staff to conduct inspection.

487. The Office considered that since sitting tenants might also make applications for alterations, it did not see any justifications why inspections were only carried out for applications for casual vacancy and mass intake. The Office was of the view that, if no inspection was carried out, it would be questionable whether the tenants had complied with the requirements or not, or even worse, HD might not be able to detect at an early stage any alteration works that might cause adverse impact. In this connection, HD stated that according to the existing usual practice, Estate Offices would arrange inspections in respect of applications for alterations made by sitting tenants. Upon receipt of the application from the Tenant on 15 May 2019, the Estate Office had been liaising with the Tenant since August 2019 to arrange for inspection of the Unit, but no suitable time for inspection could be arranged so far. The Estate Office would continue to contact the Tenant so as to complete the inspection for the alteration works. The Office considered it necessary for HD to clearly specify in the Guidelines that the requirement for flat inspection was also applicable to applications from sitting tenants to ensure the above practice is implemented by all Estate Offices.

488. In light of the above, The Ombudsman considered this complaint unsubstantiated, but other inadequacies were found on the part of HD.

489. The Ombudsman recommended that HD –

(a) consider revising the relevant Guidelines so as to reflect the original intent more clearly, i.e. before submitting an application for alterations, tenants have to ensure that there is no UA in their flats that may have adverse impact that is not yet rectified. Tenants should also be informed of the Guidelines;

(b) consider revising the relevant Guidelines to stipulate that the site inspections required to be conducted upon receipt of applications for alterations also cover applications from sitting tenants; and step up efforts in following up the applications, for example, during the construction stage, send officers to conduct more inspections and request information from tenants to ensure the approved alterations meet the standard; and

(c) step up patrol and actively detect non-compliant cases, for example, take the initiative to make enquiries and conduct inspections when sitting tenants are found carrying out renovations works.

Government's response

490. HD accepted The Ombudsman's recommendations.

Recommendations (a) and (b)

491. HD has completed the review on the Guidelines and issued the revised version in August 2020. It is stated in the enforcement notice issued by HD in response to tenants' alteration works of landlord's fixtures that tenants shall ensure that there are no UAs / irregularities with adverse effect in the concerned flat that are not yet rectified before submitting the application for alterations, otherwise the application shall be rejected. Moreover, to ensure the approved alterations meet the conditions of approval, estate management staff will visit the concerned flat within the specified timeframe upon receipt of an application for alterations regardless of whether the applications were made by sitting tenants or tenants of vacant / newly-completed flats.

Recommendation (c)

492. HD will arrange appropriate training for frontline staff regularly to strengthen their understanding of the revised Guidelines for their strict execution. Besides, daily patrol will be stepped up to detect UAs, such as making enquiries and conducting inspection proactively when tenants are found carrying out renovation works.

Housing Department

Case No. 2019/2904 – Confusing and unfair regulations for display of posters in a public housing estate

Background

493. According to the complainant, he had made frequent applications for display of posters in various public housing estates. With effect from 2018, the regulation for poster display application in an estate (the Estate) has changed from "accepting poster from each applicant one at a time according to his / her position in the queue and on a first-come-first-served basis until the quota is used up" (the 2017 regulation) to "accepting any number of posters from each applicant according to his / her position in the queue and on a first-come-first-served basis until the quota is used up" (the 2018 regulation), which resulted in vicious competition among persons applying for display of posters. On 29 March 2018, the first person queued up at the Estate Office as early as 6:45 a.m. although the posters' vetting and approving process did not officially start until 9:00 a.m. The complainant was 12th in the queue when he arrived at the Estate Office at 8:20 a.m. on that day.

494. The complainant lodged a complaint with the Office of The Ombudsman (the Office) on 31 March 2019, alleging that the Housing Department (HD) had turned a blind eye to the confusing and unfair situation caused by the 2018 regulation of the Estate and had not actively adopted his suggestions.

The Ombudsman's observations

495. The Office has reviewed the relevant policies, internal guidelines, statistics on the applications and the information provided by the complainant (including the video clip of his conversation with a staff member).

496. In considering this case, the Office focused on the compliance of the practice under the 2018 regulation with HD's policy guidelines. Staff members of estate offices, when handling applications for the display of publicity materials, should abide by a few major principles, including neutrality, consistency, transparency, fairness, first-come-first-served, and

provision of a sufficient number of display spots for meeting the demand as far as practicable.

497. As indicated by HD, the 2017 regulation and the 2018 regulation are in compliance with the first-come-first-served principle. It is not a mandatory requirement on its guidelines to impose a limited number of posters to be displayed. It has also offered an explanation that the Legislative Council (LegCo) Members and District Council (DC) Members of the district are demanding a relatively large number of poster display spots. However, according to the utilisation of the display spots, there had been no remaining quotas available for application before additional poster display spots were provided in June 2019 in the Estate. In view of the complainant's statement and the presence of a queue of applicants around 6:00 a.m., it seemed that there was a short supply in poster display spots in the Estate.

498. When there was a short supply of display spots, even though individual applicants, as claimed by HD, "queued up at the Estate Office in the early morning on account of their own commitments or personal choice", the Office considered it understandable for other applicants to arrive earlier in order to secure a poster display spot, which might trigger vicious competition. Since there was no limitation on the number of posters to be displayed under the 2018 regulation, this might lead to monopoly of such spots by a small number of people in case applicants nearing the front of a queue made a request for a large number of poster display spots. It is also impossible for HD to infinitely increase the provision of such spots. The Office believed that it would be difficult for HD to abide by all the principles if there was no limitation in this regard, especially the two principles of impartiality and provision of a sufficient number of display spots for meeting the demand as far as practicable.

499. Moreover, regarding the situation on 29 March 2019 facing the complainant, the Office noted HD's claim that there was no chaotic situation on that day. However, the Office was of the view that the Estate Office did not seem to have communicated with stakeholders. According to the conversation between the complainant and the staff member, the complainant appeared to have reflected the problem of the Estate Office's handling of poster display applications to the staff member many times before. It was not until The Office's intervention that HD provided additional poster display spots in the Estate from June 2019.

500. As indicated in The Ombudsman's Direct Investigation Report[12], HD should consider imposing a limit on the number of posters to be displayed. On account of the different designs of public housing estates, each estate should set a quota for the number of posters to be displayed by the same applicant.

501. In light of the above, The Ombudsman considered this complaint substantiated and urged HD to put in place a new arrangement as soon as possible for the display of publicity materials in public housing estates, including the recommendation to impose a limit on the number of posters to be displayed. In this connection, HD should, while taking into account factors like the specific design of the Estate and the demand for poster display of different individuals or organisations, review its current arrangements in a bid to formulate and implement more equitable guidelines and criteria for the designation of poster display spots.

Government's response

502. HD accepted The Ombudsman's recommendation.

503. HD has already revised its measure for the display of publicity materials in public housing estates and put in place a new arrangement since January 2020. Regarding the number of posters for display under the new arrangement, each DC member is allowed to display not more than three A3-size or six A4-size posters under a reserved quota at each poster display zone of each estate covered by his / her DC constituency, whereas each LegCo Member from geographical constituencies (to which the estate concerned belong) and the five LegCo members from DC (second) functional constituency are allowed to display one A3-size or two A4-size posters under a reserved quota at each poster display zone of each estate. As for other applicants, only one application for one A3-size or two A4-size posters is allowed for each round of application, which will be processed on a "first-come-first-served" basis.

[12] The Ombudsman published a Direct Investigation Report (OMB/DI/383) for the display of publicity materials in public estates in 2017.

504. Furthermore, in January 2020, the Estate Office concerned has, in accordance with the new measure, reserved the quota for the aforesaid Members on each display zone, while the remaining poster display spots are made available to other applicants. Only one application for one A3-size or two A4-size posters is allowed for each round of application, which will be processed on a "first-come-first-served" basis. The new measure has been implemented smoothly at the Estate and so far the issue of inadequate spots for poster display has not emerged.

Inland Revenue Department

Case No. 2019/0677(I) – Failing to provide four items of information related to the doubled ad valorem stamp duty

Background

505. On 13 February 2019, the complainant wrote to the Inland Revenue Department (IRD) requesting various information about doubled ad valorem stamp duty (DSD) under the Code on Access to Information (the Code). The requested information included, among others, the following four items:

(1) The number of cases in which the purchaser who had not owned any residential property before the introduction of DSD, and subsequently acquired more than one residential property under a single instrument on his or her own behalf with payment of ad valorem stamp duty at Scale 2 rates (Information (1));

(2) Among the cases in Information (1), the largest amount of stamp duty that was saved by an individual purchaser who acquired the property solely on his or her own behalf (Information (2));

(3) The number of cases in which the purchaser sold a residential property and purchased a new residential property within six months (maintaining the same number of property or properties owned upon the introduction of DSD), but the relevant instrument for acquisition of the new property was subject to DSD (Information (3)); and

(4) Among the cases in Information (3), the number of cases in which the purchaser applied for exemption from additional stamp duty on the ground that the new stamp duty measure was unfair to him / her (Information (4)).

506. IRD provided a written response to the complainant on 22 February 2019, citing paragraph 1.14 of the Code and stating that the IRD neither had nor maintained Information (1) to (4). In this regard, the complainant complained to the Office of The Ombudsman on 28 February 2019 against IRD for not providing the relevant information to him.

The Ombudsman's observations

Relevant requirements of the Code

507. Paragraph 1.14 of the Code provides that the Code does not oblige departments to acquire information not in their possession or create a record which does not exist.

508. According to paragraph 2.9(d) of the Code, a department may refuse to disclose information if such information could only be made available by unreasonable diversion of a department's resources. Paragraph 2.9.7 of the Guidelines on Interpretation and Application of the Code further explains that the circumstances covered by paragraph 2.9(d) of the Code may include: large volume of information sought, or request framed in general terms. However, before refusing a request under this provision, departments should first discuss with the applicant the possibility of modifying the request to a mutually acceptable level, or identifying the requested information more precisely.

Information (1) and (2)

509. In stamping applications, purchasers who acquired more than one property under a single instrument were only required to report the number of properties involved. There was no requirement for purchasers to report the nature of each property (whether residential or non-residential). The Stamp Office did not maintain systematic record of the nature of each property covered by the instruments reviewed, nor was there any record in the stamping system showing whether the instruments concerned involved residential properties only.

510. In short, IRD did not maintain Information (1) and (2) and was unable to compile the two items of information from its computer records. The Ombudsman accepted that the circumstances fell within paragraph 1.14 of the Code, and IRD did not violate the Code for not providing the information to the complainant.

511. However, the Ombudsman noted that IRD had manually analysed the cases involving acquisition of more than one residential property under a single instrument between August 2016 and April 2018 and maintained the relevant statistics. Although the statistics did not fully meet the complainant's request with respect to Information (1), the nature of the two was similar.

512. In general, the public does not have specific knowledge about the information actually maintained by government departments. The Ombudsman considered that since IRD had maintained the statistics of cases involving acquisition of more than one residential property under a single instrument, a more appropriate way to handle the request was to explain to the complainant what similar information was maintained by IRD, and discuss with the complainant the possibility of modifying the request to a mutually acceptable level so as to conform to the spirit of the Code.

Information (3) and (4)

513. In stamping applications, purchasers were not required to report whether they had sold or purchased any property within six months, and the number of residential properties they owned. In addition, duty payers had from time to time applied to the Stamp Office for exemption from stamp duty on various grounds. The Stamp Office did not maintain statistics for each specific ground.

514. As IRD did not maintain Information (3) and (4), IRD did not violate the Code for not providing the information to the complainant.

515. The Ombudsman considered this complaint unsubstantiated. Nonetheless, The Ombudsman recommended that IRD –

(a) explain to the complainant the statistics IRD has maintained in relation to cases involving acquisition of more than one residential property under a single instrument, and discuss with the complainant the possibility of modifying the request to a mutually acceptable level; and

(b) remind IRD officers of the need to assist applicants in identifying the information actually maintained by IRD when handling requests for information from the public in the future.

Government's response

516. IRD accepted The Ombudsman's recommendations. In light of the recommendations, the relevant IRD officer discussed with the complainant over the telephone and issued a written reply to the complainant. In the reply, an explanation was provided to the complainant about the statistics IRD had maintained in relation to cases involving

acquisition of more than one residential property under a single instrument, and other relevant information was provided to the complainant for reference.

517. IRD issued an email in August 2019 to all unit heads and officers who would handle requests for information from the public, reminding them of the need to assist applicants in identifying the information actually maintained by IRD when handling such requests in the future.

Judiciary Administration

Case No. 2018/4872(I) – Refusing to disclose the dates of taking the judicial oath for assuming office of two judges, and the names of their oath administrators

Case No. 2019/0802(I) – Refusing to disclose the date of taking the judicial oath for assuming office of a judge, and the name of his oath administrator

Background

518. The complainant lodged two complaints with The Ombudsman against the Judiciary Administration (JA) on 6 December 2018 and 8 March 2019 respectively for allegedly breaching the Code on Access to Information (the Code) in handling his two information requests. In Case I (2018/4872(I)), the complainant accused JA of refusing to disclose information about the date on which a judge (Judge X) took the judicial oath when assuming office upon his first appointment as a judge and the dates on which a Master (Judge Y) took the judicial oath when assuming office upon her first appointment as a judicial officer and upon her appointment to another judicial position; and the names of the officers administering their oaths. In the subsequent Case II (2019/0802(I)), the complainant accused JA of refusing to disclose information about the date on which another Master (Judge Z) took the judicial oath when assuming office upon his appointment to a judicial position; and the name of the officer administering his oath.

The Ombudsman's observations

519. JA as an organisation covered by the Code should act in accordance with the Code and strive to provide to members of the public the information it holds unless there are good reasons under Part 2 of the Code for non-disclosure. In refusing an information request, a department should notify the requestor its reason(s) for non-disclosure by citing the relevant paragraph(s) in Part 2 of the Code as justification.

520. Regarding these two cases, the complainant was clearly asking JA to provide the exact dates on which the three judges concerned took the oaths when assuming office and the names of the relevant oath administrators. The Ombudsman took the view that JA's replies simply

explained the statutory requirement of oath-taking by the judges when they assume office. This was obviously different from the information the complainant was asking for, which was the exact dates on which the three judges concerned took their oaths. The Ombudsman was perplexed by JA's explanation that it had followed the Code and provided the complainant with the information he requested by merely confirming that the three judges had followed the statutory requirement to take the oath when assuming office.

521. Moreover, paragraph 1.6.3 of the Guidelines on Interpretation and Application of the Code stipulates that "the information to be provided to an applicant should be the most recent and accurate one available which is relevant to his request." Even if JA wished to respond to the complainant's request without divulging the personal data of the judges and the oath administrators involved, it should have discussed with the complainant and sought his consent in advance, instead of unilaterally deciding to use certain information as a substitute for what he was asking for. In fact, upon receipt of JA's initial replies to his two information requests, the complainant again requested JA to provide the information concerned. Evidently, JA's replies had fallen short of the complainant's expectation. The Ombudsman considered JA's response incongruent with the spirit of the Code.

522. Furthermore, JA responded to the complainant's follow-up requests for information by sending to him again the same reply, and chose not to provide the information concerned or cite any reason as listed in Part 2 of the Code as justification for non-disclosure. Its response obviously did not comply with the requirements and procedures set out in the Code.

523. When assuming office, judges and judicial officers must take an oath in accordance with the relevant legislation. In the past, the Government would take the initiative to announce information about public officers taking oaths when they assumed office, and the Judiciary had also made announcements when the Chief Justice of the Court of Final Appeal took the oath upon assumption of office. It follows that such information may involve to some extent the public interest. Even if the information the complainant requested might involve the personal data of other persons, JA must still follow the requirements of the Code in handling and replying to his requests.

524. Overall, there were a number of inadequacies in JA's handling of the two information requests, which underlined its lack of adequate understanding of the requirements of the Code. The Office of The Ombudsman was glad to note that upon review of the two applications, JA had eventually provided the complainant with the information concerned.

525. In light of the above, The Ombudsman considered both of the complaints against JA substantiated, and recommended that JA step up its staff training on the Code and remind its staff to follow strictly the requirements of the Code in handling information requests from the public.

Government's response

526. JA accepted The Ombudsman's recommendation.

527. JA has always attached importance to its staff's understanding of the Code and strict compliance with the requirements of the Code in handling requests for access to information from members of the public. To enhance the staff's alertness to the requirements in handling requests under the Code and ensure that the handling process meets the requirements of the Code, the Access to Information Officer of JA specifically explained to all section heads by way of case sharing in November 2019 matters requiring attention when handling requests under the Code. These include important principles of the Code, timeframe for handling requests, application of reason(s) for non-disclosure, how to handle information held by courts and the appeal mechanism. The purpose of the sharing was to enable all section heads to have a better understanding of the concept and procedures of handling requests under the Code so that requests for access to information under the Code could be properly dealt with.

528. Besides, after having redacted all the personal data contained in these two Code-related complaint cases, JA compiled an abstract setting out the substance of the complaints and points to note, and has distributed it to all section heads so that they could take reference and learn from the experience of handling these two complaints.

Judiciary Administration

Case No. 2019/0870(I) – Refusing to disclose the identity, post title and affiliated department of the staff who had signed the transcript of a court hearing, and the name and post title of the supervisor of the staff concerned

Background

529. The complainant lodged a complaint with The Ombudsman against the Judiciary Administration (JA) on 8 March 2019 for allegedly breaching the Code on Access to Information (the Code) by refusing to provide him with information about the identity, post title and affiliated department of the staff who had signed the transcript of a court hearing, and the name and post title of the supervisor of the staff concerned (collectively referred to as the information concerned).

530. In January 2019, the complainant submitted an information request form requesting JA to provide several pieces of information, including the information concerned. In its reply of the same month to the complainant, JA stated that transcripts of court hearings are information held by courts and that paragraph 1.2 of the Code stipulates that "the Code does not apply to information held by courts, tribunals or inquiries" and therefore JA was unable to process his request according to the Code.

531. In February 2019, the complainant expressed his dissatisfaction with JA's decision. In summary, the complainant considered that he was merely asking for information about the staff who had signed the transcript of the court hearing. According to information available from JA, court hearing transcription service falls within the scope of responsibilities of the Quality Division of JA and has nothing to do with judicial decisions. Thus, the complainant did not consider the information concerned to be information held by courts and asked JA to review his request for the information concerned.

532. On 4 March 2019, in its reply to the complainant, JA reiterated that the information concerned was information held by courts and maintained its decision to refuse to provide the information concerned by citing paragraph 1.2 of the Code. Nevertheless, JA explained to the complainant that digital audio recording and transcription services for all levels of courts were undertaken by outsourced contractors; and that the Court Reporters Office under the purview of its Quality Division was

responsible for overseeing the services. JA also confirmed to the complainant that the transcriber who had signed the transcript of the court hearing concerned was a member of the outsourced contractor's staff.

533. On 8 March 2019, the complainant raised another request with JA for provision of the name of the staff in the Court Reporters Office responsible for the transcript of the court hearing concerned. On 30 April 2019, in its reply to the complainant, JA provided the name and the post title of the section head of the Court Reporters Office.

534. Arising from The Ombudsman's investigation, JA reviewed the case again and accepted that even though the name of the transcriber was part of the transcript concerned, the information requested by the complainant was not; and hence the information concerned should not be considered to be held by the Court. Furthermore, JA admitted that, in handling this information request, it has wrongly applied paragraph 1.2 of the Code as a ground for refusing to disclose the information and did not provide the review channels to the complainant. On this, JA expressed its apologies to the complainant.

The Ombudsman's observations

535. JA as an organisation covered by the Code should act in accordance with the Code and strive to provide to members of the public the information it holds unless there are good reasons under Part 2 of the Code for non-disclosure.

536. The Ombudsman agreed that transcripts of court hearings are information held by courts. However, as far as this case is concerned, the information that the complainant requested had never been recorded on the transcript of the court hearing. Therefore, it was inappropriate for JA to say that the information concerned was part of the transcript of the court hearing and refuse to disclose the information concerned by citing paragraph 1.2 of the Code as justification. In any event, JA had admitted its mistake and offered its apologies to the complainant.

537. Besides, The Ombudsman noted that although JA considered that it had provided the complainant with the information concerned, part of the information (including the name of the section head of the Court Reporters Office) was actually provided in response to another information request by the complainant on 8 March 2019. The Ombudsman was of the view that if JA considered that such information was part of the

information concerned, it should have provided such information in its reply on 4 March 2019 when the reply was issued to the complainant, rather than providing it after he had made his subsequent request.

538. In light of the above, The Ombudsman considered the complaint against JA substantiated, and recommended that JA step up its staff training on the Code and remind its staff to follow strictly the requirements of the Code in handling information requests from the public.

Government's response

539. JA accepted The Ombudsman's recommendation.

540. JA has always attached importance to its staff's understanding of the Code and strict compliance with the requirements of the Code in handling requests for access to information from members of the public. To enhance the staff's alertness to the requirements in handling requests under the Code and ensure that the handling process meets the requirements of the Code, the Access to Information Officer of JA specifically explained to all section heads by way of case sharing in November 2019 matters requiring attention when handling requests under the Code. These include important principles of the Code, timeframe for handling requests, application of reason(s) for non-disclosure, how to handle information held by courts and the appeal mechanism. The purpose of the sharing was to enable all section heads to have a better understanding of the concept and procedures of handling requests under the Code so that requests for access to information under the Code could be properly dealt with.

541. Besides, after having redacted all the personal data contained in this Code-related complaint case, JA compiled an abstract setting out the substance of the complaint and points to note, and has distributed it to all section heads so that they could take reference and learn from the experience of handling this complaint.

Lands Department

Case No. 2018/3845 – (1) Delay in processing an application for short term waiver; (2) Imposing an unreasonable prerequisite for issuing short term waiver; and (3) Charging a non-refundable administrative fee for the short term waiver application which the Department had delayed in processing

Background

542. In September 2016, the complainant obtained a planning approval from the Town Planning Board (TPB) to develop a temporary hobby farm at a site (the Site), subject to certain approval conditions. One of the conditions was that the "water supplies for fire-fighting and fire service installations" proposal should be implemented. As the fire services equipment could only be installed after erection of certain structures on the Site, the complainant submitted in September 2016 an application (the Application) to the relevant District Lands Office (DLO) for a short term waiver (STW) for erection of the said structures.

543. DLO approved the Application in principle in May 2017 and made a basic terms offer (BTO) to the complainant in August 2017. The complainant paid a non-refundable administrative fee requested by DLO in October 2017. However, DLO then stated that the prerequisites for issuing an STW to the complainant included full compliance with TPB's approval conditions and successful application for three certificates of exemption to erect temporary structures on the Site. On 27 September 2018, the complainant lodged a complaint with the Office of The Ombudsman against the Lands Department (LandsD). The complainant's dissatisfactions are summarised as follows –

(a) Delay in processing an application for short term waiver (Allegation (a));

(b) Imposing an unreasonable prerequisite for issuing STW (Allegation (b)); and

(c) Charging a non-refundable administrative fee for the Application which DLO had delayed in processing (Allegation (c)).

The Ombudsman's observations

Allegation (a)

544. When DLO circulated the Application to other departments for comments, the deadline for reply was set to be 26 November 2016. When two of the departments whose replies were considered essential to the Application had yet to reply by the end of November 2016, DLO took no action but issued a reminder only in January 2017. LandsD explained that it did not have a time pledge for issue of reminders. However, The Ombudsman considered that good administration and efficient service calls for making of timely reminders, irrespective of whether or not a time pledge has been laid down.

545. Having approved the Application in principle in May 2017, DLO issued the BTO to the complainant only in August 2017. Although LandsD explained that it had some procedures to complete before it was able to issue the BTO, it provided no concrete evidence to justify the long time it had taken, apart from limited manpower and heavy workload. The Ombudsman noted the internal limitation of LandsD but considered that it was incumbent upon LandsD to deal with such issues rather than leaving the public to suffer the inefficiency thus caused. Therefore, The Ombudsman considered Allegation (a) substantiated.

Allegation (b)

546. DLO's internal records show that in March 2017, while considering making the BTO to the complainant, it considered the complainant's compliance with TPB's approval conditions a prerequisite for issuing the STW. Even in April 2018, when the complainant enquired of DLO at a meeting whether STW applicants had to comply with all TPB approval conditions before STWs could be issued, DLO only replied that the matter was considered on a case-by-case basis and explained its concern that some STW applications had to be withdrawn due to failure to comply with TPB's approval conditions. It is, therefore, clear that it had been DLO's requirement for the complainant to fully comply with all of the TPB's approval conditions before it would issue the STW. While LandsD explained to The Ombudsman that if the complainant confirmed that the Submission Conditions, i.e., the requirements on making submissions to relevant departments (but not the "Implementation Conditions", i.e., the actual implementation of relevant technical proposals) had been complied with, DLO would have considered the conditions for issuing the STW to have been satisfied. DLO did not so convey to the

complainant. The Ombudsman did not consider there to be any misinterpretation on the part of the complainant, as LandsD alleged.

547. DLO's concern and its withholding of the issuance of an STW may be understandable in situations where TPB's planning approval conditions can be complied with without a STW. However, in the present case, it is obvious that the complainant could not possibly comply with the Implementation Conditions without a STW. It is therefore unreasonable for DLO to require the complainant to fully comply with TPB's approval conditions for issuing the STW.

548. Even if there had been reasonable grounds for DLO to require full compliance with TPB's approval conditions, DLO should have informed the complainant of such grounds to allow the latter to consider. However, DLO did not do so. And the BTO only stated that there was no binding agreement as yet on the Government until the fees were paid. It did not state that DLO might withhold the issuance of the STW until the complainant had fully complied with TPB's approval conditions.

549. LandsD's internal instructions state that the procedures following receipt of signed BTOs (and presumably, administrative fees) include "allocation of new STW number" and "recording of termination of existing STW". There is no mention of imposition of requirements for compliance by the applicants. Hence, DLO has deviated from LandsD's internal instructions by withholding issuance of the STW on the ground that the complainant had not fully complied with TPB's approval conditions. Therefore, The Ombudsman considered Allegation (b) substantiated.

Allegation (c)

550. Administrative fees are usually charged to compensate for the cost of processing applications, which will be incurred irrespective of the outcome of the application in question. It is, therefore, not unreasonable for such fees to be made non-refundable.

551. Nonetheless, The Ombudsman considered this case an exceptional one since DLO had taken a long time in processing the Application, resulting in the STW being issued on a date (15 November 2018) more than two years after the complainant had filed the Application, and the validity period of the waiver only ran up to 31 March 2019.

552. The Ombudsman did not dispute that a contractual agreement had been entered into by the complainant with one of the conditions being that the administrative fee is not refundable. However, that condition should only stay binding if DLO had properly discharged its duties, which The Ombudsman did not think so. Therefore, The Ombudsman considered Allegation (c) substantiated.

553. In light of the above, The Ombudsman considered this complaint substantiated, and urged LandsD to –

(a) consider improving its manpower resources for processing STW applications (and related tasks as appropriate) as well as amending its internal instructions, taking reference from this case; and

(b) in the event that the complainant submits a fresh application for STW and makes requests connected with the associated administrative fee and waiver fee, duly consider such requests.

Government's response

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

Recommendation (a)

555. LandsD has been keeping its manpower resources and prioritisation of work under review. At the same time, LandsD has been actively working on the recommendation on amending the internal instructions to streamline the processing of STW applications. With reference to the case, having consulted the trade and reviewed the current instructions, additional guidelines and new instructions are being devised to improve the mechanism in handling the STW applications. Specifically, LandsD will streamline the procedures for departmental circulation and public consultation, as well as adopt simplified documentation. In the meantime, relevant DLO has issued instructions to remind staff to observe the time frame in processing STW applications.

Recommendation (b)

556. No fresh application for STW from the complainant has been received so far. Should the complainant submit a fresh application for STW and make requests connected with the associated administrative fee and waiver fee, DLO will consider the application having regard to The Ombudsman's recommendation.

Lands Department

Case No. 2019/1330 – (1) Failing to review before tenancy renewal whether a site granted under short term tenancy ("STT") at nominal rent was still suitable for use as funeral hall, etc.; (2) Unreasonably leasing the STT site to the tenant at no charge; and (3) Failing to answer in detail the complainant's enquiries about termination and renewal of the STT concerned

Background

557. On 3 April 2019, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against a District Lands Office (DLO) of the Lands Department (LandsD). According to the complainant, funeral ceremonies such as scattering "hell banknotes", burning joss paper and playing music were frequently conducted at a building situated in a rural site of the New Territories (the site). Since early 2019, the complainant had complained to the DLO about the environmental and noise nuisances caused to nearby residents, and requested termination of the short term tenancy (STT) concerned. In response, DLO advised that the STT was first granted in 1988, with "funeral hall and ancillary uses" as the permitted purposes, and the hall itself was open for use by nearby residents for free. Furthermore, the STT was granted in accordance with the applicable procedures. The complainant was dissatisfied with DLO for its bureaucratic response and failure to terminate the STT. The complainant's complaints are summarised as follows –

(a) With increased population in the vicinity of the site over the past 30 years, a wider community was subject to the nuisance. However, DLO allowed renewal of the STT without conducting any review on the suitability of the government land for uses such as funeral hall in light of the changes in circumstances (Allegation (a));

(b) The land concerned was let to the tenant by DLO free of charge without any justifications (Allegation (b)); and

(c) In its email reply of 2 March 2019, DLO's staff failed to provide substantive responses to such issues as the termination and renewal of the STT as raised in the complainant's email on 4 February (Allegation (c)).

The Ombudsman's observations

Allegations (a) and (b)

558. The justifications provided by LandsD for the approval of the STT and its continued renewals at nominal rent are basically as follows –

(a) The "hillside burial" policy is intended to pay respect to the traditional customs of indigenous inhabitants and to address their needs with compassion;

(b) The site, with most of its area lying within the boundary of a "permitted burial ground" and not adjoining any residential areas, is suitable for use as a funeral hall;

(c) The site has not been planned for any long-term uses or development, nor is there any information showing any breaches of the tenancy conditions by the STT tenant (such as operation of an illegal funeral parlour as alleged by the complainant); and

(d) DLO granted and renewed the STT for the site at nominal rent without seeking policy support from relevant bureaux / departments (B/Ds) in advance as it was not required to do so in accordance with the applicable procedures for granting the said STT at the time.

559. The Office considered justifications (a) to (c) reasonable. However, as for justification (d), The Ombudsman found it questionable as to why LandsD had failed to provide appropriate guidelines on the renewal of such type of STTs (where the grant of the tenancy at nominal rent did not require policy support from relevant B/Ds), hence leading to a significant disparity in the handling of these STTs and those requiring policy support before tenancy renewal.

560. At present, LandsD's decision on whether to grant or renew an STT at nominal rent is made on the important principle that policy support must be obtained from relevant B/Ds. Nonetheless, the procedures for handling STTs of the same nature as in this case failed to reflect this principle. LandsD should have been aware of the above problem and sought to resolve it. Therefore, The Ombudsman considered Allegations (a) and (b) partially substantiated.

Allegation (c)

561. The Ombudsman considered that DLOs' reply to the complainant of 2 March 2019 only advised that the STT had been granted in accordance with the applicable procedures, what the permitted uses were and when the STT commenced, and that the complaint about "whether the tenant had allegedly operated funeral businesses" had been referred to the Food and Environmental Hygiene Department for follow-up. DLO did not respond to certain enquiries of the complainant such as whether the neighbourhood conditions of the site had been taken into account in processing the STT renewal, and whether the STT would be terminated as a result of public objection. The Ombudsman was of the view that the reply given by DLO was indeed unsatisfactory, and therefore considered Allegation (c) substantiated.

562. The Ombudsman recommended that LandsD –

(a) draw up guidelines on the handling of STTs which were granted at nominal rent without having to obtain policy support from relevant B/Ds, so as to instruct its staff how to deal with issues such as the renewal of STTs and the granting of STTs at nominal rent in conformity to the existing principle of requiring necessary policy support;

(b) consult relevant B/Ds about the renewal application of the subject STT (and other STTs of the same nature) to see whether they will provide policy support; and

(c) remind staff to handle enquiries attentively so as to provide concrete replies.

Government's response

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

Recommendation (a)

564. LandsD has undertaken a stock-taking exercise and examined the case details of those STTs which were granted at nominal rent without policy support, including the number, types, and backgrounds of approval of such STTs. While policy support from relevant B/Ds has recently been

obtained for some cases, the review aims to consider whether there is a need to draw up guidelines for handling the remaining cases where policy support may not be readily obtained at date of the grant (e.g. due to difficulties in pinpointing the relevant policy bureau, or the identified bureau requiring more time to look into history of the case, etc.). LandsD has recently completed the review and advised that all the cases could be dealt with in accordance with the existing guidelines. The Ombudsman advised on 29 October 2020 that they had accepted LandsD's explanation and concluded the investigation.

Recommendation (b)

565. DLO has consulted the relevant B/Ds regarding the renewal of the STTs concerned. If policy support could not be obtained, the STTs will be handled in accordance with the existing guidelines including termination of the STTs as appropriate.

Recommendation (c)

566. DLO has briefed its staff to handle enquiries attentively so as to provide more concrete replies.

Lands Department

Case No. 2019/1526 and 2019/1527 – Excessively pruning a valuable tree on Government land, and failing to monitor the disposal of the felled tree trunk

Background

567. According to two complainants, an Aquilaria sinensis (the tree) was growing on a piece of government land. On 12 April 2019, workers of the Lands Department's (LandsD) contractor (the contractor) felled one of the trunks of the tree without notice. Subsequent to police intervention, the contractor stopped felling the tree. The following day, an arboriculture expert inspected the tree on site. According to the expert, the tree, being more than a hundred years old, was in good health and posed no potential danger.

568. The complainants alleged that the felled tree trunk disappeared quickly. Pointing out that the Aquilaria sinensis is a protected plant species, she was dissatisfied with LandsD for felling a protected tree without the permission from the Agriculture, Fisheries and Conservation Department (AFCD), and allowing the contractor to dispose of the valuable wood felled from the tree. On 14 and 15 April 2019, the two complainants lodged a complaint with the Office of The Ombudsman (the Office) respectively against LandsD.

The Ombudsman's observations

569. Having examined the information submitted by LandsD and the contractor, The Ombudsman concluded that LandsD has given a clear decision on how to maintain the tree. Based on the latest version of the assessment report, LandsD arranged with the contractor to conduct "crown cleaning". On 1 April, LandsD took the initiative to send the contractor photos indicating the parts to be pruned. Unfortunately, the contractor did not provide the photos to the relevant workers. This, coupled with the staff member's misinterpretation of the assessment report, led to the over-pruning of the tree. Once informed of the incident, LandsD conducted a risk assessment on the tree with AFCD and adopted protective measures accordingly. It has also admonished the contractor regarding the incident.

570. As for handling the felled trunk of the Aquilaria sinensis, LandsD explained that it had no guidelines on that aspect. Subsequent to the incident, LandsD has drawn up guidelines to set out how tree species with conservation value are to be handled.

571. The incident was the combined result of the contractor's inadequate internal communication and its frontline staff's misinterpretation of the assessment report. It was not the fault of LandsD. Therefore, The Ombudsman considered this complaint unsubstantiated.

572. Nevertheless, the Office noticed that tree maintenance work carried out by tree work supervisors was based on the instructions given in the assessment report, which, did not specify the availability of photos for reference. Therefore, The Ombudsman recommended that LandsD include a section indicating "whether photos are attached" in future assessment reports, so that tree work supervisors may know clearly the availability of photos for reference when carrying out tree maintenance work in future.

Government's response

573. LandsD accepted The Ombudsman's recommendation and has included a section indicating "whether photos are attached" in the template of assessment report, so that tree work supervisors can know clearly the availability of photos for reference when carrying out tree maintenance work in future.

Leisure and Cultural Services Department

Case No. 2018/4697 – (1) Unreasonably refusing to change the enrolment method for aerobic dance programmes from "first-come-first-served" basis to "balloting", and failing to prevent a large number of repeaters from enrolling in the programmes; and (2) providing wrong information to the complainant

Background

574. On 22 November 2018, the complainant filed a complaint with the Office of The Ombudsman (the Office) against the Leisure and Cultural Services Department (LCSD), alleging that the enrolment arrangement (on a "first-come-first-served" basis) for the aerobic dance programmes organised in one of the Sports Centres (the Sports Centre) of LCSD was unfair.

575. LCSD adopted a "first-come-first-served" enrolment arrangement for the aerobic dance programmes organised in the Sports Centre. Two of the sessions[13] received overwhelming response and were always full within 3 minutes from the start of enrolment, making it difficult for members of the public to enrol for a place. However, the complainant found that many people had successfully enrolled in both of the aforementioned sessions of the programmes. This shows that the enrolment on a "first-come-first-served" basis was unfair.

576. The complainant reflected the enrolment situation of the programmes to LCSD via her email in November 2018 and suggested that it would be fairer to change to balloting for enrolment, so as to allow more people to participate in the programmes. Yet LCSD replied to the complainant without verifying the enrolment information and refused to change to balloting by claiming that there was no case where places of programmes were full within the first 15 minutes of enrolment on two consecutive occasions[14].

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[13] The two sessions are referred to as "2 p.m. Class" and "3 p.m. Class" respectively in ensuing paragraphs.

[14] According to LCSD's internal guidelines, in determining whether to adopt a "first-come-first-served" arrangement or balloting as the enrolment method of a sports programme, the organiser has to make reference to the past enrolment situation of similar programmes during a comparable period, among other criteria. Balloting should generally be adopted if there are past record showing that the programmes concerned were full within the first 15 minutes of enrolment on two consecutive occasions.

577. Thus, the complainant alleged that the enrolment information provided by LCSD in its reply was contrary to the fact and that LCSD unreasonably refused to adopt balloting for enrolment.

The Ombudsman's observations

578. The Office considered it inappropriate for the LCSD staff to fail to respond properly to the complainant and to provide inaccurate information.

579. The statistics on the enrolment for the programmes concerned show that many applicants (around 11 to 14 applicants) joined both the "2 p.m. Class" and the "3 p.m. Class", accounting for about one third to one half of the places of each class (30 places), which demonstrated domination by repeated participants.

580. The Office considered that the "first-come-first-served" enrolment arrangement currently adopted by the relevant District Leisure Services Office of LCSD for the programmes concerned and the mechanism adopted by LCSD for reducing the possibility of applicants enrolling in two consecutive classes fail to effectively prevent domination of the programmes by repeated participants. It was necessary for LCSD to review whether the enrolment method was appropriate and took remedial action. LCSD might make reference to the enrolment arrangement for the fitness (multi-gym) programmes, under which "new applicants" are given enrolment priority so as to prevent the recurring domination of the aerobic dance programmes by repeated participants.

581. It was quite obvious that the domination of the aerobic dance programmes by repeated participants had persisted for quite some time. Yet, the organiser had been exercising "discretion" in accordance with the internal guidelines[15] by continuing to adopt the "first-come-first-served" arrangement for enrolment, inevitably giving an impression that it had taken no heed of the situation under the pretext of "discretionary arrangement". This was far from desirable. In this connection, LCSD should also review the "discretionary arrangement" and consider whether more specific criteria would need to be provided in this regard.

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[15] The internal guidelines also stipulate that for programmes that are more frequently held on a monthly basis and hence provide more capacity for enrolment, the organiser might, depending on the actual circumstances, either adopt a "first-come-first-served" arrangement or balloting at its discretion although the programmes concerned were full within the first 15 minutes of enrolment on two consecutive occasions.

582. In light of the above, The Ombudsman considered the complaint against LCSD substantiated, and recommended that LCSD –

(a) review and consider changing the enrolment method of the aerobic dance programmes involved to prevent domination by repeated participants;

(b) consider giving enrolment priority to "new applicants" for the aerobic dance programmes receiving overwhelming response; and

(c) review the relevant guidelines to provide specific and clear criteria where the organiser may adopt "discretionary arrangement" concerning programmes scheduled at a more frequent interval on a monthly basis.

Government's response

583. LCSD accepted The Ombudsman's recommendations, and has taken the following actions –

(a) The enrolment arrangement for the aerobic dance programmes concerned had been changed, i.e. "balloting" had been adopted for the aerobic dance programmes scheduled for enrolment in May 2019. LCSD would continue to closely monitor the enrolment response to the programmes concerned, review the enrolment method and take timely follow-up measures;

(b) LCSD is developing a new Intelligent Sports and Recreation Services Booking and Information System. The new system is designed to extend the priority enrolment arrangement for new applicants for the fitness (multi-gym) programmes to cover other sports programmes. The development and design contract of the new system was awarded by LCSD in mid-March 2020. It is expected that the priority enrolment arrangement for new applicants will be introduced upon completion of phase 1 of the new system in 2022-23. In the interim, LCSD has already adopted "balloting"[16] for the aerobic dance programmes with a view to reducing the possibility of repeated enrolment; and

(c) According to the original guidelines, organisers are allowed to exercise their "discretion" in not using balloting enrolment method for aerobic dance programmes held in peak hours. LCSD has already reviewed and revised the implementation guidelines of the enrolment method for sports and recreation programmes. Under the new guidelines, LCSD has stated clearly that, for programmes where their places are full within the first 15 minutes of enrolment on two consecutive occasions, balloting must be adopted as the enrolment method. Organisers are required to follow the new guidelines in formulating the enrolment method for their sports and recreation programmes accordingly.

[16] According to the existing arrangement in allocating places for balloting programmes, each applicant can only submit one application form for the same type of activities organised by a district within the same enrolment period. While an applicant could fill in a maximum of five choices of activities such as aerobic activities in an application form, only one activity will be allocated to each successful applicant in the balloting process.

Leisure and Cultural Services Department

Case No. 2018/5168A – Impropriety in handling of a noise complaint against the nuisance caused by singing and music playing activities in a park

Background

584. The complainant filed a complaint with the Office of The Ombudsman (the Office) against the Leisure and Cultural Services Department (LCSD), alleging that LCSD had not followed up properly on his complaint about the noise nuisance caused by singing and playing of musical instruments in a park (Park A).

585. The complainant pointed out that there had been groups singing and playing musical instruments with high-powered speakers in Park A, causing noise nuisance which was particularly serious on weekend afternoons.

586. In December 2018, the complainant lodged a complaint with LCSD through 1823 about the noise nuisance in Park A. LCSD later replied to the complainant through 1823 that when people sang or played musical instruments in parks causing nuisances to park users, or when LCSD received relevant complaints, the venue management staff would require the persons concerned to reduce the noise. If the advice was not heeded, LCSD staff would, depending on the actual circumstances, consider prosecuting the offenders subject to the availability of sufficient evidence and other park users' willingness to stand as witnesses.

587. The Complainant alleged that the park management staff had not proactively made intervention or measured the noise level caused by the singing and playing of musical instruments, and the nuisance had not improved all along. The complainant felt aggrieved and thus lodged a complaint with the Office on 29 December 2018.

The Ombudsman's observations

588. The Ombudsman considered that LCSD had been following up on the complaint about noise nuisance in Park A within its authority. Management measures had been taken to reduce noise nuisance caused by music performances. LCSD had also taken follow-up action in response

to the complaint filed by the complainant. However, due to limitations of the law (see paragraph 590 below), prosecution was difficult at that time. Therefore, The Ombudsman considered this complaint unsubstantiated.

589. Nevertheless, music performances had been going on in Park A for over ten years, and the noise nuisance to park users and nearby residents had worsened in recent years. The behaviour and manner of some music performers had also attracted community-wide attention. There were even views that such music performances had given rise to the issue of public morals and bore an adverse impact on the local residents, particularly children and teenagers.

590. The Ombudsman believed that singing and playing instruments by individuals in the park for self-entertainment was all fine, and LCSD had no reason to forbid it as long as no nuisance was caused. However, the use of amplifiers for music performances was apparently beyond self-entertainment, and it was mainly the noise from the amplifiers rather than the music performances themselves that had caused the noise and nuisance. In fact, LCSD had once put in place the "House Rules" in an attempt to regulate the use of amplifiers. Unfortunately, due to limitations of the then existing law[17], LCSD had to rescind the rules.

591. In this regard, The Ombudsman believed that there was great urgency to regulate effectively the noise nuisance caused by music performances in the park and prohibit unauthorised use of any types of amplifiers in the park. Although LCSD indicated that members of the public might play music in their Tai Chi or fitness exercises, The Ombudsman believed that, with the advancement of technology and the growing popularity of technology products, individuals or groups in want of music could use non-nuisance-causing equipment, such as Bluetooth earphones. Since LCSD had been requested by the Legislative Council to conduct a comprehensive review on the Pleasure Grounds Regulation (Cap. 132BC) (the Regulation), LCSD should take this opportunity to ensure that the proposed amendment would give LCSD sufficient authority to resolve this problem which had been lingering for years.

[17] LCSD once invoked the "House Rules" to institute many prosecutions. Yet, in one of the prosecuted cases, the Court pointed out in its verdict that Section 25 of the Pleasure Grounds Regulation (Cap. 132BC) (the Regulation) allowed a person to play musical instrument, sing or make any sounds by means of other instruments in a park, as long as the activity concerned did not cause annoyance to other park users. The Magistrate was of the view that the said Section 25 and the "House Rules" are contradicting, and ruled that the "House Rules" are unreasonable, and hence ultra vires and void.

592. The Ombudsman recommended that LCSD should review the Regulation as soon as possible and seek legal advice from the Department of Justice for appropriate amendment to the law to regulate the use of amplifiers.

Government's response

593. LCSD accepted the recommendation and conducted a comprehensive review to amend the Regulation. The newly amended Regulation came into effect on 24 July 2020. Details are as follows –

(a) The definition of persons subject to annoyance in Section 25 of the amended Regulation has been expanded from "any other user thereof" to cover "any other person" so that LCSD officers can invoke the said provision for more effective law enforcement. If LCSD park staff and any other persons (in particular the nearby residents) are annoyed by noise, they may act as prosecution witnesses in enforcement actions of LCSD, enabling more effective regulation of noise nuisance in public pleasure grounds.

(b) The root of noise nuisance problems in some parks lies in the acts of accepting pecuniary reward for musical performances and singing activities. To tackle the situation, a new provision is included in Section 25 of the newly amended Regulation, prohibiting unauthorised persons from playing music, singing songs or carrying out other music-related activities (including dancing with background music) in parks and accepting any money or reward (e.g. "lai see"). Any person who plays music, sings songs or carries out other music-related activities, regardless of whether he or she initiates the solicitation of money or reward or not, will be in breach of the Regulation.

(c) LCSD noted that musical instruments and amplifiers are used for musical performances and singing activities in some parks, causing excessive noise and even noise nuisance affecting other park users or nearby residential areas. In view of this, a new provision has been included in Section 25 of the newly amended Regulation, empowering the Director of Leisure and Cultural Services to put up notices in parks with noise problems and stipulate that it is necessary to comply with the requirements in the playing of musical instruments and singing activities. Any person who does not comply with the requirements stipulated in

the notices, whether causing noise nuisance or not, will be deemed to be in breach of the provision. LCSD officers may prosecute the offenders in light of the circumstances. To effectively respond to the change in the form of musical performances and singing activities in parks, revisions on the requirements stipulated in the notices can be tailor-made as necessary. Requirements in the notices in relation to prevention of noise nuisance will be drawn up with regard to the actual circumstances of each park.

(d) Offenders of Section 25 of the Regulation were used to be liable on conviction to a fine at Level 1 (maximum fine of HK$2,000) and imprisonment for 14 days. Having reviewed past convicted cases, LCSD noticed that the level of fines was on the low side and was insufficient to deter persons from violating the Regulation. The fine level of the newly amended Regulation has therefore been raised from Level 1 to Level 3 (maximum fine of $10,000), while the imprisonment term of 14 days remains unchanged.

Mandatory Provident Fund Schemes Authority

Case No. 2018/3508C – Unreasonably refusing to define the nature of a payment from the complainant's former employer during the complainant's sick leave period

Background

594. The complainant was employed by the Food and Environmental Hygiene Department (FEHD) and suffered work injury. During his injury leave, FEHD made monthly payment (the concerned payment) to the complainant and deducted 5% from the concerned payment for employee's Mandatory Provident Fund (MPF) contributions.

595. The complainant considered that the concerned payment was not wages but periodical payment under the Employees' Compensation Ordinance (Cap. 282) (ECO). Thus he lodged a complaint against FEHD with Mandatory Provident Fund Schemes Authority (MPFA) for wrongful deduction of employee's MPF contributions from the concerned payment. FEHD considered that the concerned payment was full-pay sick leave paid to the complainant on injury leave in accordance with the Civil Service Regulations (CSR). Hence, MPF contributions should be deducted from the concerned payment.

596. The crux of the case was whether the concerned payment fell under the definition of "relevant income" of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO), which hinged on whether the concerned payment was periodical payment under ECO or full-pay sick leave under CSR.

597. The Inspector of MPFA contacted FEHD to obtain case details and information. After seeking MPFA's internal legal advice, the Inspector informed the complainant that there was insufficient evidence to prove that FEHD had breached MPFSO. As MPFA did not have the authority to adjudicate the nature of the concerned payment, it suggested that the complainant seek assistance from the Labour Department (LD) to pursue the case as illegal deduction of wages if he considered the deduction made from the concerned payment wrongful.

598. The complainant alleged that the MPFA unreasonably refused to define the nature of the concerned payment and lodged a complaint with the Office of The Ombudsman (the Office) in September 2018.

The Ombudsman's observations

599. Under MPFSO, MPFA did not have the power to adjudicate the nature of the concerned payment. As the complainant's case involved issues related to labour law, it should be ruled by the court. Moreover, since MPFSO did not cover the situation in which an employer deducted MPF contributions from periodical payment, MPFA could not take any legal action, even if the concerned payment was adjudicated as periodical payment by the court. The Office considered MPFA's explanations reasonable.

600. However, in the final reply letter to the complainant, MPFA only stated that there was insufficient evidence to prove FEHD had breached the MPFSO, and asked the complainant to enquire with his employer about the nature of the concerned payment. The Office considered that the letter did not clearly explain why MPFA had no authority to adjudicate the nature of the concerned payment. The Inspector also failed to inform the complainant of the same at an earlier stage, or the reason why the case could be referred to LD. The Ombudsman concluded that while the original allegation against MPFA was unsubstantiated, there was inadequacy found in MPFA's communication with the complainant as it lacked clarity.

601. The Ombudsman urged MPFA to learn from the case and remind staff of the need to clearly explain to complainants the reasons why a case cannot be further pursued so as to facilitate complainants' understanding of the decision and avoid complaints.

Government's response

602. MPFA accepted The Ombudsman's recommendation and had put in place a series of improvement measures, including conducting workshops to improve staff's writing skills; sharing effective communication skills with all staff of the relevant department at a quarterly briefing; and incorporating effective communication methods in internal guidelines and updating procedural manual for staff's observance.

Office of the Communications Authority

Case No. 2018/4853(I) – Refusing to provide the complainant with the service options menus of its telephone hotline voice system

Background

603. On 19 October 2018, the complainant made a request to the Office of the Communications Authority (OFCA) under the Code on Access to Information (the Code) for the service options menus of its telephone hotline system (the Information).

604. On 8 and 16 November 2018, OFCA replied to the complainant in writing that the document containing the Information also contained other operational information of the telephone hotline system and was, therefore, reserved for OFCA's internal use only. Considerable resources would have to be spent on editing and compilation if the Information were to be released to the public. Consequently, OFCA cited the reasons under paragraph 2.9(c) (information the disclosure of which would harm or prejudice the proper and efficient conduct of the operations of a department) and paragraph 2.9(d) (information which could only be made available by unreasonable diversion of a department's resources) in Part 2 of the Code, and declined to provide the Information to the complainant.

605. The complainant argued that the Information should have already been made available in the public domain and disagreed that OFCA would have to spend considerable resources before providing it to him. He accused OFCA of unreasonably refusing to accede to his information request and thus lodged a complaint with the Office of The Ombudsman (the Office) on 5 December 2018.

The Ombudsman's observations

606. The Code and the Guidelines on Interpretation and Application of the Code (the Guidelines) require government departments to work on the basis that information requested by the public will be released unless there is good reason to withhold disclosure under the provisions of Part 2 of the Code.

607. The complainant asked for the service options menus of the telephone hotline system, namely a written version listing all the service options that would allow him to easily find the service he needed at a glance, so that he would not need to spend time to listen to all the options one by one before choosing the right option. Among the three documents held by OFCA, the document kept by OFCA which listed the service options of the hotline (the Document) was the closest to what he needed. OFCA considered that it was inappropriate to disclose the Document un-edited because of the internal information contained therein. The Office, however, considered that while it was necessary to revise certain parts of the Document to make it intelligible to the general public upon disclosure, only limited time and resources would be required.

608. First of all, some service options listed in the Document were given in English abbreviations, while some were written in terms briefer than the options mentioned in the narration of the telephone hotline system. The Office agreed that editing the names of the options was required to facilitate understanding by the general public. Yet, full names of those options were already spelt out in the script that contained content of the narration, so OFCA could simply edit the Document accordingly. This should not be an onerous task.

609. Furthermore, OFCA could just delete the internal information about the operation of the telephone hotline system and telephone extension numbers of its staff from the Document, and/or replace all the staff contact details with the words "contact OFCA staff". This should be simple.

610. OFCA stated that it had to "elaborate clearly and precisely OFCA's jurisdiction under different service categories, as well as its workflow in handling different types of complaints" in the Document. The Office noticed that among the many options offered by the telephone hotline system, only a few involved such information. When a caller selected one of those options, the telephone hotline system would at once play a relevant voice explanatory message. These explanations were short and already written down in the script. If OFCA considered that they were important information that would warrant callers' attention, it could simply copy the relevant text of the script to the Document as footnotes. This should not involve too many resources.

611. In fact, it might not be necessary for OFCA to add the written explanations to the Document because the telephone hotline system would actually allow callers to skip all the options (i.e. skipping the audio explanations, "without first listening to and understanding the information such as the Communications Authority's functions, roles and complaint handling procedures") and press "8" right away to speak with an OFCA officer to lodge enquiries or complaints. It was, therefore, unlikely that the day-to-day operation of the telephone hotline system would be affected even if the written explanations were not included in the Document. OFCA could, taking into account the circumstances, determine whether addition of the explanations to the Document was necessary.

612. The above comments were based on the assumption that the Document would be released to the public. If it would only be provided to the complainant at his request, then deletion of information as mentioned above would suffice. OFCA could explain to the complainant as appropriate if the latter raised queries subsequently.

613. In light of the above analysis, the Office considered that OFCA could provide a copy of the suitably revised Document to the complainant without affecting the operation of the telephone hotline system. The revision would inevitably draw on certain amount of resources (such as manpower and time), but the amount involved should be limited. In this regard, the Office considered it improper for OFCA to refuse the complainant's request for information citing paragraphs 2.9 (c) and 2.9 (d) of the Code as the reasons.

614. Therefore, The Ombudsman considered this complaint substantiated, and recommended that OFCA provide the Document to the complainant after making the necessary revisions.

Government's response

615. OFCA accepted The Ombudsman's recommendation and provided the Document to the complainant after making the necessary revisions.

Post Office

Case No. 2018/3897A – Unreasonably discontinuing postal service to the complainant as his address number was not registered with the Rating and Valuation Department

Background

616. The complainant complained against the Post Office (PO) for sudden discontinuation of postal service to his address, which is in a village, since March 2018. The complainant enquired with PO about the discontinuation, and was told that it was because his address was not registered with the Rating and Valuation Department (RVD).

617. The complainant had rented his village house since 2009. From March 2018 onward, the complainant stopped receiving any letters. The complainant considered the sudden discontinuation of postal service unreasonable, given that PO had provided postal service for that address for over 50 years before. The sudden discontinuation of postal service had seriously affected the lives of the complainant and his family. The complainant therefore lodged a complaint with the Office of The Ombudsman in October 2018.

The Ombudsman's observations

618. Mail delivery to villages has all along been provided through a combination of different means, including (i) door-to-door (DTD) delivery; (ii) delivery of mail items for different addresses of a village to communal letter boxes (CLBs); (iii) delivery to nest letter boxes (NLBs), in which individual letter boxes are assigned to different addresses; and (iv) other means, say delivery to village representatives or accommodation addresses.

619. In the 1970s, the PO's policy was to provide delivery service only when a house in a village had been allocated a building number by the Buildings and Lands Department (and later RVD). With the rapid development of villages, PO also entertained requests for DTD delivery even without building numbers at the time, provided that it was operationally possible to do so (e.g. the house was accessible at a discernible location).

620. In the 1980s and 1990s, the development of new villages continued and many houses did not have a building number. PO then rejected requests of DTD delivery to houses without building numbers. Since then, PO adopted the policy that addresses already being served (irrespective of whether building numbers have been allocated) would continue to be provided with DTD service, but such houses should apply for a building number as soon as possible ("grandfathered cases"); whereas new cases would not be provided with delivery service until they had been allocated with a building number.

621. In this case, the complainant's house is one of the "grandfathered cases" receiving DTD service. After investigation, PO found that the delivery service to the house had been suspended intermittently from March 2016 to November 2018 due to inadequacies in internal record keeping and during handover between postmen.

622. The delivery service to the complainant's address has been resumed since 29 November 2018. The Ombudsman found the following inadequacies on the part of PO.

Lack of comprehensive record on grandfathered cases

623. The investigation revealed that delivery service to the house concerned was suspended intermittently due to PO's inadequate record keeping and thus, PO should keep a comprehensive list of all grandfathered cases to minimise chances of human errors.

Inadequate staff training on delivery policy for grandfathered cases

624. PO should be aware that postal service might have been provided to the house of the complainant before. The Ombudsman considered it highly likely that the staff involved was not aware of the policy of grandfathered cases and misunderstood that delivery service would only be provided to addresses with building numbers allocated by RVD. The Ombudsman considered it important for every postman to be familiar with the delivery policy for grandfathered cases.

Inadequate publicity programmes

625. PO should enhance public awareness of the importance of applying for a building number for the purpose of postal delivery, with special emphasis to encourage building owners of grandfathered cases to apply for a building number.

Other observation

626. Under the current practice, there is no regular updating of a running list of addresses with a building number. The Ombudsman considered that PO should, in consultation with RVD, review the current practice, set up a master list of addresses with a building number and devise a mechanism to update and cross-check the list to ensure accuracy.

627. In light of the above, The Ombudsman considered this complaint substantiated, and recommended that PO –

(a) keep a comprehensive list of all grandfathered cases;

(b) strengthen staff training on the policy of grandfathered cases;

(c) enhance public awareness of the importance of applying for a building number for the purpose of postal delivery, with special emphasis to encourage the building owners of the grandfathered cases to apply for a building number; and

(d) in consultation with RVD, review the current practice, set up a master list of addresses with building number and devise a mechanism to update and cross-check the list to ensure accuracy.

Government's response

628. PO accepted The Ombudsman's recommendations. In response to the recommendations, PO has already taken the following follow-up actions:

(a) completed verification of all the addresses in villages, and compiled a compressive list of all grandfathered cases for future monitoring;

(b) strengthened staff training on the policy of grandfathered cases, including conducting staff briefings and issuing newsletters to staff;

(c) communicated directly with building owners of grandfathered cases by mail to encourage them to apply for a building number, and posted a new message on PO website of the importance of applying for a building number to enhance public awareness; and

(d) set up a new mechanism to update and cross-check the address list with RVD.

Post Office

Case No. 2019/1917 – Failing to redirect the complainant's mail, and impropriety in the redirection procedures

Background

629. The complainant, after moving to a new home in April 2018, applied to the Post Office (PO) for redirecting mail items addressed to his old home address to the new home address under the mail redirection service (MRS). However, he repeatedly found that mail items were not redirected, so he lodged a complaint to PO. PO explained that for mails requiring to be redirected, such service would be arranged after being sorted out by postmen. In case a postman had forgotten about the redirection arrangement or if his / her job was taken up by another postman, the redirection request may be omitted, and the mail item would be delivered to the old address. PO undertook to pay special attention to the case. Despite that, the complainant still found mail items that were not redirected at his old address.

630. In this regard, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against PO in May 2019 for failing to redirect his mail items, opining that the procedures for handling redirection requests were improper. The complainant suggested that MRS should be improved through the use of new technology.

The Ombudsman's observations

631. Under MRS, PO redirects mail items to the addresses designated by mail recipients. For redirection requests already approved, PO will record relevant information in the MRS system, prepare corresponding information cards and labels, and store such information cards and labels in the folder for the delivery beat concerned. Besides, a colour sticker marked with the old address will be affixed on the corresponding compartment of the Vertical Postman Preparation Fitting (VPPF), indicating that MRS is effective for the old address.

632. During mail sorting, if a postman finds that the address of an item matches with an address marked on a colour sticker, he / she will take the mail item out and verify if the recipient's name and address matches with that set out in the information card. After such confirmation, the postman

will put the label printed with the recipient's new address on the item, covering the old address (except the recipient's name), and the item will be forwarded to the delivery beat concerned for handling according to established procedures.

633. Investigation by PO reveals that the postman concerned failed to specify the flat number of the complainant's old address on the colour sticker for mail redirection, thus resulting in a series of mistakes. Although PO reminds postmen of the requirement of specifying flat numbers on colour stickers during training, and it is noted through site visit conducted by staff of the Office that postmen in general comply with the requirement, such reminder at training alone is apparently inadequate. A colour sticker without the flat number is not sufficient in reminding postmen of MRS required for individual flats, and postmen would in turn need to pick mail requiring redirection by memory instead. This severely affects the reliability of MRS.

634. Indeed, failure to redirect mails also occurred when the designated postman was on leave, probably because the replacement postman was unable to pick out the items requiring redirection due to the absence of flat number on the colour sticker concerned. This reveals the inadequacies of the existing guidelines.

635. PO already explained the process of mail redirection in detail throughout the investigation. It was found that quite a number of manual procedures were involved, making it difficult to replace them with a computerised system. The Ombudsman noted that the rate of relevant complaint was relatively low, showing that the performance of MRS in general was satisfactory.

636. The Ombudsman considered it necessary for PO to prescribe expressly the requirement of marking flat numbers on colour stickers in the guidelines and ensure strict compliance by postmen as quite a number of manual procedures are involved in MRS, so as to minimise the chance of mishandling. In addition, PO admitted that neither the Postal Officer nor the Postal Inspector concerned had followed up the complaint properly. Upon receipt of complaints on several occasions, the postman concerned still failed to mark the complainant's flat number on the colour sticker, while the Postal Inspector also failed to ensure the postman concerned do so after his investigation, resulting in repeated failures in mail redirection for the complainant. Regarding the above failures, PO gave serious advice and took disciplinary action against the staff concerned. PO admitted the failures in this case and took remedial measures.

637. In light of the above, The Ombudsman considered this complaint substantiated, and recommended that PO –

(a) conduct a comprehensive check of the corresponding compartments of all sorting racks to ensure that colour stickers marked with flat numbers are affixed for addresses where MRS is effective; and

(b) revise the relevant guidelines to prescribe that postmen are required to specify flat numbers concerned on colour stickers and ensure strict compliance by postmen.

Government's response

638. PO accepted The Ombudsman's recommendations. PO has conducted a comprehensive check against VPPF of all postmen, confirming that all VPPF are affixed with colour stickers marked with corresponding flat numbers where MRS is effective. PO has also revised the relevant guidelines accordingly.

Rating and Valuation Department

Case No. 2018/3238(I) – Unreasonably refusing to provide the complainant with the information he requested

Background

639. On 31 July 2018, the complainant requested the Rating and Valuation Department (RVD) to provide information on "case law", "legal opinion and precedent", "appeals" and "practice Lands Tribunal sessions" related to rating and valuation. On 20 August 2018, RVD replied the complainant that his request for information relating to legal opinions could not be acceded to pursuant to paragraphs 2.10(b)(ii) (internal discussion and advice) and 2.14 (third party information) of the Code on Access to Information (the Code) as the legal opinions were provided by the Department of Justice. The other information the complainant requested was available in the public domain and so RVD would also not provide such information to him. The complainant lodged a complaint with the Office of The Ombudsman against RVD on 21 August 2018.

The Ombudsman's observations

640. Paragraph 1.14 of the Code stipulates that the Code does not oblige departments to provide information which is already published, either free or at a charge.

641. Paragraphs 2.6(a), 2.6(d) and 2.10(b) of the Code allow the Government to refuse to release information on the respective reasons stipulated below –

(1) The disclosure of information would harm or prejudice the administration of justice, including the conduct of any trial and the enforcement or administration of the law;

(2) Information which would be privileged from production in legal proceedings on the ground of legal professional privilege; and

(3) Information the disclosure of which would inhibit the frankness and candour of discussion within the Government and advice given to the Government.

642. The Ombudsman accepted RVD's explanations for its refusal to provide the complainant with the information he requested. The refusal was indeed in compliance with paragraphs 1.14, 2.6(a), 2.6(d) and 2.10(b) of the Code. Reliance on paragraph 2.14 was, however, not necessary.

643. The Ombudsman considered it inappropriate for RVD to have included "legal opinion and precedent" in its list of available records as such information should under no circumstances be disclosed. The Ombudsman was happy to learn that RVD had already taken remedial action.

644. According to paragraph 2.1.2(a) of the Guidelines on Interpretation and Application of the Code (the Guidelines), "when a request for information is to be refused…the applicant concerned must be informed of the reasons for refusal quoting all the relevant paragraph(s) in Part 2 of the Code on which the refusal is based with appropriate elaboration to justify invoking the relevant paragraph(s) in Part 2 of the Code". However, in its reply of 20 August 2018, RVD failed to quote that paragraph of the Code which stipulates that disclosure of information may be refused because the information is available in the public domain.

645. Based on the above findings, The Ombudsman considered this complaint unsubstantiated but there were other inadequacies on the part of RVD. The Ombudsman urged RVD to step up staff training to enhance their understanding of the Code.

Government's response

646. RVD accepted The Ombudsman's recommendation and has conducted training sessions to enhance staff understanding of the Code and the Guidelines, in particular the provisions in paragraph 2.1.2(a) of the Guidelines.

647. In addition, RVD has made available the relevant reference materials, learning resources, frequently asked questions and precedent cases in its internal knowledge management platform for easy reference by staff.

Social Welfare Department

Case No. 2018/3029 – (1) Unreasonably refusing to reimburse the agency fee for hiring a new domestic helper; (2) Unreasonably urging the complainant to collect the cheques of reimbursement of expenses; and (3) Shifting the responsibility of oversight to the complainant in respect of a claim for reimbursement of expenses

Background

648. According to the complainant, back in 2013, the Guardianship Board (GB) appointed the Director of Social Welfare (DSW) as the guardian of her father (the complainant's father), and suggested employing a domestic helper to take care of her father.

649. After the granting of the Guardianship Order in respect of the complainant's father in 2013, the complainant came to a consensus with an Integrated Family Service Centre (the Centre) of the Social Welfare Department (SWD) regarding the employment of a domestic helper to take care of her father. The complainant would pay the monthly living expenses of her father (including the expenses to employ the domestic helper) in advance (advance payment) and submit the receipts of advance payment to the caseworker. SWD would then reimburse half the advance payment through auto-transfer (the arrangement). Both parties had all along cooperated in this manner over the years.

650. In October 2017, the case of the complainant's father was followed up by Miss A, a social worker at an office of SWD (the office concerned). In December of the same year, the complainant employed a new domestic helper for her father and paid the agent fee (Agent Fee I) to the Agency. The complainant submitted the receipt to Miss A according to the arrangement. Miss A refused to reimburse Agent Fee I on the grounds that the complainant had not sought approval from SWD before signing the contract with the new domestic helper. The complainant alleged that she had never been informed about the need to consult SWD prior to employing the domestic helper. The complainant believed that SWD was unreasonably refusing to reimburse Agency Fee I for hiring the new domestic helper (Complaint (a)).

651. On 5 February 2018, the complainant's father passed away. In July of the same year, Miss A sent the complainant an email informing her that cheques for her advance payment from July to December 2017 would

be sent to her by registered mail as she had not approached the office concerned to collect the cheques. As the complainant opposed to such arrangement, Miss A kept the cheques for the complainant to pick up later. The complainant accused Miss A of unreasonably urging her to collect the cheques of reimbursement of expenses (Complaint (b)) from the office concerned simply because she wanted to close the case of the complainant's father as soon as possible.

652. On 30 July 2018, the complainant approached the office concerned to collect the cheques of reimbursement of expenses. She found that the amount reimbursed by SWD for October 2017 did not include the agent fee paid for the renewal of the previous domestic helper's contract (Agent Fee II). After negotiation, Miss A reimbursed half of Agent Fee II to her but alleged that the complainant had not specified the inclusion of Agent Fee II in the expenses of that month. The complainant claimed that whenever she submitted receipts for reimbursement, she would attach a list of expenses to indicate the purpose of all expenses. The complainant accused Miss A of being careless and shifting the responsibility of oversight to the complainant in respect of the claim for reimbursement of expenses (Complaint (c)).

The Ombudsman's observations

Complaint (a)

653. The Office of The Ombudsman (the Office) believed that as the guardian appointed by GB, SWD should pursue the best interests of the Subject (i.e. the complainant's father) (which includes monitoring the expenses incurred in taking care of the complainant's father).

654. According to SWD, the consensus of the office concerned and the Centre with the complainant was all along to employ a domestic helper to take care of the complainant's father. SWD considered employing a new domestic helper a significant change, which the complainant should have informed SWD in advance.

655. The Office believed that the failure by the complainant to inform SWD in advance regarding the employment of a new domestic helper and the payment of Agent Fee I might be due to miscommunication between the complainant and Miss A.

656. The Office also believed that if prior notification could be given by SWD in writing (instead of verbally) to the family members about the types and upper limits of monthly expenses that might be incurred in their care of the mentally incapacitated person, such dispute could have been avoided.

Complaint (b)

657. As explained by SWD, the Centre had switched to reimbursement of expenses by cheques for this case since mid-2017. Miss A urged the complainant to collect the cheques of reimbursement of expenses from the office concerned as soon as possible because the cheques were only valid for six months and would be void upon expiry. The Office considered that SWD's explanation was not unreasonable.

Complaint (c)

658. As noted by the Office, the complainant mentioned in her email dated 30 July 2018 that Miss A had informed her about the omission of Agent Fee II in the "total expenses" of the "master list of expenses" for October 2017 and Miss A would make amendment, while the complainant admitted that she had forgotten to rectify the "total expenses" concerned. However, Miss A indicated in her email dated 3 August 2018 that the complainant had not mentioned Agent Fee II during their tele-conversation on 14 February 2018. Miss A also said that SWD would reimburse half of the agent fee as it was related to the previous domestic helper.

659. Concerning whether Miss A had promised to rectify the omission of Agent Fee II in the "total expenses" of the "master list of expenses" for October 2017, both Miss A and the complainant stuck to their own versions. In the absence of independent corroboration, the Office could not confirm the facts.

660. After considering all related information, the Office could not rule out the possibility that Agent Fee II not being included in the cheque of reimbursement of expenses for October 2017 to the complainant was due to another miscommunication between the complainant and Miss A.

661. Based on the above analysis, The Ombudsman considered the complaint unsubstantiated overall, but there was room for SWD's improvement with regard to complaint (a). The Ombudsman suggested that SWD consider giving prior notification in writing to family members concerned about the types and upper limits of monthly expenses that might

be incurred in taking care of a mentally incapacitated person as well as the related reimbursement arrangements (e.g. when family members should collect the reimbursement, etc.).

Government's response

662. SWD accepted The Ombudsman's recommendation and has already prepared "Points to note for family members of mentally incapacitated persons with a public guardian appointed" and "Points to note for private guardians" for distribution by caseworkers to the family members concerned for reference.

Social Welfare Department

Case No. 2018/4895(I) – (1) Refusing to provide the complainant with the layout plan of an elderly home; and (2) Failing to answer the complainant's enquiry properly

Background

663. On 22 November 2018, the complainant in the capacity of a reporter requested from the Social Welfare Department (SWD) a layout plan (the Plan) provided to SWD by a residential care home for the elderly (RCHE A) in its licence application. On the same day, SWD replied to him that the Plan was "third party information" and the consent of RCHE A was required for disclosure of the information.

664. On the 28th of the same month, the complainant sent another email to SWD to express his view on the disclosure of RCHEs' layout plans (including the Plan). He considered that –

(a) the layout plans of RCHEs involved public interest. First, some local groups had found that a number of RCHEs did not have sufficient bed space, resulting in a lack of personal space for residents. Moreover, the "conviction records of RCHEs in the past 24 months" and "warning records of RCHEs in the past 12 months" as publicised on the SWD website indicated that 17 RCHEs were convicted or warned because they operated outside their specified premises or failed to provide sufficient personal space for protecting the privacy of residents. The above incidents reflected that some RCHEs had not complied with the requirements or conditions as indicated on their layout plans, and that disclosure of the plans of RCHEs might facilitate the public and the media to monitor RCHEs and identify irregularities; and

(b) the harm caused by disclosure of the information was uncertain as SWD did not have a statutory duty of confidentiality with regard to the layout plans of RCHEs and the plans did not contain any personal or commercially sensitive information. Moreover, in accordance with the powers granted to the Building Authority, i.e. the Director of Buildings, under the Buildings Ordinance (Cap. 123), the Buildings Department (BD) would make public the building plans of completed private buildings, and such a

practice would not cause any harm or prejudice to the Government or relevant persons.

665. The complainant asked SWD in his email if the Plan would be disclosed according to the principle in the "Code on Access to Information" (the Code) where public interest in the disclosure of (third party) information outweighed any harm or prejudice that would result; if not, he requested SWD to provide justifications.

666. On 6 December of the year, SWD made a reply to him, reiterating that the Plan was third party information and that they had contacted RCHE A. Without the consent of the third party (i.e. RCHE A), SWD would not disclose the information to him.

667. On 7 December, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against SWD, alleging SWD of –

(a) unreasonably refusing to provide the Plan to him (Complaint (a)); and

(b) failing to make a proper response to him, and failing to explain as requested why the Plan could not be released on grounds of "public interest" (Complaint (b)).

The Ombudsman's observations

Complaint (a)

668. The Plan was provided by RCHE A to SWD for a particular purpose, i.e. application for an RCHE licence, and was thus "third party information" as stated in paragraph 2.14(a) of Part 2 of the Code. Paragraphs 2.14.3 and 2.14.7 of the Guidelines on Interpretation and Application of the Code (the Guidelines) imply that SWD had the duty to hold the Plan in confidence. Unless the consent of RCHE A was obtained, or where public interest in the disclosure of the Plan outweighed any harm or prejudice that would result, SWD should not disclose it to any person.

669. RCHE A expressly disagreed with the disclosure of the Plan to the complainant by SWD.

670. At present, members of the public can obtain plans approved by BD in accordance with the Buildings Ordinance, and should in the same manner be able to obtain BD approved plans of a building in which an individual RCHE is located. However, the layout plans furnished to SWD by individual RCHEs for application of a licence contain other information involving details of management and operation of the RCHEs. Therefore, these layout plans are not comparable to BD approved plans. On the matter of whether the disclosure of the Plan involved public interest, the Office confirmed upon review of SWD's website and relevant information that RCHE A was not one of the 17 RCHEs with records of warning or conviction as mentioned by the complainant. The RCHEs' irregularities resulting in conviction or warning involved "operating, keeping, managing or otherwise having control of a residential care home for the elderly in any premises other than the premises indicated in the licence so issued" or "failure in providing sufficient personal space for protecting the privacy of residents when rendering personal care services or nursing procedures". However, these two irregularities could not be reflected by the information on the layout plans. In other words, disclosure of the Plan would not facilitate the public's monitoring or identifying the above irregularities.

671. The complainant also mentioned that some RCHEs provided insufficient bed space. However, this is not an irregularity as the existing statutes and licensing requirements of RCHEs only set out the minimum area of floor space per resident. Therefore, the Office considered there was no significant incident or evidence to indicate that RCHE A had any serious non-compliance or that SWD had failed to perform the duty of monitoring RCHEs' premises that may otherwise give rise to "overriding public interest". Under such circumstances, SWD had not contravened the requirements of the Code in refusing to disclose the Plan.

Complaint (b)

672. SWD asked RCHE A according to the Code if it would give consent for disclosing the Plan. However, in replying to the complainant, SWD neither followed the requirements in paragraph 2.1.2 of the Guidelines of quoting the relevant paragraphs of Part 2 of the Code on which the refusal was based, nor informed the complainant of the channels of review and complaint.

673. Although there was no express stipulation in the Code requiring government departments to give detailed explanation as to how they weighed public interest for disclosure of information, the complainant had listed his arguments in respect of the public interest involved in the

disclosure of the Plan and clearly requested SWD to provide justifications should SWD refuse to disclose the Plan. The Office considered that SWD should reply to the complainant in a direct manner. However, in replying to the complainant, SWD did not indicate if or how it had considered public interest in the disclosure or any harm or prejudice to RCHE A that the disclosure of the Plan might cause. This was obviously not satisfactory.

674. The Ombudsman considered Complaint (a) unsubstantiated and Complaint (b) substantiated. Overall, The Ombudsman considered the complaint partially substantiated and recommended that SWD -

(a) strengthen training, remind staff to pay attention to the requirements of the Code and to adhere to the Code when handling requests for access to i1formatio1; a1d1

(b) in the event of refusing a request for access to information, state the reasons for refusal in accordance with the Code and, if the requester has any query, reply in a direct and proper manner.

Government's response

675. SWD accepted The Ombudsman's recommendations and has adopted the following actions –

(a) SWD will strengthen training and remind staff to adhere to the requirements and procedures of the Code when handling enquiries. The Staff Development and Training Section of SWD conducted the "Workshop on the Application of the Personal Data (Privacy) Ordinance and Code on Access to Information" on 18 June 2019 and 30 June 2020. It will also enhance relevant training in the orientation cum induction programmes for new recruits, reminding them to pay attention to the requirements of the Code; and

(b) The Licensing Office for Residential Care Homes for the Elderly of SWD has held internal case sharing sessions to remind the inspectors and supervisory staff to pay attention to the requirements of the Code, including stating reasons for refusal of requests for access to information in accordance with the Code, informing the requester of channels of review and complaint, and replying to enquiries and queries according to actual circumstances.

Social Welfare Department

Case No. 2019/3188– Impropriety in handling an application for Disability Allowance [18] and unreasonably refusing to provide assistance

Background

676. On 12 July 2019, the complainant filed a complaint with the Office of The Ombudsman (the Office) against the Social Welfare Department (SWD).

677. The complainant said he was an ex-offender. Prior to his discharge from prison in September 2018, his right foot was wounded which limited his mobility. His attending doctor advised him not to go outside unless necessary to avoid bacterial infection that might result in amputation. After his discharge from prison, the complainant applied for Comprehensive Social Security Assistance (CSSA) from SWD. Because of his foot injury, the complainant asked a staff member (Staff A) of the Social Security Field Unit (SSFU) to collect the required documents for his CSSA application during a home visit for the application ("Request I"). Staff A refused his "Request I" and said that he might as well withdraw his CSSA application. The complainant then went to the SSFU in person to submit the required documents. Subsequently, he had a bacterial infection to his wound in the right foot and was admitted to hospital for amputation in late November 2018.

678. The complainant said that after his admission to hospital in late November, he was worried about not being able to pay rent to the landlord on time in early December. Therefore, he requested Staff A by phone to inform the landlord on his behalf that he had to delay the payment of rent ("Request II"). Staff A refused with a poor attitude and stated that it was not his job duty.

679. The complainant also alleged that Staff A had not followed up on his application for "Disability Allowance"[19] (which should in fact be the standard rate for persons with a disability of 100% under the CSSA Scheme) ("Higher Standard Rate"), which resulted in his receipt of the

[18] While the case title indicated that it was a Disability Allowance application, The Ombudsman acknowledged that it was in fact an application for CSSA.

[19] Ditto

"Disability Allowance"[20] only in May 2019 (which was half a year after his amputation surgery).

680. In addition, SWD asked him to submit bank records for the year prior to the date of his CSSA application and he spent $250 to obtain the relevant records from the bank.

681. The allegations of the complainant can be summed up as follows –

(a) Staff A unreasonably refused his "Request I" and "Request II" (Complaint (a));

(b) SWD unreasonably requested him to submit bank records for the year prior to the date of his CSSA application (Complaint (b)); and

(c) Staff A failed to follow up on his "Disability Allowance"[21] application earlier, resulting in him being granted the allowance not until half a year after his amputation surgery (Complaint (c)).

The Ombudsman's observations

Complaint (a)

682. For "Request I", the Office is of the view that since the complainant expressed that he was not feeling well and had mobility difficulty and that it was procedurally necessary for the SSFU to conduct a home visit for checking against the complainant's CSSA application, Staff A should sympathetically take the complaint's physical constraints into consideration, to examine the relevant application documents during the home visit and take pictures of the relevant documents as necessary without taking the original documents away. The Office considered that Staff A's refusal to satisfy Request I was a failure to provide appropriate service to the Complainant.

683. As for "Request II", Staff A claimed that the complainant had asked him to pay rent to the landlord on the complaint's behalf rather than informing the landlord of the necessary delay in payment. Since the statement made by the complainant was very different from that of Staff A,

[20] Ditto
[21] Ditto

in the absence of independent corroborating evidence, the Office was unable to comment and did not rule out the possibility that there might be some misunderstanding in the communication between the complainant and Staff A.

Complaint (b)

684. The Office was of the view that the SSFU was following established procedures in requesting the complainant to submit bank records for the year prior to his CSSA application so as to establish his eligibility for CSSA. It was a prudent and reasonable practice in line with the principle of safeguarding public funds.

Complaint (c)

685. SWD explained the reasons why payment of the Higher Standard Rate was made only after 6 May 2019. The Office believed that the delay in medical assessment was not caused by SWD.

686. However, the Office found that the complainant had requested Staff A to issue a medical assessment form (MAF) as early as 15 November 2018 for the doctor to assess his disability. Although the complainant decided on the same day to submit the MAF to the doctor by himself, the SSFU had not received any return of the relevant MAF from the medical officer or the complainant. Therefore, when the complainant appointed a social worker of a non-governmental organisation to request a fresh MAF from the SSFU on 6 May 2019, Staff A should issue a fresh MAF dating back to 15 November 2018 (i.e. the date on which the complainant had originally requested medical assessment) instead of mechanically requesting the medical officer to assess his disability as from 6 May 2019 (i.e. date of issue). As a result, the MAF completed by the medical officer only confirmed that the complainant had lost 100% of working capacity for 12 months from 6 May 2019 as a result of the amputation above his right knee. As a result, the complainant needed to approach the SSFU again on 9 August 2019 for another MAF to assess his disability as from 15 November 2018. Staff A had not requested the medical officer to assess the complainant's disability as from 15 November 2018, nor did he clarify with the complainant on the date of request for medical assessment. The Office considered that there was room for improvement in Staff A's handling of the application for medical assessment.

687. Based on the above analysis, The Ombudsman considered Complaint (a) partially substantiated, Complaint (b) unsubstantiated, and Complaint (c) unsubstantiated, but other inadequacies pertaining to Staff A were found. Overall, The Ombudsman considered the complaint partially substantiated, and urged SWD to remind staff members to clarify with the applicant on the date of request for medical assessment when filling in the MAF, instead of mechanically requesting the medical officer to assess the applicant's medical condition from the issue date of the MAF. Similar cases should be prevented from happening again.

Government's response

688. SWD agreed with the analysis and recommendation made by The Ombudsman. SWD has urged Staff A to make improvement on handling applications and reminded all staff of the SSFU to maintain effective communication with applicants when handling similar applications.

Transport Department

Case No. 2019/0669(I) – Refusing to provide the list of tenderers and selection result of operators for three new franchised bus routes

Background

689. On 28 February 2019, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Transport Department (TD).

690. On 20 July 2018, the complainant emailed TD to enquire about the progress and result of the operator selection exercise (including the lists of operators that had submitted proposals and the selected operators) for the three new franchised bus routes for the Heung Yuen Wai Boundary Control Point (HYWCP) by citing the Code on Access to Information (the Code). With TD's reply that details of the proposed bus routes were still under planning, the complainant kept following up the matter. On 4 January 2019, TD informed him that the selection exercise was expected to be completed within the month.

691. In response to the complainant's follow-up enquiry in late January 2019, TD replied on 8 February that the assessments of the proposals submitted by the operators had been completed and discussions with the operators to confirm the details of the new bus routes were underway. After the discussion, TD would announce the operators of the three new franchised bus routes and the routes' details.

692. The complainant considered TD's refusal to provide him with the lists of operators that had submitted proposals and the selected operators for those franchised bus routes to be in breach of the Code. Hence, on 8 February, he requested TD to review its decision. TD replied on 15 February that it would be more appropriate to announce the transport service arrangements for HYWCP after confirming the details with the operators so that members of the public could have a more comprehensive understanding about the arrangements. TD estimated that the announcement could be made around late March.

693. In view of the above, the complainant complained against TD for not following up his request for information in accordance with the provisions of the Code, which included its failure to give the reason(s) for refusal in accordance with the provisions in Part 2 of the Code, and to advise him of the review and complaint channels.

694. Besides, the complainant pointed out that at his request, TD had previously released to him in a timely manner the lists of operators that had submitted proposals and the selection result in respect of the operators of the new bus routes for the Hong Kong-Zhuhai-Macao Bridge Hong Kong Port (the Port) and the West Kowloon Station (WK Station) of the Hong Kong section of Express Rail Link (XRL).

The Ombudsman's observations

695. The Office noted that the operator selection exercise for the bus routes was completed on 10 January 2019 and TD had information about the operators that had submitted proposals and the selected operators. Nevertheless, upon review of the announcement arrangements for the Port and the WK Station of XRL, TD considered that it should confirm with the selected operators the details of arrangements for the bus services before announcing the result. This was explained to the complainant in TD's two replies issued in February 2019.

696. The Office's view was that while TD already possessed the information requested by the complainant in January 2019, there were still uncertainties in the progress and expected date of completion of the construction works, and there might still be variation on the transport service arrangements for HYWCP and service details of the bus routes. It was therefore understandable that TD withheld the disclosure of the information to the complainant before the arrangements were finalised.

697. Nonetheless, according to the Code and the Guidelines on Interpretation and Application of the Code (the Guidelines), government departments must provide information within 21 days of receipt of request except under exceptional circumstances. Regardless of whether a request for information by the public is to be refused or not, departments must comply with the timeframe set down in the Code and make a response. If information would not be provided within the timeframe, departments should cite the relevant provisions in Part 2 of the Code as reasons and advise the complainant of the review and complaint channels.

698. It was noted that when the complainant first requested the information from TD on 28 July 2018, the lists of operators that had submitted proposals and selected operators were yet to be confirmed and could in no way be provided. However, when the complainant asked again for the selection result (including the lists of operators that had submitted proposals and selected operators) on 21 January 2019, TD had already got the information, but did not disclose the information to the complainant. The Office considered that if TD could not or would not provide the information to the complainant within the timeframe specified in the Code, it should have given a specific and reasonable explanation in accordance with the Code. It was inappropriate for TD to justify its actions in addressing the request not in accordance with the Code by claiming that it had never refused the request.

699. Whilst TD had no intention to release the information when it responded on 15 February 2019 to the complainant's request made in late January, it did indicate that overall arrangements for public transport services of HYWCP would be announced around late March that year. Under this circumstance, TD could have considered citing paragraph 2.17 of the Code, (i.e. information which will soon be published, or the disclosure of which would be premature in relation to a planned announcement or publication) as the reason for non-disclosure.

700. TD did inform the complainant of the selection progress within 21 days of receipt of every of his enquiries. The Office, however, pointed out that such replies were not the same as "response" referred to in the Code. TD eventually provided to the complainant the lists of operators that had submitted proposals and the selected operators of the bus routes on 17 and 23 May 2019 respectively. That was almost four months since the complainant made the information request again on 21 January 2019, when TD already possessed the information. It far exceeded the response timeframe stipulated in the Code and was in breach of the Code.

701. While TD had eventually provided the complainant with the information he requested, it had failed to comply with the Code in following up and responding to his information request. In light of the above, The Ombudsman considered this complaint partially substantiated, and recommended that TD remind its staff to follow the provisions of the Code in handling public requests for information, and ensure timely follow-up of cases.

Government's response

702. TD accepted The Ombudsman's recommendation and has taken follow-up actions, including issuance of reminder to its staff on the Office's interpretation of the guidelines on handling premature requests as set out in paragraph 2.17 of the Code to ensure that they know the requirements of the provision. TD's staff have also been reminded to handle similar cases in accordance with the requirements of the Code.

Transport Department

Case No. 2019/2437 – Failing to properly monitor the progress of a bus company for completing the construction of a bus stop shelter

Background

703. On 4 June 2019, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Transport Department (TD), alleging that TD had failed to properly monitor the progress of a bus company in constructing a bus shelter at a bus stop (the works). The works was scheduled to be completed by the end of 2018 but had not yet commenced when the complainant lodged the complaint with the Office.

The Ombudsman's observations

704. The complainant was originally told by TD that the works was expected to be completed by the end of 2018. However, the works had not yet commenced in June 2019. It was understandable that he was worried that the works were put off indefinitely. When the bus company provided the above expected completion date in August 2018 in its reply to TD, it was only about four months away from that date. As pointed out by TD in its reply to the Office, it normally took three to six months to apply for an excavation permit from the Highways Department (HyD) and the works involved various procedures (e.g. tendering for selection of a contractor and formulation of works arrangements after obtaining an excavation permit). These, coupled with various factors that might affect the works (e.g. inclement weather, other works being carried out near the works area, and possible impact of footings of the bus shelter on other underground utility services at the location), made the estimation of completing the works in four months' time impractical. Although this was an estimation by the bus company, TD, being the monitoring department, should provide its view on the reasonableness of the estimation made. TD needed to tell the complainant the expected completion date, but if the date was not feasible, it would only give false expectation to the complainant. In fact, the whole complaint was due to the complainant's dissatisfaction with the works not commencing after 6 months of the expected date of completion.

705. Besides, the bus company submitted the excavation permit application to HyD in October 2018 for the first time without completing the procedure of document submission, and not until May 2019 did it follow up with TD in writing. During that period, TD had repeatedly urged the bus company to report the progress of the works and the cause of delay, but the bus company did not respond to TD directly. However, the staff of TD only passively waited for the bus company's reply after each reminder issued, and did not consider taking any further actions, such as proactively asking the bus company whether it had encountered any difficulty that required TD's assistance or setting a deadline for the bus company to reply in detail, etc. This resulted in the case remaining unresolved with no progress made for more than six months. Fortunately, TD had, after reviewing the case, written to the bus company to ask it to make improvements and remind its staff to pay attention in future.

706. In light of the above, The Ombudsman considered this complaint substantiated and recommended that TD, when handling similar cases in future, should –

(a) proactively examine the expected completion dates made by bus companies and give comments early if it finds them unreasonable or in doubt;

(b) closely monitor the progress of the construction of bus shelters and ask bus companies to provide progress updates in a timely manner. If bus companies do not give a timely response, TD should consider taking further actions as soon as possible; and

(c) remind its staff handling these cases to report to supervisors early and seek instructions or assistance if they encounter similar situations or other difficulties when monitoring works progress.

Government's response

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

Recommendations (a) and (b)

708. In order to examine the scheduled completion dates of the construction of bus shelters provided by bus companies, TD has asked bus companies, when submitting their annual bus shelter provision programme,

to provide the expected completion dates of both the whole construction works and individual works items to be undertaken in the year for TD's scrutiny. Moreover, TD has devised a summary form on expected dates of completing the construction of bus stop shelters (the form) in late March 2020. Bus companies have started to use the form in early April to provide TD with the expected completion dates of both the whole construction works and individual works items to be undertaken in the year. Through scrutinising the bus companies' submitted forms, TD can comment on the planning and program of the proposed works, and will follow up with the bus companies and revise the program in a timely manner if it considers them unreasonable or in doubt.

709. As requested by TD, bus companies will update and submit the form on a quarterly basis to facilitate TD's monitoring of the latest works progress of bus shelter projects and individual works items more effectively. If it is found that there are delays in the construction program and completion dates, TD will proactively approach the bus companies to enquire about the situation and provide necessary instructions and assistance.

710. TD is also working to amend the departmental instructions on handling bus shelter matters, so that staff will adopt the same standard and rules when monitoring the progress of the bus company for the construction of bus shelters. It is expected that the amendment will be completed in late 2020.

Recommendation (c)

711. TD has reminded the staff handling this subject to report to her supervisor early and seek instructions or assistance if they encounter similar situations or other difficulties when monitoring works progress. Separately, the relevant Transport Operations Divisions of the Regional Offices in TD have also organised experience sharing among their staff members on this case and the recommendations made by The Ombudsman on the monitoring of the progress of bus companies for completing the construction of bus shelters during their regular meetings. The staff members have also been reminded that if delay in bus shelter construction works was found, they should follow up with the bus company proactively such that timely assistance and instructions could be provided.

Transport Department

Case No. 2019/2527 – (1) Mishandling the tender of a designated driving school, resulting in monopoly of the designated driving school market; and (2) Failing to review the quota of valid private driving instructor licences

Background

712. In June and July 2019, the complainants lodged a complaint with the Office of The Ombudsman (the Office) against the Transport Department (TD). The complainants' allegations against TD are summarised below –

(a) In about 2000, Driving School A successfully won the bid and became one of the designated driving schools (DDSs) in Hong Kong. The complainants said that Driving School B / its affiliates had participated in the bidding, but the authorities did not consider its tender with a view to forestalling monopoly. According to the complainants, TD later adopted a different set of tender assessment criteria for another DDS which was re-provisioned (the re-provisioned DDS). The complainants were dissatisfied that knowing that Driving School B had submitted a bid, TD still allowed its tender to pass the first part of the assessment. The complainants considered that TD's mishandling of the tendering arrangements had led to the monopoly of Driving School B;

(b) TD requires learner drivers of motorcycles to complete the basic course of motorcycles at a DDS before moving on to practise on roads. However, the four DDSs in the market are all operated by Driving School B or its affiliates, leaving no choice to the public;

(c) When the authorities set 1 050 as the benchmark quota for licences of private driving instructors (PDIs) (private car and light goods vehicle group) in 1999, Hong Kong had a population of about 5 million. Today, Hong Kong's population has increased to more than 7 million. Yet, the number of PDI licences for that group has remained unchanged. The complainants were dissatisfied that the authorities neither reviewed nor adjusted the number of licences over the years. Despite TD's explanation that the trade failed to reach a consensus when a review was conducted on the relevant issues in 2013/2014, the complainants questioned

why TD had not looked into or reviewed the benchmark quota since then;

(d) The complainants learned that a limit was not set on the number of licences for restricted driving instructors (RDIs), which is different from the practice for PDI where benchmark quota for PDI licences were set. The complainants believed that the current practice had failed to protect the interests of RDIs. The complainants were also dissatisfied that TD had never looked into the feasibility of converting a RDI licence to a PDI licence;

(e) On 20 June 2019, the complainants wrote to TD requesting responses on the issues raised at a meeting held in October 2018. However, they had not received any reply from TD when they lodged the complaint with the Office on 15 July 2019;

(f) The law stipulates that a RDI licence holder can only provide driving training at the driving school or organisation specified in the licence. However, the complainants found that RDI licence holders of Driving School B also served as RDIs of the re-provisioned DDS, which constitutes a suspected breach of the legal requirements; and

(g) The complainants claimed that they were told by TD representatives that Driving School B was the parent company of the operator of the re-provisioned DDS at a meeting with representatives of TD and members of the Legislative Council in October 2018. However, when the complainants met with the representatives of the re-provisioned DDS on 21 November 2018 (with attendance of TD representatives), the DDS's representatives stated that the company was an independent company with no connection with Driving School B. The complainants considered the statement a deviation from that made by TD representatives at the meeting in October.

The Ombudsman's observations

Allegations (a) & (b): Designated driving school market being monopolised due to inconsistent tender assessment criteria and procedures

713. TD clarified that the tendering exercise for Driving School A in 1999 adopted an open tender and thus had not restricted any party from

submitting bids, including the company of which Driving School B was a shareholder. That company lost the bid because its overall score was much lower than that of Driving School A. As for the tendering exercise for the re-provisioned DDS in 2018, it was also an open tender and all interested parties were invited to tender for the contract with no individual bidder being excluded.

714. The Office noted that, although both tendering exercises (the first exercise was for a site managed by TD and so the exercise was carried out by TD; the second exercise concerned a Government short-term tenancy (STT) site and so it involved both TD and Lands Department) were open tenders, there were different tender evaluation procedures. Bidders in both exercises were required to meet all mandatory requirements before they would be further considered. However, the successful bidder in the tendering exercise for the re-provisioned DDS (i.e. the tender for a Government STT site) must be the bidder offering the highest rental. The Office understood that the departments concerned carried out both exercises in accordance with the established policy and procedures, and no non-compliance with regulations was found. Nevertheless, the Office opined that it was worth reviewing whether the existing arrangement of awarding a contract to the bidder offering the highest rental was in the best interest of all stakeholders (including learner drivers as consumers).

715. Selecting the successful bidder by the highest rental offer is no doubt most beneficial in terms of government revenue. However, companies which could propose a rental at a level much higher than the average for securing a sure win are normally well-capitalised ones, or operators with large market shares (as their average costs could be reduced through economies of scale to enhance the economic efficiency). For the latter, they are supposed to have greater incentives than other bidders to offer higher rentals in order to win the bid, such that they can further enhance its economic efficiency through economies of scale and expand their market shares, which may make it easier for them to control market prices in future. The Office opined that the Government should carefully review the tendering mechanism based on the highest rental proposal for selecting successful bidder as it may result in individual operators dominating or monopolising the market, thus wiping out competition and choices.

716. TD indicated that, under the "two-pronged approach" driver training policy, the market of driver training was open to all potential operators. TD's statistics show that learner drivers still have a choice between PDIs / private driving schools and DDSs. However, insofar as

DDSs are concerned, all four DDSs in Hong Kong are operated by Driving School B or its affiliates, which means that if the public wish to learn driving at a DDS, they can only choose the schools operated by Driving School B or its affiliates.

717. As for TD's requirement of motorcycle learners to complete basic skill training (Part B test) at a DDS before applying for Part C road test, the Office considered that TD's requirement was based on road safety consideration and was not unreasonable.

718. The Office considered that TD carried out the aforesaid two tendering exercises in accordance with the established policy and procedures and no maladministration was found. There was nothing inappropriate for TD to require motorcycle learners to complete basic skill training (Part B test) at a DDS. Hence, the Office considered Allegations (a) and (b) unsubstantiated. Nevertheless, the Office opined that TD and relevant departments should review whether the existing arrangement to award a Government STT site to the bidder with highest rent for operating a DDS should be adjusted.

Allegations (c) & (d): Failing to review the benchmark quota for PDI licences and the feasibility of converting a RDI licence to a PDI licence

719. TD conducted a review on the issuing mechanism of PDI licences (including the arrangement for RDIs to be issued with PDI licences) in June 2013 but the trade could not reach a consensus on any changes eventually. TD is now conducting a new round of comprehensive review on the issuing mechanism of PDI licences, including benchmark quota for all groups of PDI licences and the issuing mechanism, which will be completed in 2020. Besides, reviews on whether to issue new PDI licences were completed by TD in 2013, 2015 and 2018, and 287 new licences were issued from 2014 to 2018. It revealed that TD has conducted regular reviews on the issuing mechanism of PDI licences and related matters.

720. TD pointed out that RDIs, when they were issued with the RDI licences, knew that they could only provide driver training on behalf of DDSs or organisations that employed them and that their driving instructor licences would become invalid when they left their jobs. Moreover, TD must, according to the requirements under the Road Traffic (Driving Licences) Regulations (Cap. 374B), determine by lot which of the eligible applicants will be issued with PDI licenses to ensure a fair chance for all applicants. The prevailing law does not permit the direct conversion of

RDI holders to PDIs without going through the proper application procedures.

721. Given the above analysis, the Office considered Allegations (c) and (d) unsubstantiated.

Allegations (e) to (g): Failing to give a reply; failing to monitor RDIs who provided training at another driving school; giving false information regarding the relationship between the operator of the re-provisioned DDS and Driving School B

722. TD gave an account of how it replied to the complainant's letter dated 20 June 2019. The Office studied TD's reply letter dated 26 July of the same year and considered that TD had suitably replied to the complainant.

723. TD explained that some RDIs employed by Driving School B were allowed to provide training at the re-provisioned DDS in order to provide candidates with driver training as appropriate during the transition period to prepare for their scheduled road tests. TD had updated the licensing records of relevant RDIs and such arrangement did not contravene the law.

724. As for the complainant's query that TD gave an incorrect statement regarding whether the operator of the re-provisioned DDS was a subsidiary of Driving School B, TD had already followed up the issue and provided an explanation. There was no evidence showing that TD's statement was wrong.

725. The Office considered Allegations (e), (f) and (g) unsubstantiated.

726. In sum, The Ombudsman considered this complaint unsubstantiated, but suggested that TD and relevant departments review whether the existing arrangement to award a Government STT site to the highest rent bidder for operating a DDS should be adjusted so as to better meet the needs of relevant stakeholders including learner drivers for driving training services.

Government's response

727. TD accepted The Ombudsman's recommendation. To establish a more competitive tendering process, TD has introduced a new marking scheme for the open tender exercise for the Ap Lei Chau Driving School (ALCDS) in the third quarter of 2020. Apart from the rent proposal, consideration has been suitably given to the technical aspect of the bidders' proposals, including those relating to the improvement of the management and operation quality of driving schools. TD has planned to apply the marking scheme for ALCDS to future tender exercises for operating DDSs on Government STT sites.

Transport Department

Case No. 2019/3291 – (1) Allowing a bus company to release imprecise information on bus schedules; (2) Lack of reply to a complaint about lost bus trips; and (3) Ineffective monitoring of lost bus trips

Background

728. On 17 March 2019, the complainant lodged a complaint with the Office of The Ombudsman (the Office) against the Transport Department (TD).

729. The complainant complained that one of the route information sheets of a bus company posted at the bus stop used to list out detailed frequency information of different time periods. However, since 3 March 2019, the bus company had adjusted the frequency of the route and the route information sheet was replaced by a simplified version, which only stated the over-general information on frequency at most periods of the day at 15 to 20 minutes. Later, the complainant understood from others that another route information sheet of the bus company was also adopting the simplified version, which showed the whole day frequency at 15 to 25 minutes. The complainant also mentioned that bus company had recently adopted the new simplified version of route information chart which showed the first and last departure time of the route only, lacking frequency information of the route at different periods. To sum up, the complainant alleged TD of allowing that bus company to release over-general information on bus frequency, which hindered the public from monitoring the bus services (Allegation (a)).

730. Moreover, the complainant stated that he had lodged complaints on the lost trip of three bus routes of the bus company since May 2018. However, TD did not reply to his complaints (Allegation (b)). Furthermore, although the services of the three bus routes had improved in May 2019 after he had lodged the complaint with the Office, lost trips of the routes were found again since June 2019. The complainant alleged TD of failing to monitor the bus services (Allegation (c)).

The Ombudsman's observations

Allegation (a)

731. From the perspective of grasping buses' arrival time, the Office agreed that there were advantages of simplifying information on bus frequency. The Office also noticed that bus companies had kept up with the times to release real-time information through websites and electronic screens, apart from posting the route information sheet at the bus stop. However, the Office considered that if passengers were notified of detailed frequency information, to a certain extent they could know whether there are lost bus trips. The Office considered enhancing transparency was a good administrative measure, and the frequency information listed in the Schedule of Service (SoS) may not be too complicated to comprehend. If bus companies considered not suitable to post the frequency information at the route information sheet due to limited space or design consideration, they should at least provide channels for the public to check detailed information on bus frequency at their websites and mobile apps. Also, the Office considered that, since TD monitors bus services based on its approved SoS, TD should proactively provide the information stated in the SoS to the public to enhance transparency. In addition, the Office considered that there was room for improvement on the frequency information displaying on the route information sheet and suggested tightening the over-general information on bus frequency while maintaining certain flexibility to display bus route information according to the characteristics of different bus routes. Therefore, the Office considered Allegation (a) partially substantiated.

Allegation (b)

732. The complainant had lodged over 600 complaint cases to TD on three bus routes of the bus company. The Office considered that although TD had followed up, issued 10 letters to that bus company requesting for service improvement and issued 29 interim replies, TD only provided substantive reply in May 2019 to the complainant. According to TD, the Transport Complaint Unit should have sent individual reminder email for the complaint cases. However, the Office considered the email ineffective in reminding staff, which led to TD's failure in replying to the complainant. Therefore, the Office considered Allegation (b) substantiated.

733. The Office noted that after its intervention, TD had provided substantive reply to the complainant and set up improvement measures to monitor complaint handling of its staff. The Office considered TD should learn a lesson from this case and reply to complaint cases in a timely manner in future, so as to avoid misunderstanding of the public that TD did not follow up properly.

734. The Office also noted that TD followed the same procedure regardless of the number of complaint cases lodged for the same route. The Office considered that TD could establish a mechanism to identify routes with repeated complaints in a particular period, and conduct analysis with priority and reply to the complainants as early as possible. This would help to improve services and avoid recurrence of complaint cases of similar nature.

Allegation (c)

735. After reviewing TD's replies and relevant information, the Office was satisfied that TD had followed up with the bus company regarding the lost trips of the aforementioned bus routes. However, the regularity of bus frequency was affected by road closure due to large scale public events since June 2019. The Office considered that this could not be foreseen nor controlled by the bus company and service being affected was not unreasonable. The lost trips of the concerned bus routes had improved after TD's follow-up actions. Therefore, the Office considered Allegation (c) unsubstantiated. The Office considered that TD should continue to closely monitor the service of the bus company and carry out corresponding measures promptly to avoid continuation and deterioration of lost trips.

736. The Ombudsman recommended that TD –

(a) set up a guideline on the format of display of the route information sheet and provide channels for the public to access the detailed frequency information of bus services so as to enhance transparency;

(b) remind staff to comply with Departmental Instructions and reply to complaint cases in a timely manner;

(c) review existing complaint handling mechanism to identify repeated complaints and complaints of similar nature, and prioritise complaint handling so as to improve services as early as possible and to avoid recurrence of complaint cases of similar nature; and

(d) closely monitor the bus services and take follow-up actions accordingly.

Government's response

737. TD accepted The Ombudsman's recommendations and has taken the following actions.

Recommendation (a)

738. Upon request by TD, all bus companies had displayed the detailed frequency information according to the SoS on their websites by end February 2020. Besides, they agreed to display the timetable in the route information sheet in a five-minute interval so that the public can obtain the detailed frequency information. All bus companies had already completed replacing their route information sheets at all bus stops in the territory in early October 2020.

Recommendation (b)

739. TD has reminded frontline staff to reply to complaints and follow up promptly. TD has also strengthened the internal monitoring mechanism in that reminder email from the Transport Complaint Unit would be copied to senior staff who would monitor and ensure timely follow-up actions by their staff according to the Departmental Instructions. In addition, the Departmental Instructions on complaint handling are circulated to staff regularly to remind them of the procedures.

Recommendation (c)

740. TD has built up a complaint database to take stock of the number and nature of the complaint cases on a monthly basis. It serves the purpose of identifying repeated cases or cases of similar nature so as to handle them at an earlier stage and with prioritised attention.

Recommendation (d)

741. TD has been consistently monitoring the service of the three bus routes of the bus company. According to the results of site inspection, these routes adhered to the SoS in general. TD will continue to closely monitor the service level of these routes.

Transport Department

Case No. 2019/3939 – (1) Failing to respond and follow up a complaint about two minibus routes; and (2) Failing to monitor the service performance of those two minibus routes

Background

742. The complainant said that the services of the two minibus routes operating via its housing estate were poor with problems on lost trips and poor drivers' attitude. The complainant wrote to the Transport Department (TD) to lodge a complaint on 6 September 2018 and 12 June 2019, requesting TD to regulate the operator concerned more stringently. Subsequently, the complainant lodged the complainant with the Office of The Ombudsman against TD, alleging that TD did not respond to the complainant or follow up the complaint (Complaint (a)), and failed to properly monitor the services of the two minibus routes (Complaint (b)).

The Ombudsman's observations

Complaint (a)

743. The Ombudsman was of the view that the staff concerned did follow up the complaints lodged by the complainant in September 2018 and June 2019. However, due to heavy workload and poor handover of the case, the staff failed to give a substantive reply to the complainant, which was undesirable. TD had apologised to the complainant. Therefore, The Ombudsman considered Complaint (a) partially substantiated.

Complaint (b)

744. The Ombudsman agreed that, upon receipt of the complaint, TD had monitored the services of the two minibus routes concerned according to the existing mechanism, including conducting a number of site inspections, meeting with the operator and issuing warnings for its violations of service conditions, and requesting the operator to take improvement measures. TD also explained in detail that the lost trips and irregular service of one of the minibus routes during non-peak hours were mainly attributable to delays caused by traffic congestion en-route, which was beyond the control of the operator. In this connection, TD conducted a comprehensive review on the operation of the route and adjusted its

service frequency after local consultation with a view to improving the service. The Ombudsman considered that TD had in general properly monitored the services of the two minibus routes and there was no maladministration. Therefore, The Ombudsman considered Complaint (b) unsubstantiated.

745. In light of the above, The Ombudsman considered this complaint partially substantiated, and urged TD to –

(a) strictly implement the proposed measures (see paragraphs 747 to 750 below) to improve its complaint handling work and ensure that its staff would give a substantive reply to complainants in a timely manner according to the departmental instructions and performance pledges; and

(b) closely monitor the progress of the traffic management works regarding the designation of a 24-hour restricted zone on the bend outside the metered parking spaces at the street concerned to alleviate the traffic congestion problem as soon as possible.

Government's response

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

Recommendation (a)

747. In the course of handling this case, the supervisor of the staff in charge of this case has already been instructed to strengthen the supervision of the staff to ensure that each complaint would be handled strictly according to departmental instructions; TD has also reminded the staff concerned to follow up each case and respond to the complainant in a timely manner. If supervisors find that their staff fail to give a timely reply, they would approach their staff as appropriate to find out the reasons and provide suitable guidance to ensure that each complaint case is handled and concluded properly.

748. Through regular meetings of the Regional Offices, TD has shared The Ombudsman's recommendations and areas of improvement on the process of handling the case by the staff, with a view to further consolidating its staff's understanding of the departmental instructions and performance pledges on complaint handling and enhancing its staff's

alertness in handling complaints. At those meetings, TD has reminded its staff again to observe the departmental instructions and performance pledges on complaint handling and give substantive replies to complainants in a timely manner, while requesting its staff to make better use of the 1823 system for handling complaints, and updating and archiving the records.

749. Besides, TD has arranged to remind its staff to observe the departmental instructions and performance pledges on complaint handling by email circulation every three months.

750. Since November 2019, TD has recruited additional staff to assist in handling complaints and conducting site inspections to enhance the monitoring of public transport services in the district. TD will continue with the arrangement.

Recommendation (b)

751. The 24-hour restricted zone at the street concerned has been implemented from 14 April 2020 onwards and the traffic congestion problem has improved. During TD's subsequent site inspections, it was observed that departures of the concerned minibus route could complete their journeys according to the new service schedule. This shows that the problem of insufficient journey time of the concerned minibus route due to traffic congestion at that street has improved.

Working Family and Student Financial Assistance Agency

Case No. 2018/5026 – Disregarding the complainant's situation and disbursing the student financial assistance for her son to her ex-husband, failing to properly follow up her request to become an applicant for financial assistance, and failing to reply substantively to her relevant enquiries

Background

752. The father of the complainant's son had applied to the Working Family and Student Financial Assistance Agency (WFSFAA) for student financial assistance since his son was in Primary One. Upon separation with her husband, the complainant lived with her son and was responsible for her son's expenses. As such, she wished to replace her ex-husband as the applicant for her son's student financial assistance and to receive the subsidy. In September 2018 when her son was promoted to Primary Four, she made a request to WFSFAA for changing the applicant of her son's financial assistance to her. However, she was informed that WFSFAA had already released the first instalment of subsidy for that school year to her ex-husband. The complainant said that she had never signed any application form in the capacity of the applicant's spouse for that school year and suspected that her signature might had been forged. In this connection, the staff member indicated that she would give the complainant a reply after consulting her supervisor.

753. Subsequently, the complainant wrote to WFSFAA twice enquiring about the change of applicant for his son's application but to no avail. On 12 December 2018, the complainant filed a complaint with the Office of The Ombudsman (the Office) alleging that WFSFAA had disbursed the subsidy to her ex-husband without taking into account her situation and failed to properly follow up her request to act as the applicant for her son's student financial assistance.

The Ombudsman's observations

754. Under normal circumstances, it is not improper for one of the parents to be the applicant and to receive the student financial assistance. The couple should agree between themselves about who would be the applicant receiving the subsidy.

755. In the present case, WFSFAA had approved the application and released the subsidy to the applicant in accordance with the procedures and there was no impropriety. If the complainant wished to replace her ex-husband as the applicant of the subsidy, she should discuss the arrangement with him and change the information in the application in accordance with the procedures. WFSFAA had repeatedly explained the above requirement to the complainant. She knew that her ex-husband was the applicant, but still unilaterally requested WFSFAA to disburse the subsidy to her instead. Therefore, WFSFAA should not be blamed when her request was refused in the end.

756. Regarding the reply to the complainant, the Office considered that unless there are special circumstances[22], government departments should provide written replies to letters received from the public. The complainant wrote three times to WFSFAA. It was inappropriate for WFSFAA to reply to the complainant each time by phone only. The fact that WFSFAA had not kept record of these telephone conversations was also improper. With regard to the recording of telephone calls, the Office had examined the relevant operational guidelines and noted that there was no provision in the guidelines specifying the circumstances under which the staff concerned should make record of telephone conversations.

757. The Office agreed that a divorced couple should reach their own arrangement or await the court's decision on who should be the applicant and WFSFAA should not be involved. However, as this case involved a report of alleged fraud concerning financial assistance, it was not simply a family dispute case. WFSFAA should not have taken it lightly. The Office understood that the staff of WFSFAA were not professional investigators, but they could check the application form against the previous ones to see if there was anything suspicious from a layman's angle. WFSFAA had only advised the complainant to make a report to the police on her own. There were inadequacies on the part of WFSFAA not to conduct initial and basic investigation into the allegation to safeguard the use of public money.

758. Nevertheless, after conducting home visit with the applicant and reviewing relevant information and documents, WFSFAA reported the case to the police in March 2019 and provided assistance in the police investigation to ascertain if there was evidence to indicate that someone had obtained financial assistance by deception.

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[22] For instance, the complainant indicates that no reply is needed or the department concerned has replied a number of times and has indicated in its previous replies that no further reply will be provided on the same matter.

759. Based on the above analysis, the Office considered that it was not improper for WFSFAA to disburse the subsidy to the applicant. However, WFSFAA had inadequacies in following up on the question raised by the complainant about the application form and her request for change of applicant (including the failure to give written replies to the written enquiries of the complainant and promptly follow up on the report of suspected fraud concerning financial assistance). Overall, this complaint was found partially substantiated.

760. The Ombudsman recommended that WFSFAA should formulate / revise operational guidelines for its staff to –

(a) conduct basic investigation when reports of suspected fraud concerning financial assistance are received and report to the police when there is evidence to substantiate the suspicion;

(b) provide written replies to enquiries in writing under normal circumstances; and

(c) specify clearly that proper records of telephone conversations should be kept on all conversations related to applications, including those made with callers other than the applicants.

Government's response

761. WFSFAA accepted The Ombudsman's recommendations.

762. WFSFAA has formulated and revised the relevant operational guidelines having regard to the three recommendations of The Ombudsman above. WFSFAA will continue to provide training for staff to ensure that they are familiar with the relevant guidelines and will regularly remind them to follow these guidelines in processing applications and handling enquiries.

Part III
– Responses to recommendations in direct investigation cases

Buildings Department

Case No. DI/420 – Buildings Department's implementation of Mandatory Window Inspection Scheme

Background

763. With the amendments to the Buildings Ordinance (Cap. 123), the Mandatory Window Inspection Scheme (MWIS) commenced on 30 June 2012. It is implemented by the Buildings Department (BD) and aims to resolve the problem of dilapidated windows.

The Ombudsman's observations

764. The direct investigation conducted by the Office of The Ombudsman reveals the following inadequacies in BD's implementation of MWIS.

Implementation progress significantly below targets

765. When MWIS[23] commenced, some 20 000 buildings were within the scope of the Scheme. BD had planned to select 5 800 target buildings, with an estimate of 35 premises in each target building, for mandatory window inspection each year. The first inspection cycle was expected to complete within five years (i.e. by mid-2017). From the experience gained in implementing MWIS, BD has significantly reduced the number of target buildings since 2014. As at 2018, only 37% of buildings whose age was within the scope of MWIS were selected as target buildings.

[23] Under MWIS, owners of private buildings aged 10 years or above (except domestic buildings not exceeding three storeys), who receive a statutory notice of MWIS from BD, are required to arrange inspection and (where found necessary) repairs for all the windows of their buildings.

766. The Ombudsman considers that BD should review the number of actual target buildings selected each year and speed up listing buildings whose age is covered by MWIS as target buildings, so that the problem of dilapidated windows of old buildings can be resolved in an orderly and effective manner to ensure public safety. Where necessary, BD should allocate additional resources.

Failing to properly monitor the compliance with notices

767. As at March 2019, around 10% of all the statutory notices of MWIS (Notices) (totalling nearly 490 000) issued between 2012 and 2018 were not complied with. In The Ombudsman's view, BD should monitor the compliance with Notices more proactively to avoid further backlog of non-compliance cases. In particular, BD should give priority to long-time outstanding cases.

Lack of data between 2012 and 2016 for monitoring the work of staff, qualified persons (QPs) and registered contractors (RCs)

768. BD has an audit check mechanism in place to monitor whether QPs and RCs have properly carried out the prescribed inspection and prescribed repair for the windows of buildings. However, prior to 2017, BD had not compiled any data for monitoring the audit checks carried out by its staff, or whether QPs and RCs had completed the prescribed inspection and prescribed repair in accordance with the requirements of the legislations, code of practice and practice note. In The Ombudsman's view, there were inadequacies on the part of BD in planning for MWIS and monitoring its implementation as BD only started to maintain the relevant data some four years after the commencement of MWIS.

Time needed to complete site audits not meeting the requirements in operational guidelines

769. Since August 2015, BD has set the time frame for completion of a site audit within two months' time. Nevertheless, among the selected cases that successfully went through site audits in 2017 and 2018, 44% and 52% respectively were not completed within this time frame. The Ombudsman considers that BD staff must endeavour to abide by the time frame stipulated in the operational guidelines so that prescribed inspection and prescribed repair of windows that are defective may be identified early for timely follow-up actions, including enforcement actions.

Effectiveness of site audits affected by failure to enter premises

770. For cases selected for site audit by BD in 2017 and 2018, 77% and 78% were terminated respectively because property owners either refused BD's request for a site audit or did not respond to the request. The Ombudsman considers that BD should explore measures to increase the success rate of its staff entering premises for site audits so as to enhance the effectiveness of the audit check mechanism as a whole. Besides, instead of using the sampling ratio as the work benchmark, BD should adopt the rate of actual entry into premises to carry out site audit to reflect the real situation of site audits.

Delay in enforcement against irregularities

771. Relevant statistics reveal that BD did take follow-up and enforcement actions against Owners' Corporations / property owners who had failed to comply with the Notice. Such actions included issuing warning letters and fixed penalty notices, and instigating prosecutions. Nevertheless, in 142 cases where a Notice had been served in as early as 2012 but compliance was still outstanding as at October 2017, warning letters were only issued to the owners concerned in late 2017 (after more than five years). Such delay was glaring. The Ombudsman considers that BD must take timely enforcement actions against owners who fail to comply with the Notice.

772. The Ombudsman recommended that BD –

(a) conduct a comprehensive review on the implementation of MWIS and lay down practicable work targets so as to speed up listing of buildings whose age is covered by MWIS as target buildings. Additional resources should be allocated if necessary;

(b) monitor the compliance with Notices more proactively, and to clear backlog promptly and effectively;

(c) review the need to revise the definition of the time frame set in its operational guidelines regarding the completion of site audits so as to clearly reflect the Department's requirement, and remind its staff to follow up and complete site audits within the time frame specified in the operational guidelines;

(d) explore measures to increase the success rate of staff gaining entry into premises for conducting site audits, so that the effectiveness of the audit check mechanism can be enhanced as a whole;

(e) adopt the rate of actual entry into premises to carry out site audit, instead of the sampling ratio, as its work benchmark to better reflect the real situation of site audits; and

(f) take timely enforcement actions against property owners who fail to comply with the Notice.

Government's response

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

Recommendation (a)

774. BD has increased the number of buildings targeted for the implementation of MWIS from 400 in 2019 to 600 in 2020. BD will continue to keep the implementation of MWIS under review, redeploy resources, streamline operation procedures, and take into account feedback of the stakeholders and public with a view to expediting the implementation of MWIS as appropriate.

Recommendations (b) and (f)

775. BD is enhancing the "To-do list" function in the "Building Condition Information System" so that reminders will be sent to case officers about cases where warning letters or fixed penalty notices have yet to be issued and cases are pending prosecution. The system enhancement is expected to complete by end 2020. Besides, BD has set up the "Fast Track Prosecution Teams" and "Backlog Clearance Teams" in January and October 2019 respectively to speed up the clearance of backlog cases and take timely enforcement actions against property owners who fail to comply with the Notices.

Recommendation (c)

776. BD revised its operation manual in August 2019 which, amongst others, sets out clearly the time frame for conducting site audits and the steps to be taken, and reminds staff to complete the site audits within the specified time frame.

Recommendation (d)

777. In order to increase the success rate on site audits, BD implemented the "Pilot Scheme for MWIS Site Audit" in October 2019, inviting building owners' early participation in the site audits when the Notices or warning letters are issued so as to allow more time for building owners' cooperation. Besides, BD has stepped up publicity on site audits to building owners, including explaining the objectives and related arrangements at the district briefing sessions and BD's website. To facilitate the cooperation of building owners, BD has appointed consultants on 15 September 2020 for conducting site audits including outside office hours so as to increase the success rate of site audits.

Recommendation (e)

778. BD revised its operation manual in August 2019, adopting the rate of actual entry into premises to carry out site audit as its work benchmark.

Civil Engineering and Development Department, Highways Department and Transport Department

Case No. DI/426 – The issue of idle flyovers and "bridges to nowhere"

Background

779. The Government's various development plans are invariably coupled with proposals on land use and planning drawn up to match the needs of the local community and the economy, as well as people's daily needs. Such proposals include the building of new road networks or improving existing roads to cater for the traffic demands arising from new developments.

780. In constructing a flyover, the overall road network planning and implementation progress would be taken into consideration. Stub ends may be reserved on the flyover to facilitate future expansion of the road network and to mitigate the impact on traffic brought about by the expansion works. In addition, where a development project is implemented in stages, adjacent sections of flyovers or stub ends for future extension may also be built in advance to enable connection with a new road during the next stage of the project.

781. Generally speaking, with respect to road works (including the construction of flyovers), the Transport Department (TD) would provide expert opinion on initial road alignments and impact on traffic, while works departments such as the Highways Department (HyD) or the Civil Engineering and Development Department (CEDD) are responsible for the technical aspect of the construction. Once a construction proposal is confirmed, the works departments would take charge of its detailed design and the management of the construction.

The Ombudsman's observations

782. According to the information provided by CEDD, HyD and TD, there are currently 29 idle flyover sections or stub ends on 13 distributors / roads in different districts, and one of them was completed in as early as 1981. All of those road sections and stub ends have been left idle for over ten years, with some over 30 years. This would give an impression that the Government has not taken proactive steps in planning and developing

those road sections, resulting in those flyover sections and stub ends being under-utilised.

783. As such, The Ombudsman recommended that CEDD, HyD and TD –

(a) convene joint-departmental meetings regularly to review the development status of all idle flyover sections or stub ends. Where warranted, the local district councils should be consulted;

(b) step up its lobbying efforts with the local residents and the district councils concerned, respond specifically to the objections raised by stakeholders (in particular for those projects with stronger objections), and make recommendations and proposals for improvement or revision promptly in a bid to gain public support for constructing the concerned new road network; and

(c) set up an integrated information platform to facilitate public enquiry of information on the planning, progress and latest status of the proposed road works in various districts, and to publicise the platform.

Government's response

784. CEDD, HyD and TD all accepted The Ombudsman's recommendations and have taken the following follow-up actions.

Recommendation (a)

785. The Government has formed an inter-departmental working group (working group) to review the development status of all idle flyover sections or stub ends. The first working group meeting was held on 21 May 2020 amongst CEDD, HyD, TD, Lands Department and Planning Department to review the status, development programme and progress of all reserved flyover sections or stub ends, as well as the feasibility of alternative uses for those flyover sections or stub ends which no longer have traffic need. The working group also reviewed the progress of public consultation of the projects concerned; and oversaw the setting up of an integrated information platform. Meetings will tentatively be held at 6-month intervals.

Recommendation (b)

786. The Government will continue to step up its lobbying efforts with local residents and the district councils through public engagements at various stages of the project implementation and gather their opinions. It will respond specifically to the objections raised by stakeholders (in particular for those projects with strong objections), and make recommendations for improvement or revision promptly in a bid to gain public support for the new road works.

Recommendation (c)

787. The Government has launched and publicised an integrated information platform to facilitate public access to information on the planning, gazettal documents, progress and adjoining land uses with regard to the proposed major road works on 28 September 2020.

Government Secretariat – Education Bureau

Case No. DI/421 – Education Bureau's mechanisms for approving applications for school fee revision by Direct Subsidy Scheme / private schools and collection of other charges by private schools

Background

788. Every year, quite a number of Direct Subsidy Scheme (DSS) schools and private schools (including international schools, as used hereinafter) in Hong Kong are given approval by the Education Bureau (EDB) to revise their school fees. The media reported that some DSS/private schools had increased school fees by as much as 20%. There are concerns in the community that EDB's approval mechanism is not rigorous enough, such that the applications for school fee revision submitted by those schools are often approved. Apart from school fees, many private schools also raise capital by collecting other charges, such as debentures, school construction fees and nomination right fees (collectively referred to as "other charges"). Those other charges, in various forms and names, refundable or non-refundable, range from a few thousand to a few million dollars.

The Ombudsman's observations

EDB's mechanisms for approving applications for school fee revision by DSS / private schools

789. EDB has established and been following the existing mechanisms to approve the applications for school fee revision by DSS / private schools. Regardless of the percentage of increase in their applications for school fee revision, DSS / private schools must submit to EDB their justification for application, information on their financial positions and information about parent consultation / notification. EDB has also imposed a threshold of school fee increase (the Threshold) on the applications of DSS schools for school fee revision. If a DSS school proposes to increase school fees at a percentage higher than the Threshold, or if, despite being at a percentage equal to or lower than the Threshold, its accumulated total operating reserve at the end of the previous school year exceeded its annual operating expenses in the same year, the school must conduct a full consultation with parents and receive consent to the school fee revision from an overwhelming majority of the parents who return the reply slips.

790. Given the media reports that some DSS / private schools increased school fees by as much as 20%, the Office of The Ombudsman (the Office) has scrutinised information about their applications for school fee revision approved during the five school years from 2014/15 to 2018/19. Based on the information provided by EDB, there were indeed DSS / private schools given approval to increase school fees at a percentage close to or higher than 20%, either across all grades or for certain grades. However, those were only isolated cases. EDB has explained why it approved the applications for school fee revision at higher percentages submitted by some DSS / private schools. The Office finds no impropriety on the part of EDB in giving approval according to its established mechanisms after reviewing the schools' justification for application, financial position and the opinions of parents.

EDB's mechanism for approving collection of other charges by private schools

791. Over the years, EDB has been adopting a liberal approach in its interpretation of relevant provisions based on the legal advice received a long time ago, which considered the collection of other refundable charges by private schools a private financial arrangement between the schools and parents, and hence not requiring approval from the Bureau. During the course of the direct investigation, the Office pointed out to EDB that its long-established practice is incompatible with the Education Regulations (Cap. 279A). After seeking further legal advice, EDB conceded that the collection of any other charges (refundable or otherwise) by private schools in relation to the school education received by students should be subject to the Bureau's approval.

792. As regards other charges which are non-refundable, EDB indicated that it would consider the relevant applications from private schools on the basis of their justification for application, including such information as the purpose, needs of the schools and students, communication between the schools and parents, financial position of the schools and their relevant accounts. Nevertheless, EDB was unable to give clear details on the overall application mechanism, procedures and approval criteria, which shows that it has not fully comprehended the situation about other charges collected by private schools.

793. EDB has now gathered information from private schools about other charges collected by them and largely completed a preliminary analysis. It intends to seek further professional advice before drawing up the application and approval procedures for the various forms of other charges, and then make relevant announcements to inform the private schools.

794. The Ombudsman recommended that EDB –

(a) establish a more comprehensive application and approval mechanism regarding other charges collected by private schools, and make announcements to inform private schools and other stakeholders as soon as possible; and

(b) create a database on other charges collected by private schools to keep track of the overall situation.

Government's response

795. EDB accepted The Ombudsman's recommendations.

Recommendation (a)

796. EDB sent a letter to all private schools on 3 February 2020 to inform them of the findings of the Office on the matter and provide them with link of the Office's report for perusal. EDB has also reminded the schools that according to regulation 61(1) of the Education Regulations, schools need to seek prior approval from the Permanent Secretary for Education in case they would like to charge or accept payment of any money or any school fees other than the inclusive fees as printed on the Fees Certificate issued by EDB. In the long run, EDB aims at implementing a more comprehensive mechanism for processing and approving such other charges.

797. As it takes time for the establishment of a comprehensive approval mechanism, EDB will adopt a transitional arrangement in the 2020/21 school year. In this regard, EDB had issued letters to and organised a briefing for private schools in June 2020 to inform the schools of the details of the transitional arrangement, whereby approval will be granted on the basis of justifications given by individual schools. Schools collecting other charges in the 2020/21 school year that have not been approved by EDB before or proposing to revise the amount of approved

collection of other charges in the 2020/21 school year are required to submit applications to EDB on or before 15 July 2020.

798. To formulate the comprehensive mechanism, EDB set up an Advisory Committee in November 2019 with the participation of EDB officers and accounting professionals to advise on the proposed vetting and approval criteria for processing applications. EDB will continue to maintain dialogue with the private school sector to have a better understanding of their situations, development needs and concerns in working out the details of the regulatory measures.

Recommendation (b)

799. With a view to gradually establishing the required database on other charges of private schools, EDB will continue to collect relevant information and secure a more comprehensive and concrete understanding of the charges when processing the schools' applications.

Government Secretariat – Education Bureau and Social Welfare Department

Case No. DI/419 – Mechanism for identifying and reporting suspected child abuse cases

Background

800. According to statistics from the Social Welfare Department (SWD), the number of newly reported child abuse cases in Hong Kong has been on the rise over the past years. There have been criticisms that the reporting mechanism for preventing child abuses has been inadequate, and no mandatory requirement is imposed on people who have become aware of the situation to report suspected child abuse cases. Consequently, the Government authorities would often only intervene after tragedies have happened, rather than taking pre-emptive action to prevent such incidents.

The Ombudsman's observations

801. The Office of The Ombudsman (the Office) has made the following four observations in respect of the mechanism for identifying and reporting suspected child abuse cases.

Observation (a): Government should explore the feasibility of mandatory reporting of suspected child abuse cases

802. The Office has found that most victims of child abuse do not know how to seek help and SWD statistics have shown that many abusers of child abuse cases are close relatives of the victims. Therefore, if professionals who have frequent contact with children can pay attention to their condition, it would help to promptly identify abuse cases, enabling early intervention. At present, the Administration has not put in place any mechanism or administrative measures to require professionals who have direct contact with children (such as teachers, social workers, doctors and nurses) to report to the relevant authorities (such as SWD or the Hong Kong Police Force) after they become suspicious or aware of child abuse incidents. Moreover, Hong Kong currently has no laws governing mandatory reporting of child abuses.

803. Given the views of the United Nations and the fact that many countries have enacted laws on mandatory reporting of suspected child abuse cases, and in the light of the consultation paper on "Causing or Allowing the Death or Serious Harm of a Child or Vulnerable Adult", published in May 2019 by the relevant Sub-committee of the Law Reform Commission (LRC), which sets out the pros and cons of enacting laws on mandatory reporting of suspected child abuse cases and the issues to be considered, the Office opines that the Government should explore the feasibility of establishing a mechanism for mandatory reporting of suspected child abuse cases. The Office understands that whether a mechanism for mandatory reporting of suspected child abuse cases should be established is a complex issue involving a number of stakeholders, including various professionals and parents. It is imperative to conduct thorough and extensive discussions, studies and consultations and foster a broad consensus in the community before implementing such a mechanism.

Observation (b): Education Bureau (EDB) should insert procedures for handling suspected child abuse cases into the Kindergarten Administration Guide

804. The Procedural Guide for Handling Child Abuse Cases (the Procedural Guide) issued by SWD sets out the procedures for handling suspected child abuse cases for professionals' reference, which is also covered in the School Administration Guide issued by EDB to all aided primary and secondary schools in each new school year. Nevertheless, EDB failed to instruct kindergartens on how to handle suspected child abuse cases in the Kindergarten Administration Guide it issued to all kindergartens in September 2017. In fact, a lot of child abuse cases involve young children. The Office considers that EDB should also include the information on how to identify child abuse cases in the Kindergarten Administration Guide to help kindergartens identify such cases as early as possible, so that they can promptly report the cases to the relevant parties and provide assistance to the young children involved.

Observation (c): Relevant contents of SWD's Procedural Guide and EDB's related circulars / School Administration Guide should be consistent and clear for schools to follow in handling suspected child abuse cases

805. The Office found that SWD's Procedural Guide focuses on whether the schools should "inform" parents when making referrals, while EDB's School Administration Guide and relevant circulars focus on whether they have to seek the "consent" of parents when doing so. As SWD was revising the Procedural Guide, the Office considered that SWD

and EDB should seize the opportunity to rationalise the relevant parts in their respective guidelines for greater clarity and consistency so that schools would have clear instructions to follow when handling suspected child abuse cases. They should also continue to communicate with each other when revising their own guidelines / circulars / School Administration Guide in future to ensure consistency.

Observation (d): EDB has not conducted statistical analysis on the length of and reasons for students' absence

806. Besides family members, teachers and school social workers are the ones that children have most contact with in daily lives. If teachers and school social workers can stay alert and pay extra attention to the condition of children, in particular those who are frequently absent or have been absent for a long period, and try to find out the reasons for their absence and refer suspected cases of child abuse to relevant authorities, the Office believes it should help expose child abuse incidents earlier. In February 2018, EDB set up the Reporting Mechanism for Absentees in Kindergartens, requiring kindergartens to report to EDB any student's absence for seven consecutive days without reason or under doubtful circumstances. EDB agreed that the reporting mechanism would heighten the alertness of kindergarten staff on suspected child abuse cases. Nevertheless, the Office found that in the past EDB had not conducted any statistical analysis on the length of and reasons for students' absence in primary and secondary schools. In response to the Office's recommendations, EDB had agreed to collect and analyse the relevant data.

807. In sum, The Ombudsman recommended that –

(a) The Government explore the feasibility of mandatory reporting of suspected child abuse cases;

(b) EDB include the information on how to identify child abuse cases and procedures for handling suspected child abuse cases in the Kindergarten Administration Guide for kindergarten's reference;

(c) SWD and EDB continue to communicate with each other when revising the guidelines / circulars / School Administration Guide in order to ensure consistency of the relevant content so that schools can have clear guidelines to follow in handling suspected child abuse cases; and

(d) EDB conduct statistical analysis on the length of and reasons for students' absence in kindergartens, primary schools and secondary schools to enable early identification of child abuse cases. EDB can then get an overall picture and plan the appropriate support.

Government's response

808. EDB, the Labour and Welfare Bureau (LWB) and SWD all accepted The Ombudsman's recommendations.

Recommendation (a)

809. LWB and SWD share the views of the Office that whether to set up a mechanism for mandatory reporting of suspected child abuse cases is a complex issue involving a number of stakeholders and that it is imperative to conduct thorough and extensive discussion, studies and consultations as well as fostering a broad consensus in the community before implementation. The Sub-committee of the LRC proposed a "failure to protect" offence under the Offences Against the Person Ordinance (Cap. 212) in its consultation paper on "Causing or Allowing the Death or Serious Harm of a Child or Vulnerable Adult" published in May 2019 and conducted a public consultation during the period from May to August 2019. It covers broad and complex facets that require thorough consideration, including different options to address the problem and related issues, rights and responsibilities of different parties, public interests, social consensus and preference, as well as whether legislation is an effective means to solve the problem and achieve the desired effect, etc. LWB and SWD will keep in view the LRC's review and its final recommendations.

Recommendation (b)

810. EDB has included the information on how to identify child abuse cases and the procedures for handling suspected child abuse cases in the Operation Manual for Pre-primary Institutions updated in November 2019, as well as the Kindergarten Administration Guide (Revised 2020) issued in March 2020 for reference of pre-primary institutions. As SWD has recently drawn up the Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) and EDB has issued the EDB Circular No. 1/2020 "Handling Suspected Cases of Child Maltreatment and Domestic Violence", relevant content in the Operation

Manual for Pre-primary Institutions and Kindergarten Administration Guide were further updated accordingly in July 2020.

Recommendation (c)

811. EDB and SWD have all along maintained close liaison when revising relevant guidelines / circulars / School Administration Guide. SWD completed its review of the Procedural Guide in December 2019, and coordinated with EDB in revising the Procedural Guide to ensure consistency of the content of the documents issued by both parties. The revised version of the Procedural Guide was released in January 2020 with full implementation on 1 April 2020. Besides, EDB and SWD jointly conducted a briefing session in January 2020 to introduce the gist of the Procedural Guide to school personnel. Both parties will conduct joint seminars / workshops relating to the handling of child abuse cases from time to time in order to help schools follow clear instructions in the handling of such cases, enhance school personnel's sensitivity and capability in identifying indicators of child abuse, and strengthen their skills in handling child abuse cases with a view to protecting children from harm.

Recommendation (d)

812. Starting from the 2019/20 school year, EDB has been conducting regular statistical analysis, based on student information (including the duration and reasons for non-attendance of students who are absent without reasons or under doubtful circumstances) collected through the current Reporting Mechanism for Absentees in Kindergartens and Early Notification System for primary and secondary schools (i.e. schools are required to report student non-attendance to EDB on the 7th day of a student's continuous absence regardless of the reasons for absence). The objective is to understand students' circumstances for planning appropriate support for them.

Government Secretariat – Environment Bureau and Environmental Protection Department

Case No. DI/415 – Government's planning and arrangements for ancillary facilities for electric private vehicles

Background

813. In order to encourage the use of electric vehicles (EVs) for reducing roadside air pollution, the Government has fully or partially waived the first registration tax (FRT) for EVs since April 1994. The number of electric private vehicles (EPVs) surged rapidly within a few years, but the growth in the number of public charging facilities has lagged far behind that of EPVs.

The Ombudsman's observations

814. The Office's investigation revealed inadequacies on the part of the Environment Bureau (ENB) and Environmental Protection Department (EPD) in the following seven aspects regarding the planning and arrangements for ancillary facilities for EPVs.

Inadequacy (a): Failing to clearly explain to the public the change in EV policy

815. The Government started promoting the use of EVs as early as the 1990s and explicitly supported the implementation of such a policy in its policy documents. However, the Government has subsequently changed its policy and measures without clearly explaining to the public the reasons and justifications behind. As a result, the public cannot fully grasp the Government's stance in promoting the use of EVs.

816. Since 2016, the Government has undertaken to focus its policy on promoting the use of EVs in the public transport system, while the promotion of EPVs is no longer mentioned. In 2017, the Government reduced the FRT concession for EPVs. Meanwhile, the number of charging facilities in government public car parks has not shown any significant increase. Moreover, regarding the statement "the Government's longer term target is that as far as private cars are concerned, 30% are EVs or hybrid by 2020" in the Hong Kong Planning Standards and Guidelines (HKPSG), ENB explained that the figure merely represents

a hypothetical scenario rather than an objective. The original "target" has been changed into a "vision". All those changes would inevitably give the public an impression that the Government is not as proactive as before in promoting the use of EPVs.

817. Promoting the use of EVs in Hong Kong is a long-term policy which requires clear and long-term planning. The Government, therefore, must clearly explain to the public its policy direction and specific targets, and its reasons and justifications for formulating the relevant measures (including the planning and arrangements for ancillary facilities). Where the Government finds it necessary to adjust the policy and modify the measures, it should also take the initiative to explain to the public the reasons in detail, and inform the parties affected of what can be done in light of the change.

Inadequacy (b): Insufficient charging facilities

818. While the number of EPVs has surged since 2014, there has been no significant increase in the number of public charging facilities. It can be foreseen that EPV users will have greater difficulty than before in finding a public charger to charge their vehicles.

819. Regarding car parks managed by the Government, in the 24 hours public car parks under the Transport Department (TD), on average, 7.45% of the parking spaces have charging facilities. Furthermore, for the car parks under the Government Property Agency (GPA), which provide workplace parking spaces for some civil servants, on average, only 15.79% of the parking spaces have charging facilities. As for the Hong Kong Housing Authority (HKHA) and the Hong Kong Housing Society (HKHS), which provide public and subsidised housing, the ratio of parking spaces equipped with charging facilities is relatively low. Among the 161 car parks under HKHA, only 28 are equipped with charging facilities. Overall, the number of parking spaces equipped with charging facilities in government car parks is relatively low. At present, the Government has not set any long-term or achievable targets for installation of charging facilities in existing buildings.

820. In respect of promoting the installation of charging facilities in private buildings, the actions currently taken by the Government are merely issuing letters to encourage private building owners, and providing technical guidelines. In the lack of statutory requirements and financial incentives, and since legal concerns regarding provisions under the land lease or deed of mutual covenant of the building often arise, existing

private building owners are generally not so interested or determined in installing charging facilities. The Government has obviously underestimated the resistance to the installation of EV charging facilities at the car parks in private buildings. The Government needs to explore other means to encourage the installation of charging facilities in existing buildings.

821. As for new building developments, since 2011 the Government has granted gross floor area (GFA) concessions to encourage developers to provide EV charging infrastructure for the private car parks of new building developments. Nevertheless, the Government makes no requirements for installing chargers and electricity meter connection at the parking spaces already provided with such infrastructure, nor has it any data on the specific charging facilities available at those venues and their charging speed.

Inadequacy (c): Underestimating the demand for charging facilities

822. The Government sees no urgent need to increase the number of public charging spaces, because its statistics show that the current utilisation rate of charging facilities at public car parks is still relatively low. However, this can be due to the fact that charging spaces are often occupied by non-EVs. Besides, the charging spaces in some government public car parks are only equipped with standard chargers which require longer charging time, leading to slower turnover. The overall utilisation rate therefore becomes lower.

823. The Office believes that the current data on utilisation rate may not have fully reflected the actual demand for the charging facilities at public car parks, and the utilisation rate has been underestimated.

Inadequacy (d): Inadequate information sharing

824. While information about public charging facilities is already uploaded to the EPD website, the Government does not have data on the utilisation of public charging facilities at non-government public car parks. The Office considers that collecting data on the utilisation of charging facilities will enable effective analysis and better estimation of the demand and supply for public charging facilities. The Government obviously lags behind in the application of information technology and in the setting up of information sharing platforms.

Inadequacy (e): Poor management of charging spaces at government public car parks

825. Charging spaces at government car parks are frequently occupied by non-EVs or EVs that are already fully-charged. Although the Government claimed that charging spaces would be reserved for priority use by EVs during non-peak hours, the measure is not a statutory requirement and is implemented largely on a voluntary basis by the outsourced car park contractors. Lax monitoring also renders full and effective implementation impossible. Besides, many charging spaces are located near the entrances / exits of car parks and, therefore, readily taken up by non-EVs. The Office has also received comments from the public that some charging facilities at government car parks frequently broke down and were out of service.

826. Given the resources invested by the Government in installing more and better charging facilities, the Office considers it unsatisfactory, from the perspective of proper use of public resources, that the facilities could not be fully utilised because of poor management.

Inadequacy (f): Failing to formulate clear fee-charging policy for charging service

827. Free charging service is the main incentive for people to buy EVs. At present, the Government is paying around $1 million a year in electricity bills of the chargers at its car parks. It has already indicated that in the long run, it intends to charge a fee for public charging service. However, the Government has never announced when the free charging service will cease and the subsequent arrangements. In the Office's view, no matter the charging service is provided for free or not, and when it intends to start charging a fee, the Government should properly manage expectations and let the public know the related arrangements as soon as possible.

Inadequacy (g): Lack of other long-term support measures

828. At present, EV owners mainly rely on the maintenance service provided by the original manufacturers. With the growing popularity of EVs, demand for EV maintenance service would become greater. The Office is of the view that the Government should urge the trade and training institutions to provide systematic training to EV mechanics and those who are interested in joining the profession. Furthermore, EVs as a category is not included under the Voluntary Registration Schemes for

Vehicle Mechanics introduced by the Government. The relevant authorities should review the current guidelines and update the relevant codes of practice for the trade's reference.

829. Another important issue is the treatment for retired batteries for EVs, which normally have a lifespan of around seven years. With the growing popularity of EVs, the number of retired batteries is expected to soar. The Government now mainly relies on the EV manufacturers to recycle the batteries. No specific proposals or long-term planning for the disposal of retired batteries have been formulated.

830. The Ombudsman made the following recommendations to ENB and EPD —

Policy implementation

(a) explain more to the public the reasons and justifications behind any adjustments to the measures and arrangements regarding the policy on the promotion of EVs;

(b) review as soon as possible the contents relating to EV charging facilities in the HKPSG, and make corresponding amendments and updates to match the Government's current policy direction and targets;

(c) set an example by actively promoting the use of EVs among Government departments;

Ancillary charging facilities

(d) consider installing more charging facilities at car parks managed by Government departments and public organisations (such as HKHA/HKHS/GPA) in order to support the Government's current policy of encouraging EV owners to charge up their vehicles at their homes and workplaces;

(e) coordinate and assist other Government departments and public organisations in enhancing the efficiency of charging facilities;

(f) install more charging facilities at government public car parks;

(g) collect data on the utilisation of public charging facilities at non-government car parks for assessing the need for and scale of expansion of public charging facilities;

(h) discuss with TD and GPA, the departments that manage government public car parks, ways to improve the management of charging spaces. This should include a review on how to enhance the current measure of "priority use of charging space by EVs" and arrangements for setting up new charging facilities at locations further away from the entrances/exits and passageways of car parks;

(i) expedite the setting up of a smart system for the public EV charging network;

(j) formulate a clear fee-charging policy and announce the arrangements as soon as possible;

Support measures

(k) strengthen liaison with owners' corporations and owners' committees of private buildings, and explore other means to encourage existing buildings to install charging facilities;

(l) review the arrangements for granting GFA concessions to the car parks of newly constructed buildings, and to update the Technical Guidelines for Electric Vehicle Charging-enabling for Car Parks of New Building Developments;

(m) collect data on the charging facilities in newly constructed buildings and the charging speed of the facilities;

Long-term planning

(n) urge related institutions to step up training for EV mechanics and repair technicians for charging facilities, as well as review the current guidelines and update the relevant codes of practice; and

(o) discuss with the trade and EV suppliers the issues relating to the recycling and disposal of retired EV batteries.

Government's response

831. ENB and EPD accepted The Ombudsman's recommendations, and have taken the following follow-up actions.

Recommendation (a)

832. EPD communicates with the public and stakeholders proactively and explains to them the information and details of policies and measures on EVs through various channels, including the EPD's webpage, press releases and briefing sessions. When adjusting its policies, EPD explains the update and its considerations in detail to the public. EPD has also organised workshops, briefing sessions and meetings to promote and explain EV-related policies and measures to the public and stakeholders, and briefed the Legislative Council on the policies and the progress of promoting adoption of EVs from time to time. In 2019, EPD organised a total of 13 workshops and briefing sessions to encourage installation of EV charging facilities in private buildings and gauge views from stakeholders.

Recommendations (b) and (l)

833. EPD is preparing to update the HKPSG and the Technical Guidelines for Electric Vehicle Charging-enabling for Car Parks of New Building Developments. After consulting stakeholders, the Department will update the relevant guidelines in order to tie in with the latest development of EVs and their charging technologies.

Recommendation (c)

834. The Government has been actively promoting the use of EVs in its departments. If suitable EV models are available in the market and resources permit, the Government will first consider replacing retiring vehicles with EVs.

835. As at the end of June 2020, there were 213 EVs of different models in the government fleet. Among which, 139 were passenger cars, accounting for 9% of the total number of government passenger cars. This percentage is higher than that of electric private vehicles (EPVs) among private cars in Hong Kong (i.e. 2.3%).

836. Adopting EVs in the government fleet hinges on whether the vehicle performance, durability of batteries, and the highest mileage after a full charge, etc. can meet the departments' daily operational needs. In the meantime, the driving range of EPVs has improved in general. As regards special purpose vehicles (such as refuse collection vehicles), buses, medium and heavy goods vehicles, there are still no EV models in the market meeting departments' operational needs. Battery performance for electric motorcycles is not satisfactory either. Electric vans are also yet to be widely adopted as only a handful of models can cope with uses that require lower mileage and payload.

837. In line with the policy of promoting wider use of EVs, the Government will keep abreast of the latest technological development of EVs and continue to encourage departments to replace retiring vehicles with EVs.

Recommendations (d) and (f)

838. The Government has allocated $120 million to install 1 000 additional medium chargers at car parks of TD, GPA, the Leisure and Cultural Services Department and the Tourism Commission between 2019 and 2022. The total number of public chargers at government car parks will increase to about 1 800. Installation works of the first batch of 169 medium chargers were completed in late April 2020. The chargers have been progressively opened to public use after completion of testing.

839. HKHA and HKHS will also, if technically feasible and electricity loading permissible, install additional EV medium chargers at existing car parks according to the demand. HKHA will continue to follow the recommendation of the HKPSG to provide EV charging facilities (including chargers) for 30% of the private car parking spaces in the indoor car parks of new public housing developments. EV charging-enabling infrastructure (including electricity distribution boards, cables, conduits and trunking) will also be installed for the remaining 70% of the private car parking spaces and wall spaces will be reserved for the installation of chargers in future. HKHA will go beyond the HKPSG's recommendations to reserve sufficient power supply and underground ducts at outdoor parking spaces for future use.

Recommendation (e)

840. EPD has been working with relevant government departments and public organisations to enhance performance of EV charging facilities. Guidelines on installing EV chargers have been issued to departments and organisations showing interest for reference.

841. In order to enhance the efficiency of public charging facilities at the government car parks that are open to the public, except the 61 chargers located at TD's car parks that are planned to be demolished and the 94 chargers with both standard and medium charging functions, the Government has upgraded all 370 standard chargers installed at the public car parks of TD and GPA to medium chargers between 2016 and 2018. On the other hand, the two power companies have also upgraded their standard chargers currently available for public use to medium chargers, and installed multi-standard quick chargers.

Recommendation (g)

842. EPD has been contacting EV charging service providers and relevant organisations regularly for information and usage of their public charging facilities in order to help assess the needs to expand the public charging network.

Recommendation (h)

843. The government public car parks are to provide the public with non-on-street parking spaces so as to reduce the demand for on-street parking, thereby relieving the traffic burden. The Government has to give due consideration to the utilisation of public car parks to strike a balance between providing parking spaces for vehicles and charging services for EVs.

844. TD has implemented a trial since August 2020 to designate some parking spaces equipped with EV chargers in four government car parks for exclusive use of EVs. TD will review the trial result after six months. In addition, new EV chargers in government car parks will be installed at parking spaces away from lifts or entrances / exits of the buildings as far as practicable in order to discourage non-EVs from using parking spaces installed with chargers.

Recommendation (i)

845. The Government plans to set up a smart system for its public EV charging network. The system will cover the number and location of parking spaces equipped with chargers, instant electronic information on the status of chargers, fee charging system, etc. EPD will also explore the feasibility of reservation for parking spaces equipped with chargers, and will install equipment at entrances of car parks to show the number of EV parking spaces available for drivers' information.

846. EPD has installed equipment on public chargers in some government car parks in December 2019 to test receiving instant electronic information on the utilisation of 100 chargers, with a view to providing real-time information on the utilisation of chargers to the public in future. While conducting the tests and analysing the data, EPD is also installing relevant equipment for transmitting instant electronic information on the remaining chargers.

Recommendation (j)

847. As the Government is focusing on encouraging and promoting the use of EVs, EPD has yet to impose any fees for using the government public EV charging facilities. However, with the increasing number of EVs in future, EPD has to ensure efficient use of the government's EV charging facilities and maintain the "user pays" principle. The Government will formulate a charging policy in due course and explain it in detail to the public, especially the drivers.

Recommendation (k)

848. The Government has launched a $2 billion "EV-charging at Home Subsidy Scheme" in October 2020 to subsidise the installation of EV charging-enabling infrastructure in car parks of existing private residential buildings. To tie in with the overall trend in EV development, the subsidy scheme aims to assist car parks of existing private residential buildings to resolve the technical and financial difficulties that are often encountered in the installation of EV charging-enabling infrastructure, so that owners of individual parking spaces can install chargers according to their own needs in future. According to a preliminary assessment, about 60 000 parking spaces in existing private residential buildings will be provided with charging-enabling infrastructure in three years under the pilot subsidy scheme. Together with the charging-enabling infrastructure set up in car parks of newly constructed buildings to which GFA concessions are

granted, it is expected that about one-fourth of the overall parking spaces in private residential buildings[24] will be equipped with charging-enabling infrastructure upon the completion of the pilot subsidy scheme.

Recommendation (m)

849. For new developments approved from April 2011 to March 2020, over 80% of private parking spaces have EV charging-enabling infrastructure. About 540 EV charging-enabling car parks have been granted GFA concessions, and upon their completion, some 65 000 parking spaces will be EV charging-enabling. Among these car parks, around 230 involving some 24 000 charging-enabling parking spaces have already been completed and issued with occupation permits.

850. Apart from the above, EPD also gathers information on a regular basis from EV charging service providers on the locations, types, quantities, etc. of public EV charging facilities newly installed in car parks of existing and new buildings.

Recommendation (n)

851. The Electrical and Mechanical Services Department (EMSD) maintains close liaison with the trade and the Vocational Training Council (VTC) regarding the training of EV mechanics. Regarding the training of EV mechanics, VTC currently offers two in-service training programmes, namely "New Energy Vehicle Insight" and "Hybrid Vehicle Power Train". The programmes help enhance vehicle mechanics' knowledge on the configuration and operation of EVs, as well as the safety procedures of handling high voltage electricity. As for full-time training, programmes related to automobile maintenance provided more than 280 training places in the 2020/21 academic year. VTC has incorporated professional knowledge about EV, including design, modes of operation, safety standards, and maintenance skills into the programmes, and will continue to update the relevant programme curricula in good time having regard to the development of EV-related technologies and industry demands.

852. Furthermore, an EV research project under the Environment and Conservation Fund has been set up to explore ways to promote the use of EVs, including the maintenance of EPVs. Through participating in seminars of the project, Government departments have explored different

[24] There are about 310 000 parking spaces located in private residential buildings in Hong Kong (excluding the parking spaces in car parks that belong to Link REIT as well as car parks of industrial and commercial buildings and village houses).

feasible options and future directions in respect of the maintenance of EPVs, including training of workers, together with the project team, EV manufacturers, importers, trade associations of vehicle maintenance workshop operators, vocational training organisations, and various professional institutes. When the trade and the market reach a consensus on the feasible options in the maintenance of EPVs, EMSD will consider matters concerning the registration of EV mechanics and EV maintenance workshops.

Recommendation (o)

853. Waste EV batteries have to be properly handled under the Waste Disposal Ordinance (Cap. 354) and its subsidiary Waste Disposal (Chemical Waste) (General) Regulation. Most EV manufacturers or agents have currently engaged licensed collectors to collect the waste batteries of their brands' EVs. After proper preliminary treatment (e.g. sorting, discharging and insulating) and packaging, these waste EV batteries are exported to appropriate treatment facilities in Japan, Korea or Belgium for recycling. Although the age of most EVs in Hong Kong remains young and the number of retired EV batteries remains small at this stage, EPD is embarking on a study on how to promote recycling of new energy vehicle batteries. Apart from analysing overseas experiences, EPD has been maintaining close liaison with the trade and EV suppliers to explore solutions that are applicable to local situation, so as to enhance environmental protection.

Housing Department and Social Welfare Department

Case No. DI/429 – Notification mechanism and arrangements of Housing Department and Social Welfare Department for imprisoned singleton public rental housing tenants

Background

854. The Office of The Ombudsman (the Office) found inadequacies in the mechanism and arrangements of the Housing Department (HD) regarding imprisoned singleton public rental housing (PRH) tenants (including those who are Comprehensive Social Security Assistance (CSSA) recipients) when handling a complaint case, which may result in the PRH flats concerned being left vacant for a prolonged period of time but went unnoticed. In this connection, the Office initiated a direct investigation against HD and the Social Welfare Department (SWD) to examine the notification mechanism and related arrangements for imprisoned singleton PRH tenants.

The Ombudsman's observations

SWD's existing arrangements

855. CSSA recipients who are in custody or imprisoned in a correctional institution (CI) will no longer be eligible for receiving CSSA. When SWD becomes aware of a CSSA recipient's custody or imprisonment in a CI through regular data checking with the Correctional Services Department (CSD), it will inform the recipient of the suspension of CSSA payments, including the rent allowance.

HD's existing arrangements

856. Currently, there is no established mechanism for HD to learn that a PRH tenant is sentenced to a CI. HD will not take any further action unless the tenant or his / her relatives and friends take the initiative to inform HD, or when there are other signs, such as rent arrears or loss of contact with the tenant. Obviously, HD's work and role are relatively passive. If a tenant continues to pay rent punctually, the flat concerned may remain vacant for a prolonged period without being noticed.

857. The Housing Authority (HA) has put in place a Letter of Assurance (LA) mechanism. Singleton PRH tenants who are serving a relatively long sentence and have not breached any tenancy conditions (such as having no rent arrears) will be issued a LA by HA upon request when HA recovers their PRH flats. They will be allocated a PRH flat upon release from prison without the need to queue again as long as they still meet the relevant criteria. On the contrary, tenants in rent arrears must first clear all the outstanding rent payments before they can be issued a LA when HA recovers their PRH flats.

858. Where a singleton tenant defaults on rent payment during imprisonment and HD can neither contact him / her nor learn about his / her imprisonment in any other way, it will follow up the case in accordance with established procedures to recover the flat concerned at the end of the third month of rent arrears. During this processing period, the flat will remain vacant. The tenant will only discover upon release from prison that his / her PRH flat has been recovered, and can only be offered another unit after going through the PRH application process and with full settlement of rent arrears and other outstanding sums.

859. Where the tenant in rent arrears is a CSSA recipient and cannot be contacted, HD will send an enquiry memorandum to SWD in the middle of the second month of rent arrears. However, it can take further action only when notified by SWD that the tenant is already in prison. The Office is of the view that there is room for improvement in the efficiency of handling such cases. Moreover, HD will not issue the LA to those tenants who are unable to clear their rent arrears, and the tenants may become homeless upon release from prison.

Overall comments

860. The Office considers it incumbent upon PRH tenants to pay rent on time. They also have a duty to inform HD immediately of any changes to their occupancy status (such as when a singleton tenant is in prison) which would result in their PRH flats being left vacant. Nevertheless, if singleton PRH tenants fail to inform HD, it often takes at least two to three months before HD can learn about their imprisonment. It is also possible that HD may never be informed and the flats involved would be left vacant. HD's role is somewhat passive under the present mechanism. The Office considers there to be room for improvement.

861. If PRH tenants default on rent payments, HD would activate the procedures to recover the flats. Upon their release from prison, their PRH flats would have been recovered by HA. The tenants have to clear all outstanding rent payments before they are allowed to submit another PRH application. The Office considers such arrangements unfavourable to ex-inmates' re-integration into society.

862. Since the rent allowances of PRH tenants who are CSSA recipients are directly transferred to HA by SWD, any rent arrears with respect to their PRH flats may imply a change in the tenants' CSSA eligibility (e.g. due to imprisonment). This has a direct bearing on the utilisation of PRH flats. The Office considers that HD needs to find out as soon as possible the reason for any change in a tenant's CSSA eligibility so that prompt action can be taken to recover the flat for re-allocation. It can also prevent the situation where a tenant loses both his / her PRH flat and the chance of getting a LA because of rent arrears, which may create another social problem.

863. The Ombudsman recommended that HD –

(a) devise an alternative system to issue Conditional Letters of Assurance (CLAs);

(b) strengthen the existing notification mechanism with SWD, so that SWD can provide HD directly with the details about PRH tenants' imprisonment upon suspension of rent allowance payments and obtaining consent from the imprisoned singleton PRH tenants;

(c) step up publicity for inmates through CSD and remind imprisoned singleton PRH tenants to inform HD promptly for its follow-up action; and

(d) study with CSD the feasibility of setting up a regular notification mechanism such that appropriate arrangements can be made as soon as possible for singleton PRH tenants serving prison terms.

Government's response

864. HD and SWD both accepted The Ombudsman's recommendations.

Recommendation (a)

865. All along, HD has put in place an established mechanism for the issuance of LAs. After reviewing the relevant arrangements, HD has agreed to introduce CLAs under the existing mechanism. Singleton PRH tenants who have rent arrears / outstanding payments due to reasons beyond their control, such as imprisonment and admission to hospitals, and are willing to surrender their PRH / Interim Housing (IH) flats to HD may apply for a CLA from HA, provided that they have not breached other terms and conditions under the tenancy agreement. If they have housing need in future and meet the eligibility criteria for PRH application and other conditions listed on the CLA, they may be allocated a PRH / IH flat once all rent arrears / outstanding payments are settled. HD issued the relevant guidelines to frontline staff by email on 22 November 2019.

Recommendation (b)

866. SWD replied to The Ombudsman in writing on 27 November 2019 that the notification mechanism had been strengthened. Upon obtaining consent from the imprisoned singleton PRH tenants who are CSSA recipients, SWD will provide HD directly with the details about their imprisonment so that HD can contact the tenants concerned as early as possible to deal with matters relating to the tenancy agreement of their PRH flats.

867. When a CSSA recipient is being detained or imprisoned in a CI, he / she is not eligible for CSSA (including the direct rent payment arrangements for paying rent of the PRH flat to the HA) and stop payment will be arranged by SWD. If those detained / imprisoned singleton recipients who are occupying a PRH flat under HD have no one to handle their tenancy issues, SWD will issue a covering letter (namely Notification of rent allowance arrangement under Comprehensive Social Security Assistance Scheme) together with an intent form (namely Letter of Intent) to the recipient after the stop payment arrangement. Upon receipt of the completed Letter of Intent from the concerned recipient, the caseworker will follow up according to his / her choice as indicated in the Letter of Intent, i.e. if the recipient agreed to release the information of his / her date

of detention / imprisonment in the concerned CI to HD, the caseworker will issue a memo to notify HD to take follow-up action.

Recommendation (c)

868. CSD has agreed to step up publicity for inmates. Starting from late April 2020, messages have been progressively displayed on LED display panels, LCD TVs and inmates information system of CSD institutions (including CIs, Reception Centres, Rehabilitation Centres, etc.) and Addiction Treatment Centres to remind imprisoned singleton PRH tenants that they may contact HD in writing on their own, or through their relatives and friends, or staff of the CSD Rehabilitation Section for enquiries or arrangements in respect of their PRH tenancy matters.

Recommendation (d)

869. HD obtained on 9 July 2020 the written consent from the Office of the Privacy Commissioner for Personal Data to carry out regular data matching procedures between the information of singleton PRH tenants of HD and sentenced persons in CSD so that appropriate arrangements can be made to meet the housing needs of imprisoned singleton PRH tenants as soon as possible. HD will commence the matching procedure as soon as practicable upon finalisation with CSD on the implementation details.

Lands Department

Case No. DI/425 – Lands Department's enforcement against commercial use of public pedestrian passages and public atria in private malls

Background

870. Lot owners (owners) of some private developments (including malls) are required under land lease (lease) conditions to provide in their developments public pedestrian passages (public passages) and / or public atria (atria). The uses of these public facilities are governed by lease conditions, which may stipulate, for instance, that no commercial activities shall be carried out within the public passages and atria, public passages shall be free of obstruction with no goods placed thereon, and public passages and atria shall be open for use by the public during specified hours.

871. There were media reports about public passages and atria in malls being used for commercial purposes (e.g. for setting up sales booths, as business areas of restaurants and for placement of fee-charging children's play equipment). Some of those cases have been confirmed by the Lands Department (LandsD) as having breached the relevant lease conditions. The public has also expressed concern over the problem to the Office of The Ombudsman (the Office).

872. Against this background, The Ombudsman initiated a direct investigation on 25 July 2018 to examine whether there are inadequacies in LandsD's enforcement against the problem of unauthorised use of public passages and atria in private malls for commercial purposes ("the unauthorised commercial use") and to make recommendations for improvement as appropriate. This investigation does not cover other breaches of the lease in private malls (such as opening hours of public passages and atria not conforming to lease conditions, unauthorised building works in other parts of the malls, etc.).

The Ombudsman's observations

873. The Office has identified the following inadequacies and areas of improvement for LandsD –

Enforcement

(a) No or delayed enforcement;

(b) Insufficient enforcement;

(c) Failure to register warning letters at the Land Registry (LR);

(d) Failure to refer suitable cases of breach to other relevant departments for follow-up;

(e) Failure to proactively recover waiver fees from owners who have breached the lease;

(f) Unclear enforcement objective and ineffective enforcement; and

Information Dissemination

(g) Inadequate information provided to the public about public passages / atria in private malls.

874. The Ombudsman recommended that LandsD –

(a) review relevant operational guidelines to stipulate the time limits for issuing warning letters and registering warning letters at LR. The time limit for registration should be clearly specified in warning letters;

(b) revisit as soon as possible all known and newly found cases with unauthorised commercial use and take the initiative to recover promptly / in a timely manner waiver fees from the owners of the malls concerned;

(c) consider seeking legal advice on cases in which "the unauthorised commercial use" involving shop owners persists for determining whether warning letters can be issued to those owners;

(d) set a clear objective for enforcement action against unauthorised commercial use and devise enforcement / regulatory measures for achieving the objective;

(e) follow up regularly with private malls concerning their implementation of LandsD's suggestion that layout plans which show the locations and routing of public passages and / or atria in the malls be displayed at the entrances / exits of those facilities, and consider stipulating in the leases of new private developments (including malls) that owners of the developments must display such layout plans at the entrances / exits of the public passages and / or atria in their malls;

(f) follow its schedule in uploading more information (including photographs or videos) about public passages / atria in private malls onto the GeoInfo Map website to enhance transparency and public access to information; and

(g) upload regularly onto the GeoInfo Map website information (including photographs or videos) about public passages / atria in new private developments (including malls).

Government's response

Recommendation (a)

875. In order to ensure that District Lands Offices (DLOs) take enforcement actions against lease breaches in a timely manner, LandsD has reviewed the relevant operational guidelines. The new guidelines, which stipulate time limits for issuing warning letters, were issued to DLOs in February 2020. Under the new guidelines, for general cases a warning letter should be sent to the owner in breach of lease conditions within four weeks after the breach is substantiated, and as soon as possible where fire or public safety concerns are involved. If a DLO finds that the breach is not rectified within the time limit stated in the warning letter, it should register the warning letter at LR, commonly known as "imposing an encumbrance", within six weeks.

876. On the recommendation of specifying the time limit for the registration of warning letters, in view of the varying severity among cases, DLOs need the flexibility to register warning letters at LR before the six-week time limit is due. Therefore, having considered the recommendation, LandsD has decided not to explicitly specify the time limit in the warning letter, so as to prevent the owners in breach of lease conditions from having legitimate expectations or even unnecessary disputes on when the warning letter should be registered. Moreover, specifying the time limit may induce

some owners to delay termination of unauthorised uses, and hence slows down the rectification of breaches. LandsD has informed The Ombudsman of the above on 20 May 2020. On 10 August 2020, the Office requested LandsD to provide supplementary information for its consideration. LandsD provided the Office with the relevant information on 29 October 2020.

Recommendation (b)

877. LandsD has reviewed the 65 problematic cases contained in the investigation report and found that in four of these cases, lease breaches are unrelated to commercial uses or there is no lease breach at all. The remaining 61 cases involving unauthorised commercial uses are found in 19 developments, and in 57 of them, the breaches have subsequently been rectified.

878. The remaining cases with breaches yet to be rectified are at four developments. Application for regularization has been made by the owners of one development which is being considered. Subject to legal advice, the application shall be further processed accordingly. Regarding the other three developments, the concerned DLO has been following up the lease breaches with the concerned parties after obtaining legal advice on the appropriate further lease enforcement actions.

Recommendation (c)

879. Upon reviewing precedent cases and seeking legal advice, LandsD sent out an internal email in February 2020 to remind DLOs that when handling lease breaches concerning common areas, warning letters should be issued to both the owners of property (including owners of shop premises) committing lease breaches (including, for example, the unauthorised commercial uses) and owners of the common areas as appropriate, with copies forwarded to property management companies and / or incorporated owners and mortgagees (if any), with a view to stepping up enforcement against breaches in common areas.

Recommendation (d)

880. In respect of lease enforcement actions, it has been LandsD's established policy objective to require the owners concerned to rectify their lease breaches to the satisfaction of the department within a specified period as stipulated in the warning letters. Alternatively, they may apply for regularisation of their lease breaches through lease modifications or

waivers and LandsD will consider their applications upon consultation with relevant departments following the existing applicable policies and procedures. As for "the unauthorised commercial use", an internal email was sent out on 29 May 2020 to remind all DLOs to take enforcement actions as appropriate within the present policy framework regulating public facilities (including public open spaces in private developments). Details of the enforcement actions are set out below –

(a) If an owner who fails to rectify the lease breach within a specified period applies for regularisation by way of a waiver, LandsD will seek advice from relevant government departments on the application under the established mechanism, before deciding whether to grant the waiver or not. LandsD will also recover a waiver fee counting from the day the breach was first identified u1der t1e terms of t1e waiver;1

(b) If an owner neither rectifies the lease breach within a specified period nor applies for regularisation, or the application for regularisation cannot be approved, LandsD will take enforcement actions against the breach, including registering the warning letter at LR after consulting legal advice in accordance with the established procedures, with a view to deterring the continuation of the breach. However, if a common area of a composite development with a mixture of shops, residential units and car parks involved in unauthorised commercial use is jointly owned by a large number of minority owners, "imposing an encumbrance" on all owners of the property concerned may not be appropriate, nor can it achieve the expected deterrent effect due to fragmented ownership of the property. LandsD will seek legal advice having regard to different factors such as case complexity, nature of titles and feasible legal means in respect of individual cases, and will take appropriate lease enforcement actions including applying to the court for an injunction to demand the owner or property manager to cease the breach. The DLOs in question are reviewing individual lease breach cases and, after seeking legal advice, will consider taking furt1er legal actio1s agai1st t1e ow1ers;1

(c) As to whether LandsD can, as recommended by The Ombudsman, recover waiver fees from the owners after their rectification of lease breaches following the issue of warning letters, DLOs are identifying suitable cases and, if supported by legal advice, may consider making claims against the owners concerned through civil proceedings. If such cases meet with success, they could

serve as precede1ts for future refere1ce; a1d1

(d) On The Ombudsman's recommendation to specify in the leases of future developments that once unauthorised commercial use is found, DLOs could not only recover the waiver fee, but also impose an additional administration fee on the owners, the legal advice obtained by LandsD suggests that if it is stipulated in the leases of future developments the assumption about possible breaches of the lease conditions by the owners and payment of waiver fees and additional administrative fees as a way to offset the responsibility arising from lease breaches, this may convey an erroneous message to the owners, leading them to believe that they can obviate the need to bear the primary responsibility to comply with individual lease conditions by way of paying waiver fees and additional administrative fees. Such a condition may impede the authority of LandsD to take enforcement actions under lease conditions. Besides, the nature of the "additional administration fee" proposed by The Ombudsman, which is aimed at deterring the grantee from breach of the user restriction under lease, appears to be neither in the nature of a "waiver fee" nor an ordinary administrative fee. It may amount to punitive damages from legal point of view. Whether LandsD has the legal basis for executing contractual lease conditions pertinent to punitive damages is questionable. Furthermore, if LandsD wants to impose the "additional administration fee", it has to show that it has a legitimate interest in charging the "additional administration fee" in addition to the "waiver fee" and that such "additional administration fee" is not extravagant or unconscionable by reference to that legitimate interest, otherwise it may be regarded as penalty and not enforceable. Therefore, having taken into account the legal advice mentioned above, LandsD deems it not feasible to specify in the leases of future developments that an additional administrative fee can be charged for lease breaches. LandsD has informed The Ombudsman of the above on 20 May 2020. On 10 August 2020, the Office requested LandsD to provide supplementary information for its consideration. LandsD provided the Office with the relevant information on 29 October 2020.

Recommendation (e)

881. LandsD has already issued advisory letters to all private developments which are required to provide public passages and atria in their malls, proposing the erection of directional signs indicating the layout plans, locations, opening hours and the like of such facilities at the entrances / exits of the public passages. Since there is no relevant condition in these land leases providing that the owners must display such information for the benefit of the public, LandsD can only encourage them to do so proactively by way of advice. Having said that, to facilitate public access to such information, LandsD has since December 2019 been disseminating information about the locations of the existing private developments (so far, mainly including those completed in or after 1980 with certificates of compliance issued) and also information about the public passages / atria within the developments via the GeoInfo Map website.

882. In light of the recommendation of The Ombudsman, LandsD has prepared the draft lease conditions for incorporation into the new leases of new developments requiring the owners to display layout plans which show the locations and routing of such facilities in their malls, and is seeking comments from relevant departments on the draft conditions.

Recommendations (f) and (g)

883. LandsD will upload regularly onto the GeoInfo Map website information about all the facilities for use by the public in newly completed private developments as required under lease conditions.

884. As to the schedule of uploading more information (including photographs or videos) about public passages / atria in private malls (both existing and newly completed) on the GeoInfo Map website to enhance transparency and public access to information, LandsD has essentially completed the GeoInfo Map website enhancement, while on-site photograph taking (which is to be carried out in phases) and the follow-up work, such as geo-tagging photographs, data conversion, data verification, system testing, etc., have been postponed in view of the latest situation of the COVID-19 epidemic. Having said that, it remains LandsD's plan to provide the public with more information about public passages and atria as early as possible.

Leisure and Cultural Services Department

Case No. DI/434 – Leisure and Cultural Services Department's arrangements for depositing layout plans of public pleasure grounds in Land Registry

Background

885. The Leisure and Cultural Services Department (LCSD) is managing nearly 1 800 public pleasure grounds (PPGs) including parks, children's playgrounds, beaches, etc. In March 2019, there were media reports about LCSD's failure to deposit the layout plans of some 450 PPGs in the Land Registry (LR) in accordance with the Public Health and Municipal Services Ordinance (Cap. 132) (PHMSO). As a result, the legal basis of enforcement actions by its staff and the Tobacco and Alcohol Control Office under the Department of Health in the PPGs concerned was questioned.

886. LCSD had completed the work for depositing layout plans of all PPGs in about 10 months after the problem came to its attention. Nevertheless, the Office of The Ombudsman (the Office) initiated a direct investigation into LCSD's arrangements for depositing layout plans of PPGs in LR to avoid recurrence of similar cases of delay or omission.

The Ombudsman's observations

887. The investigation of the Office has identified the following four inadequacies in LCSD's depositing of layout plans of PPGs.

Before the discovery of failure to deposit layout plans of some PPGs

Inadequacy (a): Failing to draw up clear guidelines for meeting statutory requirements

888. The English version of PHMSO, compiled in 1960, has no clear indication that layout plans of PPGs shall be deposited in LR. Nevertheless, the Chinese version of PHMSO, compiled in 1996, stipulates that a layout plan showing the boundaries of a PPG shall be deposited in LR. According to LCSD, it had all along acted upon the English version of PHMSO. However, the investigation revealed that more than half of the PPGs had their deposit procedures completed in accordance with the requirements in

the Chinese version of PHMSO. That means throughout the years, LCSD had neither noticed nor paid attention to the inconsistent practice regarding deposits of layout plans of PPGs. Moreover, it had not drawn up any clear instructions or guidelines for meeting the relevant requirements in respect of deposit of layout plans of PPGs under PHMSO. As a result, each District Leisure Services Office (DLSO) under LCSD has its own way of handling the matter.

Inadequacy (b): Failing to actively monitor the progress of deposit procedures and records keeping

889. In the past, LCSD had not set up any centralised database to record, organise and manage information on deposit of layout plans of PPGs. Neither had the LCSD headquarters kept any records. When the procedures of depositing layout plan in LR were completed, it would only be kept by the DLSO concerned, which was not required to report its work progress to the headquarters. The Office considered that LCSD had never monitored the work of layout plans deposit procedures (including amendment of layout plans).

Inadequacy (c): Ineffective communication and lack of collaboration with the Lands Department (LandsD)

890. The work of depositing layout plans was handled by DLSOs of LCSD and the District Survey Offices of LandsD separately. There was neither established mechanism for communication between the district offices and headquarters of the two departments nor regular reviews regarding the progress or workflows of the work. Hence, the monitoring on the progress of deposit of layout plans was ineffective and the cases of delay or omission failed to be identified promptly.

After reviewing the situation and establishing procedures for deposit of layout plans of PPGs

Inadequacy (d): Failing to fill "enforcement vacuum" after opening ppgs for use

891. LCSD would normally complete the gazettal procedures for new PPGs and then open them for public use, and inform LandsD to prepare and deposit their layout plans. As the procedures for preparing and depositing layout plans usually took six months to one year, the layout plans of most PPGs had yet to be deposited when the venues were open to

public in the past. In other words, there might be a one-year or even longer "enforcement vacuum" in newly-opened PPGs.

892. After cases of omission were found, LCSD proposed improvement measures, including liaising with LandsD to speed up deposits of layout plans, updating the internal guidelines to include the procedures for preparing and depositing layout plans of new PPGs, as well as instructing staff to complete the gazetting and deposit procedures. However, there were still no clear instructions or specific measures in the revised guidelines, ensuring that a layout plan would have been deposited in LR when a PPG was opened or a venue was officially taken over from other departments to become a PPG under PHMSO.

893. Hence, the Office considered that LCSD should further review the current procedures and arrangements for gazetting and opening of PPGs for public use, and draw up effective measures (such as exploring the feasibility of depositing a provisional plan showing boundaries of the major area of a PPG) so as to avoid any "enforcement vacuum" that might affect the operation and management of PPGs.

894. The Ombudsman recommended that LCSD –

(a) formulate clear guidelines instructing staff to prepare a layout plan for every PPG and then deposit it in LR as required by law, as well as draw up clear workflow, procedures and time frames to ensure timely follow-up action and deposit of layout plans;

(b) step up monitoring of deposit of layout plans and strictly require DLSOs to report to the headquarters regularly the progress to avoid omissions;

(c) review the current procedures and arrangements of gazetting and opening PPGs and draw up effective and feasible measures to eliminate "enforcement vacuum" (including cases where the PPGs are already opened when taken over from other departments and cases where longer time is required than expected for preparing layout plans);

(d) explore the feasibility of simplifying layout plans and depositing a provisional plan which shows mainly the boundary of the major area of a new PPG in LR to ensure that the requirements for their deposit under PHMSO are already met when the PPG is opened;

(e) establish an effective communication mechanism with LandsD to strengthen collaboration between the two departments so that delay, omission or error in the depositing of layout plans can be avoided;

(f) set up as soon as practicable a central database on layout plans of PPGs for proper keeping and maintenance of all versions of layout plans of PPGs of LCSD and records of those deposited in LR to facilitate effective monitoring of the depositing of layout plans and efficient searching of relevant information by LCSD; and

(g) expedite the study of keeping electronic records of layout plans and setting up a computerised system to handle and monitor the work so that delay or omission due to human error can be avoided.

Government's response

895. LCSD accepted The Ombudsman's recommendations.

Recommendation (a)

896. The relevant guidelines was further revised by LCSD in December 2019 to remind DLSOs of the procedures, workflow and time frames for depositing layout plans. This is to ensure that the layout plans for the newly-opened PPGs are deposited in LR as required by law in future. The guidelines will be updated in a timely manner as necessary.

Recommendation (b)

897. The Land-based Venues Unit (the Unit) of the LCSD headquarters is responsible for monitoring the procedures adopted by DLSOs for gazetting and depositing layout plans until completion. The Unit will issue an alert to supervisors of relevant sections, reminding them to take early follow-up action once delay is identified in the course.

Recommendations (c) and (d)

898. The arrangements for preparing and depositing layout plans have been reviewed by LCSD and LandsD so as to strengthen the co-operation between the two departments. Moreover, a proper mechanism for preparing and depositing layout plans in LR in future has been established,

including providing LandsD with a list of PPGs to be taken over in the coming year and updating LandsD of the works progress and the estimated schedules for the opening / taking over of the PPGs as early as possible, as well as informing LandsD at least 12 months before the expected opening date of new PPGs so that manpower can be deployed for preparing layout plans in advance. Moreover, staff of DLSOs are explicitly required to verify if the layout plan of a new PPG has been deposited in LR before its opening to avoid "enforcement vacuum" after it is opened / taken over. In addition, after discussion with LandsD, in case of future exceptional circumstances where a detailed and complete layout plan is not ready before the opening of a PPG, LandsD will first deposit in LR a provisional plan showing the boundary of the major area of a PPG, which can then be revised when an official and complete layout plan is available. The arrangement has already been included in the relevant guidelines by LCSD.

Recommendation (e)

899. A communication mechanism has been established between LCSD and LandsD for preparing and depositing layout plans in an effort to maintain communication and coordination through emails, telephone exchanges and regular working meetings.

Recommendation (f)

900. LCSD has compiled a full list of gazetted PPGs and completed the consolidation of the files of layout plans of PPGs. As the large file size exceeds the storage capacity of the existing computerised system, optical discs are used by LCSD to back up the files and kept in the Land-based Venues Unit at the LCSD headquarters. The discs have also been distributed to DLSOs and relevant units for access by staff. Apart from depositing the subsequent layout plans of new PPGs, LandsD will also distribute these plans to the Land-based Venues Unit at the LCSD headquarters and DLSOs / relevant units for retention.

Recommendation (g)

901. Regarding the use of a new computerised system for depositing the files of layout plans of PPGs, handling and following up on the workflows of gazetting and preparing layout plans of new pleasure grounds, LCSD is seeking funding approval. LCSD will embark on the research and development of the new system once funding is available.

Social Welfare Department

Case No. DI/435 – Mechanism for verifying travel records of Comprehensive Social Security Assistance / Social Security Allowance applicants and recipients

Background

902. To qualify for assistance or allowance under the Comprehensive Social Security Assistance (CSSA) Scheme and Social Security Allowance (SSA) Scheme, applicants must satisfy the prescribed eligibility criteria, including the residence requirements. After approval of applications, CSSA recipients and SSA recipients (excluding those receiving allowance under the Guangdong Scheme and Fujian Scheme) (collectively referred to as "SSA recipients") must reside in Hong Kong during receipt of the assistance / allowance, with the number of days of their absence from Hong Kong not exceeding the permissible limits (absence limits). The Social Welfare Department (SWD) has established mechanisms to verify that CSSA and SSA applicants and recipients (collectively referred to as "CSSA/SSA applicants and recipients") satisfy the relevant residence requirements or absence limits. During investigation of individual complaint cases by the Office of The Ombudsman (the Office), it was found that there might be inadequacies in the relevant mechanism. Hence, The Ombudsman initiated a direct investigation against SWD.

The Ombudsman's observations

903. Regarding SWD's mechanisms for verifying the travel records of CSSA/SSA applicants and recipients, the Office's findings and comments are as follows.

Inadequacies in Regular Data Matching

904. In early 1990, SWD began to establish a mechanism with the Immigration Department (ImmD) to cross-check the travel records of SSA applicants and CSSA/SSA recipients, thereby verifying that they satisfy the residence requirement or absence limits. Under that mechanism, at the end of every month, SWD provides ImmD with the Hong Kong Identity Card (HKIC) numbers of SSA applicants and CSSA/SSA recipients for ImmD to conduct data matching (Regular Data Matching). The computerised database of ImmD retains travel records for ten years. After

completion of data matching, ImmD will revert to SWD at the beginning of the following month with the travel records of the persons concerned who cleared immigration with their HKICs. Based on those records, SWD verifies whether the persons concerned satisfy the relevant residence requirement or absence limits.

905. Since Regular Data Matching is conducted using only the HKIC numbers of the persons concerned, it is unable to obtain their accurate travel records through Regular Data Matching if those persons used travel documents other than the HKIC to exit and / or enter the territory. Consequently, it is unable to ascertain that the persons concerned indeed satisfy the residence requirement or absence limits.

906. The Ombudsman considered that in the past, outbound travelling was not so prevalent among Hong Kong residents, and only a minority of SSA applicants and CSSA/SSA recipients were holding identification or travel documents other than the HKIC. As a result, at the time when Regular Data Matching was introduced, it probably provided an effective and accurate means to verify the travel records of the persons concerned. Nevertheless, as the times and social circumstances change, there is a much higher chance now than before that SSA applicants and CSSA/SSA recipients will use identification or travel documents other than the HKIC to enter and exit Hong Kong. It is no longer possible to accurately verify the travel records of all SSA applicants and CSSA/SSA recipients through Regular Data Matching.

Practice proper in not covering CSSA applicants under Regular Data Matching

907. Only SSA applicants and CSSA/SSA recipients are subject to Regular Data Matching, while CSSA applicants are not covered. SWD explained that it is because most CSSA applicants can satisfy the relevant residence requirement (i.e. having resided in Hong Kong for at least one year since acquiring the Hong Kong resident status to the date prior to the date of application). Moreover, even after conducting Regular Data Matching on CSSA applicants, ImmD may not be able to provide their complete travel records for confirming whether they satisfy the residence requirement. Considering SWD's justifications and that the computerised database of ImmD only retains travel records for ten years, the Office accepted SWD's explanation. It is noted that in addition to Regular Data Matching, SWD has also established a manual mechanism with ImmD, whereby SWD can use where necessary a specific memorandum to obtain, for verification purpose, the detailed travel records of the persons

concerned from ImmD on a case-by-case basis (including those cases of CSSA applicants who cannot produce any documents to prove that they satisfy the residence requirement). The Office considered that the current practice can largely strike a balance between verifying the eligibility of CSSA applicants in terms of the residence requirement, and offering them timely assistance to meet their basic needs.

908. The Ombudsman recommended that SWD complete all the enhancements to Regular Data Matching as soon as possible, thereby improving the inadequacies in existing procedures.

Government's response

909. SWD accepted The Ombudsman's recommendation and has started enhancing Regular Data Matching since January 2020. The scope of Regular Data Matching has now been extended to cover the travel documents issued by ImmD, making the coverage of travel records considerably more extensive. The scope will be further extended to cover the travel documents issued by other countries / territories.